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# The Political Morality of Convergence in Contract

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**ORIGINAL MANUSCRIPT**

# The political morality of convergence in contract

**Aditi Bagchi\*****Abstract**

One of the most interesting recent developments in contract law has been an academic and political effort to integrate private law. The proposed Common European Sales Law was ultimately withdrawn, and a series of setbacks, including the British referendum to exit the EU, has recast the politics of convergence. But it remains an objective for many European scholars. This essay considers the wisdom of convergence on a single law of transactions from the perspective of philosophical contract theory.

The essay proceeds by disaggregating the rights at stake in contract law. It characterises the formal right to contract and describes its moral impetus as one that should underwrite contract law in all states, especially liberal states. But the essay argues that the legitimate contours of the formal right are contingent on tenets of political culture that vary across Member States. Similarly, substantive regulation of contract is morally compulsory and serves universal interests; the essay takes regulation of permissible work and remuneration for work as examples. But the rules and standards that best advance those moral interests depend on economic facts specific to individual political communities. The essay concludes by arguing that contract law is a poor tool by which to accelerate political and economic convergence.

## 1 | INTRODUCTION

Contract famously allows parties to create legal obligations where they had none. Each party's obligations correspond to legal rights by the other. But the rights and obligations created by any given contract do not arise out of thin air: the state credits voluntary obligations assumed in the course of exchange as legally binding; it recognises a right to contract. And because parties are subject to a variety of legal duties independent of those they elect to assume, parties' rights are not wholly dependent on their agreed terms.

Contractual obligations are thus carved in the light of two sorts of background rights. First, parties have formal rights to control the terms on which they transact. Second, parties have substantive rights with respect to certain kinds of transactions, which limit parties' control over terms. Neither right is a human right, in the sense of a transcendental right that every person enjoys irrespective of time and place. The content of both substantive and formal rights in contract is highly contingent. So much so that, I will argue here, regulation of contract by way of either general principle or substantive regulation is highly resistant to convergence.

More specifically, my aim is to show, first, that a regime of contract must be responsive to formal and substantive background rights. However, and second, their appropriate content depends on other background institutions and political commitments. The result is a picture of contract as morally *and* politically laden. Importantly,

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the latter feature refers not just to its dependence on political principles but actual politics. The view here is intended as a point of contrast to some other pictures of contract, which portray the principles of contract as either derivative from a series of moral propositions to which we must invariably commit ourselves, or a moral blank space to be filled by politics. Understanding contract as an exercise in political morality, by contrast, generates moral criteria by which we can assess the politics of contract regulation—or, in this case, the politics of convergence.

The paper has three parts. Part 2 will assess the extent to which the right to contract, or the criteria that govern our ability to enforce voluntarily assumed obligations, should be homogeneously conceived. Part 3 will assess the extent to which mandatory regulation of contract, designed to substantiate 'substantive' rights, should be transnational. Part 4 considers whether formal and substantive contract rules can be used to advance a broader project of European convergence.

If the right to contract in principle reflects a fundamental commitment that European countries share, we might think that its essential contours, including its answer to pressing policy questions such as treatment of standard form contracts, should be uniform. Likewise, if the substantive rights implicated by consumer, employment and other contracts are a species of human right, we should favour homogenisation of substantive regulation of contract. Given the historical arguments that propel regional integration, it is no longer enough to explain persistent differences between national regimes by reference to their separate legal histories.<sup>1</sup>

I will argue that the formal right to contract and the substantive rights implicated by contract are both highly contextual. In particular, the formal right to contract should manifest similarly only where political cultures converge. The substantive rights implicated by contract should be uniform only where there is substantial macroeconomic convergence.

The argument here does not rest on the inherent flexibility of a particular legal form or even the capacity of national institutions to adapt to path-dependent national cultures, since any legal form might be replicated at the transnational level.<sup>2</sup> Nor does it concern the democratic credentials of any particular integrative project.<sup>3</sup> The argument in this essay does depend on familiar descriptive claims about the present state of diversity among Member States on matters of political and legal philosophy that are directly implicated by contract law.

Even allowing for diversity within Member States, many observers perceive differences *among* states in their prevailing or median positions. Brigitta Lurger has argued that contract law necessarily involves 'political choices and [requires that one] strike the right balance between the individualistic pole of contractual freedom and the altruistic pole of regard and fairness', and further concludes that 'there is no agreement among the Member States about where to draw the line between the two principles.'<sup>4</sup> Similarly, Daniela Caruso has argued that even apparently

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<sup>1</sup>It is no longer taken for granted that political communities are historically path-dependent and for that reason alone legitimately different.' Alexander Somek, 'The Cosmopolitan Constitution', in M. Maduro, K. Tuori and S. Sankari (eds.), *Transnational Law: Rethinking European Law and Legal Thinking* (Cambridge University Press, 2014), 97, 104.

<sup>2</sup>Cf. Friedrich Carl von Savigny, *Of the Vocation of Our Age for Legislation and Jurisprudence* (Lawbook Exchange, 2011 [1814]) (primarily targeting the idea of a civil code). Nevertheless, the general thrust of this essay is in line with much of Savigny's claims about contract law and the lessons of Roman law.

<sup>3</sup>My paper addresses the question of whether convergence is desirable in principle rather than the legitimacy of convergence by way of any particular instrument or ushered in by a particular institution. For the latter considerations, that speak to the democratic credentials of a particular project of harmonisation, see Florian Roedel, 'Private Law, Democracy, Codification: A Critique of the European Private Law Project', in C. Joerges and T. Ralli (eds.), *European Constitutionalism without Private Law, Private Law Without Democracy* (ARENA, 2011) (complaining of the allegedly apolitical process by which the draft common frame of reference was developed).

<sup>4</sup>Brigitta Lurger, 'The Future of European Contract Law between Freedom of Contract, Social Justice and Market Rationality' (1995) 1 *European Review of Contract Law*, 442, 454. See also Brigitta Lurger, 'Old and New Insights for the Protection of Consumers in European Private Law in the Wake of the Global Economic Crisis', in R. Brownsword, H.-W. Micklitz, L. Niglia and S. Weatherill (eds.), *The Foundations of European Private Law* (Hart, 2011) 89, 98 ('There is no consensus among member states on the answers [to the core philosophic questions that underlie contract law]. Some of them tend to more social or protective (for instance Nordic countries, Austria); others to more liberal approaches (for instance, Great Britain, Ireland), most of them having long traditions in their respective market policies').

small differences on contract doctrine across EU Member States reflect 'truly' incompatible world views and 'no reconciliation is, to this day, in sight.'<sup>5</sup> Thomas Wilhelmsson identifies a variety of related dichotomies, including one between market-oriented and welfarist contract law, and between views that different weight commutative and distributive justice in contract.<sup>6</sup>

My contribution is not empirical—I do not undertake to defend these claims about how European systems of law vary in fact. They are well developed elsewhere and they are evidenced most compellingly, albeit indirectly, by popular discontent with the European project, most dramatically demonstrated by the recent British vote to exit the EU. To the extent there are clusters of states within or without the EU that are characterised by basic political agreement and economic similarity—or at least, no more diversity on these fronts than exists within most single states—my argument does not purport to apply. My aim here is not to establish difference but rather to trace out the normative *significance* of political and economic divergence, as it is commonly observed, for an aspirational European regime of contract. Perhaps contrary to intuitions about the universality of moral concepts, especially in private law, the moral character of formal and substantive rights in contract actually underscores the importance of national fit. I will argue further that though contract law is fair game as a legal instrument to political ends outside itself, we should not rely on contract law as a means of furthering political or economic convergence.

## 2 | THE RIGHT TO CONTRACT

There is an alternative to the argument in this essay that we should distinguish at the outset. One might argue that the rules and decisions of contract law reflect the world views of lawmakers and adjudicators. These world views vary fundamentally in familiar ways—most famously, in the context of contract, they may be more individualist or altruistic.<sup>7</sup> Countries (or populations) that are not equally individualist or altruistic cannot share a single law of contract.

The argument of this essay fills out two missing steps in that argument and further modifies it in an important respect. The first step that I aim to supply is to extrapolate from the link between contract and political ideology a link between contract and national politics. Outside of the context of EU integration, most discussion in critical theory about law and political value focuses on the ways in which social groups *within* a legal system act out their political visions, which is both an interpretation and a pursuit. It is not obvious that whole political and legal regimes qualify as groups in this framework since they are not defined by ideology and do not directly compete to act out their visions in law—unless and until they are thrust into a single legal system. Borrowing heavily from the work of scholars commenting specifically on the prospects for convergence in European private law, I hope to persuade the reader that states, notwithstanding their ideological fluidity (none has a 'world view' unto itself) and the fact that they are constituted by exogenous criteria (borders were not drawn between the altruists and the individualists, or on any grounds that we would expect to correlate with allegiance to those camps), nevertheless can be described as having distinct political commitments that are significant to contract law from the standpoint of liberal democratic theory.

The second missing step is to argue for match. The idea of a match between ideology and law does not apply (in any comparable way) when we are talking about social groups with different ideologies competing within a legal system. Even if a vague standard defers resolution of the contest, rules are written one way rather than another and cases are decided in favour of one party at the expense of the other. It is not possible for both sides of these contests to have their world views consistently reflected in their contract law; one view imposes itself on the legal order only to crowd out the other. But match is a real possibility when the groups among which we observe difference are already organised as separate legal systems. Each group can have a contract law that more closely

<sup>5</sup>Daniela Caruso, 'Qu'ils mangent des contrats: Rethinking Justice in EU Contract Law', in D. Kochenov, G. de Búrca and A. Williams (eds.), *Europe's Justice Deficit* (Hart, 2015), at 371.

<sup>6</sup>See Thomas Wilhelmsson, 'Varieties of Welfarism in European Contract Law' (2004) 10 *European Law Journal*, 712–733.

<sup>7</sup>See Duncan Kennedy, 'Form and Substance in Private Law Adjudication' (1976) 89 *Harvard Law Review*, 1685–1778, 1766.

reflects its particular political commitments than would a single law of contract imposed on all. That is, at least, the argument here.

Finally, and perhaps most controversially, I argue that it is not enough to observe disagreement in the world about how that world looks. A lot of disagreement is between people who are right and people who are wrong; the people who are wrong might be wrong, for example, about their perception of facts, their empirical predictions or their moral principles. Liberalism does not commit us to agnosticism about all these matters, even the last. To the contrary, liberalism entails a commitment to individual agency, distributive justice and other principles that speak to justice rather than the good. One claim here is that people disagree even about justice in contract in the relevant way, i.e. their agreement is reasonable and about precisely those value judgments to which states should be responsive in their contract law. The public reasons behind contract in liberal states can be of the right sort and yet differ among states.

Notwithstanding this intermediate conclusion, which emphasises difference and disagreement, my starting point –and the subject of this early section—is that liberal states should recognise a rather expansive right to contract. Although its form may vary, contract law is properly informed by an interest in individual moral agency. On this picture, moral agency is not just one personal value among many, trumpeted at one end of the political spectrum by those promoting an individualistic conception of the good. It has a special place in liberal contract. This claim is intended simultaneously to neutralise those who would reject pluralism among states on the grounds that arguments for such pluralism fail to take autonomy seriously, as well as to antagonise those prepared to embrace a more radical pluralism among laws of contract.

Of course, the right to contract has an insidious ring, associated as it is with libertarian ('neo-liberal') politics and the claim that individuals are 'free' to contract as they choose, unimpaired by public policies that their transactions may implicate. Although that strand of political rhetoric fails to acknowledge the third party implications of ostensibly private agreements, there is indeed a moral interest in relatively unencumbered contract. That moral interest is not strictly speaking a moral right, in that one does not have a natural right to state enforcement of private agreements. In fact, at first blush, the idea of such a natural right is inherently contradictory; it characterises as natural and as such independent of political society a right against the state, which presumes political society. But of course one can conceive of natural rights against the state as ones that a state must recognise at risk of its own legitimacy, rights that it must recognise in order to justify state power. But though the state must prove useful to citizens in a variety of ways in order to justify its own authority, and though thinkers like Thomas Hobbes ranked enforcing private agreements as among the most fundamental to establishing security in civil society,<sup>8</sup> no one has ever undertaken to show that a society that failed adequately to enforce private agreements would fail as a society. It would be less fair and it would be less rich but neither proves the radical claim that contract law more or less as we know it is the *sine qua non* of political legitimacy.

I argue for something considerably less. We have a moral interest in having our freely formed agreements enforced irrespective of content. That interest can only be advanced through some formal right to contract. But the weight and contour of the moral interest will vary, even among states that share a commitment to political liberalism. And so the legal form that recognises the moral interest will properly vary as well.

## 2.1 | The nature of the moral interest

The right to contract creates a power in private persons: We are able to alter our legal position merely by communicating an intention to do so. This power is a normative power, in that our normative position changes.<sup>9</sup> This is in part because our legal position is morally charged. Another aspect of the normative power in contract depends on the fact that the change in legal position usually corresponds to a change in our independent moral position.<sup>10</sup> Just as our legal

<sup>8</sup>Thomas Hobbes, *Leviathan*, Ch. XV (1651).

<sup>9</sup>Joseph Raz, 'Voluntary Obligations and Normative Powers' (1972) 46 *Aristotelian Society Supplement*, 79.

<sup>10</sup>David Owens, *Shaping the Normative Landscape* (Oxford, 2012).

position changes by virtue of the legal institution of contract, our moral position changes by virtue of the promises we make and the permissions we grant in the course of contract.

Most features of our moral and legal position are not under our control in this way. Most of our duties stem from facts about the world. Although we may exercise some modicum of control over those facts, especially as they relate to us, it is the facts themselves rather than our choice to conduct ourselves in any particular way, that give rise to duty. The contexts in which we self-consciously alter our normative position, and it is our bare communication of a desire to do so that effectuates a change in position, are rare indeed.

Happily, willed changes in normative position are rare in the best sense; they are valuable. Again, I am not claiming that the right to be able to change one's normative position through contract is a human right. But the moral value of the normative power does lie in some fundamental features of the person. It is important to our self-conception as agents that we are responsible for many aspects of our moral position. Whether we are so responsible is not a metaphysical fact. It depends on whether we take each other to be responsible in this way. By treating promises, permission, contract and other exercises of normative power as binding, we construct our own agency. Control over what we owe others and what they can claim from us makes it possible for us to author our moral life more broadly. Because contract terms directly inform or at least shadow the terms on which we interact with strangers throughout civil society, the sum of contract is an important component of an individual life. Our self-understanding as agents responsible for the central tenets of our life demands that we are responsible, in meaningful ways, for the terms on which we interact with others.

It is commonplace that the terms of highly personal relationships are the special purview of the individual agent, because we recognise the special significance of intimate relations to ordinary life. By contrast, one might doubt that commercial relationships play an important constituent role in ordinary life. But though any single intimate relation is of greater weight than an arm's-length, commercial relationship, the entirety of our market interactions also has an important role in defining our lives.<sup>11</sup> We express our values not only in our choice of partners and friends, but also in our choice of work, leisure and other moments of consumption. Allowing individuals latitude in those choices contributes to self-authorship in the most basic sense. I cannot claim that the desire for self-authorship is universal. But the conversation about contract law we are having surely presupposes the person as moral agent, and moral agency over the course of a life entails a narrative of one's own making. That narrative will encompass the choice to live here, work there, shop for certain kinds of products and services, patronising some businesses and not others.

The upshot is that the formal right to contract is not just a convenient legal device for pursuing a variety of policy ends, perhaps largely of an economic character. Good contract law certainly serves as an economic catalyst, and its rules should be informed by that objective. It is not an aim of this essay to debunk instrumental theories of contract that are not totalistic; to the contrary, I assume that the material consequences of contract law are critical because those consequences are critical to the people to whom contract law applies.<sup>12</sup> But in addition to serving instrumental ends, contract law is a moral instrument. It is not deontological in the sense that its rules exact compliance with moral rights and duties between contracting parties.<sup>13</sup> Some of its rules reflect such moral constraints<sup>14</sup> but in broad scope

<sup>11</sup>For a theory of contract that makes this point central, see Daniel Markovits, 'Contract and Collaboration' (2004) 113 *Yale Law Journal*, 1417.

<sup>12</sup>Many thoughtful economists and philosophers of contract assign some role to each, even if those roles are not equal. See, e.g., Richard Craswell, 'Contract Law, Default Rules, and the Philosophy of Promising' (1989) 88 *Michigan Law Review*, 489; Jody Kraus, 'Reconciling Autonomy and Efficiency in Contract Law: The Vertical Integration Strategy' (2001) 35 *Nous*, 420. Of course, some economists do embrace welfare as the sole end of contract. See, e.g., Louis Kaplow and Steven Shavell, *Fairness versus Welfare* (Harvard University Press, 2001), Chapter IV; Richard Posner, 'Utilitarianism, Economics and Legal Theory' (1979) 8 *Journal of Legal Studies*, 103.

<sup>13</sup>That is, in the language of Greg Klass, it incorporates both duty-imposing and power-conferring elements and is therefore a 'compound' view. Greg Klass, 'Three Pictures of Contract' (2008) 83 *New York University Law Review*, 1726.

<sup>14</sup>Interpersonal duties derivative from distributive injustice are an example of moral constraints that should be reflected in contract rules. Aditi Bagchi, 'Distributive Justice and Contract', in G. Klass, G. Letsas and P. Saprai (eds.), *Philosophical Foundations of Contract Law* (Oxford University Press, 2014), at 193.

its rules—and the formal right to contract that they effectively recognise—*promote* deontological interests of persons, including our interest in normative powers that enhance moral agency.

## 2.2 | A liberal right

An interest in moral agency is probably a fundamental feature of the person, in that a person wholly lacking in a desire for agency appears deficient. Her self-understanding would be alien to our own. Her normative system would be unappealing, if not unintelligible. To begin with, she could not properly explain her world view without buying into the practice of offering reasons, which only makes sense for moral agents.

Although the interest in moral agency is likely universal, the picture of the person as moral agent is more central to liberalism than other political systems.<sup>15</sup> A state might publicly justify its authority in largely utilitarian terms; greater welfare is achieved under political authority than in a hypothetical state of nature. A state might also justify its powers by reference to some other good it is uniquely positioned to promote. Public justifications of those sorts would have consequences for legal culture, as well as particular laws. Each doctrine and regulation would be ultimately justified by reference to the good that the larger edifice of state authority is intended to bring about. On the margin, we would expect the state to prioritise that substantive good, whether wealth or a sense of national community, over other values, like individual agency.

Unlike states that pursue substantive notions of the good, a liberal state purports to justify its powers derivatively from the moral claims of its constituents. Its authority depends on its fulfilling a moral function for its constituents. Its constituents have obligations to be fulfilled through the state, and can make claims on the state and each other, only inasmuch as they are conceived as moral agents.

Other states may have a duty to protect a space for moral agency just because it is among the basic ends that human beings have. Liberal states have a deeper commitment to protecting agency because their own grounds for authority depend on it. Liberal states cannot fall back on an independent, comprehensive theory of the good life and point to the benefits they deliver in light of that theory.<sup>16</sup> Such a justification of authority is illiberal because it promotes a view of the good independent of its endorsement by citizens. Liberal states rely on individuals to supply value to the state project. When we ask why the state should expend resources to do this or that thing, the answer ultimately has to refer back to the moral value of state action for individuals—whether it is satisfaction of our duties of justice, or promotion of resources that we will use to pursue our conceptions of the good. Only individuals capable of authoring value can supply their state with moral credibility. Only as moral agents are we subject to justice claims that implicate the state, and only as moral agents do we create reasons for the state to invest in services that aid us in our individual pursuits, whether health, education, infrastructure or art.

Our capacity to supply value to politics is not a stand-alone moral capacity. In the Rawlsian framework, individuals characteristically have a sense of justice and a conception of the good.<sup>17</sup> Moral agency links these otherwise apparently distinct moral features of a person: our sense of justice relates to our self-regard as subject to moral claims by others. Our conception of the good underlies our capacity to impart value to ends, which are entitled to recognition, without endorsement, by others. If the liberal state presupposes a sense of justice and capacity for a conception of the good, implicit is the assumption of moral agency.

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<sup>15</sup>In this respect, even the formal right to contract is not appropriately regarded as a universal human right. The right supports a distinctly liberal conception of the person. As described in the next section, even among liberal states, the formal principle is doctrinally indeterminate and requires state institutions and a corresponding public sphere to supply democratically legitimate, meaningful content. Cf. Hanoch Dagan, 'Between Regulatory and Autonomy-Based Private Law' (2016) 22 *European Law Journal*, 644–658, 655 (arguing instead that private law should be regarded as a 'source of interpersonal human rights' manifest in a 'foundational layer of mandatory norms' that apply transnationally).

<sup>16</sup>Liberalism as I characterise it here is not the liberalism of all historical thinkers associated with liberalism. But it is the dominant prevailing view of liberalism and its mandate, especially as presented and defended by John Rawls. For a discussion of state neutrality toward comprehensive conceptions of the good, see *Political Liberalism* (Columbia University Press, 1996), at 192.

<sup>17</sup>John Rawls, *A Theory of Justice* (Harvard University Press, 1971), at 505.

The assumption is not a factual assumption. Liberal democracy as we know it might be premised on some empirical bets—that majority rule will not run rough-shod over minorities, or that free speech will produce more truth than falsehood. But the assumption of moral agency is a regulatory presumption, a normatively motivated assumption that does not depend for its validity on any metaphysical truths, such as whether people actually cause the events for which we embrace responsibility or whether the moral claims we make are real.<sup>18</sup> Moral agency is built into the moral foundations of liberalism. To the extent a state invokes liberal theory for its own justification, it is committed to the assumption of individual moral agency as a matter of consistency.

One might think that even if individual agency understood in this general way is essential to liberalism, it has nothing in particular to do with individual agency as discussed in the previous section—agency of the sort that implicates contractual choice. But the same basic capacity is at issue. If we take as foundational our capacity to confer value on ends, the kind of life we expect people to lead has to make that capacity central to our way of life. It would be bizarre if the central moral capacity that animates political morality were entirely divorced from day-to-day moral life, and in particular, to the law that regulates so many of our casual interactions with strangers. There is a very loose parallel with the Kantian argument for property, namely, that people need property for freedom in civil society.<sup>19</sup> The claim is implausible if you take property to entail any very specific legal form, and by ‘necessity’ we should take Kant to mean that it is the mandate to promote freedom that requires property, not the analytic content of ‘freedom’ as a concept. The common idea is that a theory about the conditions of a morally valuable life has implications not only for the best form of government but also for how the state should organise the banal, so that everyday life is morally rich.

Liberalism starts with a picture of the person as a self-originating source of value. The edifice collapses if we do not regard individuals as capable of conferring value on their particular ends, capable of making claims on others and having claims made on them. So central is this feature of the person to liberalism’s working picture of her that a liberal state cannot afford to disregard it entirely, even when other substantive interests of those same individuals call for involuntary regulation.

### 2.3 | Variety of liberalisms and divergence in the right to contract

There is no quintessentially liberal state. Many countries generally identify as liberal though their political cultures importantly differ. Of course, the political culture in any one country is itself open to multiple interpretations. Citizens of a single country will disagree about national commitments and their relative priority. In fact, perspectives on contract law may vary systematically by social status within a given country.<sup>20</sup> Some marginalised groups may not see their political values or preferences reflected in local legal solutions, and may prefer to cast their political fortunes elsewhere.<sup>21</sup>

In light of all the variation and democratic shortcomings within states, we should be careful not to exaggerate differences between liberal states or fetishise domestic politics as sites of democracy. The value spectrums across countries that bear family resemblance to each other, as do the countries of the European Union, largely overlap. And there are winners and losers in every regime. Still, subtle differences persist in the political discourse that underlies elections and legislative choices, and those differences reflect broader compromises in which winners in one sphere may be compensated elsewhere. Because politics in stable democracies often involve choices at the margin and because those choices are part of larger political bargains, these differences among liberal contract regimes are nontrivial.

<sup>18</sup>Immanuel Kant, *The Critique of Judgment* (J.H. Bernard trans., Dover, 2000), at 261, 284–285, 306 (distinguishing regulative and constitutive principles).

<sup>19</sup>Immanuel Kant, *The Metaphysical Elements of Justice* (John Ladd trans. and ed., Library of Liberal Arts, 1965), at 51–57; see also Alan Ryan, *Property and Political Theory* (Blackwell, 1984), at 79–80.

<sup>20</sup>Frey Nybergh, ‘Dissonance in Freedom of Contract?—How to Make Sense of It’, in T. Wilhemsson and S. Huri (eds.), *From Dissonance to Sense: Welfare State Expectations, Privatisation and Private Law* (Ashgate, 1999), at 373.

<sup>21</sup>The value of voice ... understood as the value of self-governance or as participation in the policy decisions that affects one’s life, may not always be vindicated best at the level of the state.’ For example, some politically weak groups may have more success at the central level. Daniel Halberstam, ‘Constitutional Hierarchy: The Centrality of Conflict in the European Union and the United States’, in J. Dunoff and J. Trachtman (eds.), *Ruling the World? Constitutionalism, International Law, and Global Governance* (Cambridge University Press, 2009), at 326, 340.



What are the political choices in contract law? Martijn Hesselink has proposed that '[a]lternative rule solutions on any subject of private law can be placed on a continuum from more autonomy (individualism) to more solidarity (altruism).'<sup>22</sup> The political valence stems from the fact that 'in a market economy, wealth is distributed, in the first place, through the enforcement of contracts, that different contract law leads to different distributive outcomes, and that in a post-welfare state where many public entitlements toward the state have been substituted by private contractual relationships, the distributive role of contract law has become all the more important.'<sup>23</sup> Ruth Sefton-Green clarifies that at stake is not only the cumulative material consequences of contract but also standards of individual behaviour.<sup>24</sup> So central is transactional life to a polity that the laws regulating it have a constitutional dimension.<sup>25</sup>

We should take seriously these differences in economic and political culture within the family of liberal states. Political authority must be exercised in a manner consistent with its own public justification.<sup>26</sup> As Hesselink has argued, contract law is no exception; it is legitimate only if it has a 'democratic basis.'<sup>27</sup> If political discourse in one country emphasises the fact of choice over the quality of choice, or vice versa, we should expect the criteria under which contractual choice is regarded as binding to be more lax in the former. If political discourse in one country regards the conditions of free choice as essentially relative—i.e. whether a choice is free depends on the conditions under which most other people in that society make comparable choices—we should expect their rules of excuse to be more permissive than those of a country where the conditions of free choice are regarded as inherent in the concept of free choice. If political discourse regards legal recourse for a civil wrong as derivative from the primary entitlement, liquidated damages may be enforced more broadly than where remedy for breach of even a voluntary obligation is regarded as the state's prerogative. Consumers may be assumed 'weak' and entitled to protection in one political context while small businesses are regarded as presumptively and equally vulnerable in another; and the status of parties as 'weak' or 'strong' may be alien to contract law in still another jurisdiction. Some political communities will regard the duties of prospective contracting parties to another as extensive of the robust 'fraternal' obligations of all citizens towards one another, while another liberal society will regard the imposition of contractual obligations prior to a moment of agreement as inconsistent with the voluntary bases of contract. Apparently technical differences between rules reflect political choices and, where those doctrines are long-standing and deeply rooted, they help comprise a distinct legal culture.<sup>28</sup> The pluralism we observe among

<sup>22</sup>Martijn Hesselink, 'The Politics of a European Civil Code' (2004) 10 *European Law Journal*, 675–697, 676.

<sup>23</sup>*Ibid.*, at 677. See also Hugh Collins, 'The European Economic Constitution and the Constitutional Dimension of Private Law' (2009) 5 *European Review of Contract Law*, 71, 87.

<sup>24</sup>Ruth Sefton-Green, 'Social Justice and European Identity in European Contract Law' (2006) 2 *European Review of Contract Law*, 275–286, 277.

<sup>25</sup>Collins, above, n. 23, at 91 ('Private law has a constitutional character because of its persistence as a source of legitimate authority in society, its implicit endorsement of a complex distributive pattern, and the way it expresses the horizontal effect of constitutionally protected human right. For these reasons, private law provides an articulation of the economic constitution for a society.'). See also Matthias Kumm, 'Who is Afraid of the Total Constitution? Constitutional Rights as Principles and the Constitutionalization of Private Law' (2006) 7 *German Law Journal*, 341.

<sup>26</sup>Jürgen Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy* (William H. Rehg trans., MIT Press, 1996) (Suhrkamp, 1992), at 110–111. Although Habermas stresses that public discourse that complies with appropriate discursive norms begins to take on a universal character, his democratic principle requires that actual legal norms be adopted in a process backed by realised political discourse.

<sup>27</sup>For the most complete and sophisticated account of the relationship between democracy and contract law, see Martijn Hesselink, 'Democratic Contract Law' (2014) 11 *European Review of Contract Law*, 81.

<sup>28</sup>Pierre Legrand has emphasised how legal rules reflect existing culture. 'Legal statements achieve the status of "rules" only if they are generated and implemented in accordance with prior agreements about the appropriateness of particular policies ... These agreements, in turn, are socially derived through continuous negotiations ... among relevant bodies of law-makers consisting of culturally determined individuals.' Pierre Legrand, 'European Legal Systems Are Not Converging' (1996) 45 *International and Comparative Law Quarterly*, 52, 57. But rules also have a feedback effect on political values. Collins, above, n. 22 at 89 ('technical discussions of private law have indirect effects on the persuasiveness and acceptance of broader political points of view in wider conflicts normally conducted in electoral and legislative organizational contexts').

laws of contract is not an outgrowth of diversity in comprehensive worldviews but disagreement about justice, including the moral demands of autonomy and the scope of distributive justice.

In all of the permutations considered here, choice and agency figure prominently, as befits liberal regimes. Each of us will tend to regard some of these views about how the moral interest in agency manifests in contract as right or wrong. But the homage each view pays to the value of agency is sufficient to qualify it as liberal.

We might be tempted to account for doctrinal diversity in ways that do not connect it with varying interpretations of liberal principles. First, we might think some states are wrong as a technocratic matter: Their legal doctrines could reflect false empirical beliefs. For example, a state might fail to take into account the economic costs of a rule, or believe that people behave differently than they do. They might misunderstand what contributes to welfare. To the extent contract law is designed just to serve welfare or other ends the pursuit of which involves error-prone means-end analysis, we are more likely to attribute doctrinal differences to policy error. On this view, more perfect technocratic revision of contract law would result in convergence. Because 'contract law is not folklore', 'specific national values [do] not have much relevance.'<sup>29</sup>

The rise of legal economic study of contract in this respect parallels social scientific theories of constitutional law. Contract law has become for some a manifestation of practical rationality on which judges are competent and authorised to propound, and in which jurisdiction appears irrelevant and only a technical consideration.<sup>30</sup> As described by Alexander Somek, on such a 'cosmopolitan' view, political choices are reinterpreted from 'acts of volition' to 'practical manifestations of fallible knowledge'. That is, 'they are not expressions of somebody's will but of anybody's reasons.'<sup>31</sup>

This is a deeply unattractive view of democracy and the relationship of a state with its citizens.<sup>32</sup> It seems to deny the intersection of liberal and democratic theory, which is that the exercise of state power—and, hence, politics—is fraught with normative choice, and that citizens are the source of value that should determine how those choices are made. The state exists to satisfy the moral demands of citizens, to make it possible to live together justly, and it can exercise power to this end justly only by looking to the citizens themselves to decide those moral imperatives that the state is called upon to meet. Liberal theory is not agnostic about technocratic matters. Because the 'circumstances of justice' on which liberalism presumes to operate assume that politics is value-laden, liberals should be sceptical of any claim that a subject of law is largely a matter of expertise. The fact that disagreement is contingent—certainly the adoption of this or that view by any particular person is the result of a personal narrative—does not undermine its normative significance as *the* starting point for liberal democracy. Such a dismissal of contingent identification with values proves too much. It is not only our attachment to the legal doctrines we grew up with that is contingent. Our very conception of justice, though it may aspire to conform to universal reason, is locally sourced. Although our conceptions of justice are not equally meritorious, their relative claim to manifestation in coercive law does not lie directly in their inherent truth but in their (hopefully related) potential to persuade. It is the actual understandings of people as to what justice requires of them and their state—messy and unstable as those may be—rather than the theoretical truth of the matter that is the basis for state action in a liberal democracy.

The political process is meant to translate individual conceptions of justice into particular legal rules. It does so not simply by tabulating them but through a process of ideational exchange in which legal principles are extracted from moral-political principles, and legal rules are extracted from those legal principles (without implying a chronological sequence). A legal and political culture reflects not just the stagnant principles of a population but the institutional space in which principles are generated and adopted. No matter how cosmopolitan elites have become in many

<sup>29</sup>Ole Lando, 'Liberal, Social and "Ethical" Justice in European Contract Law' (2006) 43 *Common Market Law Review*, 817–833, 826.

<sup>30</sup>Somek, above, n. 1 at 105, 118.

<sup>31</sup>*Ibid.*, at 118.

<sup>32</sup>It is also ironic that such a view should be regarded as cosmopolitan, since cosmopolitans should be more aware than ever of deep differences not only within but between states. The view that differences are technical misunderstandings seems more befitting of a citizen exposed only to the most friendly disagreements.

individual countries, for the most part, the political process—including ideational exchange—for most of the population remains domestic. Europeans may eventually achieve such a common public sphere but the primary stage of political communication is still national.<sup>33</sup>

The moral demand that law be justifiable by public reasons generates both procedural and substantive constraints on law. The rules of contract must be the product of democratic process (though we should not interpret that demand too narrowly, excluding, for example, the role of courts in lawmaking in certain jurisdictions). But as commentators on law, we occupy a double position, observing not only compliance with procedural requirements but also participating in that procedure, offering reasons why a proposed rule is preferable or not. In that latter role, we ask whether the rule can be justified in light of other commitments we share. Knowing then, that a large portion of the population believes in propositions inconsistent with the reasoning behind a proposed rule, gives us reason to reject that proposed rule—even before we can observe whether it survives democratic process. That is, democratic commitment does not entail limiting ourselves to comment on procedure alone. But it does inform (and limit) the kinds of reasons we should give for why a given rule is better or worse.<sup>34</sup> The reasons we give should have to do with whether a given rule would be endorsed by all those who will be subject to it in light of its moral and economic consequences. A rule that would be more consistent with the reasons recognised by those governed by the rule is preferable to a rule that would be rejected by them.

This means we can say of a prematurely transnational rule that it is not only procedurally flawed, inasmuch as democratic politics remains largely national, but also that it is substantively ill-conceived where it is misaligned with the principles widely espoused in more than one of the territories it would cover.

One might dismiss worries about such misalignment on the grounds that an objectively optimal rule will be rejected by populations in some states because the rule to which they are accustomed is illiberal. Those states, we might claim, fail to value moral agency as such, or at times. It would be unsurprising then that their contract law is morally inadequate, if we take as our premise (developed above) that contract law ought to serve the principle of moral agency. Theoretically, it is true that some contract laws might fail to give due weight to liberal principles, including moral agency, in such a way that we doubt existing laws there reflect deliberation under suitable democratic conditions. However, it is doubtful that any contract law in the European Union fails to meet that test. What we find instead is reasonable disagreement.

In fact, some of this disagreement is not strictly speaking disagreement but rather divergent choices under disparate conditions. Contract law is one part of the legal system, which is in turn one cluster of institutions among a host of political institutions that together comprise the state. Substantive doctrinal differences may reflect differences in institutional competence, or the division of labour between state agencies. For example, doctrine may be more permissive with respect to the enforcement of agreements because other process requirements already make contract slow and more deliberative. States with less robust competition policies may find it necessary to scrutinise agreements entered by firms with market power. Legal systems with costly procedural rules, including extensive opportunity for the collection of testimony and documentary evidence, may gravitate towards more restrictive liability rules, so that these costly procedures are not too frequently triggered. In myriad ways, contract law must fit into a larger institutional scheme, and as those background institutions vary—sometimes for reasons that are themselves political but also often for historical reasons—doctrines will diverge as well. Again, contingency of difference does not warrant its erasure. To the contrary, 'being aware of the embeddedness of markets ... means respecting the diversity of the institutions, rules, and norms which have been the product of the different processes of embedding in the different countries, and this means that diversity is not a situation which has to be overcome.'<sup>35</sup>

<sup>33</sup>Cf. Jürgen Habermas, *The Lure of Technocracy* (Polity, 2015) at 39: 'Europeans already share the principles and values of largely overlapping political cultures. What is required is a European-wide political communication. For this we need a European public sphere ... The existing national public spheres suffice for this purpose; they only have to open themselves up sufficiently to each other.'

<sup>34</sup>Hesselink, above, n. 27, at 82 (targeting essentialist theories of private law that rely on comprehensive doctrines).

<sup>35</sup>Karl-Heinz Ladeur, 'The State in International Law', in C. Joerges and J. Falke (eds.), Karl Polyani, *Globalisation and the Potential of Law in Transnational Markets* (Hart, 2011), at 405.

One might be tempted to dismiss the threat of democratic misalignment on still other grounds. One might attribute doctrinal variation across states to indeterminacy unrelated either to reasonable disagreement about underlying principles or difficult empirical questions. Contract law might be indeterminate simply because it does not matter very much; its own irrelevance might relieve systems of any pressure towards convergence. At face value, such a contention is not implausible. The Coase Theorem holds, after all, that in the absence of transaction costs, legal rules do not alter the ultimate allocation of social resources.<sup>36</sup> One might think that we have developed a variety of ways in which to minimise transaction costs, or that these are so varied and cut in so many directions that they do not consistently favour any single set of doctrines. One might think that even if they do in fact cut one way or another, no one (no legal system) has the capacity to actually determine what the optimal rule is, such that we are all equally floundering, albeit in a largely harmless fashion (given our equal incompetence). In this context, we might settle for a pluralistic order where multiple sets of legal norms are available to parties, who may opt into their regime of choice.<sup>37</sup> Indeterminacy might thus cut in favour of a single pluralistic law of contract rather than separate legal regimes among which contracting parties are assigned without any choice at the individual level.

One might plausibly argue for indeterminacy rooted in irrelevance from another angle as well: It might be that contract law lacks moral significance. Its substantive principles may be entirely conventional. The normative merits of a system of contract adjudication may derive entirely from the rule of law. As long as rules are applied consistently, it may not matter what they are. Just as economic transactions can be structured to work around legal rules as we find them, so too might the moral valence of private interactions adjust to background legal rules without requiring any prior fit. We might be so deeply constituted as moral agents, and that may figure so unavoidably in our moral life, that this feature of ourselves requires no support in law, let alone contract law.

Indeterminacy is a plausible view of the moral situation of contract, but it is just one view, and arguably not the dominant one in any of the legal cultures of Europe. As with each of the other rival explanations for doctrinal differences among states, there is some truth in it but it is not the kind of truth to trump actual disagreement. The point here has been only to show that at least some of the doctrinal differences between states that belong to the liberal family may derive from variations in political culture that their common political philosophy commits us to take seriously. Thus, for example, if it turns out that a rule can be explained either as the result of reasonable normative disagreement or as technocratic error, we should refrain from correcting the technocratic error where it will entail bringing contract law out of alignment with the public justifications available for it in a given state.

The argument here is not from multiculturalism or diversity, that is, it does not take a plurality of legal cultures as an ideal in itself (though it might be one). Instead, taking facts about the world as we find them—including heterogeneity in liberal culture and economic development—it concludes that diversity is morally imperative from within the demands of liberalism itself. That is, liberalism offers a limited common mandate for contract. For the rest, it affirmatively mandates disunity.

### 3 | SUBSTANTIVE TRANSACTIONAL RIGHTS

The right to contract, or to transact on binding terms of one's choice, does not exhaust the moral landscape on which parties contract. The moral interest that underwrites the formal right frequently, if not always, rivals a moral interest in reigning in contractual choice, either to protect one of the contracting parties or to advance the interests of third parties.<sup>38</sup> 'Europe-wide' standards in areas like employment and consumer law may advance morally mandatory minimum standards. Transnational legislation could help solve collective action problems and avert a 'race to the bottom', in which states compete with each other for corporate investment by way of low corporate taxes (undermining the

<sup>36</sup>R.H. Coase, 'The Problem of Social Cost' (1960) 3 *Journal of Law and Economics*, 1, 15.

<sup>37</sup>Jan Smits, 'A Radical View of Legal Pluralism', in L. Niglia (ed.), *Pluralism and European Private Law* (Hart, 2013), at 161.

<sup>38</sup>Steven Shavell, 'Contractual Holdup and Legal Intervention' (2007) 36 *Journal of Legal Studies*, 325–354, 346.

viability of the welfare state) and employer-friendly labour codes.<sup>39</sup> More generally, the very idea that many substantive restrictions on contract are justified by considerations of justice seems to count in favour of transnational substantive restrictions—since justice is for all.<sup>40</sup> Once a transnational contract law is on the table, even those sensitive to national diversity will advance a transnational vision of contractual justice lest the proposal adopted embody an alternative conception.<sup>41</sup>

At issue is social justice, or the justice of social institutions—not individual justice, or the inherent justice of particular transactions. Like the formal right to contract, one party's substantive rights with respect to a transaction do not usually reflect any absolute right that she bears; they do not reflect the moral calculus of a single transaction. Just as the right to contract is responsive to a systemic interest in empowering individuals, the right to (or against) particular terms normally responds to a public interest in narrowing the range of terms. To be clear, the argument here rejects the contention that substantive regulation of exchange is normally justifiable based on principles of equivalence of exchange, dignity conceptions of non-commodification or theories of exploitation that turn on distribution of transactional surplus. Substantive regulations do not turn on the terms of a bilateral agreement in isolation in the way that those alternative explanations for regulation would lead us to expect. We can name terms unjust only by reference to the terms in other people's contracts; we rely on such reference both to assess how the contracting parties at hand are treating one another, and also to decide that the terms at issue generate externalities that justify overriding party choice. Imbalance in exchange is not in itself the basis for substantive regulation; such a principle proves too much, in that much apparently unequal exchange goes unchecked, and too little, in that it does not explain how we decide what value to ascribe each side of an exchange. Dignity and exploitation too rely on social reference for content.

Consider the example of a prohibition on contracts that permit sexual harassment (or practices that would be regarded as harassing by others) and contracts for very low wage work (of any kind). We might adopt these contract restrictions even if we suspect that some individuals are indifferent to harassment and would not make any trade-offs to avoid it; or that some workers are unemployable and therefore worse off at a higher minimum wage. We would prohibit terms not really for the sake of each 'protected' individual, at least as they are constituted at the moment of contract. We prohibit them, respectively, because we think most women end up worse off and women in general may suffer from the subordination perpetuated by workplace harassment; and because more workers will benefit from a higher minimum wage than will lose out, and because we do not want an economy in which purchasing goods and services implicates us directly in the poverty of others.

I do not defend these reasons or specific regulations at length here. The examples are intended merely to illustrate that substantive rights in contract, like the formal right to contract itself, should not be understood as moral rights of individual parties that happen to be enshrined in law. Outside of those rules that contemplate discontinuity of persons over time, the individual moral interest can be conceived only by reference to the aggregate state of affairs that motivates the legal right. In most cases, the moral interest manifests in an individual legal right only because such a right advances a political or social state. The legal right is not deontological in either the formal or substantive case, even if the best explanation for recognising each right appeals to deontological arguments about how people should live together.

In this part, like the last, I aim to show first why a basic feature of contract law—here, regulations restricting transactional choice—must be recognised in *some* form. There are many types of morally compulsory substantive restrictions

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<sup>39</sup>Simon Deakin, 'Regulatory Competition after *Laval*' (2008) 10 *Cambridge Yearbook of European Legal Studies*, 581. For a summary of arguments and sceptical treatment of this concern, see Hans Micklitz, 'Three Questions to the Opponents of the Viking and *Laval* Judgments', in *OSC Paper Series* (2012).

<sup>40</sup>Cf. Martijn Hesselink, 'European Contract Law: A Matter of Consumer Protection, Citizenship, or Justice?' (2007) 15 *European Review of Private Law*, 323 (concluding that the Commission must articulate a common conception of justice in contract). See also Prince Saprai, 'Should Contract Law Converge in Europe?' (unpublished draft manuscript) (arguing that right to equal treatment is the best argument for convergence but ultimately doubting the legitimacy of the EU program in light of prerogatives of national sovereignty and other considerations).

<sup>41</sup>See, e.g., Martijn Hesselink et al., 'Social Justice in European Contract Law: A Manifesto' (2004) 10 *European Law Journal*, 653.

but I will consider here two types of restrictions that apply in the employment context: restrictions on types of work, and on remuneration. After showing that a legitimate regime of contract needs to regulate both aspects of employment in some respect, I will proceed to show why the appropriate legal response to the underlying moral interest in each case should depend on the economic circumstances of a jurisdiction. Finally, I will consider the morally—not merely economically—perverse consequences of premature convergence on substantive regulation.

My account is intended to emphasise the ways in which substantive rights are contingent even when they reflect at some level a fundamental, even universal moral interest. We saw in the previous part that operationalising the moral interest in contractual choice must account for the reality of disagreement about the best interpretation of liberal principles. Forced convergence on a right to contract effectively denies reasonable disagreement, and it has the effect of undermining the very political legitimacy that recognising a right to contract, or securing the conditions for moral agency, is intended to promote.

In the same way, substantive regulation of contract that aims to promote quite general principles of non-exploitation, non-commodification or distributive justice must be sensitive to the economic circumstances in which it intervenes. If it does not, substantive regulation may make the very worst off still worse off, using them to further public policies in a way that is arguably exploitive and likely only to exacerbate their social segregation. Even a rule of non-commodification, which could be designed to ‘guarantee’ certain entitlements to each person by restricting market alienability, is not coherent when justified at the level of an individual transaction, in isolation. To the extent it is conceived that way, it disrespects the person who, but for the legal rule, would commodify what others can afford to call sacred.

Substantive regulation of contract often takes the legal form of employment rights of just the sort that are sometimes lumped with human rights of speech, association or religious liberty. But it is fundamentally a different animal. Those other kinds of human right may be well justified by exclusive reference to the moral rights of individuals. By contrast, transactional rights may be rooted in individual moral interests, but the connection between such moral interests and related legal rights is invariably mediated by social and economic institutions.

### 3.1 | The boundaries of free contract

Every legitimate regime of contract will draw some boundaries on free contract.<sup>42</sup> Contracts are drafted by two people but have consequences for others. They are also drafted by two people at a particular moment in time; those people—their thinking, their preferences, their values—may change over time. Contracting parties do not have unbridled authority to decide the obligations of their future selves, let alone of others.

The justification for reigning in contractual freedom thus lies within the case for free contract. The argument for allowing parties to choose the terms of their own transactions rested on a claim about agency and a moral interest in control. But that agency and interest applies to everyone. Inasmuch as my decisions constrain others, their independent interest in deciding matters for themselves rivals my own.

This is not to suggest that there is no principled way to decide which transactional choices should be left to parties and which choices should be collectivised. But the general principle that contract should be unconstrained except in the face of externalities is woefully inadequate. Ironically, though it is intended as a sharply narrow limiting principle, in fact, it is not limiting at all—almost every contract term affects others in some way. Nor do externalities exhaust the reasons for limiting contractual choice, at least where third parties are limited to other people, literally understood. Sometimes we have reason not to defer to a past version of a person over a future version. Other restrictions protect contracting parties from unwitting opportunism by their counterparts.<sup>43</sup>

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<sup>42</sup>See, generally, Michael Trebilcock, *The Limits of Freedom of Contract* (Harvard University Press, 1997).

<sup>43</sup>George Cohen, ‘Implied Terms and Interpretation in Contract Law’, in B. Bouckaert and G. de Geest (eds.), *Encyclopedia of Law and Economics Volume III: The Regulation of Contracts* (Edward Elgar, 2000), at 78, 90. Designing contracts to avoid opportunism and hold-up is costly, and the courts might lower the transaction costs of contracting by interpreting contracts in ways that make it difficult or impossible to behave opportunistically. The mandatory duty of good faith in contract can be understood in this way. Because these interventions are ones that parties cannot rationally wish away, I do not regard them as substantive regulation of terms. The discussion here is limited to terms that are designed to benefit the parties as they differ from themselves at contract formation, or third parties.

Employment contract is an area ripe for considering these issues because it is an important class of contract to which ordinary contract rules are regularly applied. Ordinary court adjudication of contract disputes also operates alongside a rich regulatory infrastructure, complete with administrative agencies devoted to the particular challenges of the field. I consider two kinds of restrictions on employment contracts here. The purpose is not to defend any particular regulation but to show that justice requires some substantive regulation of each type.

### 3.1.1 | Regulations limiting permissible work

Regulations that limit permissible work do not address how many hours one may work, or at what price. They put certain kinds of work off bounds. I will consider two kinds of banned work that are common to most modern post-industrial states: work with sexual harassment in the environment, and avoidably dangerous work. Regulations that prohibit sexual harassment in the workplace can be understood to ban work in which one of the working conditions is sexual harassment. Similarly, a requirement that labour machinery comply with certain safety standards effectively makes it illegal to work with more dangerous versions of those same machines. These qualify as outright bans because employers cannot induce employees to trade off safety (or dignity) for compensation; employees are not free to make that trade-off.

Regulations on sexual harassment can be variously motivated. Here are two justifications. First, sexual harassment is usually a surprise and more burdensome than one might expect *ex ante*. The result is that most people are not going to contract out of sexual harassment, i.e. negotiate its prohibition with respect to themselves, at the time they begin employment. Because information about rates of sexual harassment at a given firm are not readily available, nor actively searched for by prospective applicants, people making employment choices do not have information about sexual harassment at potential employers, nor are they likely to give that information great weight. In effect, prospective employees poorly represent their future interests in this domain. The result is that the only way you can expect a ban on sexual harassment is if it is imposed from the outside.

One might think that though individuals are not likely to contract out of sexual harassment *per se*, they might contract more generally against burdensome working conditions that do not in any way advance the economic interests of their employer. Employers would in principle agree to such a restriction, as it would not, by definition, impair their economic interests. But the interest against sexual harassment does not fall into this category because the harassers are employees of the employer as well, and disciplining or firing those employees will come at a cost to the employer. Thus, it may very well be in an employer's (at least short-term) interest to allow sexual harassment, especially where it values the harassers more than the harassed.

One might alternatively imagine that employees will contract out of abuse of power, should they in fact attach negative value to such exploitation. But here again we can expect free contract to fail. The right to abuse power can be valuable to employers—or at least, the right to avoid accountability to third parties for such abuse is valuable. So employees cannot contract for such protection without trading off something else. And given the uncertainty associated with future abuses of power, and the lack of information about what such abuse will look like in an unknown work environment, it is quite likely that employees will not bargain for or seek out protective terms.

Finally, one might conjecture that work with sexual harassment is just something people are okay with—and that banning it introduces costs and artificial fault lines into the workplace. Indeed, we often hear that sexual harassment, or at least some of its specific behaviours is just 'life', which ostensibly consists in part of men 'being men', whose 'natural' behaviour is just predatory. This unfortunate line of argument at least has the upside of forcing us to move beyond the paradigm of sexual harassment as a failure of individual contracting; it puts into focus the affirmative wrong of sexual harassment. There are many things that individual employees want but cannot contract for because they lack bargaining or market power; what is special about protection from sexual harassment?

Scholars of sexual harassment have argued that sexual harassment perpetuates social hierarchy and courts and policymakers have inconsistently adopted this view of the problem.<sup>44</sup> The micro-aggressions of sexual harassment constitute the ordinary experience of oppression by those on the losing side of the hierarchy. The wrong of sexual harassment, in other words, is not just limited to contract failure and the limits of a present self's vigilance on behalf of a future self. Its real force can be appreciated only by reference to social context.

Protecting individuals from sexual harassment is necessary to undo or mitigate the harms resulting from a social problem. Free contract is just the wrong apparatus for fixing social problems. We cannot rely on individually negotiated terms to remedy structures that parties find themselves within at the time of contract. Not only are individuals unlikely to seek out the costs of such ad hoc attenuation of the problem, they should not have to bear the costs individually. Mandating a prohibition of sexual harassment not only alters the employment contract but also gets individual employees a better deal on such a ban than they would be able to obtain were they even motivated to contract for it.

Sexual hierarchy is a pretty universal phenomenon, though, as stressed below, its extent, its particular features and the priority accorded its abolition varies from one country to the next. The phenomenon of social hierarchy, along one dimension or another, is still more universal. Substantive regulation that is designed to limit the work of background social hierarchies on the employment relation is necessary to advance egalitarian justice, everywhere.

Another type of restriction on employment bans avoidably dangerous work. What can justify such restriction on employment choice? Again, such restrictions can be understood in part as a result of contract failure together with our unwillingness to defer to contracting parties completely as guardians of their own future interests. And again, there is a public interest: here in the terms on which work is available to others and in the moral taint that avoidable death in the course of employment casts on society at large.

Employees contemplating dangerous work are rarely presented with reliable information about the odds of injury, let alone the cost at which the rate of injury might be lowered. Nor are they in a position to demand such information. Employees prepared to undertake work that is known to be dangerous in the most general terms are usually ones without bargaining or market power. Their pressing immediate economic needs, as well potential social isolation, will undermine their ability to process data about low-probability risks. Thus, employees are likely not to know when they are agreeing to undertake avoidably dangerous work, and they may not refuse that work even when they recognise it.

These do not exhaust our reasons for prohibiting avoidably dangerous work. We also have reasons that have to do with other workers. The availability of some workers for unnecessarily dangerous work reduces the employment options for those unwilling to undertake such work, as employers are not forced to modify their production processes to reduce danger. Finally, but also importantly, those who buy and use commodities and buildings produced with such labour end up buying the lives or physical well-being of others, and that is a purchase we may be unwilling to make. These consumption decisions cannot be made at the individual level, because goods and buildings enter the economy and are used by many others than those who make the initial decision to buy them, the only ones plausibly in a position to inquire about the details of production. And if they are to inquire, in the absence of a government regulation that has already marked out certain production methods as unnecessary and wrongful, as private parties they are not positioned to make the call about whether a given method of production is socially justifiable or not.

What work is avoidably dangerous will vary from one society to another. But there is always avoidably dangerous work. We cannot rely on private contracting to eliminate such work, nor can a just society tolerate disregard for human life. Thus, there will be everywhere some categories of work that are too dangerous and should be disallowed.

### 3.1.2 | Regulations limiting permissible compensation

Substantive bans on work tend to operate on the margin, in that most people are unaffected by them. (Sexual harassment laws might be an exception, depending on the perceived pervasiveness of sexual harassment and one's

<sup>44</sup>Ruth Colker, 'Anti-Subordination Above All: Sex, Race, and Equal Protection' (1986) 61 *New York University Law Review*, 1003; Catharine A. MacKinnon, *Feminism Unmodified* (Harvard University Press, 1987); Cynthia Fuchs Epstein, *Deceptive Distinctions* (Yale University Press, 1988), at 14, 233.



estimation of how effective such laws are in changing work environments.) But large proportions of the workforce are affected by rules regulating compensation. The prevalence of such rules could be surprising, since over time most post-industrial states have come to disfavour price controls on most retail goods and services. But in the sale of labour, most governments place a floor on price and further regulate compensation in the form of paid leave, severance, health insurance and other in-kind compensation.

What justifies such regulation? We should not understand the right to a minimum wage, as the most obvious regulation of compensation, as an individual right that can be conceived in terms of a single employee's dignity. The threshold of pay required to secure dignity depends on distributive justice. Although individuals may have claims deriving from distributive justice, such claims must always run through a variety of social facts before they acquire substantive content. Thus, though individuals have a right to fair pay, what qualifies as fair pay depends on what is happening elsewhere in the economy.

Why even go so far as to say there is a right to fair pay? Conceived at that level of generality, the right should be seen everywhere. Fair pay is pay that meets the demands of distributive justice, and those demands may vary in content but as a matter of principle apply to every political economy. Fair pay can also be understood as pay that does not depend on coercion for consent, lock employees into patterns of dependency that compromise their options long term, or that undermines the ability of other workers to meet similar demands. Although actual prices will vary depending on a host of contextual facts, fair pay understood as compensation compliant with background duties is a universal objective, and we should not be surprised to see it promoted by international bodies.

### 3.2 | Economic and institutional contingency

The above discussion of the universality of restrictions on work and compensation for work anticipates the limits to universality. In fact, though every jurisdiction should have some substantive regulation of the types of permissible work, the content of those regulations is highly contingent on the economic structures it acts upon.

Returning to the case of restrictions on work or working conditions that reinforce background hierarchies, the appropriate response to hierarchy will depend on the kinds of hierarchy present, their relative insidiousness, the institutional means available by which to redress hierarchy, probable private response to substantive regulation of private contract, and the financial means available to private and public entities called upon to expend resources. Regulations aimed at mitigating social hierarchy are not merely expressive; they do more than declare that hierarchy is unjust. To be effective, they have to take into account the social facts on which they operate. Even to be a meaningful communication among citizens, substantive regulations must take seriously the reality they redress.

Similarly, what constitutes avoidably dangerous work will depend on the means available to producers and consumers in a given jurisdiction. In richer states with access to better technology, some kinds of work may reflect excessive discounting of future welfare and/or indifference to risks borne by others. In other states, that kind of work may reflect a different set of tradeoffs and will not permit of the same moral inferences. We may react with horror to working conditions in countries, but the appropriate legal response is not always to ban those conditions directly but to alter the underlying material conditions that motivate dangerous work.

The contingency of context is still more apparent with respect to regulation of compensation. The demands of distributive justice with respect to wages will depend on the role that market wages play in citizens' total resource package; while they constitute the bulk of the resources available to individuals in some states, in others, well-developed social services and a high social wage allow for greater flexibility in market wages. Wages that may reflect coercive conditions of employment in one country may be acceptable to many in another state just by virtue of different levels of development. Externally imposed standards for compensation that are out of tune with the economic conditions of an economically disadvantaged jurisdiction to which they are applied may be fairly cast as protective of worker interests in wealthier jurisdictions.

The universality of the moral logic behind substantive rights in contract does not translate into universal regulations. My focus has been on employment regulations but the same is true of another important category of

transactional regulations in the EU, consumer law. As Christian Joerges and Christoph Schmid have argued, the strategy of full harmonisation of consumer protections is 'at odds with the socio-economic diversity' and 'do[es] not make economic sense.'<sup>45</sup>

Homogeneous rules applied across diverse political economies have perverse consequences. Poorer states that prematurely adopt the standards appropriate for rich countries do so at the expense of their poorest, who are the ones most likely to seek and benefit from access to dangerous or low-wage work. There may be some ways in which to agree in principle to certain kinds of employment restrictions. But aspirational convergence exacts a moral cost that is perverse in the pursuit of justice in employment, justice in consumption, or justice within any other transactional sphere.

The consequences of such a conclusion extend beyond the prospect of convergence in European contract law. In the first instance, it calls for scepticism about employment directives that directly regulate leave and other compensation across disparate Member States. Caution about disparate economic circumstances might dictate in favour of amorphous central regulations of the sort we see from the International Labor Organization, which are not detailed but tend to describe rights in principle and call on countries and firms to draw out entitlements. International labour standards have been disappointing because they rely on essentially unreliable governments and private actors for their efficacy. Some of the disappointment we could expect about general guidance coming from the EU would similarly derive from low national standards that result from political capture by powerful economic interests at the Member State level. But some of the disappointment would be misplaced because legal standards should differ among countries under different social and economic circumstances.

#### 4 | CONTRACT LAW AS AN INSTRUMENT OF CONVERGENCE

One might argue that waiting for convergence in legal discourse or economic conditions is futile and fatalistic. Futile, because convergence will not occur so long as laws, including contract law and regulation, entrench a particular political culture and reinforce and validate economic circumstances. Fatalistic, because the above arguments might underestimate the capacity for cultures and economies to change over time. Law is not just made by society, the argument would run, it helps make society; and so one should adopt laws that befit the society one envisions. And society, for its part, is not a fixed state of affairs. It is not even capable of accurate characterisation over any extended period of time. Society adapts to the law; it keeps up with the aspirations of law, which operate as a kind of goal post. Of course, change comes at a cost, as do all good things.

These claims about the relationship between society and law sound true mostly because they are true of laws other than the ones at issue here, namely, the law of contract and substantive regulation of contract. However central *these* kinds of law are to society, they are the tail that should not wag the dog.

Law should move society forwards where lawmakers have good reason to believe that the principles embodied in a proposed law are ones that society should and will ultimately come to accept. But there can be no such confidence about any particular permutation of the right to contract. The kinds of disagreement about agency and how it manifests in private transactions are both meaningfully steeped in deeper political values and well within the bounds of reason. Adopting a contract law that is alien to prevailing political-moral values will not move society forward, it will just move law sideways, bringing it out of alignment with political discourse and, for that reason, rendering it less legitimate. And while contract figures importantly in ordinary life, citizens tend to become aware of its details only in the unlikely event that a transactional dispute escalates; at that point, the rule either comports with their expectations of the law, grounded in political culture and lay exposure to contract law, or it is surprising.

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<sup>45</sup>Christian Joerges and Christoph Schmid, 'Towards Proceduralization of Private Law in the European Multi-Level System', in A.S. Hartkamp, M.W. Hesselink, E. Hondius, C. Mak and E. Du Perron (eds.), *Towards a European Civil Code*, 4th rev. and exp. edn (Kluwer Law International, 2010), at 277, 295.

Surprise about the law is generally a problem for the rule of law<sup>46</sup>; in the case of contract, it also undermines the efficacy of the whole edifice, designed as it is to promote stability of expectations and protect reliance.<sup>47</sup> Contract pervades society and the practice is forged in the shadow of contract law itself. Because the law appears in the lives of people in this attenuated way, its principles do not directly address citizens as might, for example, constitutional principles guaranteeing free speech. Without a mass audience, contract law is an unlikely candidate for altering political culture in the medium term to match a political vision imported from elsewhere. Without attempting to state the full conditions under which it would be appropriate for law to lead the evolution of prevailing conceptions of justice, a necessary condition is probably political salience. However politically saturated the doctrinal choices in contract law, and however materially consequential it may be for individuals and societies, choices about the contours of contract law are not actively debated by most people governed by it. Only a more salient area of law can lead people to adopt a progressive moral vision, as opposed to inducing them to abide by the vision of others.

Substantive regulation is also a poor means by which to promote economic convergence because there is no a priori reason to believe that rules designed to promote convergence will happen to be just those rules that advance the *apparent* purpose of the regulation, i.e. to promote the justice of transactions or improve their cumulative material effects. In the context of consumer transactions, Roger Brownsword has observed that while 'in purely domestic contexts, the principal purpose of regulating consumer transactions is to ensure that consumers are treated fairly by suppliers, in a regional European context, the regulatory purposes [involve] ... the encouragement of cross-border consumption ... and improving the environment for small business who want to increase their cross-border markets.'<sup>48</sup> We can expect a tradeoff between regulatory purposes in other areas of substantive regulation as well. Although domestic regulators are also distracted by purposes outside those they announce, the layering of regulatory goals at the European level is notable because it is not a matter of politics corrupting regulation at the margins. Promoting convergence is an official aim of transactional regulation, perhaps *the* aim.<sup>49</sup> Yet European integration is not a project for which contracting parties have agreed to act as instruments. Those parties expect to be subject to regulations that ensure the justice of their own agreements and that control the proximate harms to others flowing from their activities.

Scholars like Hans Micklitz and Guido Comparato have described an emergent European Regulatory Private Law (ERPL) that might chafe at this framework and the dichotomy it posits between the project of European integration, on the one hand, and the 'internal' purposes of private law, on the other. European regulation of particular classes of transactions may adhere to the logic of specific sectors while advancing a consistent vision of 'regulatory autonomy' and 'access justice' that serves the European project as well.<sup>50</sup> Regulatory autonomy differs from the notion of autonomy traditionally invoked in (classical, if not actually conservative theories of) private law in that ERPL takes the autonomy of persons to be the by-product of regulation rather than natural jurisdiction over which regulation must avoid trespass. Access justice promotes access to various economic sectors.<sup>51</sup> One might argue that these principles infuse the aims of a common market into the 'internal' policy ambitions of discrete EU regulations. European

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<sup>46</sup>Richard H. Fallon, Jr., 'The Rule of Law' as a Concept in Constitutional Discourse' (1997) 97 *Columbia Law Review*, 1, 7–8; Robert S. Summers, 'The Principles of the Rule of Law' (1999) 74 *Notre Dame Law Review*, 1691, 1693–1694; Jeremy Waldron, 'The Concept and the Rule of Law' (2008) 43 *Georgia Law Review*, 1, 5.

<sup>47</sup>Leon Fuller and William R. Perdue, Jr., 'The Reliance Interest in Contract Damages' (1936) 46 *Yale Law Journal*, 52; see also Victor P. Goldberg, 'Protecting Reliance' (2014) 114 *Columbia Law Review*, 1033.

<sup>48</sup>Roger Brownsword, 'The Theoretical Foundations of European Private Law: A Time to Stand and Stare', in Brownsword et al., above, n. 4, at 159, 166.

<sup>49</sup>The 1985 White Paper on the Completion of the Internal Market provided the necessary legitimacy for the European legislator to use and to instrumentalise law as a means to open up and to shape markets. This is where the birth of the EU as a Market State may be located. Private law is submitted to the overall objective of the internal market.'Hans-W Micklitz, 'Monistic Ideology versus Pluralistic Reality—Towards a Normative Design for European Private Law', in Niglia, above, n. 37, 29 at 32.

<sup>50</sup>Guido Comparato, 'Public Policy through Private Law: Introduction to a Debate on European Regulatory Private Law' (2016) 22 *European Law Journal*, 621, 623.

<sup>51</sup>*Ibid.*, at 624.

regulation might use the common market as a tool to advance specific regulatory objectives, rather than the other way around.

Where the common market as an economic institution advances regulatory aims relevant to transactional activity, including lower prices, higher wages, rapid technological deployment or environmental safety, regulation that self-consciously aims to integrate the market may very well simultaneously advance the projects of both European integration and liberal contract. But regulations that self-consciously integrate the market are importantly different from regulations that self-consciously aim to integrate the law itself as an end in itself, i.e. as a political ideal.

Problems arise from the difficulty of distinguishing among possible regulatory motives of EU lawmakers and administrators. Many people in the European Union appear concerned that integration is driven in substantial part by an elite that does not take seriously the differences between member states, because those differences are less material to elites. In this discursive environment, the principles of regulatory autonomy and access justice might supply a useful narrative for transactional regulation because it suggests ways in which a common market leaves all people better off even on traditional regulatory metrics. The concept of regulatory autonomy helpfully moves past an outdated notion of autonomy that was distorted usually to weigh against regulation; the principle acknowledges the ways in which the modern administrative state is essential to realising autonomy, individual and collective, and further highlights how the transnational character of the EU enhances the regulatory potential of its administration state.

Nevertheless, regulatory autonomy and access justice, like other principles of transactional regulation, generate answers to regulatory questions only by way of political discourse and detailed policy analysis, each of which is highly contingent on the salient values and economic circumstances of particular states. Political discourse that negotiates the specifics of what regulatory autonomy looks like in a given sector is no less dependent on local theories of justice than more traditional questions of contract doctrine. Interpreting regulatory autonomy to consistently favour convergence is suspect.

Access justice appears more concrete; it has the flavour of an economic policy, chosen from a rivalrous set. But it is politically acceptable only because it does not systematically privilege the access of any particular group. Everything turns, however, on whether regulators will choose to prioritise access for small business owners in this or that country, consumers in this or that country, workers in this or that country. Even if we agree that 'access' is an ideal, it is precisely because the access interests of different groups rival one another that we must again resort to political discourse and contingent economic analysis to derive any particular directive from the general principle. Of course, there are winners and losers in every instance of domestic regulation as well. But the justifications for imposing losses on some groups at the expense of others are harder to extend across political ideologies, or when losers perceive themselves grouped by an entity that is not positioned to compensate them through other political measures.

It is not clear that promoting every conception of access justice will promote convergence. Just as pursuing regulatory convergence as an end in itself is likely to compromise regulatory autonomy on some plausible readings of the principle, pursuing legal convergence as end in itself is likely to come at the detriment of at least some groups' understanding of their access justice. Regulating for transactional justice, even where such justice is understood in the particular framework offered by ERPL, may often but cannot always promote regulatory convergence.

We have a final reason to hesitate before using contract—or even transactional law broadly conceived—to further the project of European integration. As is evident in the cases of substantive regulation explored above, there is always a thin line between regulation that corrects contracting failure and protects future selves and third parties, on the one hand, and regulation that makes life more difficult for those least able to withstand further pressures, on the other. Drawing the wrong line is dangerous but a risk every society must assume. But to impose a line drawn across facts from another place is actually unjust. This is true not only because of the high probability of a mismatch but especially because substantive regulation almost always serves the public interest, and not just the interests of those who ostensibly benefit in the first instance at the expense of the most disadvantaged. We saw this in the case of both employment rules that prohibit certain kinds of work and rules that require minimum levels of compensation. Such rules serve broad social objectives such as undermining social hierarchy, protecting choices for other workers, promoting distributive justice and providing moral comfort for others in the economy. Ill fit in substantive regulation

not only ensures that such objectives are more weakly advanced but also places the cost of the pursuit of justice squarely on those on the losing end of hierarchies, victims of distributive injustice, and those without good alternatives to whatever is banned.<sup>52</sup>

It is worth pausing to observe one form of convergence that might avoid many of the pitfalls described. It is formal convergence that accommodates persistent diversity in practice. It may be difficult to implement such a balance using any new transnational code of contract law. But it might be possible if the language of any new rules is deliberately vague, such that much content is filled in by national courts or other institutions. A formally integrated but somewhat hollowed out transnational law would keep politics alive in contract law—and still situated in existing domestic institutions of public discourse, electoral competition and elite exchange. It would result in more diffuse power over private law in the long run than would a code of private law that aimed to settle all the major doctrinal debates once and for all.<sup>53</sup>

Notwithstanding the theoretical potential in a pluralistic model of contract law, I do not make this possibility central to my discussion here because it is so remote from any model of convergence on the table. Observing that the 15 principles initially recognised in the Draft Common Frame of Reference were narrowed to a short list of four, Leone Niglia argues that orthodox thinking about European private law disfavors pluralism (notwithstanding its embrace in the context of constitutional theory).<sup>54</sup> If they do not disfavor it, architects of a common framework seem poised to embrace the hard choices 'between national legal cultures, on the one hand, and a new common Europe legal culture on the other, and ... between the various national cultures as ingredients for the new European legal culture.'<sup>55</sup> And it is easy to see why. The impact, or the perceived achievement, of private law integration is diminished to the extent there are residual differences in the laws among states. Integration has not been conceived as an umbrella project; it consists in hard, expert choices that bring out the 'best' (or best justified principles) of European legal culture. The goal is to create the conditions for deeper economic and political convergence down the line, whether to promote economic growth or the political conditions for transnational redistribution. Neither aim is furthered by a shared contract law that might increase party choice and reduce some transaction costs but leaves the essential diversity of law and underlying attitudes in place.

And so the object of inquiry remains a project of substantive convergence, for which contract law and regulation is neither an effective nor a legitimate tool. Some parts of the law, like constitutional law, might be appropriately aspirational. But contract law is too removed from citizen consciousness to be an effective agent of change in political culture, and contracts themselves have too many concrete implications for the material lives of ordinary people to be warped in the service of exogenous political purpose.

## 5 | CONCLUSION

Contracts create rights that correspond to obligations voluntarily assumed by parties. But those new rights operate against background rights. This essay has considered two kinds of rights implicated by contract: a formal right to contract and substantive rights to or against particular terms.

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<sup>52</sup>This point relates to the important point pressed by Damjan Kukovec regarding the perverse distributive effects of 'social legislation' designed primarily to benefit workers in wealthier EU states. He argues that social protections that are regarded as interference with the free market actually harm weaker members of the periphery and are thus improperly regarded as 'social' from some objective standpoint. Free movement of labour, usually regarded as a free market principle, benefits the social agenda and distributive claims of the periphery. See Damjan Kukovec, 'Law and the Periphery' (2014) 21 *European Law Journal*, 406.

<sup>53</sup>Cf. Hesselink, above, n. 22, at 681: 'Different outcomes of the European private law debate have different consequences for the power of the actors involved in private law making.'

<sup>54</sup>Leone Niglia, 'The Double Life of Pluralism in Europe', in Niglia (ed.), above, n. 37, at 13, 17. Indeed, some scholars have been wary of integration precisely because they fear it cannot produce an internally coherent system but will culminate instead in a hodgepodge of principles and doctrines. See Joerges and Schmid, above, n. 45, at 294.

<sup>55</sup>Hesselink, above, n. 22, at 679.

My aim has been to show that in some sense these legal rights are more than mere entitlements. They are not like the right to park on a particular street, which is entirely a function of the traffic rules in a city and do not relate importantly to any moral interest. Barring some unexpected angle to the issue, a conversation about parking rights and what they should look like has to be local. An economic analysis might be exhaustive; there is little, if any, moral content to the entitlement generated by legal rules. By contrast, legal rights behind contract are morally significant. They are traceable to fundamental moral commitments and constraints. The formal right relates to a foundational interest in moral agency, which enjoys a privileged status in the moral calculus of all liberal states. Substantive rights in contract correct for social hierarchy, distributive injustice, and the potential for exploitation and ensnarement. These are again moral interests of the highest order, and thus, universal.

But though there is deep moral content to both formal and substantive rights behind contract, they are also inevitably contingent on existing features of the societies in which they operate. Formal rights depend on a more specific characterisation of political culture than the label 'liberal' allows. Substantive rights depend on social and economic facts for their efficacy and legitimacy.

In the last part, I argued that contract law is a poor tool with which to pursue convergence that is not found. Limited in its ambition, the essay does not develop an alternative account by which convergence might come about, assuming that is a goal the states in the European Union share. Having assessed only the nature of contract law and regulation, my conclusions are necessarily limited to what contract should and can do. Within this limited domain, the match between law and society is more important than the match between laws of different states.

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