

## INTRODUCTION

# The Radical Aspirations of *Justifying Contract in Europe*

Mirthe Jiwa & Lyn K.L. Tjon Soei Len

This special issue provides a collection of critical responses to Martijn Hesselink's book *Justifying Contract in Europe: Political Philosophies of European Contract Law* (Oxford University Press: 2021). The book is the result of more than a decade of teaching and political and academic engagement in the field of European contract law and its theory. In the book, Hesselink sets out to rethink the normative foundations of European contract law. Whilst the normative foundations of contract law have been explored by a wide range of scholars, Hesselink brings such explorations together in a nuanced, in-depth, and critical conversation across six leading contemporary political theories: utilitarianism, liberal-egalitarianism, libertarianism, communitarianism, civic republicanism, and discourse theory. To these theories, the book submits six fundamental questions of European contract law: (1) Does contract law need to have a democratic basis? (2) Should contract law be national, European, or global? (3) Should contracts have legally binding force and, if so, what should this entail in terms of remedies? (4) Should contract law protect weaker parties? (5) Should the freedom of contract be limited for reasons of public policy or public morality? (6) Should contract law be partly optional? *Justifying Contract in Europe* thus offers a critical introduction to the political philosophy of European contract law, which Hesselink defines as 'a new field of study at the crossroads of European law, contract law, and political philosophy'.<sup>1</sup> The intellectual breadth, however, is not the only or most uniquely valuable contribution of the book.

Some scholars bring normative political theory to contract law to (better) explain and legitimate the existing law. To the extent that scholars use reasons derived from normative political theory to critique certain rules, doctrines, or practices of contract law, the focus is often on *reform*: normative considerations then serve to inform and articulate reform proposals of status quo contract law. Whilst Hesselink's project is also normative and constructive in this reformist sense, his aspirations for *Justifying Contract in Europe* go further than only offering reasons for reform: the book's critical engagement with the political philosophy of European contract law aspires at the same time to be foundational and radical ('as going to the root of the problem', as Hesselink reminds us of its etymology).

1 Martijn W. Hesselink, *Justifying Contract in Europe: Political Philosophies of European Contract Law* (Oxford: Oxford University Press, 2021), 12.

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The book proceeds from a radically democratic and pluralistic hunch. In this context, the six leading political theories function as potentially effective ideas in a democratic society. The book's aim is explicitly not to formulate one singular authoritative view on European contract law. To the contrary, Hesselink commits to the multiplicity and diversity of perspectives on normative questions of European contract law. According to Hesselink: 'In a democracy, it is unthinkable that generally applicable laws will be based on one single underlying value or principle.'<sup>2</sup> In showing what concrete alternative futures for European contract law are possible based on reasons and arguments derived from different political theories, the book aims to open up the political debate on European contract law. The reader is thereby invited not to stop at contemplating only concrete proposals for reform of law, but to open their mind also 'towards new horizons, widening the scope of what seems realistic and feasible, and so changing the understanding of which views are moderate and which extreme, and of where the political centre is located'.<sup>3</sup>

These normative (constructive) and radical aspirations make the book thought-provoking as illustrated by the contributions to this issue. The collection of responses is, by and large, the result of a book symposium hosted and organized by the Amsterdam Centre for Transformative Private Law on 30 September 2021 in Amsterdam. This issue offers critical comments by six scholars, followed by a reply from Hesselink. Several contributors were provoked by Hesselink's claim to radicalness in *Justifying Contract in Europe*, whilst others raised questions concerning the book's method, scope, and/or subject matter.

Christina Eckes questions how radical the book's understanding of democracy really is. She argues that by relying on Habermas' discourse theory *Justifying Contract in Europe* neglects the dimension of 'agonistic separation'/'agonistic pluralism' necessary to accommodate radical democracy. The institutional arrangements necessary for accommodating radical democracy are relevant to relations of power and domination, which is a central concern for Hesselink. The book's reliance on Habermas, Eckes argues, risks concealing sustained antagonism between polarized positions in a radical democracy by presenting contingent political solutions as the most reasonable, and marginalizing alternatives as 'populist'.

Giacomo Tagiuri connects to the book's rhetorical and methodological commitment to pluralism and argues that this also entails a normative and political commitment. The book often returns to the language of irreconcilability and compromise between different political theories, and the different worldviews they represent. Tagiuri observes, however, that it is well possible to be genuinely persuaded by different theories and reasons *at the same time* – an option that *Justifying Contract in Europe* does not seem to contemplate. The ways of reconciling the different values, or moral institutions, that coexist within a society at a given time – not only

2 Hesselink, *Justifying Contract in Europe*, 9.

3 Hesselink, *Justifying Contract in Europe*, 438.

between different groups but also within one person or group – is not adequately captured by the notion of compromise according to Tagiuri. He argues for a more robust rejection of monism and more a decisive embrace of pluralism.

Lyn Tjon Soei Len critiques the book's potential to live up to its diagnostic and remedial ambitions. Does *Justifying Contract in Europe* help readers to envision more just alternative futures? Tjon Soei Len raises concerns about the book's understanding of feminism, the non-intersectional treatment of intersectionality, and the intellectual disengagement with questions of racial and gender injustice. She argues that important approaches to justice, freedom, and democracy are neglected and structurally excluded from the book's vision of what and who offers *leading* political thought, limiting how readers may envision more just alternative futures.

Mirthe Jiwa connects the method and approach of *Justifying Contract in Europe* to the question of delimitation. The question she asks is ostensibly simple and straightforward: what is normative theory? And: what does Hesselink mean when he speaks of normative theory? Jiwa raises several concerns with the reasons Hesselink offers for excluding feminist and Marxist theory, including their heterogeneity and presumed hostility to normative questions and approaches. She suggests that these reasons point to a broader problem with Hesselink's understanding of normative theory, which appears to rest on a problematic distinction between normativity and critique. To this, Jiwa responds that critique and normativity (moral philosophy), properly understood, are intimately related – in fact: inseparable – and that one without the other leaves us with a significantly impoverished and unduly narrow understanding of both normativity *and* critique.

Gareth Davies addresses the relationship between normative theory and empirics, or, if you will, between deontology and instrumentalization. If the aspirations of *Justifying Contract in Europe* extend to actual contributions to justice and democracy, Davies questions how it can do so through normative theorizing. Theorizing in times of crisis, for Davies, requires output legitimacy. What are the limits of (normative) theory, and what is its value in isolation of actual consequences and actual outcomes? Davies thus poses a question about the book's aspiration towards justice and democracy. For Davies, the normative question 'what should we do' is a call for a plan of action that *Justifying Contract in Europe* does not, and cannot, provide.

Candida Leone explores Hesselink's understanding of contract, notably the (implicit) understanding of contract's basic structure. In keeping with the liberal tradition, Hesselink maintains that – at the very least – contract law's 'basic structure' needs to fulfil the requirements of justice. Whilst he remarks that 'the basic structure of contract – just like the basic structure of society – is not a neutral, pre-political concept',<sup>4</sup> Leone discerns an inclination to contemplate general private law as the suitable candidate for contract law's basic structure. For contemporary

4 Hesselink, *Justifying Contract in Europe*, 441.

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European private law(s), however, Leone argues that this 'general private law nostalgia' is no longer warranted.

This special issue ends with *The Power of Reasons in European Private Law* in which Martijn Hesselink offers thoughtful replies to the six critiques.