

# The Power of Reasons in European Private Law

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## 1 Introduction

*Justifying Contract in Europe* (hereafter: the book) explores the power of political reasons in European private law.<sup>1</sup> It does so by engaging critically with the justifications offered by various political theories for their ideal European contract law. Thus, the book neither aims nor claims to remain neutral, as some critics have suggested.<sup>2</sup> Instead, its stance is consistently critical (which is not the same as sceptical).<sup>3</sup> The epistemic dimension here is the expectation that we can learn something about European contract law that other approaches leave unaddressed, that is, about European contract law as it should be. Crucially, however, the book is equally committed to the idea that learning about normative questions is a collective endeavor. I am, therefore, delighted, that the editors of the *Netherlands Journal of Legal Philosophy* decided to bring together six critical discussions of the book in a special issue. And I am deeply grateful to the authors for their insightful and challenging engagement with core aspects of my book. I would like to express my particular gratitude to two of them, Mirthe Jiwa and Lyn Tjon Soei Len, for acting, in addition, as guest editors of this special issue. Because the six contributions are invariably rich and dense, it is impossible to fully address all the important questions they raise. Therefore, in this response I will restrict myself to focusing, in each case, on the two or three points I consider their main and most challenging criticisms. The responses to two contributions take somewhat more space than the others, because they invited me to engage with the work of specific philosophers.

## 2 Political Struggle for Hegemony, or for Justice? – In Response to Christina Eckes

In her contribution, Christina Eckes makes two main points. First, the book uncritically embraces Habermas' discourse theory. Secondly, and as a consequence, it fails to engage critically with discourse theory's inability to account for agonistic political struggle, as understood by Chantal Mouffe, and thus misses an important aspect of democratic legitimacy in 21st century Europe. While I readily grant the first point, the second one, in my view, fundamentally misreads the Habermasian

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

2 Hans-W Micklitz, 'Thoughts on Martijn W. Hesselink's *Justifying Contract in Europe, Political Philosophies of European Contract Law*', *European Review of Private Law* 30, no. 2 (2022): 373-386.

3 Hesselink, *Justifying Contract in Europe*, 11.

project while it also fails to appreciate the implications of a key aspect of Mouffe's understanding of democracy.

### 2.1 *Uncritical Endorsement of Critical Theory*

Let us start with the first point. The core claim in Habermas' *Theory of Communicative Action* was that we cannot make proper sense of society if we understand human interaction as entirely strategic, where each person pursues their own objectives and regards others as mere obstacles between them and their aims, which, therefore, they must either navigate or set aside. Habermas argued, convincingly in my view, that human interaction cannot be reduced to mere strategic action – and politics to a mere power struggle – not even descriptively, because at least some people at least sometimes try to convince each other with reasons, thus engaging in what he calls communicative action, where under ideal circumstances the unforced force of the better argument would prevail. *Justifying Contract Law in Europe* picks up on this idea of reason-demanding and reason-giving and of (normative) justification as opposed to mere (causal) explanation. Insofar, the book is indeed much more committed to discourse theory than its structure, where discourse theory is presented as merely one among six political theories, would seem to suggest. Eckes is entirely right to point this out. Moreover, her point that in the book discourse theory has too much of an easy ride is also a fair one. While the book explicitly takes a non-neutral stance, which allows for taking sides, this should of course happen, in each case, after a discussion of the most powerful criticisms expressed against the theory at hand. And I acknowledge that the book would have benefited from a more thorough discussion of Chantal Mouffe's criticism of Habermas' work.<sup>4</sup>

### 2.2 *A Quest for Consensus?*

This brings me to the second point. Throughout her work,<sup>5</sup> Chantal Mouffe has consistently charged Jürgen Habermas – and John Rawls, for that matter – with depoliticizing the political by requiring consensus on all political questions, referring to their views as 'democracy as the realization of a rational consensus',<sup>6</sup> 'the consensus model of democracy',<sup>7</sup> and 'the misguided quest for consensus and reconciliation'.<sup>8</sup> In a representative passage, she writes: 'Both Rawls and Habermas assert, albeit in different ways, that the aim of democracy is to establish a rational

4 The book discusses Mouffe's agonistic understanding of democracy on three occasions (on 10, 265, 446) but never very extensively.

5 See, in particular, Ernesto Laclau and Chantal Mouffe, *Hegemony and Socialist Strategy: Towards a Radical Democratic Politics* (New York: Verso, 2014); Chantal Mouffe, *The Return of the Political* (New York: Verso, 1993); Chantal Mouffe, *The Democratic Paradox* (New York: Verso, 2005); Chantal Mouffe, *Agonistics: Thinking The World Politically* (New York: Verso, 2013).

6 Mouffe, *The Democratic Paradox*, 7. She also consistently refers to both Habermas' and Rawls' theories as 'rationalist' (e.g. Mouffe, *The Democratic Paradox*, 11: 'the rationalist approach'), even though both authors take great care to distinguish reasonableness (and reason-giving) from rationality. See, e.g., John Rawls, *Political liberalism* (New York: Columbia University Press, 2005), lecture II, § 1, 49-54 ('The reasonable and the rational').

7 Mouffe, *The Democratic Paradox*, 7.

8 Mouffe, *The Democratic Paradox*, 77.

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agreement in the public sphere. Their theories differ with respect to the procedures of deliberation that are needed to reach it, but their objective is the same: to reach consensus, without exclusion, on the common good.<sup>9</sup> In her contribution, Eckes similarly suggests, with reference to Mouffe, that the Habermasian conception of democracy has no room for political struggle because it is obsessed with seeking consensus. She writes: ‘Reading [the] institutional settings within which European contract law develops through a (quite uncritical) Habermasian lens highlights the cooperative and consensus-oriented and bears the danger of concealing sustained political conflicts and radically alternative visions of what constitutes a “good life”/ pluralism. It allows presenting contingent political solutions as the most reasonable and gives them an air of being apolitical.’

But nothing is further from the truth. First, for both Rawls and Habermas the *impossibility* of reaching consensus in society about what constitutes a good life or about any ‘common good’ is the very *premise* of their political theories, which Habermas refers to as our ‘post-metaphysical condition’ while Rawls calls it the ‘fact on reasonable pluralism’. It is under these (modern) conditions that the question first arises of how we can nevertheless live together, respecting each other as equals. Their answer is that we should try to reach a consensus on some procedure (Habermas) or on justice principles governing our most basic institutions (Rawls). We might refer to this solution as a form of constrained political pluralism, which is typical of all functioning constitutional democracies, and which, crucially, leaves wide room for ordinary politics and struggle. In other words, agonistic struggle is an entirely legitimate and typical part of democratic politics, as long as it takes place within a procedural framework that is reasonably acceptable to everyone concerned. The framework constraining the strategic political action of various interest groups will typically include human rights, which are the rights we all have by virtue of our humanity, and which, therefore, are universal. Habermas expresses this idea by stating that arguments invoking human rights, and similar moral reasons, would obtain consensus in a hypothetical ideal speech situation, where no one’s point of view is excluded and where the unforced force of the better argument prevails, and should therefore have priority over all other political considerations. Note, however, that the reference to consensus merely operates here as a stylized heuristic to indicate a high threshold. Note also, crucially, that for Habermas there exists no other way for rights and justice claims to vindicate their universal vocation, as trump cards, than *within* the real political struggles.

### 2.3 *The Constitution as a Hegemonic Structure*

Coming now to Chantal Mouffe’s own understanding of democracy, the first thing to note is that her project is not concerned with democratic legitimacy but with political hegemony. In her comment, Eckes does not pay much attention to hegemony. Yet, this is a core element of Mouffe’s understanding of democracy and, in my view, key to its distinctiveness. In *Hegemony and Socialist Strategy*, Mouffe adopted, together with her co-author Ernesto Laclau, a post-Marxian understanding

9 Mouffe, *Agonistics*, 55.

of socialism, replacing Marx's notion of class struggle between workers and capitalists with the Gramscian idea of hegemonic order.<sup>10</sup> On this view, the various agonistic political struggles are always struggles *for hegemony*. And as Mouffe elaborates in her later work, struggles for hegemony are always political struggles in Carl Schmitt's sense of the term, *i.e.*, struggles between 'us' and 'them' (where Mouffe replaces 'enemies' in the friend/foe dichotomy with 'adversaries').<sup>11</sup>

Consistently with this understanding of the political, Mouffe's writing is explicitly concerned primarily with the strategy for the Left to become hegemonic,<sup>12</sup> and to defeat the incumbent hegemonic order, which is neoliberalism.<sup>13</sup> Thus, Mouffe understands politics explicitly and exclusively as *strategic* action: in agonistic politics there is no room for convincing the other with reasons. Moreover, she rejects the possibility of political neutrality, even as an aspiration, because in the struggle for hegemony it will always be either us or them. Further, in its rejection of any moral or otherwise idealizing dimension her (Schmittian) understanding of the political is radically realist. Finally, she understands the democratic people in a strongly communitarian-identitarian (again Schmittian) sense as having a substantive identity, which comes about in the agonistic struggle.<sup>14</sup>

Clearly, Mouffe's view is radically and explicitly at odds with the Habermasian and the Rawlsian projects of finding political procedures, institutions, and practices that are reasonably acceptable to members of modern societies who adhere to radically divergent worldviews. However, crucially, in my view, this view of politics also seems difficult to match with the idea of democratic constitutionalism. It is true that on several occasions Mouffe points out that the difference between antagonism (between enemies) and agonism (between adversaries) is that in the latter case the struggle for hegemony is subject to some rules of the game. However, in the absence of any elaboration, or even a hint, it is far from clear what these rules should look like, which considerations should inform them, how they should come about, and – crucially – why the side prevailing in the political struggle should abide by them rather than to set them aside as soon as it becomes hegemonic. In this light, it is surprising that Eckes sees a connection between the agonistic understanding of politics and the separation of powers.

10 Laclau and Mouffe, *Hegemony and Socialist Strategy*. Mouffe consistently refers to that book as the theoretical bases of her views. See, *e.g.*, Mouffe, *The Democratic Paradox*, 99.

11 Mouffe, *The Return of the Political*, 2-3, 49-50; Mouffe, *The Democratic Paradox*, Chapter 2.

12 See, *e.g.*, Laclau and Mouffe, *Hegemony and Socialist Strategy*, xix: 'One needs to know for what one is fighting, what kind of society one wants to establish. This requires from the Left an adequate grasp of the nature of power relations, and the dynamics of politics. What is at stake is the building of a new hegemony.'

13 See, *e.g.*, Laclau and Mouffe, *Hegemony and Socialist Strategy*, xvii (preface to the second edition); Mouffe, *The Democratic Paradox*, 5; Mouffe, *Agonistics*, xvii.

14 See, *e.g.*, Mouffe, *The Democratic Paradox*, 56. In Chapter 4 she emphasizes, with reference to Michael Oakeshott, the importance of passions and affects in creating the bonds needed for a political community.

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#### 2.4 *The Blurring of Powers*

Eckes' point about the separation of powers is puzzling also in another respect. While she argues that separation of powers is 'essential to understanding democratic decision-making in Europe', in fact she seems to argue against it, in favor of the *blurring* of powers. In particular, she seems to support the trespassing of the judicial branch into the territory of the legislative branch. This raises the question of when and why this should occur. The aim seems to be to allow 'those devoid of political power to challenge the exercise of public power and law, including by relying on extra-legal concepts for the interpretation of law'. If the objective is indeed to enfranchise those devoid of political power, several questions arise: which procedures will courts adopt to determine who is devoid of political power? Is political power to be understood here as legitimate political power, and, hence, is the aim to empower only those who have been *illegitimately* disempowered? If so, how will a court determine whose political power is legitimate? And, most fundamentally, are citizens really politically empowered when courts take favorable decisions on their behalf?

If the aim is indeed to empower the disenfranchised, then this suggests that in Eckes' case for institutional trespassing judicial activism would be a second-best solution only, part of non-ideal theory, for circumstances where the legislature is not properly functioning, in this case because it denies equal political agency and marginalizes certain voices.<sup>15</sup> The solution is second best, because, for a series of well-known reasons, civil litigation is structurally ill-equipped for democratic law-making. In this regard, it is noteworthy that Habermas not only discusses the separation of powers extensively,<sup>16</sup> but also strongly defends it, because in his view – with which I agree – political agency is ensured solely when enfranchised citizens can understand themselves as the co-authors of the laws that will apply to them, rather than being subjected to the paternalistic view of legal experts (however enlightened, and however concerned about injustice), such as judges, as to what their rights and obligations should be.

#### 2.5 *Hegemony or Justice?*

In sum, while Eckes believes that Habermas fails to account for an agonistic conception of democracy as understood by Chantal Mouffe, in reality he would *reject* core features of it – and for good democratic reasons in my view. What I find most appealing in Mouffe's understanding of radical democracy is that it regards the various historical and contemporary emancipatory movements, and their struggles against subordination (feudal, capitalist, sexist, racist, ableist, homo- and transphobe etc.), as successive extensions of the democratic revolution that was started by the French revolution, each time deepening the democratic revolution by calling into question various relations of subordination.<sup>17</sup> However,

15 In my book, I discuss the question of judicial private law-making as a second-best solution from the Habermasian point of view on 135-137 and 142.

16 See Jürgen Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy*, trans. William Rehg (Cambridge, Massachusetts: MIT Press, 1996), section 4.3, 168-193.

17 See, in particular, Laclau and Mouffe, *Hegemony and Socialist Strategy*, Chapter 4.

while Mouffe understands these struggles as struggles of the Left for hegemony, which essentially is another form of inequality, I would prefer to see them, with Rainer Forst, as essentially democratic struggles against injustice and for the right to fully count – and be respected – as justificatory equals.<sup>18</sup>

### 3 Public Non-Choice Theory – In Response to Giacomo Tagiuri

Giacomo Tagiuri starts his discussion from his own experience when reading the book of finding himself convinced by different reasons in support of the same answer to a given normative question. In such cases, he writes, ‘it may not be necessary, desirable, or even possible to choose the precise reasons why we support a certain answer’.

#### 3.1 *Modus Vivendi and Exclusion*

The book does in fact consider this possibility of non-choice between reasons grounded in different convictions, under the Rawlsian label of overlapping consensus. Rawls believed that different reasonable worldviews, while grounded in irreconcilable ultimate values and metaphysical convictions, could overlap enough to reach a consensus on terms that citizens could affirm from within their respective worldviews as a basis for living together in mutual equal respect. However, in the book I question whether an overlapping consensus on abstract (but substantive) principles of justice will prove to be sufficiently stable when tested in concrete disputes.<sup>19</sup> And I would be inclined to similar scepticism when Tagiuri writes, for example, that ‘the democracy of private law rules may be pursued for very different reasons or in pursuance of different values, most, if not all of which, are intuitively desirable: community and bonds of solidarity, efficiency and growth, freedom and equality’. This is doubtlessly true on the very abstract level of the question: do you support democracy? But as the book aims to show in some detail in Chapter 3, the overlapping consensus unravels rapidly when it comes to the more concrete question of what this entails for European contract law-making, for example for the respective roles of courts, legal and technical experts, and the legislature. On this more concrete level of constitution- and law-making, it will become necessary to choose among the precise reasons when these turn out to support different answers. In sum, unless a consensus is grounded in the same reasons it seems to amount in fact to nothing more than a *modus vivendi*, which is inherently unstable when it comes to concrete applications.

Moreover, while the book finds, as one of its conclusions, that there exist various coalitions among different subsets of the six theories the book discusses, depending on the political question at hand, it also concludes that these coalitions only rarely amount to a full consensus, even among the already limited number of six political

18 See Rainer Forst, *The Right to Justification: Elements of a Constructivist Theory of Justice*, trans. Jeffrey Flynn (New York: Columbia University Press, 2012).

19 Hesselink, *Justifying contract in Europe*, 267.

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theories that the book discusses.<sup>20</sup> In other words, in most cases the non-choosing approach would in fact amount to a choice against the worldviews that are not part of the coalition – and insofar for the exclusion of their supporters.

Finally, there is something peculiar about Tagiuri's proposed way of celebrating the normative diversity of EU contract law. Not only does it seem odd to celebrate the plurality of reasons by ignoring them altogether, focusing instead on the outcomes we can all agree on (on a certain level of abstraction). It also implies a choice for one particular strand in normative theory, *i.e.*, consequentialism, or, in the terms familiar to the debate on the legitimacy of the EU, for output legitimacy.

### 3.2 *The Illusion of Reconciliation without Loss*

Tagiuri's line of criticism, or 'nuance' as he modestly puts it, is diametrically opposed to that of Cristina Eckes. While in Eckes' view the book structurally *downplays* sustained conflict, persisting antagonism, and irreconcilable claims, Tagiuri charges it with *overstating* conflict and not seriously considering the possibility of reconciling different political views.

Much depends, in this regard, on what exactly we mean by reconciliation. And I am not sure that the kind of non-conflict cases we just saw, where different reasons support the same answer, are best understood as instances of reconciliation. However, in his discussion Tagiuri also points to a different type of cases that seem to me to be more genuine cases of reconciliation. When he raises the possibility 'to genuinely be persuaded by more theories within the same question' and suggests that 'there may be mechanisms for reconciling different answers or reasons that are not adequately captured by the notion of compromise', then he does indeed raise a possibility that the book had not considered.

If we understand reconciliation, with Hegel, as 'recognis[ing] reason as the rose in the cross of the present',<sup>21</sup> then it always comes with a loss. Indeed, it constitutes an attitude towards loss. Reconciliation, while bringing us the win of not being alienated from the world we live in comes at the price of having to accept affirmatively the reality of the pain and suffering that comes with it.<sup>22</sup> In other words, on this understanding, reconciliation is not so much – for our context – a way of overcoming the fact of reasonable pluralism, but rather an attitude towards it, which is distinct from mere resignation, because one recognizes the reasonableness (the rose) of the absence of perfect harmony among worldviews (the cross).

However, what Tagiuri seems to have in mind is not so much that we will have to reconcile ourselves with the fact of reasonable pluralism of worldviews as a permanent condition of modern democracies, but rather the resolution of conflict

20 Hesselink, *Justifying contract in Europe*, 443-444.

21 G.W.F. Hegel, *Outlines of the Philosophy of Right*, trans. T. M. Knox, Revised edition (Oxford UK; New York: Oxford University Press, 2008), 22.

22 Michael O. Hardimon, *Hegel's Social Philosophy: The Project of Reconciliation* (Cambridge: Cambridge University Press, 1994), Chapter 3.

between political reasons grounded in competing values or metaphysical views. Yet, that ‘nuance’ to the book’s core argument would no longer be the ‘celebration of pluralism’, as he claims, but its denial. In a pluralist society, it will not be possible to reconcile the views its different members hold concerning the hierarchy among various values, however well-intentioned and reasonable everyone may be. That is the fact of reasonable pluralism, which, as Rawls warns us, goes hand in hand with the fact of oppression, which is the fact that a shared adherence in society to a certain worldview, ultimate value, or political theory, or a specific combination thereof, can be maintained only by the oppressive use of state power. In other words, we will have to reconcile ourselves with certain irreconcilable differences between us concerning some of our deepest ethical and metaphysical commitments, which constitute core parts of our respective identities.

#### 4 Demarginalizing Intersectional Corrective Justice – *In Response to Lyn Tjon Soei Len*

##### 4.1 *White Ignorance and Epistemic Injustice*

In her contribution, Lyn Tjon Soei Len criticizes the book for structurally excluding feminist intersectional work from its discussion. By foregrounding the political theories that the book presents as leading, she argues, it encourages us to see reasons for European contract law that ‘make structural forms of injustice invisible’. I believe that Tjon Soei Len is fundamentally right in her criticism. Not having included intersectionality as an analytical lens in a book on the justification of European contract law, especially one that aims to open our eyes towards potential alternative futures for contract law in Europe, constitutes both an epistemic loss – a missed opportunity to learn – and an epistemic injustice, wronging all those whose expertise about, and lived experience with, intersectionality in European contract law thus seem to count less. The explanation lies, of course in ‘white ignorance’,<sup>23</sup> in this case the cognitive failure to even consider the possibility that racial injustice and intersectionality might be central concerns when it comes to justifying contract in Europe. And as Tjon Soei Len rightly points out, this ignorance is deeply grounded in the epistemic privilege, that I share with most political philosophers and European private law scholars, of not having had any first-person experience with intersectional injustice.

##### 4.2 *Occupying Liberalism*

Tjon Soei Lyn suggests that we may want to turn our attention to Charles Mills, who, as she points out, extensively discussed the disengagement in mainstream political philosophy with racial injustice. In his seminal work, *The Racial Contract*, Mills shows how historically the social contract has always been accompanied by a side-letter, the racial contract, to the effect that liberal rights to freedom and equality in society would be limited only to white persons (originally only white

23 Charles W. Mills, *Black Rights/White Wrongs: The Critique of Racial Liberalism* (New York: Oxford University Press, 2017), Chapter 4.

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men).<sup>24</sup> The book was inspired by Carole Pateman's *The Sexual Contract*.<sup>25</sup> However, contrary to Pateman, who considers social contract thinking, such as Rawlsian justice, beyond repair (because contracts structurally lead to subordination), Mills believes that contract theory could be modified for emancipatory purposes,<sup>26</sup> arguing for a 'sanitized Kantianism, washed clean of sexism and racism'.<sup>27</sup> He therefore makes an appeal to 'occupy liberalism', retrieving it for a radical emancipatory agenda.<sup>28</sup> The reader will be acutely aware that this makes the white ignorance of my book even worse: Mills' internal critique of liberal-egalitarianism would have fitted perfectly into the structure of the book.<sup>29</sup>

In one of his last essays, Mills considers two quite different ways of thinking about racial justice. In the first 'excitingly revolutionary' way, the entire body of Western political theory is set aside, as part of the problem of systemic racism, to be replaced by a decolonial Global South perspective. The second 'boringly reformist' one, explores how racial justice can be fruitfully thought from within one of the existing Western justice theories. In the essay, he opts for the latter approach, 'leaving to some other day the more revolutionary alternative' and argues that deontological approaches constitute the most promising avenue towards racial justice.<sup>30</sup> Mills himself focuses specifically on what he calls 'left-liberal' Rawlsian social contract approaches. As he puts it, 'it is left-liberalism, Rawlsianism and its neighboring variants, that offers the most promise for the project, given its overt acknowledgment of how deeply people's life chances are shaped by inequalities in their initial starting point in the "basic structure"'.<sup>31</sup> And it is true that the priority of equal basic liberties, equal fair access to positions, the difference principle (which permits socio-economic inequalities only when these benefit also the least well-off), and the fair value of political liberties, each could constitute core elements for a theory of racial justice, and – most importantly –, vice versa, each of these elements of Rawlsian justice as fairness patently *demand*s racial justice. Beyond justice as fairness, one could also think of Martha Nussbaum's version of the capabilities approach, which is explicitly committed to Rawls' political liberalism, but is grounded at the same time also in human dignity.<sup>32</sup> The latter approach was adopted

24 Charles W. Mills, *The Racial Contract* (Ithaca: Cornell University Press, 1999).

25 Carole Pateman, *The Sexual Contract* (Stanford: Stanford University Press, 1988).

26 See their dialogue, 'Contract and social change: a dialogue between Carole Pateman and Charles W Mills', in Carol Pateman and Charles W. Mills, *Contract and Domination* (Cambridge: Polity Press, 2007).

27 Pateman and Mills, *Contract and Domination*, 21.

28 Mills, *Black Rights/White Wrongs*, Chapter 2.

29 Tjon Soei Len argues that 'the grid structure of the book: '6x6=36 boxes' does not invite or even allow the reader to see the possibility of intersectional analyses'. But I cannot see why. Intersectionality could have been the object of one of six fundamental political questions about European contract law, while Millsean left-liberalism could have been structurally included, for all six political questions, in the discussion of liberal-egalitarian answers, on a par with Rawls, Dworkin, Nussbaum, and Raz (or replacing some of them).

30 Charles W. Mills, 'Racial Justice', *Aristotelian Society Supplementary Volume* 92, no. 1 (2018): 69-89.

31 Mills, 'Racial Justice', 80.

32 Martha Nussbaum, *Creating Capabilities: The Human Development Approach* (Cambridge: Harvard University Press, 2011).

by Lyn Tjon Soei Len as a basis for minimum justice in European contract law.<sup>33</sup> In addition to Rawlsian strands, other Kantian approaches seem promising too. Think, for example, of Rainer Forst's work with its central focus on injustice and domination.<sup>34</sup>

#### 4.3 Corrective Justice

Crucially, however, Mills points out quite rightly that the Rawlsian project of formulating an ideal theory of justice for a well-ordered society is not good enough, given that we are living in what he rightly calls an 'ill-ordered society', characterized by severe injustices including widespread and structural racial injustice. Rawls' idea was that we first needed a sense of what a well-ordered society would ideally look like, as a beacon for our endeavors for achieving a more just society. However, as Mills rightly points out, more than fifty years after the publication of *A Theory of Justice* a non-ideal theory of social justice is long overdue. What should such a theory of injustice as unfairness look like? Mills himself proposed a shift from social justice towards corrective or rectificatory justice. Unfortunately, he did not have the chance to sketch more than the core elements of such a Rawlsian theory of corrective racial justice. It would have been particularly interesting to see what role, if any, he saw for private law, given that this field has been considered traditionally to be the key instrument for corrective justice.

#### 4.4 Intersectionality

As Audre Lorde put it, 'there is no such thing as a single-issue struggle because we do not live single-issue lives'.<sup>35</sup> Therefore, any understanding of correction of injustices has got to be intersectional. Intersectionality refers to the fact that multiple types of social inequality may intersect and compound, for example oppression based on race, ethnicity, religion, gender, or disability.<sup>36</sup> When a person is oppressed on the basis of a combination of these grounds it may well be that the combined effect even of successful single-issue struggles against discrimination on each of these grounds, will still fail to benefit them, because they will fall between the cracks. It seems to me that Tjon Soei Len's own capabilities approach to minimum contract justice lends itself especially well to address problems of intersectional injustice. First, because Tjon Soei Len has already turned Nussbaum's ideal theory of social justice into a non-ideal theory, where private law plays a central role in achieving (minimum) contractual justice, which could be understood as corrective justice in Mills' sense. Secondly, because the capabilities approach,

33 Lyn K.L. Tjon Soei Len, *Minimum Contract Justice: A Capabilities Perspective on Sweatshops and Consumer contracts* (Oxford: Hart Publishing, 2017).

34 Elsewhere, I have recently proposed a Forstian account of injustice in European private law, discussing, as some of the most salient injustices, intersectional domination, and the whiteness of European private law. See Martijn W. Hesselink, 'Injustice in European Private Law' (December 21, 2020), *EUI Department of Law Research Paper*, available at SSRN <https://ssrn.com/abstract=3752748>.

35 Audre Lorde, *Sister Outsider* (London: Penguin Books, 1984), 133.

36 Kimberlé Crenshaw, 'Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics', *University of Chicago Legal Forum* 1989, no. 1 (1989): 139-167.

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grounded as it is in human dignity, does not allow for any trade-offs between various degrees of success in single-issue justice struggles,<sup>37</sup> thus structurally demanding, it would seem, an intersectional approach. Tjon Soei Len's own book did not yet discuss racism or intersectionality, but the consideration of intersectional (minimum) contractual justice seems a natural next step.

The Forstian approach to justice might be promising too. Not only does it focus centrally on injustices; it lends itself well for an intersectional lens. On such a view, intersectionality would be understood as intersectional domination, a particularly egregious case of background injustice, where a person is subjected to several different types of domination at the same time, which overlap and mutually reinforce each other. As I have argued elsewhere: when the combined effects of various types of structural social domination spill over to interpersonal relationships governed by private law (such as contracts) this can have a serious impact on these relationships, causing significant power asymmetries within these relationships, which are profoundly unjust.<sup>38</sup>

In sum, further research is certainly needed, but it is clear that private law could and should provide remedies to achieve intersectional corrective justice. And Tjon Soei Len is entirely right that, rather than being marginalized, intersectional corrective justice should be a core concern of European private law.

## 5 Justification and Critique – *In Response to Mirthe Jiwa*

### 5.1 Answering Normative Questions

The central question in Mirthe Jiwa's contribution is: what is normative theory? More specifically, her aim is to discuss '[my] conception of normative theory'. However, contrary to her premise, my book is not based on any specific understanding of normative *theory*, be it explicitly or implicitly. Instead, it is based on a specific understanding of normative *questions*. It labels the six questions central to the book as normative. The reason is relatively straightforward: they are 'ought-' (or 'should-') questions. And the reason why the book submits these normative questions to various prominent strands in utilitarianism, liberal-egalitarianism, libertarianism, and communitarianism, and discourse theory, is that these political theories have specialized in developing principled and articulate answers to this kind of questions.

In her contribution, Jiwa consistently uses the language of exclusion: the book (or: its author) 'excludes feminism and Marxism' from the book. In my view, that way of putting it unduly removes agency from both feminism and Marxism. Rather, I would say, they would probably decline the invitation. And, crucially, they do *so for a reason*: questions of the kind the book asks are simply not their core concern. They have other priorities. So, if one wants to use the language of exclusion: they

37 Nussbaum, *Creating Capabilities*, Chapter 2.

38 Hesselink, 'Injustice in European Private Law'.

exclude the normative questions of the kind my book discusses from their core concerns. And there is absolutely nothing wrong with that. Their priority is to get rid of patriarchy and capitalism. And when confronted with the questions central to the book their first reaction would be: these are the wrong questions, they distract from what should be our core concern, which is to ask critical questions about dominant – and dominating – structures.

Indeed, it is significant that in her discussion Jiwa herself also does not go into any of the six normative questions raised. Why not provide at least a rough outline of the feminist and Marxist answers to the questions of whether contract law should have a democratic basis, whether it should be European, whether contracts should be legally binding, whether contract law should protect weaker parties, whether contracts contrary to public policy should be void, and whether contract law should be in part optional, if specifically feminist and Marxist answers to these questions do indeed exist? Do feminists think that contracts should be legally binding, and if so for what reason? Do they believe contract law should be national rather than European? Are Marxists in favor of optional contract law? Do they maintain that contract law should have a democratic basis?

Jiwa comes closest to addressing these normative questions from a feminist point of view when she claims, with reference to the question central to Chapter 7, *i.e.*, whether a society should refuse to enforce certain contracts because they are contrary to good morals or public policy, that ‘what the different strands of feminism seem to unite [on] is a *direction of thought*’ (emphasis in original). However, then, rather than providing us with a sense of that direction – an impression of where feminist thought would lead us concerning the normative question of whether or not certain contracts should be declared void because they are immoral – she suggests that ‘it points to the ways in which modern contract laws enable and effectuate the separation between the contractual and the non-contractual sphere, the home and the market – and, what is more, prioritize the market, at the same time as they mark the home, and the women within it, as inferior’. But that is exactly what the book claims to be among feminism’s main contributions, *i.e.*, the *critique* of the public/private divide, and the *critique* of commodification.<sup>39</sup> These are classical instances of feminist critique. And they have been groundbreaking. Yet, while I am aware that this may be a matter of standpoint, to me it would seem a distortion – and therefore disrespectful towards their authors – to try to turn these powerful critiques into a feminist ideal theory of European contract law, presenting an outline of what the basic structure of European contract law ought to look like from a feminist point of view.

### 5.2 *The Moral Imperative to Critique*

It is important to point out, in this regard, that by labelling feminist and Marxist political theory as critical I am not denigrating them or demoting them to a lower

39 Discussed extensively, respectively, in Chapters 3 and 7, centring on the work of Elisabeth Anderson, Seyla Benhabib, Nancy Fraser, Martha Nussbaum, Peggy Radin, Seana Shiffrin, Lyn Tjon Soei Len, among others.

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realm of political theory, understanding them as somehow lesser. If anything, the *opposite* is the case. In this regard it is somewhat surprising that Jiwa seems to overlook the fact that I also present the book *itself* as critical. As I explain in the Introduction, the book offers a critical discussion of the answers given by leading political theories to the fundamental political questions of European contract law.<sup>40</sup> And as I further elaborate, the critique is both immanent and transcendent. The book critically discusses reasons, provided in normative answers to normative questions, in particular to practical questions about what to do, in this case about what we ought to do about European contract law. The Introduction explicitly states that the book will not develop or present its own normative political theory of European contract law, grounded in first principles of its own. In other words, the book is fundamentally a contribution to the critique of the reasons of European contract law. Also in other recent publications, rather than offering an outline of an ideal European contract law I propose critical accounts of injustices in contract law and in European private law respectively.<sup>41</sup> Therefore, when Jiwa claims, with reference to Michel Foucault and Judith Butler, that ‘critique is intrinsically normatively motivated as well as normatively oriented’, I could not agree more. Indeed, in Kantian thought morality and critique have always gone hand in hand in the ontological-epistemic-moral project of human emancipation through critical reason. Thus, critique is best understood as a (categorical) moral and epistemic imperative.

### 5.3 Critiquing Contract in Europe

By way of summary, then, I would say that a book called something like *Critiquing Contract in Europe* could be fascinating. And if I were to write it, feminism and Marxism would have a central place in it, alongside critical race theory, decolonial theory, and one or two others. But I would never organize the book along the lines of normative political questions to be answered by each of them, because that would end up distorting each of their distinctive, distinctly critical contributions.

## 6 No Time for Democracy, Freedom, or Justice? – In Response to Gareth Davies

### 6.1 Escaping moral responsibility

In his contribution, Gareth Davies expresses profound scepticism about normative theory. In particular, Davies has little patience for theories about democracy or freedom or justice – what he calls DFJ. As he puts it sarcastically, ‘once the secular priests of DFJ have issued a stamp of approval, the empiricists can start on the real work’. Consequences are what really matters in his view, especially in times of crisis. As he writes, ‘where issues are urgent or existential, in a time of crisis, consequences loom larger’. However, Davies seems to overlook (or wish away)

40 Hesselink, *Justifying Contract in Europe*, 11.

41 Martijn W. Hesselink, ‘The right to justification of contract’, *Ratio Juris*, 33 (2020): 196-222; Hesselink, ‘Injustice in European Private Law’.

several important questions that have been central to practical philosophy, in particular to moral and political philosophy.

First, there exists an important difference between forecasting what will happen and deciding what to do. The latter involves a decision, individual or collective. And whatever the decision (including the decision not to act), somebody will be responsible for it. In theory, we could try to escape individual and collective responsibility by trying to predict what we will do (say, about contracts in Europe), but it seems quite difficult even to make an adequate forecast without considering what might be a good or bad course of action, and what it would right or wrong for us to do. So, even if Davies believes that a crisis is not the right time to think about right and wrong, some others may still try to do the right thing (because they think they ought to). I will not venture much into empirical claims or forecasts, but it seems a safe guess that at least some people, and perhaps many, will consider questions of democracy, freedom, and justice *particularly* important in times of crisis. Some would even define the very nature of the crisis in terms of these moral categories, as a justice crisis (climate injustice, racial injustice, injustices towards LGBTQ+), a crisis of democracy (democratic backsliding), or as a threat to freedom (surveillance capitalism). Secondly, as the title of his contribution suggests, Davies seems to believe that normative theory is necessarily ideal theory. But that is a mistake. Even if we leave Utopia aside, we still must decide what to do here and now, in our profoundly non-ideal world. And if tossing a coin seems arbitrary, then we may want to consider reasons for and against certain courses of individual and collective (in)action. Thirdly, and most strikingly, despite his seeming scepticism, Davies does in fact take a strong moral stance, in favor of a rather radical version of consequentialism, which he seems to consider particularly pertinent in times of crisis: 'Output legitimacy, in a time of crisis, trumps input.' Put differently, a crisis is not a time for democratic agency; we can legitimately respond to it over the people's heads; the end justifies the means. With this consequentialist move, far from disengaging with the normative DFJ debate, he situates himself squarely within it, siding with one of the six schools of political thought that the book consistently discusses, *i.e.*, utilitarianism.

Unfortunately, even in times of crisis – or rather, especially in such times – political decisions, including those about which laws to adopt and how to interpret them, are unlikely to have only good consequences (by whichever standard). So, it will be necessary to decide who will be the winners and who the losers. Therefore, when Davies claims that a good theory is 'one that predicts what will work' this raises the immediate question: work for whom? Surprisingly for a consequentialist, however, Davies does not make any suggestions about how to go about trade-offs between the social costs and benefits of – in our case – different public choices about European contract law. Does he want to count and aggregate preferences? He does consider the issue at the individual level, noting that 'what seems to be the optimal trade-off will be a product of one's personal preferences, worldview, religion, and so on'. But that leaves open the question of how to aggregate, interpersonally, the various individual optima, which in a pluralist society like our own are bound to

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diverge and even to be incommensurable, unless he is willing to resort to the (hardly empirical) categories of ‘preferences’ and their ‘satisfaction’.<sup>42</sup>

### 6.2 *Yesterday’s War?*

To Davies, the fight for democracy, freedom, and justice ‘looks increasingly like fighting yesterday’s war’. That seems overly optimistic. Not only are some of the main battles for democracy, freedom, and justice still to be fought, there also exists serious reason for concern about regress when it comes to democracy, freedom, and justice, also in Europe. So, there appears to be very little reason today for complacency, or to move on to other concerns. Davies considers the fights against climate change and for the recognition of trans identities to be more urgent imperatives than democracy, freedom, and justice. He writes that ‘climate change, it hardly needs pointing out, is the great threat facing humanity today’. While this may be true, I am not sure that concerns about climate change (or the recognition of trans identities) are best understood as entirely distinct from democracy, freedom, and justice concerns. Nor does it seem prudent to start from European contract law if we want to avert this existential threat of climate change in time.

## 7 The Politics of Searching Contract Law – *In Response to Candida Leone*

### 7.1 *General Political Questions*

The most striking feature of Candida Leone’s contribution is that it completely – and, no doubt, quite deliberately – bypasses the book’s central focus on political theories. She does not mention utilitarianism, liberal-egalitarianism, communitarianism, libertarianism, civic republicanism, or discourse theory even once. This is striking because it circumvents the obvious explanation for what she sees as the book’s ‘struggle to detach itself from the idea of a “general part”’. As the book points out, most contemporary political philosophers do not discuss contract law at all. And where they do, they are concerned only with its main traits. This is not only because they lack expertise on detailed rules of contract law, but also because, from their points of view, if contract law is relevant at all to social justice, then this will be the case at best for its basic structure. Therefore, rather than nostalgia for a ‘traditional’ or ‘vintage’ general contract law, I would suggest, the book’s discussion reflects an attempt to address contract law questions at a level of generality that contemporary political theories are most interested in and can comfortably relate to. So, my first response to Leone’s main comment would be that general questions are likely to yield general answers. However, Leone might well be suggesting that general answers to general questions are not what we need for European contract law right now, and that, insofar, we are faced with an important mismatch between contemporary political philosophy and the questions that matter for European contract law today. This would mean that our disagreement runs deeper.

42 On the critique of ‘preferences’, see Hesselink, *Justifying contract in Europe*, 27, 92-93.

Leone seems disappointed that a book on political philosophies of European contract law does not engage extensively with normative political questions at the level of detail which is typical of the European contract law *acquis*. However, to my mind the fact that general political theories do not provide any distinct answers to very specific contract law questions is rather a good thing. If a Platonic philosopher-queen had precise answers to the many specific normative questions one can ask about the *acquis*, then that would certainly give us reason for concern. Luckily, as we saw in the book, contemporary political philosophies provide at most some core elements of an ideal basic structure of (European) contract law. As it happens, this resonates with my argument against blueprint contract theorists, who believe that normative theory could indeed provide such answers, as a matter of theory, and that we, the democratic polity, would be well advised, as a matter of politics, to implement their detailed expert blueprints.

### 7.2 *The Stakes in the Definition of Contract Law*

Whereas the book explicitly understands the definition of contract law as a political question, where different political theories rely on radically divergent definitions, Leone seems determined to depoliticize the matter. In any case, she does not mention any political dimension of contract law's definition. At the same time, however, she is searching for contract law in Europe, keen to find a definition. And her objective seems to be specifically to find a capacious definition that would include much of the *acquis communautaire*. This raises the question of why she wants to label certain parts of EU law as contract law. If her motivation is indeed unpolitical, then what is at stake in her view in the inclusion and exclusion of certain matters from contract law? In other words, how does Leone see the definition of contract? Is it for her a metaphysical question of trying to grasp contract law's essential nature? Or does she endorse some systems theory of functional differentiation where contract law has its own rationale? Or indeed, is it a form of *acquis* positivism or – to put it in more appealing terms – of rational reconstruction of the *acquis*?

### 7.3 *The Misguided Rhetoric of 'Traditional' Private Law*

Just like Hans Micklitz and his followers usually label the general rules of private law as 'traditional private law', so too does Leone refer to general contract law as the 'traditional rules' of contract law, with the – intended – rhetorical effect of suggesting that the real action has long moved elsewhere. I find this use of language politically naive and even somewhat dangerous because it distracts from some of the most brutal realities of global capitalism. As Katharina Pistor has demonstrated, today highly sophisticated lawyers, based in law firms in New York and London, use the general rules and doctrines of private law (contract, property, and trust) to 'code capital', as she calls it.<sup>43</sup> And as she also shows, when it comes to staggering social inequalities and the sustained undermining of democracy this is where much of the real action is today.

43 Katharina Pistor, *The Code of Capital: How the Law Creates Wealth and Inequality* (Princeton: Princeton University Press, 2019).

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#### 7.4 *Justice Labor as Paternalism*

Leone attributes to me the view that what she aptly calls ‘justice labor’ is going to be ‘uncontroversial’ and ‘not susceptible to criticism’. The reason for this attribution seems to be that I follow Seana Shiffrin in her claim that most of weaker party protection is optional and, therefore, not paternalistic. But that is a *non sequitur*. Shiffrin does indeed argue that the libertarian charge of paternalism fails, because in most cases weaker party protection is optional, and I agree with her on that. However, this does not exclude at all that weaker party protection may be criticized on other grounds. Indeed, it is in fact severely criticized, on various different grounds, as Chapter 6 of the book aims to show. Yet, crucially, the mere fact that a certain view – for example, one offering a justification for an existing legal rule or for legal change – is controversial does not disqualify it. The view may be simply right, and its competitors wrong. Indeed, this is typically the case for ‘justice labor’, *i.e.*, political action (and agency) towards the removal and correction of injustices, especially when it comes to the emancipation of marginalized groups: their claims about injustice and the need for change will typically meet with criticism (and sometimes rage) from people with vested interests in maintaining the status quo. As Chapter 6 concludes, there exists no overlapping consensus on ‘weaker party protection’ in contracts, or on contractual justice as I prefer to call it, but this does not mean that contracting parties have no right to contractual justice. This is a key difference between the Rawlsian political-constructivist view of justice and the Forstian moral-constructivist one that I prefer.

### 8 Conclusion

A society governed by the tyranny of reasons would doubtlessly be a miserable one. All the book wanted to foreground is that for a society to be minimally just – indeed to be a society in the first place rather than a mere mass of individuals – it will have to be governed at least in part by reasons. And by the same token, reasons should at least have some power over the future of European contract law. Those subjected to European contract law have a right to receive convincing answers to the kind of questions the book asks, and we as the European democratic polity jointly owe each other such answers. Therefore, it is meaningful, both epistemically and morally, to try to distinguish better reasons from ones that are worse, also with regard to European contract law. If that was not clear already, the six comments on my book collected in this special issue have wonderfully underscored that there is very good reason to ‘have a legitimacy crisis about contract law’ as one commentator put it,<sup>44</sup> and to debate European contract law’s reasons.

44 See Aditi Bagchi, ‘Let’s have a legitimacy crisis about contract law’, *JOTWELL* (19 August 2021), <https://contracts.jotwell.com/lets-have-a-legitimacy-crisis-about-contract-law/>.