ARTICLES

How Radical is the Understanding of Democracy in *Justifying Contract in Europe*?*

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1   Introduction

Justifying Contract in Europe answers on every page the 'so what'-question of why one should care about European contract law. I thoroughly enjoyed reading the engaging analysis of the normative foundations of law through the lens of six strands of political theory: utilitarianism; liberal-egalitarianism; libertarianism; communitarianism; civic republicanism; and discourse theory. In this short reflection, I will concentrate on one specific question, which seem, however, relevant to the entire inquiry of the book: Does *Justifying Contract in Europe* fully honor its expressly stated commitment to radical democracy?

This normative evaluation of the choices taken in the context of contract law in Europe is the book's central contribution. And without taking away from this contribution, it is in this framing, where the conviction of the author, while seemingly put aside, shines through the most. On the first five normative political theories the book offers critical perspectives, largely by letting the different strands of political theory speak to each other. Then, however, the book quite uncritically embraces discourse theory, as best represented in Jürgen Habermas' work. However, in particular two of the questions addressed in the remainder of the book – namely whether contract law needs a democratic basis and whether contract law should be national, European, or global – would have benefitted from an engagement with the strand of criticism of Habermas' discourse theory that argues that his discourse theory insufficiently engages with political struggle. In this context, two related points of criticism that have been raised against Habermas' discourse theory appear of particular interest. Habermas' discourse theory has been criticized for failing to account sufficiently, first, for the antagonism in politics and, second, for the necessary institutional arrangements to accommodate antagonism, centrally through a system of separated powers, both between the different branches of government, and, in the European Union, also between the EU and its Member States.

The book discusses 'six fundamental political questions of European contract law' in light of the above-mentioned six political theories. Yet, while acknowledging the particular role of scholarship in exposing fundamental principles and values in

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normative debates on polarizing issues,[1] the book does not engage in its normative evaluation with the relevance of a system being able to accommodate political struggle. *Justifying Contract in Europe* seems not to consider democratic legitimacy to depend also on the capacity of accommodating agonistic exchanges of those who share a commitment to certain fundamental principles and values while deeply disagreeing on their interpretation.[2] In light of the acknowledged increasing 'populism' in Europe, the book does not discuss the necessary institutional arrangements that could equip a political system to turn unproductive antagonism into productive agonism.

2   Separation of Powers, Political Struggle, and Polarization

Justifying Contract in Europe explicitly raises questions of separation of powers[3] but does so in isolation from the deeper purposes of the idea of separation of powers, ignoring in particular its potential to accommodate antagonism. This potential, however, is particularly needed in a polarizing society. At the same time, I would argue that separation of powers, both between the branches and between the EU and the Member States, is essential to understanding democratic decision-making in Europe. It is in many ways 'the litmus test of legal and political legitimacy' in constitutional democracies,[4] including in the area of contract law. The lack of critical engagement with the inability of discourse theory to account for agonistic political struggle makes the book miss an important aspect of democratic legitimacy in 21st century Europe.

In constitutional democracies, the idea of *separation of powers* is a central mechanism for allowing a continuous exchange of opposing views of interpretation of the fundamental principles and values in our societies. It assumes that different positions cannot (always) be reconciled but may continue to collide for the foreseeable future.

There is not *one* legal or conceptual blueprint for separation of powers. Yet, it is possible to identify and explain the underlying rationale and the purpose that rationale serves. A conceptualization of the doctrine of separation of powers and its purpose that seems well suited for liberal democracies that have a strong commitment to the rights and freedoms of individuals was offered by Christoph Möllers.[5] He identifies individual and collective self-determination as the central

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1   Martijn W. Hesselink, *Justifying Contract in Europe: Political Philosophies of European Contract Law* (Oxford: Oxford University Press, 2021), 444.

2   Chantal Mouffe, *Agonistics. Thinking the World Politically* (New York: Verso, 2013), 7.

3   Hesselink, *Justifying Contract in Europe*, 131-132 on 'separation of powers'; 69, 73 on the 'power struggle' between, *i.e.*, 'judges' and 'legislators'; and in the context of the different political theories, see, *e.g.*, 92, 100, 103, 104.

4   Andrea Pin, 'Introduction to Part I,' in *New Challenges to the Separation of Powers – Dividing Power*, eds. Antonia Baraggia, Cristina Fasone and Luca P. Vanoni (Cheltenham: Edward Elgar, 2020).

5   Christoph Möllers, *The Three Branches: A Comparative Model of Separation of Powers* (Oxford: Oxford University Press, 2013).

elements of the justification of public authority and links their protection back to separation of powers.[6] This emphasizes not just separation and mutual control but the institutional interactions between the branches that allow for continuous struggle of irreconcilable interests while excluding any lasting domination of one branch over the other.[7] In this reading, separation of powers allows both will formation and control by ensuring that the judiciary, on the one hand, embraces that it exercises public power and, on the other, remains independent from public power. This double function of the judiciary allows 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. Struggle and substantive disagreement between the branches channel ineradicable dimensions of conflict. They are both a manifestation of power and a confrontation with a possible alternative.

Emphasizing even more strongly the continuous struggle of irreconcilable interests at the centre of democracy, Panu Minkkinen, drawing on the work of Claude Lefort, speaks of 'agonistic separation' that allows democracy to resist or oppose totalitarian tendencies of modern capitalism through rights.[8] The terminology of 'agonistic separation' emphasizes the capacity of a system of separation of powers to productively institutionalize conflict and channel ineradicable dimensions of conflict into an institutional exchange.

Separation of powers in this reading creates the 'potentiality' of judicial intervention that creates stability through mutual deterrence.[9] This reading is shared by Chantal Mouffe, a prominent critic of Habermas, who speaks of 'agonistic pluralism'.[10] Conflicting interests should be able to engage in substantive political competition in an adversarial but institutionally regulated fashion. In other words, a system of separated powers (at least potentially) redirects the antagonistic political struggle for power between different groups in society in rationalizing procedures that (have the potential to) turn antagonism into agonism.

Politicization is not a threat to but a necessary ingredient of separation of powers. Separated powers create the institutional setting to find a temporarily settled position despite incommensurable background conditions. The temporarily settled position is accepted because of the acceptance of the claim that it benefits from legitimacy as a result of the fact that it was produced under the condition of separation of powers. In an increasingly polarized society, which may be read to illustrate the persisting differences, separation of powers gains a central role in mitigating conflict.

6   Möllers, *The Three Branches*, 51.
7   Christina Eckes, Päivi Leino-Sandberg, and Anna Wallerman Ghavanini, 'Conceptual framework for the project 'Separation of Powers for 21st Century Europe (SepaRope)'', 1 *ACELG WP* (2021), available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3777334.
8   Panu Minkkinen, '"Enemies of the People"? The Judiciary and Claude Lefort's "Savage Democracy"', in *Constituent Power – Law, Popular Rule and Politics*, eds. Matilda Arvidsson, Leila Brännström, and Panu Minkkinen (Edinburgh: Edinburgh University Press, 2020), 38.
9   Minkkinen, '"Enemies of the People"? The Judiciary and Claude Lefort's "Savage Democracy"', 41.
10   Chantal Mouffe, *The Democratic Paradox* (New York: Verso, 2000), 80-108.

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3   *Justifying Contract in Europe*, Discourse Theory, and Radical Democracy

Justifying Contract in Europe explicitly acknowledges that a 'radically democratic hunch' implies a 'pluralist hunch'.[11] This particular understanding of democracy appears to connect very well to the intrinsically agonistic nature of separation of powers described above.

Justifying contract in Europe's explicit commitment to a radically democratic hunch could have also offered a hook for a critical perspective on Habermas. Instead, the book embraces Habermas' discourse theory by understanding it as equally 'committed to radical democracy'.[12] This characterization may be correct for the *procedural dimension* of Habermas' discourse theory that links all political action to the people. Yet, it cannot easily be reconciled with the claim that discourse offers a way to establish a common interest/normative truth. This latter claim appears to be based on an *epistemological concept* of democracy, which has consequences for discourse theory's ability to account for political struggle as a necessary part of radical democracy.

Habermas' discourse theory of law aims to establish an internal link between the state of law (*Rechtsstaat*) and democracy.[13] Habermas historically explains *positivization* of law as a response to the loss of overarching sacred law, in accordance with which politically enacted law must be adopted.[14] He concludes that a 'moment of indisponibility' (as previously embodied in sacred law) continues to exist in modern law as 'an irrevocable counterweight to the political instrumentalisation of law as a medium'.[15] In modern law, this indisponibility lies in the 'rationality of legislative and judicial procedures guaranteeing impartiality',[16] which offer 'a structure removed from the grips of contingency [of][...] positive law'.[17]

Habermas gives the rule of law and separation of powers the role of the necessary institutional backbone, which protects positive law's 'irritating ambivalence of validity claims [...] through the interlocking of legal procedures with the logic of argumentation that check their own rationality in the light of the principles of universalization and appropriateness', *i.e.*, ensure that law does not completely become an instrument at the disposal of politics.[18]

However, Habermas' understanding of the rule of law and separation of powers should be read in light of his comprehensive discourse theory of law, which is

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11   Hesselink, *Justifying Contract in Europe*, 8-10, at 9.
12   Hesselink, *Justifying Contract in Europe*, 122.
13   Jürgen Habermas, *Faktizität und Geltung. Beiträge zur Diskurstheorie des Rechts und des demokratischen Rechtsstaats*, (Frankfurt: Suhrkamp Verlag, 1994), 664 (Epilogue to the fourth edition).
14   Jürgen Habermas, 'Law and Morality', The Tanner Lectures on Human Values, Delivered at Harvard University on 1 and 2 October 1986', trans. Kenneth Baynes, in *The Tanner Lectures on Human Values, Vol. 8*, ed. Sterling Mcmurrin (Salt Lake City: University of Utah Press, 1987), 264.
15   Habermas, 'Law and Morality', 264.
16   Habermas, 'Law and Morality', 277.
17   Habermas, 'Law and Morality', 278.
18   Habermas, 'Law and Morality', 278.

primarily a theory of democracy aimed at the peaceful reconciliation of colliding positions and interests. Its focus is, first, on 'the persuasive power of the better argument', with the aim of increasing the chances of a shared – intersubjective – truth (or rather, validity), which is not identified but created in an ideal speech situation and, second, making this normative truth/common interest effective in society through law.[19]

In his discourse theory, Habermas distinguishes between consensual and compromise-based forms of communication in relation to different issue areas, rather than seeing them as potentially simultaneously present elements of the same democratic process. Only the consensual form of communication links to a normative truth/common interest that meets the criterion of generalizability. It allows for a discourse free of domination (*herrschaftsfreien Diskurs*), in which the presumed universalism of thought makes consensus possible.

Compromise, by contrast, is established via institutional power. Here, separation of powers is one of the framework conditions of institutional power, which is meant to counteract power imbalances.[20] Important is, however, that Habermas gives separation of powers relevance *only* in the context of the second, *compromise-based form of communication* where generalizable truth/interests are not in focus or cannot be reached.[21]

The first (more desirable) *consensual form of communication*, with its function of identifying a generalizable normative truth/common interest, does not conceptually account for separation of powers. It does not give space to persistent political struggle and the prominent possibility of sustained conflict. Persisting antagonistic positions and interests, however, appear factually likely, perhaps even perceivable in the growing polarization of society. I would like to add that this criticism is different from a critique that the requirements of the discourse free of domination (this is acknowledged by all) cannot be met in reality. The point of this criticism is that already the regulative ideal of the discourse free of domination does not account for persisting antagonism in society. Hence, this point of criticism is relevant to the normative analysis of European contract law through the lens of discourse theory. It emphasizes that this lens fails to capture an aspect highly relevant to the question of whether contract law is best developed in the national, European, or international context, namely whether the respective contexts are capable of productively dealing with persistent disagreement or even antagonism.

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19   Jürgen Habermas, *Theorie des kommunikativen Handelns – Erster Band: Handlungsrationalität und gesellschaftliche Rationalisierung*, 2nd ed. (Frankfurt: Suhrkamp Verlag, 1982), 47: 'eigentümlich zwanglosen Zwang des besseren Argumentes'.
20   Jürgen Habermas, *Legitimationsprobleme im Spätkapitalismus* (Frankfurt: Suhrkamp Verlag, 1973), 154.
21   Habermas, *Legitimationsprobleme im Spätkapitalismus* (Frankfurt: Suhrkamp Verlag, 1973), 155: 'Gewaltenteilung [darf] nur dort legitimerweise eintreten, wo Interessenbereiche geregelt werden sollen, die diskursiv nicht gerechtfertigt werden können und daher Kompromisse verlangen […]'.

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Under conflictual circumstances the idea of separation of powers allows that one branch temporarily imposes its view on the others but excludes that any branch can dominate decision-making over an extended period of time at the level of general application. While building on cooperation between the branches to ensure will formation, separation of powers precisely does not require procedures that contribute or assume the possibility of establishing an intersubjectively binding standpoint on normative questions. To put it more briefly, discourse theory with its focus on intersubjectivity and consensus cannot account for the separation of powers' potential to accommodate antagonistic dynamics in society,[22] which however is crucial to understanding democratic decision-making in the polarized politics of contemporary Europe. By relying on discourse theory and seemingly endorsing it as the most appropriate lens for the evaluation of European contract law the book itself develops the same blind spot: it does not consider the relevance of an institutional setting that could accommodate radical democracy by institutionalizing the antagonism of polarized positions.

4   Radical Democracy Needs a Setting Able to Work with Radical Differences

As mentioned above, a prominent critic of Habermas' theory of deliberative democracy is Chantal Mouffe. She identifies contentious issues as 'political', namely as characterized by 'the dimension of antagonism which [she] take[s] to be constitutive of human societies […]'.[23] Power is a necessary component of the political and consensus, defined very differently than by Habermas, is 'a temporary result of a provisional hegemony, as a stabilisation of power and that always entails some form of exclusion'.[24] It is this marginalization and exclusion in politics in Europe that *Justifying Contract in Europe* cannot account for because of its uncritical embrace of discourse theory. Mouffe argues that a combination of truly radical democracy and agonistic pluralism is required to accommodate the different views on democracy. Against this background, *Justifying Contract in Europe* may seem less committed to radical democracy than it explicitly states.

Both Habermas' discourse theory and *Justifying Contract in Europe* neglect the accommodating dimension of 'agonistic separation'/'agonistic pluralism'. As a result, they appear in fact to marginalize alternatives as 'populist'/irrational and do not – at least not prominently – account for existing and lasting power relations/domination.

As *Justifying contract in Europe* readily accepts and highlights, European contract law does not deliver Pareto-efficient results but entails consequential redistributive choices. This more widely shared realization may also explain 'the growing salience

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22   This also explains the very limited engagement of Habermas with separation of powers, see also: Tobias Lieber, *Diskursive Vernunft and formelle Gleichheit* (Tübingen: Mohr Siebeck, 2007), 170-173.
23   Chantal Mouffe, *On the Political* (New York: Verso, 2005), 9.
24   Chantal Mouffe, 'Deliberative Democracy? or Agonistic Pluralism?', *Social Research* 66, no. 3 (1999): 745-758, at 756.

of European governance, involving a polarisation of opinion, and an expansion of actors and audiences engaged in monitoring EU affairs'.[25]

Reading above all the national (but also to a degree the European) 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. In the multi-layered and pluricentric context of European (contract) law, it facilitates blame-shifting and blame-avoidance strategies and hinders the public to identify who bears political responsibility for seemingly consensual policies.[26]

While offering original and thought-provoking reflections on the normative foundations of contract law, *Justifying Contract in Europe* – at least for this reader's taste – could have been just a shade more radically democratic.

25   Pieter de Wilde, Anna Leupold and Henning Schmidtke, 'Introduction: The Differentiated Politicisation of European Governance', *West European Politics* 39, no. 3 (2016): 4.
26   Markus Hinterleitner and Fritz Sager, 'Anticipatory and Reactive Forms of Blame Avoidance: Of Foxes and Lions', *European Political Science Review* 9 (2017): 587, 598-599; Frank Schimmelfennig, 'Politicisation Management in the European Union', *Journal of European Public Policy* 27 (2020): 342, 346-347.