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Distributive Justice as a Function of Contract Law

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ABSTRACT

According to the minimalist view of the function of contract law, contract law rules should merely facilitate the intentions of the bargaining parties, with a mind to respecting their autonomy. Considerations of distributive justice, accordingly, have no place in such a framework. This article argues that this view is incorrect. Contract law can and should have a more ambitious aim of promoting distributive justice by ensuring that private transactions achieve a fair distribution of wealth. Not only are distributional considerations already deeply embedded in contract rules, but contract law has the capacity and ability to perform a more robust distributive function.

Keywords: contract law; distributive justice; private law; legal theory; jurisprudence

I. INTRODUCTION

According to the conventional view, the function of contract law is merely to facilitate the intentions of the bargaining parties, with a mind to respecting their autonomy. Considerations of distributive justice, accordingly, have no place in such a framework.[1]

In disagreement with this view, this article argues that contract law can and should have a broader, more ambitious aim: to promote distributive justice by ensuring that private

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1 Aditi Bagchi, 'Distributive Justice and Contract' in Gregory Klass, George Letsas, and Prince Saprai (eds), *Philosophical Foundations of Contract Law* (Oxford University Press 2014) 195: "distributive justice is still perceived as not just misguided but *alien* to contract".

transactions achieve a fair distribution of wealth.[2] Section II will critically analyse those accounts proposed by advocates for a minimalist, facilitative function of contract law, and critique their underlying motivations. Building on that, Section III will sketch out the case that in a liberal society, contract law has the capacity and ability to perform such a distributive function. Finally, Section IV will investigate whether the adoption of a distributive lens makes any particular demands of the legal framework in which contract law's purpose is to be instrumentalised.

There is both a descriptive and normative aspect to the present inquiry. This article is *descriptive* to the extent that it proves how distributional considerations are already deeply embedded in contract law rules and therefore we cannot divorce them from the corpus of contract law even if we wanted to, as some scholars do.[3] It is *normative* to the extent that it requires contract rule makers, such as judges, to rethink their role and consider more readily and transparently the implications their decisions can have on the distributive arrangements between members of society.

II. CONTRACT LAW, EFFICIENCY, AND WEALTH MAXIMISATION

The idea of a purely facilitative function of contract law is inextricably linked to the theory of welfare maximisation and the value-neutral understanding of private law. According to the traditional dichotomy between the public realm (the state) and the private realm (the market), the state is there to support private ordering by supplying parties with legal enforcement to their private arrangements. The purpose of the institution of contract law is not to steer private ordering in any distributionally fair manner,[4] but to merely facilitate the desires of the parties.[5] Therefore, under the view that broadly coincides with most liberal theories, contract law's facilitative aim is constrained to the establishment and limited protection of the market. Any distributive consequences depend on the autonomous choices of the individual and, where appropriate, state intervention through taxation and the welfare system.

The central assumption underpinning this view is that private exchanges should be supported by contract law because people make themselves better off by pursuing their own

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2 This article therefore assumes that contract law pursues *instrumental* goals. For a convincing rejection of anti-instrumentalist approaches to contract law, see Jonathan Morgan, *Contract Law Minimalism: A Formalist Restatement of Commercial Contract Law* (Cambridge University Press 2013) chs 1 and 2.

3 Charles Fried, *Contract as Promise: A Theory of Contractual Obligation* (Harvard University Press 1981).

4 Ernest J Weinrib, *The Idea of Private Law* (Harvard University Press 1995) 80.

5 For a discussion of the conventional view that contract law only has a facilitative role: Hugh Collins, 'Regulating Contract Law' in Christine Parker and others (eds), *Regulating Law* (Oxford University Press 2004) 17.

self-interest. And, by extension, they make society better off. If efficiency is about the creation of a pie and distribution its division, then according to this view, contract law should only be concerned with maximising the size of the pie, whereas taxation is tasked with its fair distribution amongst the guests at the dinner table.[6] To this end, there have been calls, most prominently made by scholars such as Jonathan Morgan, Alan Schwartz, and Robert Scott, for a formalist regime of contract law rules, one that is rid of judicial imagination and should do nothing more than facilitating parties' preferences.[7]

At the outset, there are at least two preliminary responses to be made against this simplistic view. Firstly, contract law rules, no matter how seemingly neutral, are fundamentally distributive in nature, and the assertion that a rule's welfare-maximising effects can be separated from its distributive implications is highly misleading. I will develop this point in Section III.A below.

Secondly, implicit in these formalist accounts is the distinction between an allegedly neutral private law arena (the market) and a value-laden, political realm (the state). As already noted, the conventional view holds that the state should only *facilitate* contracting in the marketplace. To go beyond that is to disrespect private autonomy. Yet, we may observe that this suggestion of a formalist contract law regime is reminiscent of a particular understanding of private law, one which was rejected by the American legal realist movement about a century ago.[8] When advocates speak of a politically neutral regime of contract law, they overlook the fact that courts are necessarily making policy choices about which contracts should or should not be enforced.[9] This is because typically when a party calls on the courts to uphold their agreement, it is inviting the state to coerce the other party to make good on her side of the bargain. As Morris Cohen influentially recognised,

> "[I]n enforcing contracts, the government does not merely allow the two individuals to do what they have found pleasant in their eyes. Enforcement, in fact, puts the machinery of the law in the service of one party against the other. When that is worthwhile and how that should be done are important questions of public policy."[10]

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6 Louis Kaplow and Steven Shavell, *Fairness versus Welfare* (Harvard University Press 2002).

7 See Morgan (n 2); Alan Schwartz and Robert E Scott, 'Contract Theory and the Limits of Contract Law' (2003) 113 Yale Law Journal 541.

8 Morris Cohen, 'The Basis of Contract' (1933) 46 Harvard Law Review 553. See also Peer Zumbansen, 'The Law of Society: Governance Through Contract' (2007) 14 Indiana Journal of Global Legal Studies 191.

9 Gary Peller, 'The Classical Theory of Law' (1998) 73 Cornell Law Review 300, 301–03.

10 Cohen (n 8) 562.

If we find that private contracting generates externalities that harm some segments of society more severely than others, then it is not only the (private) market players who are the culprits; rather, the public institution of contract law has also made a conscious policy decision to aid and abet that outcome. In other words, given that players who have found themselves in a socially advantaged position can have their advantage reinforced and strengthened through the machinery of contract law, contract law cannot be neutral. Therefore, if those who are prejudiced under the current function of contract law can do better under a more distributively concerned regime, then such a change in perspective is very much commendable.

III. Contract Law as Exercising a Distributive Function

As the foregoing discussion shows, the enforcement of contracts is a deeply public and political phenomenon. Given that contract law is inseparable from the wider institutional arrangement, this section develops the idea that contract law can be used to address other normative concerns, beyond the adherence to freely chosen obligations: namely, to promote distributive justice.

Unlike corrective justice,[11] distributive justice takes a broader stance and is concerned with the allocation of wealth, resources, and entitlements amongst the members of any given society. Any attempt to usurp a distributive role from contract law invites several opposing arguments: that it is contradictory to the bilateral nature of private law; that it infringes on private autonomy; that it is futile and counterproductive; and that it is a less appropriate means compared to taxation. These arguments will be considered, and rejected, in turn in Sections II.B–II.E.[12]

A. Distributive justice throughout contract law

There is a "claim for neutrality" within contract law.[13] Consistent with the pre-political understanding of private (contract) law, this idea suggests that contract law rules merely enable

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[11] Jules Coleman and Arthur Ripstein, 'Mischief and Misfortune' (1995) 41 McGill Law Journal 91, 93: "Corrective justice concerns the rectification of losses owing to private wrongs. In contrast, distributive justice concerns the general allocation of resources, benefits, opportunities, and the like."

[12] There is indeed more than one theory of distributive justice, and to pick one most suitable for contract law to adopt is beyond the scope of this article. The focus here is whether the machinery of contract law has good reason and the capacity to accommodate at least some theories of distributive justice.

[13] Hugh Collins, 'Distributive Justice Through Contracts' (1992) 45 Current Legal Problems 49, 49–52.

private ordering and allow individuals to pursue their own preferred goals; it does not impose any instrumental goals onto the parties.

But even if we could accept that contract law is this apolitical, value-neutral system of rules, separate from the upheavals of politics (a view which I have argued in Section II to be incorrect), it is impossible to ignore the distributional consequences that they entail. This was recognised by Anthony Kronman, who influentially observed that the laws of contract can have an important role to play in achieving a socially just allocation of resources, at least in some cases.[14] He gives the examples of usury laws, minimum wage laws, and so on.[15] I would go further and submit that *every* contract law rule, no matter how seemingly mundane and facilitative, possesses a distributive nature. In other words, there is no such thing as a non-distributional rule of contract.[16]

Consider the default rules in contract law. Although it is intuitive to attribute only *mandatory* rules with a regulatory dimension, as they are indeed the more intrusive and interventionist forms of law, *default* rules can also have strong implications for distribution, albeit less obviously. Even if parties contract out of default rules, as they often do, the rules still provide the parties a starting point that will determine *ex ante* how much each party will be able to bargain and which party will have to bear the main cost in deviating from the default structures. For example, in an incomplete contract where the parties failed to specify the consequences of delivering services that were below par than expected, there are at least two options open to the court. It may either: (a) inject a default rule to compel the service-provider to guarantee its quality; or (b) let the loss lie where it falls. A purely facilitative idea of contract law would most likely prefer the latter policy: after all, why 'regulate' the parties' relationship when they could have done so themselves? However, whilst this latter option resembles non-regulation, both options are, in fact, two different forms of regulation, each entailing its own distinct distributive arrangement.[17] On the one hand, a policy which protects the purchaser with a warranty bestows upon the purchaser a form of *ex ante* advantage even prior to the bargaining process. If the service-seller wants to substitute this implied warranty with her own preferred terms, she must bear the cost and give something in return, usually in the form of a lower price.[18] On the other hand, if the courts adopted a stance that lets the loss lie where it falls, that would

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14 Anthony T Kronman, 'Contract Law and Distributive Justice' (1980) 89 Yale Law Journal 472.
15 ibid 473.
16 Marco Jimenez, 'Distributive Justice and Contract Law: A Hohfeldian Analysis' (2017) 43 Florida State University Law Review 1265, 1271 ("the idea of distributionally 'neutral' contract rules is a 'legal unicorn'"). Cf Fried (n 3).
17 ibid 1308–11.
18 ibid 1310.

give the service-seller an important benefit vis-à-vis the buyer. Similarly, if the buyer wanted to insert such a warranty into the terms of the agreement, it is he who must do the convincing and shoulder the cost of bargaining.

The upshot here is that whenever the courts are asked to interpret an ambiguous term or make a decision in a contractual dispute, it essentially makes a distributive decision. In Marco Jimenez's words, "[e]very choice governing every rule in contract rule [*sic*] is a distributive choice setting the regime of background rules against which the parties bargain with one another".[19] Of course, one might question whether the fact that contract rules have a distributive *effect* should necessarily mean that one of the *functions* of contract law should be about fair distribution.[20] But, as Hugh Collins questions, once we accept that contract law has foreseeable distributive effects on the market, "[h]ow can it then be maintained that these foreseeable effects are not intended effects, that is, effects which are not part of the purpose of the law of contract?"[21] It is therefore not unmeaningful to ask the question of whether contract law is indeed suitable to pursue this distributive purpose, and if so, how its encompassing rules should go about generating distributive effects in an equitable manner.

B. THE 'PROBLEM' OF BILATERALISM IN PRIVATE (CONTRACT) LAW

One argument against the use of contract law for distributive purposes is that it would run counter to the very nature of private law. The fact that bilateralism is such a defining feature of private law means that contract law struggles to take into account the interests of parties outside the contract.[22] As there is no obvious link between the collective values imbued in distributive justice and the bilateral contracting parties, private law seems therefore a poor tool for redistribution. Yet, this argument rests on a fallacy that contracting parties are somehow insular to the community as a whole. We are reminded by Aditi Bagchi that "[c]ontracting parties do not encounter each other in a legal or moral vacuum" and that the "morality of exchange, agreement and even promise… are contingent on institutional arrangements".[23] The contractual relationship between parties, whilst mostly private and self-invented, are nonetheless informed

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19 ibid 1306. See also Collins (n 13) 65–67.
20 Jane Stapleton, 'Regulating Torts' in Parker and others (n 5) 124.
21 Collins (n 13) 51.
22 Aditi Bagchi, 'Other People's Contracts' (2015) 32 Yale Journal on Regulation 211.
23 Bagchi (n 1) 199 (emphasis omitted).

by other interpersonal duties which are in turn informed by the state of distribution in the outside world.[24]

Nonetheless, there is still one way in which it might be more accurate to say that bilateralism poses a problem: that is, contract law rules do not actively consider the interests of other parties. This is the externality argument. At least two reasons, however, can be offered in defence of contract law, each drawn to some extent from the increased blurring of the public-private divide.[25] Firstly, courts have demonstrated an ability to consider the collective interests of a group or class of people who share characteristics similar to that of the parties before it, and this informs their legal reasoning.[26] This is evident, for example, in the differing approaches of the Court of Appeal and of the House of Lords in *Co-operative Insurance Society Ltd v Argyll Stores (Holdings) Ltd*.[27] When considering whether to issue an injunction to maintain the opening of a supermarket in a shopping mall until other tenants are found, the former court took the view that it is the tenants of the shopping mall whose interests need protecting. By contrast, the latter held that it is the supermarket tenants who should prioritised. The precise reasoning of each proposition is less relevant for our purposes, but the important point here is that contract law judges can and do have the capacity to assess the distributive impact their decisions can have beyond the bilateral contracting parties.[28]

Secondly, though it is conventional to think of third-party effects as only relevant at the *ex ante* legislation stage, rather than in the *ex post* adjudication stage, there is nonetheless a sense in which the public 'participates' in private adjudication.[29] Through interpretation[30] and utilising considerations of public policy, the courts, at least in some cases, can manage, adjust, and recalibrate the social ramifications caused by the contractual obligations of private parties.

C. INTERFERENCE WITH PARTY AUTONOMY

A second, yet related, objection to the use of contract law for distributive purposes is that such a policy entails an undue interference with the principle of freedom of contract, which Lon Fuller once observed to be "the most pervasive and indispensable" conception of contract law.[31]

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24 ibid.

25 On the public-private distinction, see generally Duncan Kennedy, 'The Stages of the Decline of the Public/Private Distinction' (1982) 130 University of Pennsylvania Law Review 1349.

26 Hugh Collins, *Regulating Contracts* (Oxford University Press 1999) 70–73.

27 *Co-operative Insurance Society Ltd v Argyll Stores (Holdings) Ltd* [1996] Ch 286 (CA); [1998] AC 1 (HL).

28 For other judicial and academic examples of a class-based analysis, see *Smith v Eric S Bush* [1990] 1 AC 381 (HL); Orit Gan, 'The Justice Element of Promissory Estoppel' (2015) 89 St John's Law Review 55, 86–87.

29 David A Hoffman and Cathy Hwang, 'The Social Cost of Contract' (2021) 121 Columbia Law Review 979, 985.

30 ibid 1002–05.

31 Lon L Fuller, 'Consideration and Form' (1941) 41 Columbia Law Review 799, 806.

The argument, which broadly coincides with the libertarian view, contends that contract law should not, even in the name of promoting fair distribution, interfere with transactions freely consented to by private parties.[32] A closer examination of contractual freedom, however, will show that it may pose less of an issue than first thought.

In the first place, Peer Zumbansen's contention that "[t]here was never a period of pure freedom of contract or of pure private autonomy" is telling.[33] Contrary to classical theory, private contracting has necessarily evolved in the context of some regulatory framework, constrained to varying extents by notions of fairness and justice. The alleged misalignment between the pursuance of distributive justice on the one hand, and the respect for party autonomy on the other, is reduced when we consider that the two are invariably interdependent.[34] In reconciling the concepts of autonomy and fairness, Florian Rödl said, "[t]here is no tension between the two concepts of contractual freedom and contractual justice because contractual freedom can only be exercised in voluntary agreements with fair terms. Unfair contracts cannot be claimed valid by appealing to contractual freedom".[35]

In the second place, not all legal doctrines that restrict contractual freedom fit equally and neatly in the notion of 'a search for real consent'. Contract law tends to marginalise the extent to which the courts can and do assess the substantive fairness of bargains by couching freedom-restraining rules in the language of realising parties' true intentions. Yet, amongst these doctrines, there are several that can be explained in parallel with distributive language, and then there are others where adopting a pure non-distributive explanation would be quite unpersuasive. Rules of procedural fairness such as the doctrine of misrepresentation are examples of the former.[36] Whilst it is entirely appropriate to rationalise misrepresentation as vindicating the autonomy of the promisee who was misled into entering an agreement she did not truly consent to, it can also be conceived as a tactic for redistributing wealth in the market.[37] The rule restrains dominant parties from exploiting the market advantages they have, whether it be superior product information or intellect, to the detriment of others without the opportunity to gain such advantages.

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32 *Printing and Numerical Registering Co v Sampson* (1875) 19 LR Eq 462 (CA) 465.

33 Zumbansen (n 8) 207. See also P S Atiyah, *An Introduction to the Law of Contract* (5th edn, Clarendon 1995) ch 1.

34 Florian Rödl, 'Contractual Freedom, Contractual Justice, and Contract Law (Theory)' (2013) 76 Law and Contemporary Problems 57, 62.

35 ibid. Although Rödl does not speak specifically of 'distributive justice', much of his discussion on 'contractual justice' aligns with the substance of the former concept.

36 Collins (n 26) 75.

37 Kronman, (n 14) 480–82.

As to the latter group of rules, the rules of contractual interpretation is a likely contender. The notion of freedom of contract provides only partial guidance as to how courts decide what is the best contractual reading of a concluded agreement. Although Sarah Worthington warns the courts against implying or reconstructing terms too readily on the grounds of substantive unfairness,[38] it is clear that when tasked with construing contracts, the courts are not just engaged in an exercise of reassembling bargains as they once were.[39] Bagchi's quadripartite account of what courts consider 'reasonable' (empirically, procedurally, substantively, and publicly) reminds us that the search for the best contractual reading is motivated also by a desire to ensure transactions achieve a just allocation of wealth.[40]

D. FUTILITY AND COUNTERPRODUCTIVITY

A third set of objections contends that the pursuance of distributive goals through contract law can be futile and may even be counterproductive.

In terms of futility, proponents of a facilitative, minimalist function of contract law argue that the attainment of distributional goals through the law would not produce meaningful results. Schwartz and Scott contend that the reason for this is because most parties will exercise their freedom to contract away distributive rules that do not serve their goals of profit maximisation.[41] This is not persuasive. Firstly, as Schwartz and Scott themselves admit, the force of such an argument greatly diminishes once we leave the realm of commercial (firm-to-firm) contracts. Although commercial contracts arguably form the bulk of headline contractual disputes, they are but a subset of everyday contracting. Their narrow account ignores, for instance, consumer contracts, employment contracts, or government contracts[42], and therefore cannot be generalised. In these other types of contracts, distributive concerns come even more to the forefront, thereby making it less likely and less desirable for parties to contract out of distributively-motivated terms. But secondly, even if we do stick *within* the realm of commercial contracts, that most contract rules are easily overridden does not mean that any pursuance of distributive objectives must therefore be futile. As discussed in Section III.A

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38 Sarah Worthington, 'Common Law Values: The Role of Party Autonomy in Private Law' in Andrew Robertson and Michael Tilbury (eds), *The Common Law of Obligations: Divergence and Unity* (Hart Publishing 2016) 319.

39 S M Waddams, 'Unconscionability in Contracts' (1976) 39 MLR 369, 382–84. See also *L Schuler AG v Wickman Machine Tool Sales Ltd* [1974] AC 235 (HL); *Yam Seng Pte Ltd v International Trade Corp Ltd* [2013] EWHC 111 (QB), [2013] 1 All ER (Comm) 1321.

40 Aditi Bagchi, 'Interpreting Contracts in a Regulatory State' (2019) 54 University of San Francisco Law Review 35, 73.

41 Schwartz and Scott (n 7) 545–46.

42 On the inadequacy of efficiency theory in the context of government contracting, see Wendy Netter Epstein, 'Contract Theory and the Failures of Public-Private Contracting' (2013) 34 Cardozo Law Review 2211.

above, even when firms sidestep default rules, they nonetheless provide an important *ex ante* starting point for the bargaining process to take place.

Another argument on similar lines is that redistribution through the regulation of contracts may even be counterproductive to the goals it purports to achieve. Namely, it risks raising transaction costs at the detriment of the parties who are the intended beneficiaries of the distributive policy.[43] But although it may well be the case that costs are sometimes passed on, this is not a reason in itself for contract law to cease offering such protections altogether. Indeed, "[r]ules intended to advance distributive justice exact a cost".[44] To use the above example of a service-seller and buyer,[45] if the imposition of a pro-buyer default rule makes it more costly for the buyer to enter into the contract, she may nonetheless consider it worthwhile to do so for the benefit of an added layer of legal protection. That being said, it would of course be most unacceptable if that cost was borne disproportionately by an already socially disadvantaged group. Yet, whether this occurs is a highly fact-sensitive question, and the issue requires careful consideration by rule-makers.[46] It should not support a blanket aversion to redistributive restrictions on contractual freedom, especially in the light of evidence exposing the exaggerated nature of some regulatory-backfiring arguments.[47]

E. TAXATION: A BETTER ALTERNATIVE FOR REDISTRIBUTION?

Finally, even if we accept that the machinery of contract law has the capacity to incorporate distributive considerations within its framework and good reasons to do so, it may nonetheless be open for advocates for distribution to hold that, given the relative advantages of the tax and welfare system, the role of wealth redistribution should ultimately be kept away from contract law.[48] However, we should be careful not to lose sight of the weakness inherent in public techniques for redistribution. At a theoretical level, the contention that taxation is less intrusive or more morally justifiable should be subjected to scrutiny;[49] and at a practical level, the assertion that taxation is inevitably more efficient can be challenged. As Kronman observes, there is always at least one way in which the law of contract is more efficient than taxation:

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43 Morgan (n 2) 153–156.
44 Bagchi (n 1) 210.
45 See Section III.A.
46 Bagchi (n 1) 210.
47 Collins (n 26) 277–79. Cf Morgan (n 2).
48 Advocates for this view include Michael Trebilcock. See Michael J Trebilcock, *The Limits of Freedom of Contract* (Harvard University Press 1993).
49 For an objection to the proposition that redistribution through taxation is more morally permissible than contract law, see Kronman (n 14) 498–507.

unlike taxation, which requires the prior collection of state revenue before redistribution, contract law, through its rules and doctrines, can facilitate a direct transfer of resources and advantages from one part of the community to another without additional state mediation.[50]

IV. Towards a Law of Contract More Apt to Promote Distributive Justice

If contract law were to adopt a more robust, distributive function, how should its doctrinal framework look like to instrumentalise that goal? A detailed re-examination of the doctrines of contract law is beyond the scope of this article; however, this last section seeks to put forward a general direction in which the law could follow to promote distributive justice in the contracting process. If one overarching theme had to be identified, it would be that contract law doctrines should pay more attention to the structural inequalities between the parties, the allocative impacts of substantive terms, and other public policy considerations. For reasons discussed below, this has particularly significant implications for the empowerment of traditionally disadvantaged social groups, who will overall benefit from a more inclusive, equitable, and pluralist law of contract.[51] Three principles are suggested here.

Firstly, a distributive contract law should be sensitive to how its rules have different implications for different segments of the population. Consider the requirement for intention to create legal relations, which has been the subject of scathing feminist critiques.[52] It has been revealed that this doctrine, and its presumption against legal bindingness in the domestic setting, has the effect of "[insulating] the female world from the legal order", as it "devalues women by saying that they are not important enough to merit legal regulation".[53] Given that doctrines such as this one often deal with members of different social groups, contract law should take into account the power imbalances and allocative consequences of the contracting process. For instance, contract law could do away with this presumption of legal bindingness altogether or lower the threshold for rebutting the presumption. The end result would be to enable the courts to steer private ordering in a more distributively equitable fashion and empower the underprivileged by giving them greater bargaining power. A refusal to do so would have detrimental distributive ramifications, as it would reinforce the status quo and preserve the

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50 ibid 509.

51 See Patricia J Williams, *The Alchemy of Race and Rights* (Harvard University Press 1991).

52 See Michael Freeman, 'Contracting in the Haven: *Balfour v Balfour* Revisited' in Roger Halson (ed), *Exploring the Boundaries of Contract* (Dartmouth 1996).

53 ibid 74.

economic and social inequalities between any two social groups, in this case by privileging men over women.

Secondly, when interpreting or construing ambiguous agreements, the courts should include distributive considerations as relevant factors. A literal, four-corners approach ought to be resisted as it is too insensitive to the allocative implications of everyday contracting. In a sense, this recommendation is hardly novel, as both scholars[54] and modern-day courts have advocated for a contextual approach to interpretation. However, even under most contextual approaches, the scope for promoting distributively fair outcomes is limited, as the focus is still on unearthing the parties' true intentions. Contextualists only differ from textualists in terms of methodology, the former being more liberal in respect of relying on extrinsic evidence than the latter.[55] Instead, the courts should be willing to prefer some contractual readings over others on the explicit ground that, for example, it could lead to more equitable distributions or fairer impacts to third parties.[56]

Thirdly, contract law should do away with its traditional antipathy towards regulating substantive fairness.[57] In congruence with what has been said above and in line with developments in other common law jurisdictions,[58] it is submitted that English law should recognise a doctrine of unconscionability as a general ground for relieving parties of certain perverse contractual obligations. This is no invention: the courts are already doing it under the guise of other rules, such as the rules on the incorporation of terms, duress, and the regulation of exemption clauses.[59] Open recognition can allow the courts to intervene more readily in bargains where one party seeks to exploit a distributive injustice, as well as to make their decisions more transparent. As Stephen Waddams asserts, "despite lip service to the notion of freedom of contract, relief is every day given against agreements that are unfair, inequitable, unreasonable or oppressive".[60] This principle of unconscionability could be invoked, for instance, where the court finds that there is substantive unfairness in the terms of the contract. The effect of such a finding would be to vitiate the contract in the same way as misrepresentation does, thereby granting the complainant the option to set aside the contract.

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54 Particularly relational scholars. See Hugh Beale, 'Relational Values in English Contract Law' in David Campbell, Linda Mulcahy, and Sally Wheeler (eds), *Changing Concepts of Contract: Essays in Honour of Ian Macneil* (Palgrave Macmillan 2013).

55 Bagchi (n 40) 37–38.

56 Bagchi (n 1) 208.

57 Collins (n 13) 65–67.

58 More prominently in American jurisdictions.

59 Waddams (n 39).

60 ibid 390.

V. CONCLUSION

The question that all contract rule-makers should ask themselves is this: "what kind of contract law should the state offer?" A facilitative regime of contract law might have the benefit of consistency, clarity, and predictability, and is perhaps more easily applied than a context-sensitive one. Yet, in our factually varied world, "the moral reality of distributive injustice"[61] requires any meaningful conception of contract law to not only blindly facilitate the exchanges between private parties, but also to consider broader considerations, such as their power dynamics, background duties, as well as allocative implications.

[61] Bagchi (n 1) 210.