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IS THERE A PLACE FOR CONTRACT LAW IN RAWLS'S THEORY OF JUSTICE?

Abstract: *The goal of this paper is to show that contract law has its place in Rawls's theory of justice, even though Rawls himself claimed the opposite. The author starts with the short presentation of Rawls's theory of justice, then analyses the objections to contract law being part of the basic structure, and finally shows that contract law can have the distributive function, and therefore fits into the Rawls's basic structure.*

Key words: John Rawls, theory of justice, contract law.

INTRODUCTION

The essence of Rawls's political philosophy is freedom of every individual to pursue their own notion of good life.¹ In order to enable individuals to follow their own idea of good life just distribution of primary social goods is needed, and they are distributed by social institutions.² According to Rawls, contract law is not one of those institutions, i.e. does not have a distributive function.³ On the other hand, many legal scholars claim that contract law does have the distributive function.⁴

Given the significance of Rawls's theory of justice, and the impact it had on legal thinking⁵, we find this controversy interesting. It incited us to examine

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1 Kymlicka, W., 2002, *Contemporary Political Philosophy: An Introduction* 2nd edition, Oxford, Oxford University Press, p. 64.

2 Kymlicka, W., 2002, p. 65.

3 Kordana, K. & Tabachnik, D., 2005, Rawls and Contract Law, *The George Washington Law Review*, April 2005, vol. 73, pp. 603–604.

4 For example see Kordana, K. & Tabachnik, D., 2005, pp. 598–632; Social Justice in European Contract Law: a Manifesto, Study Group on Social Justice in European Private Law, 2004, *European Law Journal*, Vol. 10, No. 6, pp. 653–674; See Kronman, A. T., 1980, Contract Law and Distributive Justice, *The Yale Law Journal*, Vol. 89, pp. 472–511.

5 See Nussbaum, M., 2001, *The Enduring Significance of John Rawls*, (<http://web.ebsco-host.com.proxy.uba.uva.nl:2048/ehost/detail?sid=9c77ee94-319d-45f0-ab62-db3084a>)

whether, following the principles of justice set by Rawls, contract law has its place in his theory of justice i.e. whether it is part of the basic structure or not.

Even before we made any deeper analysis, our intuition placed contract law into the basic structure, and this instinct has proven right, as we intend to show in this paper. In order to reach this goal we shall first introduce Rawls's theory of justice, and then offer the arguments for our claim that contract law has a distributive role, and as such fits in Rawls's basic structure.

RAWLS'S THEORY OF JUSTICE

Rawls's theory of justice rests on two principles. The first principle states that everybody has an equal right to basic liberties which are compatible with a system of liberty for all.⁶ This means that every person's liberty is limited only by the liberties of others, or in other words that every person can exercise their liberty as long as they do not infringe someone else's liberty.⁷ The second principle is related to the fact that some positions in the society bring more benefits than other positions. However, those benefits are just only if they are for the sake of those who are worse off, and if everyone had an equal opportunity to assume those positions.⁸ True equality of opportunity means that chances to acquire those positions are not determined by social circumstances one did not choose, but by one's choices and efforts.⁹ Rawls also acknowledges that natural talents, or the lack of them is undeserved as well, so the talented individuals deserve to profit of their talents only if that is for the benefit of those to whom the nature was not so giving.¹⁰ This principle is known as the difference principle and it ensures "that no one gains or loses from his arbitrary place in the distribution of natural assets or his initial position in society without giving or receiving compensating advantages in return."¹¹

Rawls suggests that if people did not know what position in the society they would occupy, nor what their talents would be, nor what is their

7b089%40sessionmgr104&vid=4&hid=127&bdata=JnNpdGU9ZWZWhvc3QtbGl2ZQ%3d%3d#db=aph&AN=4837098, 23.05.2013.)

6 Kymlicka, W., 2002, p. 56.

7 Ripstein, A., 2006, *Private Order and Public Justice: Kant and Rawls*, (<http://ssrn.com/abstract=894431>, 18.05.2013.), p. 7.

8 Kymlicka, W., 2002.

9 Kymlicka, W., 2002, p. 58.

10 Kymlicka, W., 2002, p. 59.

11 Rawls, J., 1971, *A Theory of Justice*, London, Oxford University Press, p. 102.

conception of good life, nor what are their preferences, they would want to make sure that they get the maximum possible access to social primary goods even if they end up in the least advantaged position.¹² That is exactly why they would choose these two principles to govern the distribution of social primary goods.¹³

THE BASIC STRUCTURE AND CONTRACT LAW

Basic structure is a set of social institutions whose role is to distribute the social primary goods according to said principles of justice.¹⁴ For Rawls, contract law is not one of those institutions because social justice is not a matter of relationship between two persons; it is a matter of conditions underlying the interaction between individuals.¹⁵ He further argues that:

such rules (alone) will not be sufficient to ensure and maintain background justice. This is because rules for “individual transactions cannot be too complex, or require too much information to be correctly applied; nor should they enjoin individuals to engage in bargaining with many widely scattered third parties, since this would impose excessive transaction costs.”¹⁶

Therefore, the objections Rawls has to contract law being part of the basic structure are that contract law alone is not enough; that it would be too complex for application and thus present an obstacle for wide scale exchange and raise transaction costs. According to Kronman, it seems that Rawls even thinks that using contract law as an instrument of distributive justice would present an illegitimate impediment to personal freedom of individuals to pursue their own conception of good life.¹⁷

However, no one suggests that contract law alone should be a part of the basic structure. As we have seen, basic structure is a set of institutions. The number and diversity of social primary goods makes it impossible for one institution alone to satisfy the demands of just distribution of those goods. According to Rawls the social primary goods are basic liberties and

12 Kymlicka, W., 2002, pp. 65–66.

13 Kymlicka, W., 2002, p. 66

14 Kordana, K. & Tabachnik, D., 2005, Rawls and Contract Law, *The George Washington Law Review*, April 2005, vol. 73, p. 604.

15 Kordana, K. & Tabachnik, D. 2005, pp. 603-604.

16 Kordana, K. & Tabachnik, D. 2005, p. 604.

17 Kronman, A.T., 1980, Contract Law and Distributive Justice, *The Yale Law Journal*, Vol. 89, p. 500.

material resources.¹⁸ Basic liberties are distributed by constitutional law and material resources through taxation which Rawls prefers over contract law for the said reasons.¹⁹ Therefore, we already have a plurality of institutions in the basic structure.

Furthermore, the second Rawls's argument that, if contract law would be an instrument of distributive justice, its rules would be too complicated to apply on individual transactions, and thus hamper the exchange,²⁰ at first glance looks convincing. That would be true if every individual transaction would be subjected to the difference principle.²¹ However, that is not the idea of contract law as part of the basic structure. The idea is to design rules which would govern individual transactions according to principles of social justice.²² Contract law would represent a frame designed in accordance with principles of social justice, and within which parties would be free to make arrangements. In that way, nobody would have to apply the principles of social justice to individual contracts. Rules constituting the system of contract law would be applicable to individual transactions, while in turn those rules would be designed in accordance with the principles of justice. That way the state would provide fair background conditions for individual transactions. In fact, contract law is already in use for these purposes. A good example of such use of contract law are the minimum wage rules.²³ Providing these rules the state makes sure that employers cannot use their bargaining power to the detriment of workers, and thus makes an adequate setting for fair negotiations. Another example are the rules rendering void contracts by which one party exploits the weakness of the other party to make disproportionate gain.²⁴ These rules obviously reflect the difference principle, because not allowing someone to profit from undeserved advantageous position by exploiting someone's "inexperience, or...substantial weakness of will..."²⁵ when that exploitation does not benefit the exploited person is a realization of the difference principle. Once again, the difference principle would not be applied to every single transaction directly, but to design the rules governing particular transactions.

18 Kymlicka, W., 2002, p. 65

19 Kronman, A. T., 1980, p. 500.

20 Kordana, K. & Tabachnik, D., 2005, p. 604.

21 Kronman, A. T., 1980, p. 501

22 Kronman, A. T., 1980.

23 Kronman, A. T., 1980, p. 499.

24 For more detail see B. Hugh et al., 2010, *Cases, Materials and Text on Contract Law* 2nd ed. (Ius Commune Casebooks for the Common Law of Europe, Hart Publishing 2010), pp. 570-596.

25 BGB, Article 138, (http://www.gesetze-iminternet.de/englisch_bgb/englisch_bgb.html#p0406, 23.05.2013).

The same two examples can be used as a reply to the argument that use of contract law for distributive purposes is an illegitimate state intervention into individuals' freedom to pursue their conception of good life.²⁶ This statement implies that contract law is very important for exercising the freedom to choose our ends and to realize them. That is true. For whatever our conception of good life is we cannot ourselves provide all means necessary to fulfill it. If one wants to be a painter, one needs paints, canvases, brushes etc. How one will acquire the mentioned things? Most likely by purchasing them, thus by virtue of contract. However, we cannot agree with the second implication of the statement that putting contract law in service of social justice would make illegitimate limitations to freedom of individuals to pursue their ends. We beg to differ. The rules we offered as an example in the previous paragraph are the same rules that actually ensure that parties are substantively free in making their choices. There is no real freedom and no real meeting of the minds if one party can impose their own conditions to the detriment of the other party. The mentioned rules do impose limitations on what the parties can agree upon, but these limitations are for the sake of freedom of the weaker party. These limitations prevent the extension of one party's liberty into another party's liberty. Therefore, not only that these rules comply with the difference principle, they actually reflect the first principle of social justice as well.²⁷

After all these considerations, we believe that it is obvious that contract law can, and actually does have a distributive function. Therefore, Rawls, or anybody else following his line of argumentation, would have to justify the preference to taxation over contract law by showing superiority of taxation as a distributive instrument. Kronman has made a detailed analysis on this issue, so it is not necessary to go into detail on that matter.²⁸ We will just draw on his conclusions that all the objections made to contract law as a distributive instrument can be made regarding taxation as well.²⁹ In fact, there is no need to choose between the two. Both methods of distribution of social primary goods should be applied because in some areas one is superior to other, but neither alone can satisfy the demands of distributive justice. For instance, providing free education in public schools, which we deem important from the perspective of equal opportunities, is better entertained

26 Kronman, A.T., 1980, p. 500.

27 Ripstein, A., 2006, *Private Order and Public Justice: Kant and Rawls*, (<http://ssrn.com/abstract=894431>, 18.05.2013.), p. 7.

28 Kronman, A.T., 1980, pp. 498-510.

29 Kronman, A.T., 1980, p. 502.

through taxation, while removing inequalities in bargaining power is better achieved through various contract law mechanisms.

CONCLUSION

In the center of Rawls's theory of justice is the freedom of every individual to pursue their own conception of good life.³⁰ To be able to do this, individuals need certain social primary goods like liberties, property, income and wealth, and basis of self-respect.³¹ These goods are to be distributed by social institutions following the principles of justice.³² These principles are the equal right to basic liberties compatible with the system of liberty for all and equality of opportunity to assume beneficial positions in society, under the condition that such position brings benefits to those who are worse off because of undeserved social or natural endowments.³³

While we find his theory of justice appealing, we disagree with Rawls that contract law should not be the part of the basic structure. For this reason we explored the implications this theory has on contract law and contested the objections to its distributive role in the society.

We believe that we showed that contract law plays an important part in creating a background for fair exchange and thus contributing to just distribution of wealth, and freedom of individuals to pursue their conception of good life. Therefore, we think it is fair to conclude that there is a place for contract law in Rawls's theory of justice.

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30 Kymlicka, W., 2002, p. 64.

31 Kordana, K. & Tabachnik, D., 2005, p. 601.

32 Kymlicka, W., 2002, p. 65.

33 See n. 6, 7, 8, 9 and 10.

5. Rawls, J., 1971, *A Theory of Justice*, London, Oxford, Oxford University Press.
6. Ripstein, A., 2006, *Private Order and Public Justice: Kant and Rawls*, (<http://ssrn.com/abstract=894431>), accessed on 18.05.2013.

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SUMMARY

In the center of Rawls's theory of justice lies the idea that all individuals should be free to pursue their own vision of good life. In order to realize that idea, every individual should have equal liberties limited only by liberties of others. Furthermore, there should be a fair distribution of primary social goods. The distribution is fair if everyone had an equal opportunity to assume the beneficial positions in the society, and if no one can profit from their undeserved advantages unless it is for the benefit of those who are worse off. The fair distribution of primary social goods is made through institutions which make the so called basic structure. According to Rawls contract law should not be a part of the basic structure for a number of reasons. The author addresses these reasons and offers counterarguments that lead to the conclusion that contract law should have, and actually does have a distributive function, and therefore should be a part of the Rawls's basic structure.

IMA LI MESTA UGOVORNOM PRAVU U ROLSOVOJ TEORIJI PRAVDE?

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REZIME

U centru Rolsove teorije pravde jeste ideja da svaki pojedinac treba da ima pravo da živi svoj život onako kako on ili ona smatraju da je najcelishodnije. Da bi ta ideja mogla da se sprovede u delo svaki pojedinac treba da uživa iste slobode ograničene jedino slobodama drugih članova društva. Osim toga treba da postoji pravedna raspodela primarnih društvenih dobara. Ta raspodela je pravedna ako je svaki pojedinac imao jednaku priliku da zauzme one pozicije u društvu koje donose određene povlastice i ako niko ne može da profitira od prednosti koje ničim nije zaslužio osim kada je to profitiranje i u korist onih koji su u najgorem

položaju u društvu. Pravedna raspodela primarnih društvenih dobara odvija se kroz institucije koje čine takozvanu osnovnu strukturu. Prema Rolsu ugovorno pravo ne bi trebalo da bude deo te strukture iz više razloga. Mi smo identifikovali te razloge i ponudili kontraargumente koji su nas doveli do zaključka da bi ugovorno pravo trebalo da ima, i da zapravo ima, distributivnu ulogu u društvu, te da bi trebalo da bude deo Rolsove osnovne strukture.

Ključne reči: Džon Rols, teorija pravde, ugovorno pravo.

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