



Article

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Justice in Contract, no Justice in the Background

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Abstract: In the first part of his book, Peter Benson elaborates for the common law that fairness in exchange is not only a fundamental principle of contract law, but that it is, moreover, conceptually rooted in the idea of private autonomy. For the common law presumes that a party to a contract intends, in principle, to exchange performance at its value and on fair terms. The following comment shows that this presumption also animates German contract law, including the rules on the review of standard terms. In the second part, Benson develops the image of a harmonious complementarity of private law, which is characterised by transactional justice, and public law, which instantiates distributive justice. The following comment disputes the claimed harmony by demonstrating the fundamental asymmetry in the institutionalisation of both forms of justice in civil society.

Keywords: justice in contract, review of standard terms, private law and distributive justice

1 Introduction

In the following, I would like to treat the two topics that are most important to me in Peter Benson's book. The first topic is justice in contract. The second topic is the idea of background justice, i.e. the relationship of civil society to its state.

As regards the first issue, I would like to support Benson's account on the basis of existing German civil law. In particular, I would like to explain how the judicial review of standard terms is to be understood in Benson's theoretical framework of contract as a transfer of a right, i.e. after it is excluded that review of standard terms

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can be illuminated by means of economic analysis¹ or that it can be explained as consumer protection.² It will be shown that contract law presumes that a party intends to make a legally binding promise of its own performance to another party only in exchange for an equivalent consideration and on fair terms. It is this presumption which carries the judicial review of standard terms, as well.

On the second issue, I would like to articulate my disagreement with Benson's account. The disagreement relates to the normative harmony which Benson claims for the relationship between civil society and its state. In my understanding, the core of Benson's assertion is that the state realises a background justice on the basis of which private law operates and may also do so from a normative perspective. In contrast to this, I would like to assert a reverse relationship: Private law provides background (in)justice for the state, which must continuously and inadequately try to compensate for the disinterest of private law in human need.

2 Justice in Contract

I would like to develop the first topic on the basis of German law. In doing so, I will show *en passant* that Benson's explanation of the law of contract and the constituting doctrines in the Common Law also sheds light on the contract law of the civil law tradition, as he hopes.³ This will also support the underlying thesis, originally put forward by James Gordley,⁴ that the differences between the common law and civil law traditions are not really significant at the basic conceptual level.

Before starting, I should emphasise from a methodological point of view that in what follows, I deal with essential rules of contract law in the German Civil Code; case law plays a role only at one point.⁵ This is because, in the civil law tradition, the rules of the code take on the role of structure-forming precedents in Common Law. With regard to these rules, I certainly do not reproduce the prevailing view in German legal, because the latter provides quite different narratives (about 'protection of legal transactions', 'protection of the weaker party', 'correction of market failure' etc.). Rather, I present – not least with the help of Peter Benson's conceptual tools – a fundamental alternative.

1 Cf A. Katz, 'Standard Form Contracts', in P. Newman (ed), *New Palgrave Dictionary on Economics and the Law* (London: Palgrave Macmillan, 1998) 502–505.

2 Cf Council Directive 93/13/EEC on unfair terms in consumer contracts, *OJEC L 95*, 29–34.

3 P. Benson, *Justice in Transactions: A Theory of Contract Law* (Cambridge, MA: Harvard University Press, 2019) 29 *et seq.*

4 J. Gordley, *Foundations of Private Law* (Oxford: Oxford University Press, 2006) 32 *et seq.*; for criticism see Hesselink's contribution [CROSS], sub 3.

5 See text accompanying note 21.

2.1 Contract Law's Presumption: Exchange for Equal Value and on Fair Terms

Private law rules on contract are animated by a fundamental presumption. The presumption is twofold and is that, firstly, the party to a contract intends to create a right in its performance in order to acquire a right in an equivalent performance and, secondly, that the conditions of this exchange of equivalent performance should be fair. In short, each party to a contract intends to exchange its performance *at its value and on fair terms*.⁶

This presumption is not explicitly stated in the German Civil Code. But it animates its rules. In the first place, the presumption guides legislation of default rules in contract law. When it is to be determined in general how a performance owed is to be effected, the guiding perspective is what reasonable parties would probably agree. Yet, reasonable parties agree on fair terms.⁷ This understanding of default rules is confirmed by the general rule in § 242 BGB⁸ on the content of any performance owed: In any case, a performance is to be effected in such a way as is required in good faith and with due regard to customary practice. 'Good faith, taking customary practice into consideration' is just another expression for the standard of fairness. All other default rules are more specific provisions of what fairness requires with regard to particular terms.

The presumption also guides the courts in interpreting the declarations of intent of particular contracting parties (Interpretation of particular contractual declarations and determination of default rules form a continuum, a fact which is more commonly understood under common law, because common law courts are responsible for both⁹). Accordingly, § 157 BGB,¹⁰ the central provision for the interpretation of contractual declarations of intent, contains the same wording as § 242 BGB: Declarations which are intended to bring about a contract are to be interpreted in the light of good faith, taking customary practise into account. In other words, in interpreting a declaration of intent, it is to be presumed that the party who proposed an exchange, was proposing fair terms.

⁶ 'Value' naturally refers to exchange value, cf G.W.F. Hegel, *Elements of the Philosophy of Right*, Sec 63 I side with Benson, that value and fair terms are actually interdependent, e.g. n 3 above, 232.

⁷ F.C. von Savigny, *System of the Modern Roman Law*, vol 1 (Madras: J. Higginbotham, 1867) § 16, 45.

⁸ Sec 242 BGB: 'An obligor has a duty to perform according to the requirements of good faith, taking customary practice into consideration.'

⁹ See Benson, n 3 above, 122 *et seq* on implication.

¹⁰ Sec 157 BGB: 'Contracts are to be interpreted as required by good faith, taking customary practice into consideration.'

The general presumption does not only refer to fair terms; it also refers to the price. The presumption is that a party intends to exchange its performance at its value. Expressly, the presumption is found in the law on service contracts and on contracts to produce a work, §§ 612, 632 BGB,¹¹ i.e. for two of the four paradigmatic contract types. These are, again, default rules. By default, a service or production of work is to be exchanged against remuneration, whereby, at the end, the sum due amounts to the usual remuneration. However, the usual remuneration is nothing other than the exchange value as effective at the time of the conclusion of the contract. The contractual declaration (here and in the following: or a legally significant conduct) is therefore to be interpreted in such a way that performance is to be provided at the exchange value. For the two other basic types of contract, purchase and loan, the German Civil Code does not contain a similar provision. If, however, the seller or lessor have already effected their performances and this event, in each case, is to be interpreted as meaning that these performances are based on a concluded contract, a court must reach the same conclusion via § 157 BGB: it is agreed that the performance should be exchanged for an equivalent consideration.

2.2 Valid Consent About a Transfer of Value

Private law's presumption in contract is not only evident from the provisions cited above. It can also be inferred from what the law requires in order for the counterpart of an exchange for equal value to be legally effective. The counterpart is the transfer of value.¹² A transfer of value is an act that reduces the wealth of one party, deprives this party, and increases the wealth of the other party, enriches that party. A transfer of value may be made on the one hand by effecting a performance without consideration. It can also be made by exchanging a performance below its value. In both cases, the party providing the performance is deprived and the recipient of the performance is enriched.

11 Sec 612 BGB: '(1) Remuneration is deemed to have been tacitly agreed if in the circumstances it is to be expected that the services are rendered only for remuneration. (2) If the amount of remuneration is not specified, then if a tariff exists, the tariff remuneration is deemed to be agreed; if no tariff exists, the usual remuneration is deemed to be agreed'. Sec 632 BGB: '(1) Remuneration for work is deemed to be tacitly agreed if the production of the work, in the circumstances, is to be expected only in return for remuneration. (2) If the amount of remuneration is not specified, then if a tariff exists, the tariff remuneration is deemed to be agreed; if no tariff exists, the usual remuneration is deemed to be agreed.'

12 Cf E. Weinrib, 'Unjust Enrichment', in E. Weinrib, *Corrective Justice* (Oxford: Oxford University Press, 2012) 185–229, 190 *et seq.*

In the case of a transfer of value in the form of a performance without consideration, § 812 (2) 1 1. Alt. BGB¹³ applies. The provision requires a contract for the persistence of an enrichment. If performance is to be provided without consideration, it must be a gift. This in turn requires according to § 516 (1) BGB,¹⁴ that the consensus of the parties must include the gratuitousness. Both parties, the enriched and the deprived, must be aware that a transfer of value is made. In the absence of a shared awareness of the fact that the performance is gratuitous, a performance without consideration is nevertheless legally effective if the deprived party performs its service in accordance with § 814 BGB¹⁵ knowing that there is no legal obligation, i.e. if the transfer of value is made at least by the deprived party with its eyes open. The law thus requires an event from which it can be positively inferred that at least the deprived party is aware of the transfer of value. The reason for this requirement results precisely from the presumption that a performance is meant to be exchanged for an equivalent consideration. The presumption is rebutted if it is clear that in the particular case it is different, because the declaration of the deprived party is to be understood in such a way that it exceptionally wants to transfer value to the other party.

In the second case of a transfer of value, a transfer enacted by exchanging a performance below its value, § 138 (2) BGB¹⁶ applies. In a first step, the provision identifies that a legally relevant transfer of value requires that the values of the two performances are clearly disproportionate, i.e. if they differ considerably¹⁷ from each other. For such transfers, the provision further specifies that the transfer of value is only legally effective if the consent of the deprived party is not due to a predicament or inexperience, alternatively, if it is not due to a lack of sound judgement or to a weakness of will, and if this is in each case recognisable to the

13 Sec 812 BGB: '(1) A person who obtains something as a result of the performance of another person ... without legal grounds for doing so is under a duty to make restitution to him ...'.

14 Sec 516 BGB: '(1) A disposition by means of which someone enriches another person from his own assets is a donation if both parties are in agreement that the disposition occurs gratuitously.'

15 Sec 814 BGB: 'Restitution of performance rendered for the purpose of performing an obligation may not be demanded if the person who rendered the performance knew that he was not obliged to do so ...'.

16 Sec 138 BGB: '(2) In particular, a legal transaction is void by which a person, by exploiting the predicament, inexperience, lack of sound judgement or considerable weakness of will of another, causes himself or a third party, in exchange for an act of performance, to be promised or granted pecuniary advantages which are clearly disproportionate to the performance.'

17 This requirement – that the difference must be considerable – reflects the dynamics of exchange value in time. Some further comments on this can be found in F. Rödl, 'Contractual Freedom, Contractual Justice, and Contract Law (Theory)' (2013) 76 *Law and Contemporary Problems* 57.

enriched party.¹⁸ The transfer of value is therefore only effective if no circumstances of the kind described are recognisable. The reason for this again results from the presumption that a performance is meant to be exchanged for an equivalent consideration. The presumption is rebutted if the deprived party gives its conscious and authentic consent to an exchange of its own performance below its value. However, the consent is only authentic if there are no special circumstances of the kind described.¹⁹

For a transfer of value to be legally effective, private law thus requires that the enriched party was allowed to understand the declaration of the deprived party as meaning that the latter wanted the transfer of value as such. Conversely, this confirms the presumption that a performance is to be effected in exchange for an equivalent consideration.

2.3 Valid Consent About Unfair Terms

The presumption is that a performance is to be exchanged not only at its value but also on fair terms. It is against this background that the legal requirements are set to agree on unfair terms. Corresponding to the requirement for a transfer of value, the requirement for an agreement on unfair terms is that the party benefiting from unfair terms could understand the declaration and significant conduct of the disadvantaged party as meaning that the latter wanted the unfair terms as such.

It is well known that, in practice, one point of agreeing on standard terms is that they are usually not read by the other party. Nevertheless, standard terms can become part of the parties' united will. So, in the usual case, the user of standard terms must not understand the consent of the other party to an unfair term as meaning that the latter wanted the unfair term as such. Such an understanding is impossible from the outset if the other party has not read the terms at all. Private law then concludes that the individual wills of both parties have indeed been united into one. However, that united will does not contain the unfair term. In German law, this is determined in §§ 307 (1), 306 (1) BGB.²⁰

18 The wording of the law in Sec 138 (2) BGB requires exploitation. But this makes the subjective side morally too charged. It is all about recognisability.

19 In the case of employment, rental and loan agreements, German case law has recognised that the correct legal consequence is not nullity but adjustment of the consideration. In my view, such adjustment is the correct legal consequence in § 138 (2) BGB also in general. This would correspond to the legal consequence of an agreement on unfair standard terms regulated in § 306 (1) BGB (see sub 3).

20 Sec 307 BGB: '(1) Provisions in standard business terms are ineffective if, contrary to the requirement of good faith, they unreasonably disadvantage the other party to the contract with

However, it is not decisive that the other party has not read the unfair term. Let one assume, that the other party has read the unfair term because, for example, the user has expressly referred to it. In this case, too, the user must not understand the subsequent consent of the other party as meaning that the other party wanted the unfair condition as such, i.e. as unfair.²¹ Because in order to do so, the other party would have to be aware of the juridical assessment of the term as unfair.

Accordingly, § 305 (1) BGB²² stipulates that a contracting party which is favoured by an unfair term may only understand the declaration and significant conduct of the other contracting party as meaning that the other party wanted an unfair term as such if the condition was not imposed as a standard term. Rather, it is necessary that the term has been negotiated between the two parties in detail (see § 305 (1) 3 BGB). ‘Negotiation’ implies that the disadvantaged party had a fair alternative in mind and that both parties jointly decided – for whatever reasons – in favour of the term which is unfair. If it results from negotiation, a term is no longer imposed as a standard term by a user, but can be offered by one party as well as by the other for the purpose of concluding a contract. In this case, the beneficiary party may indeed understand the other party as wanting the unfair condition as such.

Now, the hard case is the one in which the unfair term has not been negotiated, but the other party has been made aware not only of its content but also of its assessment as unfair.²³ In this case, the other party agrees to the unfair term, knowing both the content and its legal assessment. In this case, can the user not understand the other party to the contract to mean that it wanted the unfair term as such? – The answer is, again, negative. However, this does not follow from the special rules on the control of standard terms (§§ 305 *et seq* BGB). It follows from the rules on the interpretation of the content of contractual declarations of intent in

the user ...’ Sec 306 BGB: ‘(1) If standard business terms in whole or in part have not become part of the contract or are ineffective, the remainder of the contract remains in effect.’

21 Bundesgerichtshof, Urteil vom 22. Dezember 2012 – VII ZR 222/12 (*bring or pay*), *Neue Juristische Wochenschrift* 2013, 856. The Court declared a term void, which had been explained to the other party as an essential part of the user’s business-model. I am not sure, whether Benson would agree with the Court and in what follows in the text; see Benson, n 3 above, 225, 229, 234 and also 231.

22 Sec 305 BGB: ‘(1) Standard business terms are all contract terms pre-formulated for more than two contracts which one party to the contract (the user) presents to the other party upon the entering into of the contract. ... Contract terms do not become standard business terms to the extent that they have been negotiated in detail between the parties.’

23 This may appear to be an unusual practice that would not make sense in mass business. This is true. But it would be attractive for contracts for performances of high value or of long duration. It would be an effective way of undermining judicial review: If a term is declared unfair, only the other parties would have to be expressly informed of the term in question and of the court’s assessment of it as unfair.

general. The subject of the relevant rules is the interpretation of the declaration of a party who has made a normatively contradictory offer.

These rules do not state that such a declaration as a whole is without legal significance due to contradiction. The rules do state that the contradiction shall be resolved in favour of the other party. For example, a party who offers an exchange cannot promise its own performance and at the same time reserve the entitlement to intentionally not keep the promise. In this constellation, the other party may understand the promising party as if the reservation had not been made (cf § 276 (3) BGB²⁴). And a seller may not guarantee a certain quality of the sold item and at the same time exclude his obligations in the event of material defects. In this constellation, the buyer may understand the seller as if the exclusion with regard to the guaranteed quality had not occurred (cf § 444 BGB²⁵).

The offer of an exchange using standard terms is subject to the same rules. According to the presumption, the other party may understand the user to offer an exchange of his performance at its value and on fair conditions. If the user at the same time expressly offers an unfair term, the user's contractual statement is normatively contradictory. The contradiction is to be resolved in favour of the other party. The other party may understand the user as if he had not offered the unfair condition. For this reason, the unfair condition does not become part of the united will established by the consent of the other party, even in this constellation.

3 Background Justice

I turn to my second issue, the relationship of civil society to its state. Benson paints a harmonious picture²⁶ and I would like to contradict.²⁷

Benson's overall picture is based on the political philosophy of John Rawls and ties in with the widespread interpretation that contract law is not part of Rawls' basic structure and therefore is not to be established according to the two fundamental principles of justice.²⁸ With regard to the strategy of his presentation, Benson often does not redeem the burden of proof himself, but defers to Rawls. So anyone who has questions or objections regarding the relevant points should

²⁴ Sec 276 BGB: '(3) The obligor may not be released in advance from liability for intention.'

²⁵ Sec 444 BGB: 'The seller may not invoke an agreement that excludes or restricts the rights of the buyer with regard to a defect insofar as the seller ... gave a guarantee of the quality of the thing.'

²⁶ Benson, n 3 above, 448 *et seq.*

²⁷ See also my criticism of a related account in Arthur Ripstein's Force and Freedom, F. Rödl, 'The Legitimacy of Civil Freedom' (2019) 69 *University of Toronto Law Journal* 159.

²⁸ See A. Ripstein, 'The Division of Responsibility and the Law of Torts' (2004) 72 *Fordham Law Review* 811, 813.

address them to Rawls. But I will not discuss Rawls' position in the following. Rather, I want to ask critically whether the fundamental explanation of contract law that Benson gives in the first part of his book can actually fit with John Rawls' political philosophy. In my opinion, strongly influenced by Benson's convincing conception of contract law, his harmonious picture cannot be correct.

3.1 Detour on Rawls' Difference Principle

Before I address my topic directly, I would like to take a small detour. The detour concerns an essential element of Rawls' philosophy, the difference principle. In my opinion, this element cannot be included in Benson's account. I quote the relevant reformulation in Rawls' 'Justice as Fairness', condensed to the aspects which are essential for my purposes: '[...] economic inequalities [...] are to be to the greatest benefit of the least-advantaged members of society.'²⁹

Some contract law theorists have argued that contract law is also subject to the difference principle.³⁰ They have tried to justify the existing rules of contract law in the light of the difference principle. Benson believes that this is a clear misunderstanding of Rawls' position.³¹ There is a lot to be said in favour of this. But there is also something to be said against it. And that is namely the explanation Rawls himself gave for the difference principle.

In the context of his basically economic explanation of the difference principle, Rawls states: 'We now turn to the difference principle as a principle of distributive justice in the narrow sense [...] Social cooperation, we assume, is always productive, and without cooperation there would be nothing produced and so nothing to distribute [...] A scheme of cooperation is given in large part by how its public rules organize productive activity, specify the division of labour, assign various roles to those engaged in it, and so on. These schemes include schedules of wages and salaries to be paid out of output.'³²

Taken as a conceptualisation of the organisational structure of our economic system, this description seems at first sight to be completely mistaken. There are no public rules that organise productive activity, specify the division of labour and set remuneration for human labour. This is precisely the point of civil society.³³ The

²⁹ J. Rawls, *Justice as Fairness: A Restatement* (Cambridge, MA: Harvard University Press, 2001) § 13.1

³⁰ K. Kordana and D. Tabachnik, 'Rawls and Contract Law' (2005) 73 *Georgetown Washington Law Review* 598.

³¹ Benson, n 3 above, 448 n 113.

³² Rawls, n 29 above, § 18.2.

³³ Hegel, n 6 above, §§ 189–208.

organisation of production, the specification of the division of labour and the level of remuneration result from the operation of countless transactions under the rules of private law. These are transactions which are not organised by a superior public authority, but which result from the exercise of private liberties. Production and the division of labour take place on the basis of the legal institutions of private property (of means of production) and contract (of work). The level of remuneration is largely determined by collective agreements whose point is that they are agreed between autonomous collective bargaining parties acting independently of public authorities.

Against this background, Rawls' explanation of the difference principle must be understood differently. The labelling as a 'public' regulation cannot be meant to express a contrast to rules under private law. What must be meant is a labelling as 'state' regulation, i.e. a labelling which does not express a structural difference between public and private law. Then, however, the structural difference cannot really be brought to bear in Rawls' picture. The idea of a division of labour, which decisively shapes Benson's theory, cannot be understood in this framework.

3.2 Lexical Priority and Regulative Primacy

To take up my actual point, the question of the harmonious relationship between civil society and its state, I will first repeat the two main theses which Benson puts forward in this regard. These are the theses of a lexical priority of private law and a regulative primacy of public law.

Benson explains that private law has lexical priority over public law.³⁴ I think that is a very important finding. In my understanding, lexical priority, which could also be called 'conceptual priority', means the following: our modern state constitutions obviously presuppose the idea of human beings as free and equal. This idea is presupposed, for example, by the principle of democracy and the idea of the rule of law. Consequently, this idea is also presupposed in the case of state distribution of benefits or burdens. For the criteria of distribution must not be arbitrary; the refusal of a benefit or the imposition of a burden must be justified to the person concerned. Because as an equal, the person concerned can in principle claim to receive a benefit as others do, or to be excluded from a burden as others are.

The idea of freedom and equality is thus presupposed in the political constitution and thus in public law. But this idea of freedom and equality is constituted by private law. Without private law, whose logic starts with the innate right to one's

³⁴ Benson, n 3 above, 457 *et seq.*

own person (which includes body and soul), we would not understand this idea. In my opinion, this is the core of the thesis of a lexical or conceptual priority of private law.

On the other hand, Benson claims that distributive principles enjoy a regulative primacy over private law.³⁵ This will appear to many as a radical move, and rightly so. The move means that private law rules have to step back when they collide with distributive rules and instruments. And it needs particular emphasis that this primacy, for Benson, goes as far as it will go: distributive principles may, under certain circumstances, require that all things in our world are removed from private acquisition and thus from private ownership³⁶ (a note in passing: this would not be permitted under the German Basic Law, because Article 14³⁷ contains a guarantee of the institution of private ownership). In this respect, Benson's conception is open to a social system of democratic socialism, as is Rawls'.³⁸ Benson stresses that, from the point of view of his conception of private law, no red line can be drawn in relation to an alternative socio-economic system, because this conception only requires the potentiality of private acquisition, but not its actuality.

So what is Benson's justification for the regulative primacy of distributive principles? I think his point is very important and very interesting. For the justification does not start with an idea of political sovereignty, in the sense that the state as legislator represents the origin of the validity of private law, and so, it may also limit its scope at will. Benson, in contrast, bases primacy on the fact that only distributive principles respond to human needs. This is crucial, because private law as a strictly non-distributive order does not. Private law represents the human being only as rational, disregarding our specifically human nature. That is why, in view of private law, a second field of law becomes necessary, a field that speaks to the needs of human nature, and that is precisely the field of distributive principles, the field of public law.

3.3 Private Law as Background

At first sight, this idea that public law responds to human nature, which is normatively irrelevant in private law, seems to be related to the idea I developed in

³⁵ Benson, n 3 above, 449 *et seq.*

³⁶ *Ibid.*, 451.

³⁷ Art 14 GG: '(1) Property and the right of inheritance shall be guaranteed ...'.

³⁸ Rawls, n 29 above, § 41.

the last chapter of my own book under the heading ‘Restrictions for the Public Good, or: the Deficit of Private Law.’³⁹ But the kinship exists only at first sight. I wanted to say that there is something wrong with private law, and fundamentally so, because our human nature does not appear in private law’s representation of us as beings who are free. There is therefore a fundamental normative deficit in private law, and as long as private law applies, this deficit must be countered as far as possible by means of public law. One might think that this is exactly Benson’s point, just put in slightly different terms: there would be something wrong with the legal order as a whole if it consisted only of private law and its institutions, i.e. if there were no social sphere of statehood that could put distributive principles into action with the means of public law.⁴⁰

Our difference comes out, in my view, in answering the following question: do both parts, private law and public law, form a harmonious, a normatively coherent whole? Benson seems to answer the question in the affirmative and I disagree. To justify my disagreement, I would like to point out the essential asymmetry between private law and public law. It is a practical asymmetry in favour of private law that devalues the regulatory primacy of public law. The asymmetry in favour of private law results from the fact that private law provides the default rules. Private law thus takes priority over public law not only conceptually but also practically. This means that if public law fails to fulfil its function with regard to human needs, the rules of private law remain fully in force. Public law, however, requires a democratic policy which must define its content and put it into effect. Insofar as democratic politics does not work – for whatever reason – even basic human needs such as food or shelter remain unsatisfied.

It is probably needless to refer to homelessness in the USA or extreme poverty in Latin American countries for illustrative purposes. The societies concerned are not too poor to solve the problems. Rather, it is the case that the respective state refuses, that democratic politics fail to enact those regulations which are actually required by human needs. Flight is another, currently very pressing example. Under private law, every refugee is a person whose rights and freedom are determined by the rules of private law. But whether the refugee’s needs count is a question of democratic politics. Whether or not the refugee’s human needs are met, depends on the policies of the country of origin and the country of destination. As long as they are not met, the refugee is subject without restriction to the rules of private law only.

³⁹ F. Rödl, *Gerechtigkeit unter freien Gleichen* (Baden-Baden: Nomos, 2014) 405 *et seq.*

⁴⁰ Benson, n 3 above, 454 *et seq.*

If practical asymmetry exists in the sense I have just argued, then the characterisation of the field of distributive justice as ‘background justice,’ as coined by Rawls and now adopted by Benson,⁴¹ is not only false but positively misleading. There is no background justice for private law, private law provides the background. Private law is not a game like Monopoly, which only commences after distributive principles have been applied. It is the other way round: private law, with its ignorance of human nature, provides the unbreakable background for public law and its more or less successful attempts to respond to at least some human needs, at least sometimes.

⁴¹ Rawls, n 29 above, § 15; Benson, n 3 above, 456 *et seq.*