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Peter Benson, JUSTICE IN TRANSACTIONS: A THEORY OF CONTRACT LAW

Cambridge (MA): Belknap Press ([https:// www.hup.harvard.edu](https://www.hup.harvard.edu)), 2021. x + 624 pp.

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The claim that contracts and contract law are just is not generally accepted in legal literature. Accounts such as those of Alain Supiot and Katharina Pistor, to name but two recent ones, indicate that rather than justice, contracts and contract law pursue market-driven (specifically, capitalist) logics of accumulation (*Governance by Numbers: The Making of a Legal Model of Allegiance*, trans. Saskia Brown, 2017; *The Code of Capital. How the Law Creates Wealth and Inequality*, 2019). Thus, to claim, as Peter Benson does in his new monograph, *Justice in Transactions: A Theory of Contract Law*, that there is justice both in the way contracts operate and in how they are regulated, is a claim that calls for serious scrutiny.

Benson's main aim is two-fold: first, to develop "a public basis of justification" (xii, 3, 12, 25, 29, 319, 395) for contract law; secondly, and relatedly, to move beyond promissory and economic theories of contract which, on his view, are unable to provide the "distinct normative conception" (3) informing the law of contract. The first aim takes its inspiration from John Rawls' political philosophy (xii, 3). Specifically, it draws from Rawls' liberal "ideas of public justification and the reasonable" (11) and revises it so that it can be employed as a normative referent "for transactional relations" (ibid; see also Ch 11). Animated by this Rawlsian spirit, what makes Benson's justification of contract law *public* is the fact that it is grounded on "terms and reasoning [...] [that] are open to view as well as common, available, and reasonably acceptable to parties generally" (13). More specifically, "[t]he justification is ... public only inasmuch as it is something that *all* parties can reasonably and identically be expected to share" (ibid, emphasis in original). Furthermore, *qua* a theory, Benson's account must be subject to professional scrutiny by those who are tasked with "the interpretation, assessment, and application of the [...] considerations" (ibid) which compose it. As Benson observes, in Common Law jurisdictions, it is courts "performing [their] adjudicative function" (ibid) that are tasked with these activities. This, however, should not lead one to assume that the theory Benson envisages cannot be made to work for "other modern system of contract law" (29) as well, such as those "belonging to the civilian tradition" (ibid). And indeed, due to its drawing from a series of notions and values which define modern liberal political economies broadly understood, the theory is, to an extent, well-suited for Civil Law systems as well.

Regarding the second, and related, aim, it ought to be noted that the peculiar normative conception of contract law Benson sets forth in his book is one crafted from within the law of contract itself: "[it] is drawn from its principles and doctrines [...] [it] constitutes their organizing idea, underpinning and explaining the whole of contract law as well as its various parts" (3). In short, Benson's contract law theory aims to be analytically self-sufficient and internally coherent (395).

In setting out these two inter-related aims, Benson further specifies that his conception of contract law "embod[ies] a distinct conception of justice: justice in transactions" (30). The main point here is that, on Benson's reading, combining (contract) law and justice is a necessary step if a contract law theory is to be "morally acceptable" (ix, Ch 11). As Benson notes, the latter notion was first theorised by Aristotle, who referred to it as "corrective justice" (30) and divided it into "voluntary and nonvoluntary" justice (ibid).

From the very outset of his analysis, Benson makes it clear that the conception of contract law he is after is "latent in the main contract doctrines and principles" (9; see also 29, 320, 475) that constitute this branch of law. Accordingly, *Justice in Transactions* embarks upon an

intellectually rich and compelling journey through the whole of the contract law dimension, from formation to remedies, “to illuminate the internal rationality of contract law” (5). Divided into two parts, one exploring various contract law principles and doctrines, the other substantiating the proposed theory in detail to demonstrate its “intrinsic reasonableness” (319), the book is testament to Benson’s profound knowledge of the law of contract and scholarly acuteness. It not only features a great variety of examples and insights regarding “the principles, standards, and values of contract law” (19); it also meticulously engages with a wealth of established legislative, judicial, and scholarly views on the subject.

Of particular interest is Benson’s framing of contract as “transfer of ownership” (21). The latter is a central notion in Benson’s account. It recurs throughout the book and is discussed in detail in the first chapter opening the second part (i.e. Ch 10). By it, Benson means that, juridically, contracts are “an interaction [...] of representational acts” (320) by which “each party reciprocally and identically mov[es] a substantive content from its side to the other” (321). Thus, in and through this mutual interaction, of which the parties’ promise is the main propellant, “each side objectively recognizes the other’s exercise of exclusive rightful control over what he or she either gives up or takes” (ibid; see also 386).

Benson’s conceptualisation of contracts as instances of “transactional and [...] representational acquisition [of ownership]” (25) is entirely dependent upon, and thus revolves around, the notion of consideration. This Benson states clearly in several key-passages of his analysis. Thus, and by way of example, we read that “[the] promise-for-consideration relation is the basic contractual relation” (22). Accordingly, all “other [contract law] doctrines and principles” (ibid) are conceived as “fill[ing] out and specify[ing] its essential aspects and effects” (ibid). Not coincidentally, the requirement of consideration is discussed in the book’s very first chapter (where Benson holds that it “provid[es] the basic and general framework for the contractual relation as such”: 40), and then again in the chapter opening the second and last part of the book (Chapter 10), where the conceptualisation of “contract as representational transfer of ownership” is fully thematised. On this point, Benson’s reading of the (Common) law of contract’s dependency on the bargaining logic of consideration is wholly in line with earlier accounts emphasizing the pivotal role played by the “consideration-offer-acceptance” “indivisible trinity” (C C Hamson, “The Reform of Consideration” (1938) 54(2) *Law Quarterly Review* 234) in contract law theory (critically, see Luca Siliquini-Cinelli, “Reflections on the *Pactum* in the Public and Private Spheres”, in L Siliquini-Cinelli & A Hutchison (eds), *The Constitutional Dimension of Contract Law: A Comparative Perspective* (2017).

There is much to learn from Benson’s acute account of contract law. *Justice in Transaction* is a rich, intellectually rewarding journey through complex rules and themes that make up what is, arguably, the most relevant branch of law in market societies. If a criticism is to be raised against Benson’s account, it concerns the theory’s Aristotelian inspiration and orientation. In the book’s Introduction, Benson draws a parallel between his theory and Aristotle’s conception of voluntary corrective justice and states that his theory “engages some fundamental themes and outstanding questions arising from Aristotle’s account” (30). Unfortunately, not only does Benson not adequately thematise the link between his theory and Aristotle’s conception of justice, but, more importantly, his conception of justice turns out to be very distant from Aristotle’s, as it de-contextualises the latter by reading it through modern lenses. Not incidentally, as seen earlier, Benson’s main political-philosophical referents are Kant and Rawls. This shortcoming is unfortunate as it undermines Benson’s otherwise valuable insights on contract law’s nature, scope, and dynamics.

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