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Article

DISTRIBUTIVE JUSTICE AND CONTRACT LAW: ON THE INSTITUTIONAL DIVISION OF LABOR IN PETER BENSON

JUSTICIA DISTRIBUTIVA Y DERECHO CONTRACTUAL: SOBRE LA DIVISIÓN INSTITUCIONAL DEL TRABAJO EN PETER BENSON

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Abstract

The article deals with Peter Benson's defense of an IDL between institutions charged with carrying out distributive justice and contract law. More precisely, the article deals with two of Benson's theses in this regard. The first is the IDL thesis itself. According to this thesis, it is distributive justice itself that requires a division of labor between contract law and the institutions charged with meeting distributive injunctions. The second is the indirect application thesis, according to which IDL is compatible with distributive justice applying indirectly to contract law. The article raises objections to both theses.

Keywords: contracts; distributive justice; institutional division of labor; Benson

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Resumen

El artículo aborda la defensa que hace Peter Benson de una DIT entre instituciones encargadas de llevar a cabo la justicia distributiva y el derecho contractual. Más precisamente, el artículo aborda dos de las tesis de Benson al respecto. La primera es la propia tesis de la DIT. Según esta tesis, es la propia justicia distributiva la que requiere una división del trabajo entre el derecho contractual y las instituciones encargadas de cumplir los mandatos distributivos. La segunda es la tesis de la aplicación indirecta, según la cual la DIT es compatible con la justicia distributiva aplicada indirectamente al derecho contractual. El artículo plantea objeciones a ambas tesis.

Palabras clave: contratos; justicia distributiva; división institucional del trabajo; Benson

Introduction

The allusion to an IDL is present in John Rawls's writings on what constitutes, for him, the object of justice: the basic structure of society. This structure comprises, according to Rawls,

> "the way in which the major social institutions distribute fundamental rights and duties and determine the division of advantages from social cooperation"[1].

The IDL, in turn, is a division of labor between the institutions that are part of the basic structure of society and a "set of rules that govern the transactions and agreements between individuals and associations (the law of contract, and so on)"[2].

It is, therefore, roughly speaking, a division of labor between the institutions that make up the basic structure and private law (of which contract law is one of the main branches). The institutions of the basic structure would be responsible for preserving what Rawls calls "background justice" or for enforcing the principles that, according to Rawls, would be chosen in the original position[3]

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[1] Rawls (1999), p. 6.

[2] Rawls (1996), p. 268.

[3] In Rawls, principles of justice for the basic structure of society are the principles we would choose under certain conditions of limited information. Rawls designates as original position the position of agents who deliberate on principles of justice subject to the aforementioned conditions. On the original position, see Rawls (1999), chap. 3.

to govern the social distribution of primary goods[4]. Private law, in turn, would be responsible for regulating individual transactions, meeting the "requirements of simplicity and practicality". Individuals and associations would thus be "free to act effectively in pursuit of their ends and without excessive constraints"[5].

What the IDL entails, according to some interpreters, is that contract law and private law in general[6] remain indifferent to the injunctions of distributive justice[7]. In an ideal society governed by the principles of Rawls's conception of justice (justice as fairness), the role of private law would therefore be limited to providing simple and practical rules for individual transactions. Meanwhile, other institutions (for example, tax law) would seek to ensure that those transactions take place under a distributively fair background.

In the literature, there is a debate on whether this interpretation of the IDL –let me call it a "isolationist interpretation"[8]–, corresponds to Rawls's intentions[9] and is consistent with the rest of his theory. Considering that the basic structure of society is the object of justice due to its impact on the social distribution of primary goods, would it be defensible to exclude private law from that structure?[10].

[4] Primary goods are goods that serve the interests of citizens as those interests are represented in the original position. They include basic liberties, freedom of movement and free choice of occupation, powers and prerogatives of offices and positions, income and wealth and the social bases of self-respect. See Rawls (1996), p. 181.

[5] Rawls (1996), p. 268.

[6] Perhaps with exceptions, especially if we consider "private law" in a sense, common in civil law countries, which includes family and inheritance laws. The interpretation of the IDL to which the text alludes is mainly aimed at the more strictly patrimonial and transactional branches of private law, in particular the law of obligations and its main subareas: contract law, tort law, and the law of unjust enrichment.

[7] For examples of this interpretation, see Kronman (1980), pp. 499-500; Murphy (1998), pp. 257-258. Both Kronman and Murphy are critical of the IDL as they understand it.

[8] From now on, unless otherwise noted, it is in this sense that I will refer to the IDL.

[9] See, for example, Freeman (2018), pp. 193-194, for whom the isolationist interpretation is the result of an unfortunate wording in the famous passage from Rawls's *Political Liberalism.* According to Freeman, the sentence that begins on the penultimate line on p. 268 of *Political Liberalism* ("What we look for, in effect, is an institutional division of labor between the basic structure and the rules applying directly to individuals and associations") must be read with the amendment "What we look for, in effect, is an institutional division of labor between *the basic structure's rules for institutions and its rules* applying directly to individuals and associations". Thus, it would be clear that the IDL does not entail excluding private law from the list of institutions that make up the basic structure. For further considerations on the interpretation of this passage, see Kordana and Tabachnick (2005), pp. 605-606, n. 34); Murphy (1998), p. 261, n. 30.

[10] For examples of authors for whom the exclusion of private law from the basic structure is irreconcilable with the rest of Rawls's theory of justice, see Kordana and Tabachnick (2005); Scheffler (2015), pp. 217-220; Freeman (2018), chap. 5.

Recently, the IDL has been the subject of an sophisticated approach by Peter Benson in the book *Justice in Transactions: A Theory of Contract Law*. In this book, Benson defends a non-distributive theory of contract law, designated as "transactional" or "juridical conception". Benson claims that there is a mutually supportive relationship between a non-distributive conception of contract like his and distributive justice. The author therefore subscribes to a peculiarly ambitious thesis regarding IDL: not only would this division entail, in fact, keeping contractual law apart from distributive injunctions, as such isolation constitutes a demand by distributive justice itself. In other words, it is, among others, also for reasons dear to distributive justice that an IDL must take place[11]. Another thesis defended by Benson is that, even conceived along the aforementioned lines, the IDL is compatible with distributive considerations applying indirectly to contract law.

My objective in this article is to detail and scrutinize these two theses, namely:

a) the IDL thesis itself, in the terms in which Benson defends it (IDL thesis, for short) and
b) the thesis of the indirect application of distributive justice to contract law (indirect application thesis).

To this end, the article is organized as follows.

In section 1, I will make a brief reference to other theses by Benson. The objective is to provide the reader unfamiliar with Benson's work with an overview that helps to understand the context in which the IDL and indirect application theses take place. The next two sections, 2 and 3, are devoted to the IDL thesis. Benson uses two arguments to defend this thesis, which I will designate as the complexity and the basic liberties arguments. The complexity argument is the subject of section 2, while section 3 deals with the basic liberties argument. Section 4 turns, finally, to the indirect application thesis.

I. The Transaction Theory of Contracts and Some Related Theses

Benson argues for the IDL and indirect application theses as part of a transactional theory of contract law. According to this theory, contracts are a means of transferring ownership, which makes it possible to treat contract law as part of a system of private law that deals solely with protecting property rights. This is a system under which, consequently, the only possible cause of liability is interference with someone else's rights – what Benson calls

[11] Benson's emphasis is on contract law, but he implies that his arguments about IDL could be extended to other parts of private law. See, for example, Benson (2019), p. 454.

the principle of liability for misfeasance only. I would like to mention below some theses espoused by Benson of which it is important for the reader to be aware, since they are articulated with the theses that will be examined in the following sections.

The first thesis to be mentioned is the thesis of the completeness of the transactional conception of contract. According to Benson, the theory of contract as a transfer of ownership has the resources to deal with issues of contract law (issues such as conditions for the enforceability of promises and remedies for breach) without needing to be supplemented by other considerations. As Benson himself recognizes, the thesis of the completeness of the juridical conception is fundamental to the theses of IDL and indirect application[12]. After all, if the theory of contract as a transfer of ownership were incomplete, one would wonder why it would not be the case of supplementing it through considerations of distributive justice.

Another important thesis concerns the superfluity of contract law for distributive justice. When referring to distributive justice, Benson has in mind Rawls's theory of justice and, in particular, the second of the two principles that, according to Rawls, would be chosen in the original position[13]. By stating that the IDL does not contradict distributive justice, Benson therefore implies that the second principle of justice as fairness can be fully satisfied without being applied (or without directly being applied) to contract law.

A third important thesis is the thesis of the indispensability of the IDL for the justification of contract law. As already mentioned, Benson defends a purely transactional conception of contract in the light of which the contracting parties are proprietary agents subject to a single injunction, namely, that of not infringing on the rights of others. One could assume, then, that Benson was willing to defend such a conception without appealing to distributive justice. This is not the case, however. According to Benson, the justification of contract law requires that this area of law plays the institutional role of supporting the market as a system of needs[14]. But if the justification of contract law requires this institutional role, it also cannot be indifferent to how purchasing power is distributed[15]. The justification of contract law thus depends on a fair distribution of resources that enables the market to meet everyone's needs.

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[12] Benson (2019), p. 457.

[13] Rawls states this second principle as follows: "Social and economic inequalities are to satisfy two conditions: first, they are to be attached to offices and positions open to all under conditions of fair equality of opportunity; and second, they are to be to the greatest benefit of the least-advantaged members of society (the difference principle)". Rawls (2001), pp. 42-43. The first condition is also known as the principle of fair equality of opportunity, while the second condition is the difference principle.

[14] Benson (2019), p. 413 et seq.

[15] *Op. cit.*, pp. 453-454.

Having mentioned the three theses, I believe it is now possible to state more precisely the limits of the discussion that will take place in the following sections. As regards the first of these, I will therefore assume that the theory of contract as a transfer of ownership is, in fact, complete. As to the second, I will also assume that Benson is right about the superfluity of contract law for distributive justice[16]. Note, however, that agreeing with this last thesis does not imply agreeing with the IDL thesis, which is much more ambitious. After all, the fact that distributive justice *can* be fully realized through other institutions (thesis of the superfluity of contract law) does not entail that it *must not* be realized through private law (IDL thesis).

The third thesis, in turn, is outside the scope of the article, since the question faced here is not about the role of distributive justice for the justification of contract law. What I propose to inquire is whether the IDL is an imperative of distributive justice, as well as whether this division of labor is compatible with the indirect application of distributive values to contract law. Let us now turn to these questions.

II. IDL Thesis: The Complexity Argument

As noted in the previous section, something that stands out in Benson's writings on the IDL is their ambition. The thesis of IDL is not simply that distributive justice can be realized by means other than contract law. It also urges that *this is how it has to be*, so that there is a mutually supportive relationship between distributive justice and the juridical (non-distributive) conception of contract. Referring to distributive justice and other moral prescriptions, Benson states that:

> "not only is there no incompatibility between contract and these other imperatives, but they mutually support each other as distinct but integrated aspects of a more complete scheme of morality and justice"[17].

But what kind of support can a non-distributive conception of contract law gain from distributive justice?

Benson offers two arguments in this regard. The first of them, object of this section, alludes to the difficulty of meeting distributive justice through

[16] None of the two theses is uncontroversial. For discussions of the first thesis, see Kronman (1980); Craswell (1989). For the second, see Dagan et Dorfman (2018).

[17] Benson (2019), pp. 396-397.

contract law. Considering that the distributive effects of individual transactions are subject to many contingencies, realizing distributive justice would have the consequence of making the rules of contract law quite complex. For example, suppose that the distributive impact of a transaction between *A* and *B* depends on:

i) that *C*, *B*'s ex-partner, finds a suitable partner to replace *B*;
ii) that there is no sharp increase in demand for the product that *A* must supply to *B*; and
iii) that a state policy of fiscal subsidy for the region where *A*'s production takes place is maintained.

A distribution-sensitive contract law might have to subject the enforceability of the covenant between *A* and *B* to these and possibly many other conditions.

However, given the nature and role of principles aiming to ensure fair background conditions over time, the systemic, unavoidably complex, and long-term nature of the factors that must be considered for this purpose cannot be feasibly known and readily followed by individual transactors in their circumscribed local situations or ascertained and assessed by courts in their adjudicative role. All this must be reasonably viewed as beyond their respective competences. Far from meeting the market-generated demand for knowable rules and standards, imposing upon individuals or courts the burden of ensuring background justice would thus completely undermine that imperative and make the realization of background justice illusory. Therefore, to prevent the erosion of background justice, the requisite principles must have an institutional form that is distinct from the contract law that directly governs separate transactions[18].

For distributive justice, the complexity of contract law is a problem for more than one reason. First, predictability is a condition of justice. The application of principles of distributive justice whose results are not predictable is, according to Benson, morally indefensible[19].

Second, complying with a distribution-sensitive contract law is beyond the capabilities of judges. If the task of distributive justice were attributed to the courts, the consequence would be frequent errors, with possibly deleterious results[20].

The complexity argument is hinted at by Rawls himself, who, when presenting the idea of IDL, claims that rules about individual transactions "cannot be too complex, or require too much information to be correctly applied"[21].

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[18] Benson (2019), p. 455, note omitted.
[19] *Op. cit.*, pp. 457-458.
[20] *Op. cit.*, p. 458.
[21] Rawls (1996), p. 267.

However, as an argument in favor of the IDL thesis, the complexity argument makes the mistake of assuming that contract law cannot comply with distributive justice through simple rules. Complexity could arguably be a problem if we intended to achieve distributive justice through contract law alone. However, I am not aware of any egalitarian liberal who subscribes to the thesis that contract law (or private law in general) should be the only institutional tool to meet the demands of distributive justice. Nor is it necessary, of course, to endorse this extreme thesis in order to reject the IDL as Benson proposes it. It suffices to acknowledge that contract law must be among the institutions employed for distributive purposes.

The question, therefore, is whether complexity is an inevitable consequence of any employment of contract law for distributive ends. The answer is negative. Consider, for example, what Samuel Freeman says about the application of the difference principle (one of the parts of the second principle of Rawls's justice as fairness) to contract law:

> "[...] the difference principle [...] would not permit the laissez-faire doctrine of caveat emptor, especially in sales of goods, services, and real property to ordinary consumers who are not in a position to acquire information about the quality of goods and services or the trustworthiness of those from whom they make purchases. Certain implied warranties in contracts regarding the safety and reliability of goods, and other protections for consumers, would then also be justifiable on grounds of the difference principle. Gross differences in economic bargaining power might provide added grounds for judging contracts unconscionable or voidable where it is clear that a party has taken unfair advantage of another's ignorance, desperation, or poverty. Also, gross mistakes regarding the value of assets, or due to a failure to understand or even read long and complex documents written in legal jargon that are very difficult for a layperson to understand, may make contracts voidable. Unreasonable provisions in mortgage and other lending contracts (*e.g.*, loss of equity in event of default) regarding foreclosures and debt collections might be deemed void under the difference principle. And predatory lending contracts to the less advantaged should be at least voidable under the difference principle, and subject to repayment of loans at a reasonable rate"[22].

The question that matters to us is not whether Freeman is correct about the implications of the difference principle. What matters is the comparison he makes between two *well-known* types of contract law: one is a laissez-faire

[22] Freeman (2018), p. 181.

contract law, while the other includes measures to protect vulnerable contractors such as consumers. There are three points to note here. First, the question Freeman asks himself about these two types of contract law is an intelligible one: It makes sense to ask under which of these regimes the poorest citizens will be better off. Second, whatever the answer, the type of regime to be preferred would be a practicable one, since neither of the two types stands out for the high complexity of its rules[23]. Third, it makes sense that one type of regime be preferred for the distributive reasons that Freeman alludes to. But, in this case, we would already be abandoning the purely transactional conception of contract.

Another misunderstanding is that achieving distributive justice would require giving up general rules. So, in order to subject individual transactions to distributive purposes, judges would have to decide according to the circumstances of each case and without following pre-established rules. But, as Anthony T. Kronman ponders, even if this were a promising way of realizing distributive justice through private law, it is certainly not the only one; we can instead insist that judges decide cases through the application of pre-established rules and without regard to the distributive consequences of their decisions, while at the same time shaping the rules to be applied in order to achieve distributive goals[24].

The lesson to be drawn from this discussion is that, contrary to what the complexity argument suggests, a contract law sensitive to distributive reasons is not necessarily a law whose rules suffer from exaggerated complexity or, worse still, devoid of rules. Complexity could be the price to pay if we tried to meet the demands of distributive justice through contract law alone. As this is not the case, it is enough that, among fairly simple contractual regimes, we choose the one most likely to achieve distributive desiderata.

III. IDL Thesis: The Basic Liberties Argument

Another argument in favor of the IDL pictures contract law as a basic liberty. Basic liberties are the subject of the first principles of Rawls's conception of justice[25]. Note that, between the first and second principles, Rawls

[23] Contract law systems that make more important exceptions to laissez-faire doctrine may be comparatively more complex, but are currently in place in many countries. Thus, it is difficult to claim that they are indeterminate to the degree alluded to by the complexity argument.

[24] Kronman (1980), p. 501.

[25] This first principle is stated as follows: "Each person has the same indefeasible claim to a fully adequate scheme of equal basic liberties, which scheme is compatible with the same scheme of liberties for all [...]". Rawls (2001), p. 42.

states that the first enjoys lexical priority[26]. Consequently, the distributive demands of the second principle (the demands of fair equality of opportunity and the difference principle) are subordinated to the basic liberties warranted by the first principle.

At first glance, it seems promising to appeal to the lexical priority between Rawls's two principles of justice. After all, as a basic freedom, it would indeed seem a matter of justice (of justice, at least, as Rawls conceives it) that contract law should not be subject to distributive injunctions of the second principle. The problem is that treating contract law as a basic freedom seems to be in contradiction with Rawls's own interpretation of the first principle. According to Rawls, although it includes a right to personal property, the principle of basic liberties does not encompass robust economic freedoms such as private ownership of the means of production[27]. Let us see, then, how Benson proceeds in this respect.

Benson's argument consists in affirming the congruence between the juridical conception of contract and three of the freedoms included by Rawls in the first principle, the right to personal property, freedom of movement and free choice of occupation. For Benson, the fact that Rawls's first principle of justice does not safeguard robust economic freedoms is not a problem. After all, the juridical concept of contract says nothing about the limits of the market, that is, about what can be the object of individual property and what can be transacted[28]. As much as Rawls's principle of basic freedoms, the juridical conception of contract is thus compatible with the abolition of private property in the means of production, as well as with constraints on market freedom.

On the other hand, personal property, freedom of movement and free choice of occupation are freedoms that, according to Benson, require the institutional apparatus of the market for their realization. Benson interprets the right to personal property as a "right to acquire, hold, and exchange personal property"[29]. Nor can there be freedom of movement and free choice of occupation without a labor market. Much more, however, than just entailing market institutions, the mentioned basic freedoms are congruent with the transactional conception of contract because they are the same freedoms that this conception enforces, although not as basic liberties but as legal rights. This is a crucial part of the argument, so it's useful to transcribe what Benson says about it:

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[26] Rawls (1999), §82.

[27] Rawls (1996), p. 298.

[28] Benson (2019), p. 459: "[...] as understood in terms of the juridical conception, contract law does not exhaustively and antecedently specify the particular subject matter or scope of the transactions that come within its purview. Contract law also leaves open and does not decide what and how much should be market-determined".

[29] Benson (2019), p. 459.

> [...] the right of property and the formal freedom of occupation that background political justice embeds and validates from its own standpoint as basic liberties are the very same in content as that which the institution of contract law works out from within its own framework –the only difference being that contract law specifies and justifies these rights as part of its juridical conception, whereas background justice upholds these same rights as part of its own normative political conception of what free and equal citizens need[30].

This coincidence of content between basic freedoms and the rights of the juridical conception of contract is constituted, in my view, by two negative characteristics. First, as much as Rawls's basic liberties, the rights of the juridical conception of contract are neutral in relation to the ends chosen by the contractual parties. Second, these liberties and rights also coincide in their insensitivity to distributive justice. Distributive considerations do not affect basic liberties because of the lexical priority between the two principles of justice as fairness; the same considerations do not affect the rights of the juridical concept of contract either, in this case because they are rights based on a concept of the person (what Benson calls the juridical concept of person) that is indifferent to needs[31].

The point Benson wants to get at is that if basic freedoms entail a market whose deficiencies (in particular, uncertainty about the rights of agents) are made up for by an institution such as contract law, then the contract law must be of a sort that conforms to the freedoms in question. This is, for Benson, a purely transactional contract law.

Benson's argument about basic liberties is, in my view, the most ingenious presented to date in favor of the IDL. I dare, however, raise two objections. The first of these has to do with a certain conception of the lexical priority between principles of justice which plays a decisive role in Benson's argument. Consider that there are two possible interpretations of what lexical priority consists of[32]. According to the first interpretation, which I shall call weak, the lexical priority of principle *A* over principle *B* simply entails that *A* cannot be violated for *B*'s sake. According to the second interpretation (strong interpretation), what lexical priority requires is that there be one

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[30] Benson (2019), p. 459.

[31] *Op. cit.*, p. 396: "We have seen that the higher-order moral interest that parties have as juridical persons is in asserting their sheer independence from everything given or particular, with the consequence that their particular interests, needs, purposes, preferences, and subjective understandings are per se irrelevant to the contractual analysis of their relation".

[32] My comments cover lexical priority between principles in general, but, like Benson, I have particularly in mind the lexical priority between Rawls's two principles of justice.

or more institutions devoted exclusively to *A*. Only after these institutions are established would we be allowed to implement *B*, and never through the same institutions used in the service of *A*.

To see why Benson's basic liberties argument depends on the strong interpretation of lexical priority, it is enough to ask what would be wrong with a contract law whose rules, while sensitive to distributive considerations, were reasonably clear. A contract law with these features would overcome market deficiencies by defining ex ante the conditions for the enforceability of promises and the rights and duties of contracting parties. Consequently, it would meet the basic freedoms that, according to Benson, depend on an institutionally supported market for their realization. What we would have, in such a case, would be a contract law aimed at fulfilling the injunctions of Rawls's second principle of justice, but without neglecting what, in terms of basic freedoms, also needs to be done. If, for Benson, the lexical priority between the two principles of justice requires an IDL, it is therefore because lexical priority does more than merely preserving the first principle from being violated for the sake of the second. This priority seems further to require institutional tools used exclusively to comply with the first principle.

Benson may be right to insist on the strong interpretation of lexical priority, but he owes us an argument in this regard. In Rawls's theory of justice, the lexical priority between principles is defended with the argument that a conception of justice must offer a public basis for judging citizens' claims. This demands that such claims are not supported by potentially conflicting principles, the relative weight of which is uncertain. For this function of justice as a public basis of justification to be satisfied, it is sufficient that we know what to do in cases where there are two or more claims supported by different principles. To this end, however, lexical priority in the weak sense is enough[33].

A second objection is that the basic liberties argument does not tell us why the IDL should apply beyond the core of contract law that concerns these liberties. Benson recognizes that, like the juridical conception of con-

[33] I acknowledge that there is a passage in *A Theory of Justice* where Rawls seems to refer to lexical priority between principles in the strong sense. It is as follows: "This is an order [refers to the lexical order] which requires us to satisfy the first principle in the ordering before we can move on to the second, the second before we consider the third, and so on. A principle does not come into play until those previous to it are either fully met or do not apply". Rawls (1999), p. 38. Immediately afterwards, however, it becomes clear that the interest in defining lexical priority relationships between the principles of the same conception of justice is to avoid principles having to be weighed: "A serial ordering avoids, then, having to balance principles at all; those earlier in the ordering have an absolute weight, so to speak, with respect to later ones, and hold without exception".

tract, Rawls's principle of basic liberties is silent on ownership of the means of production and economic institutions in general[34]. All that the principle of liberties requires, as Benson interprets it, is a freedom of exchange restricted to the scope of the rights to personal property, freedom of movement and free choice of occupation. But if a society chooses to have individual property rights and a market that are more robust than necessary to meet the aforementioned basic freedoms, why must the law of contracts applicable to that eligible part[35] (that is, the one not required by the basic liberties) remain insensitive to the second principle of Rawls's justice? It seems that, even accepting Benson's interpretation of what lexical priority entails, the basic liberties argument cannot account for an IDL that encompasses the whole of contract law of our capitalist societies.

IV. Thesis of Indirect Application

The other thesis I would like to address is the indirect application thesis. According to Benson, the IDL does not preclude distributive injunctions from applying to contract law, so long as that application is indirect. My aim in this section is to scrutinize what this indirect application consists of. Furthermore, I also intend to argue that the sense of indirect application that Benson has in view differs importantly from a more common one (often found in the debate on the application of fundamental rights to private law). The consequence of this difference is that the indirect application thesis seems of little interest.

Let's start with what I call the more common sense of indirect application. Like Benson, I have in mind, in this regard, the voluminous literature on the application of fundamental rights to private law. In this literature, what is usually called indirect application (or efficacy) is an application mediated by doctrines or legal provisions specific to private law. Due to their seman-

[34] Benson (2019), pp. 459-460: "Contract law also leaves open and does not decide what and how much should be market-determined. [...] I have suggested that what the institutional role of contract does suppose and accommodate is only this: an existing system of needs comprising some domain of market relations through which individuals can enter legally enforceable voluntary bilateral transactions and in this way exercise their capacities for ownership and exchange in the pursuit (under the idea of the rational) of their particular interests and conceptions of good. In short, there must be at least the opportunity of acquiring and exchanging some forms of property, both assets and services. This criterion is fully satisfied even if limited to the narrow conception of personal property and the free choice of occupation that are enshrined in Rawls's first principle. More than this, contract law does not require".

[35] This eligible part includes contracts on goods such as education and health, the commodification of which a society committed to justice as fairness may well prefer to avoid.

tic openness, these doctrines or provisions can be subject to reinterpretations influenced by fundamental rights. It is this effect exercised by fundamental rights in private law –the effect or reinterpreting doctrines and semantically open legal provisions– that is usually designated as indirect application of fundamental rights to private law[36]. Something to highlight regarding this indirect application is the assumption that, despite being applied only indirectly, fundamental rights make some difference, that is, that the interpretation of private law is actually affected by fundamental rights. This implies that fundamental rights offer one or more reasons for private law to be given an interpretation *x*, reasons without which another interpretation, y, could prevail.

Well, let's go back to Benson. When dealing with the relation between distributive justice and contract law, Benson alludes, as mentioned, to discussions about the efficacy of fundamental rights in private law. He claims that his theory is compatible with an indirect application of distributive justice to contract law in the way in which, in the literature, the indirect application of fundamental rights to private law is conceived[37]. Benson divides his analysis of the topic into three parts, concerning, respectively, the principle of basic liberties, the distributive demands of Rawls's second principle (the principles of fair equality of opportunity and difference) and formal equality of opportunities. Let's see what he has to say about each of these topics.

As far as basic liberties are concerned, Benson's thesis is that their indirect application to contract law takes place through an inalienable core of capacities and freedoms:

> "Now based on the juridical conception alone, this inalienable core clearly includes the legal capacity to own and exchange property. But it need not stop there. Under this rubric of the policy of the law, it can incorporate everything that constitutes the inalienable moral identity of individuals in virtue of which they are free and equal participants in the different forms of fair social cooperation. Also included, therefore, are the freedom to take part effectively in market

[36] See, *e.g.*, Cherednychenko (2006), pp. 494-495: "According to this theory, constitutional rights as objective values were only to influence private law by affecting the interpretation of its existing rules, whereas a dispute between private parties on the rights and duties that arise from rules of conduct thus influenced by the constitutional rights was to remain 'substantively and procedurally a private law dispute' ". A famous precedent on the indirect application of fundamental rights to private law is the Lüth case of the German Federal Constitutional Court (BVerfG 15 January 1958). On that occasion, the court gave to the §826 of the German Civil Code an interpretation in line with the fundamental right to free speech.

[37] Benson (2019), p. 463, n. 154.

> relations and thereby to earn one's livelihood as well as the right to have the necessary means and opportunities to meet one's basic needs in a condition of nondependence upon the wills of others. Ultimately, this inalienable core comprises whatever can count as (or be presupposed by) a basic liberty in Rawls's sense, for example, freedom of religion and conscience, the political liberties and their fair value, freedom of association, and even a substantive claim (not to be confused with the difference principle) to have one's basic needs met"[38].

At first glance, this could seem a case of indirect application in the usual sense. One could take inalienable core as an open concept of contract law whose interpretation is affected by Rawls's first principle of justice. Understanding the passage transcribed above in this way contradicts, however, the thesis that the juridical conception of contract is complete. Benson criticizes the direct application of fundamental rights to contract law because it:

> "fails to recognize the possibility, for which I have argued in detail, that contract doctrines specify a distinct and complete code of publicly justifiable fair and reasonable principles for all matters having to do with the parties' coercive rights and duties"[39].

But if the doctrines of contract law (as interpreted in Benson's theory) provide a complete code for dealing with all questions of contract law, then we must believe that everything Benson asserts about the inalienable core could be deduced exclusively from his theory and, in particular, from the theory's conception of person as an independent agent. It may be that Benson is right in noting a happy coincidence between the inalienable core as defined in light of the juridical conception of contract and what would constitute this same core according to the principle of basic liberties. However, in order for the thesis of the completeness of contract law to be maintained, it is necessary that the inalienable core can be inferred without appealing to the basic liberties.

As far as basic freedoms are concerned, Benson's thesis regarding indirect application is, therefore, sui generis. Basic freedoms would define a core of freedoms and capabilities that cannot be the subject of a contract, but this core could also be drawn exclusively from the juridical conception of a contract. Thus, unlike the traditional sense, the indirect application

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[38] Benson (2019), p. 464 (notes omitted).

[39] *Op. cit.*, p. 463.

that Benson has in mind does not offer us reasons for a reinterpretation of private law[40].

Let's move on to the second principle. Benson is less sympathetic to the indirect application to contract law of the principle of fair equality of opportunity and the difference principle. Not only are these principles lexically subordinated to the principle of basic liberties, but also "there is the further difficulty that these principles are general and systemic norms that cannot be readily and effectively applied by courts in their adjudicative function"[41]. Benson seems to assume that distributive justice can be applied to contract law only on a case-by-case basis. But, as I argued earlier, this is not true. Distributive injunctions can also determine the content of general rules to be followed by judges, who will then decide in accordance with those rules and without regard to the distributive consequences of each single contract.

The last part of Benson's discussion on indirect application deals with formal equality of opportunity or "careers open to talent". Unlike fair equality, formal equality of opportunities is content with the absence of certain discriminations –for example, discriminations based on gender, race and sexual orientation[42]. Formal equality of opportunities thus contrasts, according to Benson, with the rest of Rawls's second principle of justice, because its application "would seem to be more readily practicable and justiciable before a court"[43]. The difficulty is that the application of formal equality of opportunities seems to contradict the contractual doctrine of offer and acceptance, according to which the reasons why someone may refuse to propose a contract (or accept a contract offer) are not controllable and may, consequently, include reasons (of gender, race, etc.) that formal equality of opportunities would like to ban.

[40] It doesn't help that Benson restricts the indirect application to what Olha Cherednychenko calls the weak sense. Cherednychenko in fact differentiates indirect application in the strong and weak senses. In the first, private law is subordinate to fundamental rights, while in the second, the relationship between the two is complementary. There is no point in discussing the merits of this distinction here. The important thing is that even what Cherednychenko calls weak indirect application involves some influence of fundamental rights on private law: "The complementarity between fundamental rights and private law implies that although fundamental rights law enjoys a higher position in the hierarchy of norms, this does not lead to the substitution of private law as the law governing relationships between private parties by fundamental rights. [...] fundamental rights only *influence* private law, and it is private law which determines how the values embodied therein are to be accommodated within it. In other words, fundamental rights affect private law and private law affects the way in which fundamental rights affect it". Cherednychenko (2007), pp. 53-54.

[41] Benson (2019), p. 465.

[42] On the difference between formal and fair equality of opportunity, see Rawls (1999), pp. 62-63. Rawls's second principle of justice includes the principle of formal equality or careers open to talents, but adds to this principle the fair equality principle itself, according to which "those with similar abilities and skills should have similar life chances".

[43] Benson (2019), p. 466.

Benson's solution to this dilemma is to defend the indirect application of formal equality of opportunity to contract law, but in the particular terms in which this application is conceived by him. According to Benson, it is sometimes reasonable to interpret an offer as intended for the general public. Such an interpretation will be reasonable to the extent that discrimination proves to be irrelevant to the offeror's interest in the performance. In such cases, arbitrary exclusion of recipients (for example, for reasons of gender, race, etc.) shall be considered null and void[44].

The reason for Benson to state that this is an instance in which formal equality of opportunities is applied "indirectly and thus consistently with the internal makeup of contract law"[45] is that, in general, offers are subject to be interpreted according to what, for the other party, was reasonable to infer[46]. Thus, the solution that he finds to incorporate careers open to talents into contract law is, in fact, a solution consistent with the principles of a purely transactional conception of contract. On the other hand, it is legitimate to ask what role distributive justice plays in this case. If the refusal to contract with certain groups of people will only be dismissed when, according to the principles of the juridical conception of contracts, this refusal is contrary to the terms of the offer, what difference does it make that formal equality of opportunities is an imperative of justice? Once again, therefore, Benson's indirect application of distributive justice to contract law is superfluous. It is an operation through which a result that conforms to distributive justice is reached, but this is the same result we would get at if distributive justice were put aside[47].

Conclusion

This article deals with the recent and original defense of an IDL between distributive justice and contract law made by Peter Benson in the book *Justice in Transactions*. More precisely, I examined two theses advocated by Benson, the IDL thesis itself and the thesis of the indirect application of distributive justice to contract law.

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[44] Benson also says that the universality of the offer can also be imputed to the offeror as a "fixed contractual incident" (analogous to an implication) "when the offeror has legal exclusive control over a resource or facility sufficient to affect a legitimate interest of access that all members of the public are deemed to share". *Op. cit.*, p. 467.

[45] *Op. cit.*, p. 466.

[46] *Op. cit.*, pp. 112-113.

[47] Benson also says that the universality of the offer can also be imputed to the offeror as a "fixed contractual incident" (analogous to an implication) "when the offeror has legal exclusive control over a resource or facility sufficient to affect a legitimate interest of access that all members of the public are deemed to share". Benson (2019), p. 467.

According to the IDL thesis, a division of labor between contract law and institutions charged with carrying out distributive justice is defensible from both the point of view of contract law and justice itself. On the one hand, a purely transactional contract law needs, to justify itself, institutions that ensure background justice. On the other hand, distributive justice also requires a contract law conceived on a strictly transactional basis. Benson offers two arguments in favor of this last claim.

According to the first argument, which I called the complexity argument, distributive justice requires that contract law be made up of rules that are easy to follow and whose application has predictable results. My objection to this is that Benson undulyassumes that distributive considerations cannot be incorporated into contract law through rules with the features (clarity, easy of application, etc.). A contract law influenced by distributive justice is not necessarily constituted by excessively complex rules.

The second argument is the more original of the two. It appeals to basic liberties –in particular, the rights to personal property, freedom of movement and free choice of occupation. According to Benson, these liberties entail a certain freedom to contract and require that contract law overcomes certain market deficiencies (fundamentally, uncertainty about the rights and duties of contracting parties). My objections to this argument were two-

fold. First, the argument wrongly assumes that the lexical priority between principles of justice entails institutions aimed exclusively at realizing the principle that enjoys priority. Second, the argument does not account for why all contract law (and not just the part of that law required by basic liberties) should remain insensitive to distributive justice.

The other thesis that was the subject of the article, the indirect application thesis, states that the IDL is compatible with distributive justice being applied to contract law, as long as only indirectly. Regarding this thesis, what I tried to demonstrate is that Benson conceives the indirect application of distributive justice to contract law in a sui generis way –a way contrasting with what, in the literature, is reffered to as indirect application of fundamental rights to private law. Unlike indirect application in the usual sense, the indirect application that Benson envisages is one in which distributive justice merely endorses results that would be obtained independently, *i.e.* only with the resources of a purely transactional conception of contract.

References

Benson, Peter (2019). *Justice in Transactions: A Theory of Contract Law.* Cambridge: Belknap Press.

Cherednychenko, Olha (2006). "Fundamental Rights and Contract Law". *European Review of Contract Law*, vol. 4. Berlin.

Cherednychenko, Olha (2007). *Fundamental Rights, Contract Law and the Protection of the Weaker Party: A Comparative Analysis of the Constitutionalisation of Contract Law, with Emphasis on Risky Financial Transactions.* Munich: Sellier European Law.

Craswell, Richard (1989). "Contract Law, Default Rules, and the Philosophy of Promising". *Michigan Law Review*, vol. 88, No. 3. Michigan.

Dagan, Hanoch and Avihay Dorfman (2018). "Justice in Private: Beyond the Rawlsian Framework". *Law & Philosophy*, vol. 37. Berlin.

Freeman, Samuel (2018). *Liberalism and Distributive Justice.* New York: Oxford University Press.

Kordana; Kevin and David H. Tabachnick (2005). "Rawls and Contract Law". *George Washington Law Review*, vol. 73, No. 3. Washington.

Kronman, Anthony T. (1980). "Contract Law and Distributive Justice". *Yale Law Journal*, vol. 89, No. 3. New Haven.

Murphy, Liam B. (1998). "Institutions and the Demands of Justice". *Philosophy & Public Affairs*, vol. 27, No. 4. Hoboken: NJ.

Rawls, John (1996). *Political Liberalism.* New York: Columbia University Press.

Rawls, John (1999). *A Theory of Justice*, 2ª ed. New York: Belknap Press.

Rawls, John (2001). *Justice as Fairness: A Restatement.* New York: Belknap Press.

Scheffler, Samuel (2015). "Distributive Justice, the Basic Structure and the Place of Private Law". *Oxford Journal of Legal Studies*, vol. 35, No. 2. Oxford.

Acronyms and Abbreviations

chap.	chapter
DIT	División Institucional del Trabajo
e.g.	*exemple gratia*
etc.	etcétera
i.e.	*id est*
IDL	Institutional Division of Labor
NJ	New Jersey
Op. cit.	*Opus citatum*
ORCID	Open Researcher and Contributor ID
n.	note
No.	number
p.	page
pp.	pages
seq.	sequentia