

The Complex Context of Contract Law

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Review Essay

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REVIEW ESSAY

THE COMPLEX CONTEXT OF CONTRACT LAW[©]

IMPLICIT DIMENSIONS OF CONTRACT: DISCRETE, RELATIONAL, AND NETWORK CONTRACTS

EDITED BY DAVID CAMPBELL, HUGH COLLINS &
JOHN WIGHTMAN (Oxford: Hart, 2003) 401 pages.

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THE TRANSFORMATION OF CONTRACT IN EUROPE BY LEONE
NIGLIA (The Hague: Kluwer Law International, 2003) 235 pages.

BY ALBERTO SALAZAR VALLE*

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I. INTRODUCTION

Re-conceptualizing contract law in light of its broader context has a long academic history. Both law and economics, and law and society scholarship have made important contributions to this end. This article critically reviews two important contributions to the study of “contract law in context,” namely David Campbell, Hugh Collins, and John Wightman’s *Implicit Dimensions of Contract*¹ and Leone Niglia’s *The Transformation of Contract in Europe*.² Both works suggest that contract law should no longer

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¹ David Campbell, Hugh Collins & John Wightman, eds., *Implicit Dimensions of Contract: Discrete, Relational, and Network Contracts* (Oxford: Hart, 2003) [*Implicit Dimensions*].

² (The Hague: Kluwer Law International, 2003) [*Transformation of Contract*].

remain separated from the context of market transactions. The collection of articles by Campbell, Collins, and Wightman suggest that contract law needs to be re-examined with consideration to its implicit dimensions. But the context of contracts is not just composed of implicit contractual practices or customs. Contract law may also reflect broader economic, political, or social choices. This may include the sole pursuit of the competitiveness of market capitalism: Leone Niglia concludes that several European contract laws tend to satisfy the needs and values of the market. Both works further demonstrate that classical contract law is inadequate and ought to be abandoned.

This article argues that, despite these contributions, the study of contract law in context urgently needs better descriptive and normative frameworks that not only illuminate the context of contracts and its interrelations with contract law but also solve unavoidable contractual justice problems and determine the values that may guide contract law. The first section of this article briefly examines the contributions of the two reviewed books. Both the implicit dimensions project and the evolution of European contract law are described. In the second section, I critically assess the central arguments of the books and explore alternative views of contract law in context. This criticism suggests a different story of the implicit dimensions of contract that in turn complicates attempts at understanding the context of contracts. This section concludes with a preliminary exploration of a communicative institutional view of contract law in context. In this view, contract law is seen as an output of the communicative process of contracting individuals and groups, which is involved in enhancing human rights. The article concludes that the specific contract law implications and empirical basis of this approach remain a challenge for future research.

II. CONTRACT LAW IN CONTEXT

A. *The Implicit Dimensions of Contracts*

Both of the reviewed works suggest that contract law should no longer remain separated from the context of market transactions. Classical contract law is being and ought to be abandoned. Instead, contract law should be interpreted and enforced in light of its context. The collection of works edited by Campbell, Collins, and Wightman suggests that contract law should recognize and respect the implicit dimensions of contracts. These include non-legal sanctions, customs, trust, cooperative practices,

expectations,³ and conventions of meaning in language.⁴ The authors defend this view from different angles and find implicit dimensions of contract in several areas such as consumer, commercial, and corporate relations.

Several articles in the book defend the significance of the implicit dimensions of contract from a more general perspective. Recognizing that the formal approach to contracts may have some merit, Stewart Macaulay suggests that the legal system may lose its legitimacy if it ignores the implicit dimensions of contracts and rejects the “real deal” of the parties.⁵ Respecting this real dimension of contracts may help settle disputes in a manner that satisfies the expectations of both parties. Roger Brownsword argues that courts may need an ethical theory of contract to guide the determination, recognition, and protection of implicit dimensions of contracts.⁶ Taking a contextualist approach, Brownsword suggests that in interpreting contracts the real debate is about the role played by normative standards of fairness. Recognizing that the “reasonable expectations” of the parties can be based on the interpretation of different factors such as conventions, business practices, and objective standards, he claims that the law can develop objective standards based on a Kantian theory of moral entitlements. These standards would establish basic principles of contracting, such as truth-telling and promise-keeping, that all contracting parties should respect.

The concept of relational contracts has shown that written contracts are relative and that non-written aspects of contracts are critical for a successful market exchange. The theory of relational contracts shows that trust, cooperation, and incomplete obligations are central features of contracts. Ian R. Macneil argues that a good understanding of contracts requires starting the analysis by examining the context and giving serious consideration to all relational elements.⁷ Renaming his relational contract theory “essential contract theory,” Macneil argues that this approach compels those attempting to understand contracts to consider elements of power, solidarity, reciprocity, and harmonization with the social matrix. He

³ *Implicit Dimensions*, *supra* note 1 at 7-9.

⁴ *Ibid.* at 49.

⁵ “The Real and the Paper Deal: Empirical Pictures of Relationships, Complexity and the Urge for Transparent Simple Rules” in *Implicit Dimensions*, *supra* note 1 at 51.

⁶ “After *Investors*: Interpretation, Expectation and the Implicit Dimension of the ‘New Contextualism’” in *Implicit Dimensions*, *supra* note 1 at 103.

⁷ “Reflections on Relational Contract Theory after a Neo-classical Seminar” in *Implicit Dimensions*, *supra* note 1 at 207.

claims that such relational theory is relatively neutral and incomplete. William C. Whitford hypothesizes that, unlike their British counterparts, courts in the United States tend to exercise their discretion to fill gaps in the understandings of parties to contracts.⁸ It is argued that the non-responsiveness of the American legislative process to contract law issues and thus the need for judicial activism may mainly account for such difference in the use of judicial discretion. This argument shows that the ability to change written contracts to favour some implicit aspects of contracts may be an expression of the governing power of courts.

Another group of articles find implicit dimensions in consumer and commercial contracts. John Wightman argues that the unilateral expectations of consumers should be given greater weight in interpreting standard form contracts where customary implicit understandings and joint understandings are absent, as no contracting community exists to foster such shared understandings.⁹ Wightman maintains that one important reason for this argument is that the suppliers often shape consumer expectations by providing the informational context. Hugh Collins claims that the protection of the reasonable expectations of contractual parties is based on the economic and relational dimensions of contracts.¹⁰ This in turn constitutes the basis for regulating the discretionary power of contract parties. Following his social system theory, Gunther Teubner suggests that expert liability towards third parties is an implicit dimension of contracting that arises from the binding of expertise contract to project contract.¹¹ This third party liability emerges between parties that have no explicit contractual ties but participate in the same contractual network. This implicit dimension has its origin in the embeddedness of contract in a variety of social institutions. Third parties are then internalized into the contract. Drawing on this approach, Teubner claims that experts have a direct responsibility to third parties. In this way, all expectations in the contractual network are respected and protected against incompetence and fraud by liability rules.

The idea of implicit dimensions of contracts is taken farther in several articles that explore corporate governance issues. The authors argue that

⁸ "A Comparison of British and American Attitudes Towards the Exercise of Judicial Discretion in Contract Law" in *Implicit Dimensions*, *supra* note 1 at 187.

⁹ "Beyond Custom: Contract, Contexts, and the Recognition of Implicit Understandings" in *Implicit Dimensions*, *supra* note 1 at 143.

¹⁰ "Discretionary Powers in Contracts" in *Implicit Dimensions*, *supra* note 1 at 219.

¹¹ "Expertise as Social Institution: Internalising Third Parties into the Contract" in *Implicit Dimensions*, *supra* note 1 at 333.

implicit dimensions exist in corporate governance, shedding light on several problematic issues. The last portion of *Implicit Dimensions* is devoted to articulating this view. Paddy Ireland argues that contract theories of corporations have been used to justify the efficiency of corporate structure, ignoring the implicit expectations of important stakeholders such as employees and, more generally, neglecting the relational and network aspects of firms.¹² Simon Deakin, Richard Hobbs, David Nash, and Giles Slinger claim that corporate takeovers breach the implicit contracts between corporations and non-shareholder constituencies, such as employees and communities, as the short-term financial interest of shareholders is the main objective sought in takeovers.¹³ Their empirical study suggests that takeovers often cause redundancies and expropriation. This may create disincentives for employees, suppliers, and communities at large to invest in human capital and engage in innovation. This, ultimately, will risk the long-term success of productive enterprise and bring significant costs to society. From this view, the concept of implicit dimensions of contract suggests a progressive perspective of corporate governance that most traditional approaches have underestimated. Christopher Riley discusses the UK courts' changing stance on the implicit dimensions of contracts between shareholders in small, private companies.¹⁴ He finds that the courts have been recently denying force to the parties' informal agreements, implicit terms, and expectations, and have insisted on giving greater recognition to the shareholders' express agreements. Riley claims that this is a judicial retreat that may reflect the courts' reaction to concerns associated with the economic account of inter-shareholder contracting such as mounting litigation cost.

The fundamental message is that scholars and practitioners should take into account the context of contract law, and consequently, contract law itself needs to be reformulated in light of this context. While this approach has its merits, the claim that implicit dimensions of contract should be respected is to some extent another way of claiming that contract law should be responsive to the real needs of the market. This view is clearly adopted by several European countries where contract law is being reinterpreted to meet the needs of building efficient or fairer markets. In *The Transformation of Contract in Europe*, Leone Niglia explores these

¹² "Recontractualising the Corporation: Implicit Contract as Ideology" in *Implicit Dimensions*, *supra* note 1 at 255.

¹³ "Implicit Contracts, Takeovers and Corporate Governance: In the Shadow of the City Code" in *Implicit Dimensions*, *supra* note 1 at 289.

¹⁴ "Implicit Dimensions of Contract and the Oppression of Minority Shareholders" in *Implicit Dimensions*, *supra* note 1 at 365.

developments from a historical perspective.

B. *Contract Law in the European Market Context*

Leone Niglia finds that modern European contract law, particularly consumer law, tends to satisfy the needs and values of the market. Consumer protection law no longer applies general protective rules. Instead, it is now meeting the demands of efficient markets in the belief that this will ultimately make consumers better off. Consequently, European contract law is becoming a cluster of policy-oriented discretionary choices that explicitly promote market competitiveness.¹⁵ This transformation is termed “market factor-based” contract law. Niglia argues that this change represents a departure from the rule-based treatment of standard form contracts that characterized European countries during the twentieth century and prevailed until the 1990s. Under the rule-based contract law regime, all European courts and legislatures would identify a number of standardized consumer terms and assess the validity of them in the abstract without significant reference to the social context or the market system. However, since the 1990s, and unlike the old rule-based consumer protection policies,¹⁶ the rights and obligations of consumers are now largely being shaped by the demands of efficient markets. For instance, the same “penalty” or “exemption clause” may be held unfair in some cases and fair in other cases depending on the conditions and objectives associated with market competitiveness (for example, “whether harsh terms entail a reduction in price to the advantage of consumers”) and largely regardless of existing abstract legal rules.¹⁷ Niglia argues that England and Italy are clearly committed to this project but that this new trend has found some resistance in countries such as France and Germany where the “contract law of ‘rules’ remains in operation.”¹⁸

Niglia discusses this trend in the context of the 1993 European Community Directive on unfair terms in consumer contracts, a model of contract law aimed at promoting the competitiveness of internal markets.¹⁹ The focus is on “the law of standard form contracts” that is central both to

¹⁵ *Transformation of Contract*, *supra* note 2 at 149, 206 (regarding the UK).

¹⁶ *Ibid.*

¹⁷ *Ibid.* at 4.

¹⁸ *Ibid.* at 149.

¹⁹ *Ibid.* at 4, 150.

the history of contract law in Europe and to the reviewed book.²⁰ The author shows that countries with market-oriented consumer protection laws and deregulatory policies have welcomed and implemented the Directive. This is the case in England and Italy;²¹ however, these countries have taken different routes in pursuing market-oriented consumer policies. Whereas England has relaxed its old consumer protectionist standards and deregulated contract law in an attempt to promote the competitiveness of its market, Italy is attempting to accomplish this same goal by implementing some forms of legal interventionism in the economy. Unlike these countries, Germany and France have pursued more interventionist policies towards their markets and have been resistant to the Directive's precepts. While France has defended the role of the state as a central economic actor and placed faith in the state economic power, Germany has supported the idea of state regulatory power and defended the need to discipline private market power.²² Niglia claims that it is these social and political projects (associated with different beliefs on the role of the market), rather than abstract legal narratives, that explain the different consumer protection policies in Europe.

The author claims that the debate about rule-based versus market factors-based consumer protection laws is ideological and impractical. The author notes that decision makers in each country may be faced with the real challenge of meeting the true needs and aspirations of their citizens, and may thus need to make choices that depart from their adopted consumer protection projects in an attempt to serve the public interest.²³ This need to serve the public interest seems to be a call for a legal, economic, and political assessment of consumer protection laws in Europe to determine how these laws may contribute to improving the well-being of citizens. It also poses a challenge to traditional legal narratives and the legal elite, asking whether and how the public interest should be pursued.

Niglia demonstrates that contract law can no longer be viewed separately from broader social, political, and economic contexts. Macro social choices may provide the content and directions of contract law, which is open to the changing influence of its macro market context. A self-referential contract law is thus misleading. This is the new form in which contract law links with society in Europe.

²⁰ *Ibid.* at 2.

²¹ *Ibid.* at 149-50.

²² *Ibid.*

²³ *Ibid.* at 150, 227-28.

III. THE CONTEXT OF CONTRACT LAW

A. *The Other Implicit Dimensions of Contract Law*

While the reviewed works make important contributions towards developing an account of contract law embedded in its social context, a richer view of this context is needed. The idea of implicit dimensions of contract seems to be grounded on a neoclassical-friendly view of contractual relations, which is to say that several important social dimensions of contracts and market exchange are not given significant attention. A race-less, sexless, classless, and largely cooperative market-world dictates the rights and obligations of contractual relations through the notion of “implicit dimensions.” References to other implicit dimensions of contract law—associated with race, class, gender, ethnicity, and power relations—are largely absent. These elements do not appear significantly, either in the implicit dimensions of contracts or in the account of the evolution of European contract law. While purporting to take the real context of contracts seriously, there seems to be an over-concentration on the inadequacies of contract legal rules in Campbell, Collins, and Wightman’s book²⁴ and an over-emphasis on the macro socio-political context of contracts in Niglia’s book.

Implicit dimensions of contract cannot only be comprised of neglected reasonable expectations of contractual parties, implicit understandings, or unspoken obligations of loyalty.²⁵ Race, class, gender, ethnicity, power, and broader political projects also influence the design and enforcement of contract law. For instance, the ethnic identity of contractual parties may determine the scope of contractual trust and

²⁴ This is even noticed by one of the authors. See Macneil, *supra* note 7 at 210, noting that “[m]ost of the papers and comments seemed to take as their starting point: Dimensions of Contracts Implicit in *express terms*. (Stewart Macaulay’s paper was the clearest and most complete exception; John Wightman’s went almost, but not quite, as far, if I understand his paper correctly). Thus, even in such an enlightened group there was a strong tendency to start thinking about any contract with its *express terms*. ... *the express terms cannot be the beginning and end of our analysis*” and claiming that “[s]tarting with the *express terms* and the classical contract approach almost invariably skews the analysis of the circumstances in which they are embedded” (*ibid.* at 211). One of the articles that arguably shows such over-concentration in contract legal rules as opposed to a deep understanding of the context of contracts is David Campbell & Hugh Collins, “Discovering the Implicit Dimensions of Contracts” in *Implicit Dimensions*, *supra* note 1 at 25ff.

²⁵ See e.g. Hugh Collins, “Introduction” in *Implicit Dimensions*, *supra* note 1 at 23.

cooperation and often mould parties' reasonable expectations.²⁶ Shared identity may facilitate trust, cooperation, and relational contracting, and may give content to the reasonable expectations of contracting parties. But differences in race, class, gender, or ethnicity may also create discrimination problems in commercial transactions. Racial and gender considerations may indeed lead to changes in the terms and conditions of contracts so as to discriminate against disadvantaged groups.²⁷ Ignoring these other implicit dimensions of contract may be detrimental to a more accurate description of the broader context of contracts. Making abstractions of some important aspects of the context of contracts may misguide the project of re-formulating contract law in light of its context, causing it to yield only a modest agenda. It should not come as a surprise that the practice and theory of contractual justice are not central in the reviewed books, and the commitment to normative ideas or values associated with contractual justice is modest.²⁸

Nevertheless, Niglia's book contributes to broadening the view of the context of contract law in a very important respect. Unlike the micro implicit dimensions project, he shows that political and economic context does account for the content and objectives of contract law.²⁹ This suggests

²⁶ See e.g. Mark Granovetter, "Economic Institutions as Social Constructions: A Framework for Analysis" (1992) 35 *Acta Sociologica* 3 at 7; Izhak Schnell & Michael Sofer, "Embedding Entrepreneurship in Social Structure: Israeli-Arab Entrepreneurship" (2003) 27.2 *Int'l J. Urban & Regional Research* 300 at 302. The relevance of ethnicity for the study of contracting was earlier noticed by Amartya Sen. See Amartya Sen, "Goals, Commitment and Identity" (1985) 1 *J. L. Econ. & Org.* 341.

²⁷ See e.g. Ian Ayres, "Fair Driving: Gender and Race Discrimination in Retail Car Negotiations" (1991) 104 *Harv. L. Rev.* 817; Ian Ayres, "Is Discrimination Elusive?" (2003) 55 *Stan. L. Rev.* 2419; Ian Ayres, *Pervasive Prejudice?: Unconventional Evidence of Race and Gender Discrimination* (Chicago: University of Chicago Press, 2001); Ian Ayres & Peter Siegelman, "Race and Gender Discrimination in Negotiation for the Purchase of a New Car" (1995) 85 *Am. Econ. Rev.* 304; and Ian Ayres, "Further Evidence of Discrimination in New Car Negotiations and Estimates of its Cause" (1995) 94 *Mich. L. Rev.* 109. See also Iain Ramsay & Toni Williams, "Inequality, Market Discrimination, and Credit Markets" in Iain Ramsay, ed., *Consumer Law in the Global Economy: National and International Dimensions* (Aldershot: Ashgate and Dartmouth, 1997); Peter Siegelman, "Racial Discrimination in 'Everyday' Commercial Transactions: What Do We Know, What Do We Need to Know, and How Can We Find Out?" in Michael Fix & Margery Turner, eds., *A National Report Card on Discrimination in America: The Role of Testing* (The Urban Institute, 1999); and John Yinger, "Evidence of Discrimination in Consumer Markets" (1998) 12 *J. Econ. Perspectives* 23. For an analysis of racial discrimination in the UK see e.g. John Solomos, *Race and Racism in Britain*, 2d ed. (London: Macmillan, 1993).

²⁸ This is particularly true for Campbell, Collins, & Wightman's book. See Collins, *supra* note 25 at 23. An exception to this non-central place of contractual justice seems to be Deakin *et al.*, *supra* note 13.

²⁹ There are modest references to the macro implicit dimensions of contract in *Implicit Dimensions*, *supra* note 1. See e.g. Macneil, *supra* note 7 at 214 (claiming that a relational analysis of contract law needs to take account of some form of harmonization of contracts with the social matrix-supra contract behaviour and norms).

a view of contract law embedded not only in its micro implicit relations but also in the macro political, economic, and social relations that reflect society's choices and, in turn, further explain the development of contract law. Contract law thus reflects broader political, economic, and social choices. For instance, if a society makes the choice of disciplining private market power, rule-based consumer protection laws—rather than a market-oriented consumer protection project—may be both instrumental to and reflective of this objective. These *macro* implicit dimensions are critical in understanding the context of contract law.

All these *other* implicit dimensions complicate our understanding of the context of contract law, creating uncertainty as to whether the law can respond to such a complex context. Furthermore, contract law is now faced with the challenge of both solving large contractual justice problems and determining the values and welfare criteria that will guide the choice of contract legal rules. Niglia notes this problem towards the end of his book in his normative reflections. He articulates it by subjecting alternative contract law projects to a public interest assessment. In evaluating and making choices regarding contract regulation, an assessment of the public interest should ascertain whether the well-being of citizens is being improved. Niglia claims that this issue is critical and that a better analytical framework is needed. He argues that moving forward requires the abandonment of abstracted views of the law. However, beyond this, no clear solutions are offered. An evaluation of the extent to which these different consumer protection projects serve the public interest may require an assessment of the welfare effects of such projects, not just theoretically, but empirically.

Thus, the study of the embeddedness of contract law in its complex context is largely an unfinished and contentious project.³⁰ Indeed, how the context of contract law and the relationship between contract law and its context are understood is still problematic.³¹ This is one of the central problems with the reviewed books. Their view of the context of contract law is biased towards the framework employed to describe such a context. For each theoretical framework of contracts and markets, different sets of features of contract relations can be captured accordingly. For instance, from one perspective trust and cooperation may not be the only aspects of market transactions. Drawing on another framework, power and

³⁰ This is even recognized by Campbell and Collins. See David Campbell & Hugh Collins, "Discovering the Implicit Dimensions of Contracts" in *Implicit Dimensions*, *supra* note 1 at 49.

³¹ This is somewhat recognized. See Collins, *supra* note 25 at 19 (noting the "need for strategies to understand the context of contracts" or the implicit dimensions of contract).

discrimination associated with differences and asymmetries of wealth, race, class, gender, and ethnicity may also be relevant for contract law analysis. Thus, contract law can be contextualized in many ways and, depending on the empirical basis, the accuracy, or the comprehensiveness of the framework being employed, contract law can also be de-contextualized so that a mental construction may provide the alleged “reality” of contracts.³² Even more problematic is the attempt to formulate normative values and goals for contract law.

Therefore, there is an urgent need to explore descriptive and normative frameworks that can help us better understand and use contract law in context. This is a gap in the enterprise of studying contracts in context that the reviewed books to some extent recognize but provide no clear solutions.³³ In the next section, some ideas are suggested in an attempt to enrich the debate on this matter.

B. *Exploring a Communicative Institutional View*

Adopting a communicative institutional view of contract law may enrich the study of contract law in context in several important ways. In this approach, contract law is no longer understood as a set of legal rules of contracting that simply responds to and reflects its implicit social dimensions. Instead, contract law is the *output* of the communicative process of individuals and groups contracting under the constraints of legal rules and other social orders or rationalities.³⁴ Initially, contract law establishes and regulates the *constitutional* or *ground* rules of contracting.³⁵ But the social embeddedness of these rules show that they are also in

³² This criticism logically disagrees with Macneil’s claim that his relational contract theory is neutral. See Macneil, *supra* note 7 at 217 (concluding that his “[e]ssential contract theory, one of countless possible relational theories of contract, is a neutral analytical tool, not one oriented towards particular social views”).

³³ See e.g. Campbell & Collins, *supra* note 30 at 49.

³⁴ See generally Jürgen Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy*, trans. by William Rehg (Cambridge Mass.: The MIT Press, 1998); Kenneth L. Avio, “Three Problems of Social Organisation: Institutional Law and Economics Meets Habermasian Law and Democracy” (2002) 26 Cambridge J. Econ. 501.

³⁵ This point builds on the contributions of German Ordoliberalism, American old institutionalism, and institutional law and economics scholars. These diverse schools of legal thought have independently noted the significance of ground rules. See e.g. Agnès Labrousse & Jean-Daniel Weisz, eds., *Institutional Economics in France and Germany: German Ordoliberalism versus the French Regulation School* (Berlin: Springer, 2001); Iain Ramsay, “Consumer Credit Law, Distributive Justice and the Welfare State” (1995) 15 Oxford J. Legal Stud. 177. Macneil somewhat recognizes this insight. See Macneil, *supra* note 7 at 215.

constant communication, not only with other legal rules within the legal system (for example, legal constitutions), but also with other contracting discourses and practices arising from the economic, social, cultural, and political orders.³⁶ These combined ground rules and their modifications establish the starting and evolving rights of contractual stakeholders. This communicative process is, however, activated and shaped only by the action of individuals, groups, and elites involved in contracting. These *socialized* actors³⁷ construct and materialize the nature and objectives of both the broad ground rules of contracting and their modifications. The assignment and use of contractual and property legal rights do not live in a vacuum. It is through this communicative process between contracting individuals and groups that the weighing of multiple interests and values of contracting takes place. For instance, individuals and groups determine the extent to which a pattern of contract ground rules and their modifications enhance efficiency, equity, or distributional objectives under the constraints of the social orders of contracting. The establishment and modifications of ground rules do not alone produce the desired effects or objectives.³⁸

Yet, the ability of individuals and groups to make decisions; negotiate, network, plan, and implement a plan of action; use and convert their legal rights into actual benefits; articulate, translate, and communicate their interest and values; and the like, is often taken for granted by contract law. The best efforts to break from these assumptions have concentrated on questioning the rationality assumptions of both the neoclassical economic analysis of contracts and classical contract law. But this problem cannot be reduced simply to the difficulties in making rational decisions. The communicative process of contracting orders reveals that contracting individuals and groups hold some form of *power* and display *differences* in gender, class, race, ethnicity, human capabilities, and commodity holdings ranging from wealth to legal rights. These differences empower or disempower contracting parties, creating unavoidable contractual justice

³⁶ This point was raised early in the twentieth century by German Ordoliberals who viewed contract law as an important component of the broad institutional *constitution* of markets and as embedded in interpenetrated economic and non-economic orders. As such, contract law institutionally constitutes markets and sets its ground rules that in turn can be regulated to ensure greater freedom and protection from abuse of power. See *e.g.* Labrousse & Weisz, *ibid.*

³⁷ Socialized actors indicate that individuals and groups are also shaped by the communicative process of contracting.

³⁸ This problem is largely ignored by German Ordoliberalism, American old institutional economics, and institutional legal scholars. It draws on Sen's capability approach and his critique of the commodity holding paradigm of market capitalism. From this perspective, the holding of contractual rights does not necessarily make the holder better off. See *e.g.* Amartya Sen, *Development as Freedom* (New York: Alfred A. Knopf, 1999).

problems in the communicative process.

These broad human abilities or *freedoms* are so critical that neither markets nor contract law and the communicative process of contracting can be made possible without them. Besides the instrumental or consequential value of these freedoms, contractual parties and stakeholders also find intrinsic value in enjoying their freedom to, for instance, negotiate contractual terms or decide the use of their commodities. Similarly, human freedoms may also enable individuals and groups involved in the communicative process of contracting to construct and communicate their own values and priorities such as profit maximization, contractual fairness, a commitment to a healthy environment, or combinations thereof. These consequential, intrinsic, and constructive roles of freedoms thus make them a necessity ubiquitous to contract law and the communicative process of contracting.³⁹

Contract law, by taking such freedoms as given, is involved in legalizing existing social arrangements regardless of the fact that these may be unequally or heterogeneously configured. Contract law, along with human rights legislation, inescapably permits or prohibits the existence of certain human conditions as the basis for the operation of markets and for contracting in particular. If these human abilities or freedoms are translated into legal rights⁴⁰ as a natural result of the communicative process, it may be argued that—in fact—contract law and the communicative process of contracting operate on the basis of the presence of some implicit *human rights ground rules*. Contract law may do little to modify or improve these human rights rules despite their intrinsic, instrumental, and constructive values. A communicative institutional view contends that contract law is involved in the creation and modification of contractual and human rights ground rules, and that the protection of such rights or freedoms is a necessity.

It is through the communicative action of contracting individuals and groups that normative ideas are also advanced. Individuals and groups communicate their values and interests associated with their contractual practices under the constraints of contractual or human rights ground rules and their modifications. Furthermore, contracting individuals and groups use, mould, and are shaped by these ground rules of the legal order, and are in constant communication with the discourses and practices of the other

³⁹ This idea draws on Sen. See Sen, *ibid.* at 246. Habermas also notes the essential role of rights in modern society and the need for a better understanding of the law. See Habermas, *supra* note 34 at 82ff.

⁴⁰ Sen, *ibid.*

social orders of contracting. Through this communicative process, contracting individuals and groups weigh and implement competing values, interests, discourses, and practices involved in contracting. By setting and modifying ground rules, contract law should facilitate this communicative process of weighing and implementing multiple values and interests, including those associated with contractual justice. Moreover, given the intrinsic, consequential, and constructive significance of human freedoms for the communicative process, contract law should also seek to enhance such freedoms.⁴¹ It may do so by adopting human rights as constraints and goals of contracting activities.⁴²

A central implication of this view is the rejection of *economic imperialisms* in the study of contract law in context. It requires that contract law and its communicative process not be reduced to merely satisfying the demands of the economic order, that is to say, to solely maximize utilities or profits as Pareto efficiency principles suggest. This economic imperialism, or the attempt to prioritise the economic discourse of contracting with Pareto efficiency, at the heart of it, is not only unviable but also undesirable. Pareto efficiency goals are unrealizable not just due to their *internal* inconsistencies,⁴³ but also because of their *external* incapacity to appreciate and intercommunicate with other non-economic contractual discourses and practices, including the ground legal rules and competing values and interests emerging from the intercommunication of social orders of contracting. These *internal inconsistencies* and *external inadequacies* of Pareto efficiency principles are largely neglected in Hugh Collins's Pareto-based reflexive or implicit contract approach,⁴⁴ and underestimated in Alan

⁴¹ This idea is increasingly gaining support. See e.g. Daniel Friedmann & Daphne Barak-Erez, *Human Rights in Private Law* (Oxford: Hart, 2001).

⁴² This draws on Sen's goal-rights system. See Sen, *supra* note 38 at 212, arguing that this view of rights "shares with utilitarianism a consequentialist approach (but differs from it in not confining attention to utility consequences only), and it shares with a libertarian system the attachment of intrinsic importance to rights (but differs from it in not giving it complete priority irrespective of other consequences)."

⁴³ This refers to the economic critique that has questioned the Pareto welfare principles with economic arguments and from an economic perspective. This internal criticism has largely concentrated on demonstrating that Pareto efficiency is impossible due to its unrealistic behavioural conditions (the assumed ability and desire to maximize utilities or profits and the violation of individual autonomy), traditional market failures (externalities, imperfect information, and monopoly power), the initial or existing distribution of social resources, the presence of transaction costs and the significance of institutions, and the inadequacy of adopting the view of welfare as commodity holding. Perhaps Sen has best articulated this economic critique of Pareto efficiency. See Sen, *supra* note 38 at 116-119.

⁴⁴ Collins, *supra* note 25 at 14 (arguing that the incapacity of contract law to appreciate the implicit dimensions of contracts "harms through inept legal regulation the goal of facilitating voluntary transactions that lead to Pareto optimal outcomes"). See also Hugh Collins, *Regulating Contracts* (New

Schwartz's economic-oriented formalism.⁴⁵ Moreover, powerful contracting parties may manipulate the communicative process to impose profit-maximization goals despite the seemingly semi-autonomous legal system. Teubner's systems theory seems to underestimate this form of forced economic imperialism.⁴⁶

The significance of a communicative institutional view may be illustrated with the English case *Barclays' Bank plc v. O'Brien*.⁴⁷ A wife had charged the matrimonial home to secure her husband's business debts. The House of Lords prevented the bank from enforcing the charge on the grounds that the bank knew both that the husband may have unduly influenced his wife and that the transaction was not beneficial to the wife and failed to provide the wife with independent legal advice.⁴⁸ Lord Browne-Wilkinson notes the presence of several contracting parties (the husband, the wife, and the bank) and their embeddedness in several relationships (marriage, business, and lending).

Each contracting actor in *Barclays' Bank* holds and communicates several concurrent contractual values and interests. All seem to be interested in profiting or obtaining an economic benefit from the lending relation. It may be plausible to think that the wife and husband may also be interested in supporting each other, strengthening their marriage, maintaining their matrimonial home if possible, increasing their access to credit and their credit worthiness, and probably implementing a work or vocational project. On the other hand, the bank may also be interested in developing trust, a long-lasting and cooperative business relation, expanding its network of borrowers, promoting the flow of capital, and increasing its reputation. Although these contractual considerations are not explicitly articulated in *Barclays' Bank*, it is plausible to think that contractual actors may consider such contractual rationalities when

York: Oxford University Press, 1999); David Campbell, "Reflexivity and Welfarism in the Modern Law of Contract" (2000) 20 Oxford J. of Legal Stud. 477 at 490-91 (reviewing Collins' *Regulating Contracts*, Campbell claims that Collins "fails to engage with the full implications of the pursuit of the best concept of economic efficiency, Pareto optimality," and notes a contradiction between the Pareto source of the reflexive capacity of private law that requires no goals and the demand for political goals of his approach). It must be noted that Collins' contract approach largely draws on Teubner's social system theory (Collins, *Regulating Contracts*, *ibid.*).

⁴⁵ Alan Schwartz & Robert E. Scott, "Contract Theory and the Limits of Contract Law" (2003) 113 Yale L.J. 541 at 556 (arguing that "contract law of commercial parties is about efficiency").

⁴⁶ Marcelo Neves, "From the Autoopoiesis to the Allopoiesis of Law" (2001) 28 J.L. & Soc'y 242.

⁴⁷ (1993), [1994] 1 A.C. 180 (H.L.) [*Barclays' Bank*].

⁴⁸ Cited in Olha Cherednychenko, "The Constitutionalization of Contract Law: Something New Under the Sun?" (2004) 8 E.J.C.L. 1.

participating in the contractual relation. With important differences, the wife, the husband, and the bank also articulate and communicate what they perceive as their contractual legal rights on the basis of their existing human freedoms and implicit human rights ground rules. In sum, they participate in different contracting orders and communicate interpenetrated contractual discourses and practices.

But individuals and groups do not simply follow and submit to these contractual rationalities as Teubner and Collins seem to suggest. Drawing on their advantages, they also exploit the communicative process to advance their goals. In *Barclays' Bank*, the husband may have misrepresented and unduly influenced his wife (who probably placed too much trust in him and was not well informed). On the other hand, the bank, enjoying greater abilities and freedoms than the wife, may have known about the husband's undue influence and taken advantage of the situation by drawing on its existing (ground) right *not to inform*.⁴⁹ The diverse contracting orders may contain opportunities or disadvantages, including contractual and human rights ground rules, that actors may take advantage of through the communicative process. Lord Browne-Wilkinson is receptive to some aspects of this problematic reality and, in the language of the communicative institutional approach, recognizes that contract law should balance the needs and values of such intercommunicated contracting actors and interpenetrated contracting orders:

The number of recent cases in this field shows that in practice many wives are still subjected to, and yield to, undue influence by their husbands. Such wives can reasonably look to the law for some protection when their husbands have abused the trust and confidence reposed in them.

...

It is easy to allow sympathy for the wife who is threatened with the loss of her home at the suit of a rich bank to obscure an important public interest, viz. the need to ensure that the wealth currently tied to in the matrimonial home does not become economically sterile. If the rights secured to wives by the law renders vulnerable loans granted on the security of matrimonial homes, institutions will be unwilling to accept such security, thereby reducing the flow of capital to business enterprises. It is therefore essential that a law designed to protect the vulnerable does not render the matrimonial home unacceptable as security to financial institutions.⁵⁰

⁴⁹ *Smith v. Hughes* (1871), L.R. 6 Q.B. 597 at 607 (cited in Cherednychenko, *ibid.* at 14, n. 41).

⁵⁰ *Barclays' Bank*, *supra* note 47 at 188 (quoted in Cherednychenko, *supra* note 48 at 13-14).

Moreover, this judgment establishes a new “general duty to inform,” which changes the existing ground contractual legal rights.⁵¹ Not only is the structure of contractual power altered through this modification of the ground rules, but the wife’s right to autonomy, free will, dignity, and perhaps to a sound family life are protected and advanced.⁵² Thus, such modification of ground contractual rights may also modify and enhance existing and implicit human rights ground rules in the sense suggested above. While facilitating the communication and balancing of contracting stakeholders’ competing values and needs, courts will have to make a normative decision whether to maintain or expand existing arrangements of human freedoms or rights.

IV. CONCLUSION

The two books reviewed in this article contribute to the broadening of our understanding of contract law in its social context. The collection of articles edited by David Campbell, Hugh Collins, and John Wightman suggest that modern contract law needs to take into account several forms of implicit contractual rights and obligations arising from the context of contracts. The authors find implicit dimensions of contracts in consumer, commercial, and corporate relations. The broader political and economic context may also influence the development of contract law. Leone Niglia finds that in Europe contract law has already been re-formulated to serve broader political and economic choices associated with the role of markets. Niglia discusses this trend, focusing on the different reactions to the European Community Directive on unfair terms in consumer contracts. Both books further demonstrate the failures of classical contract law and show that contract law ought to be understood in light of its social context.

While these works make important contributions towards a view of contract law embedded in its social context, further progress needs to be made. The idea of implicit dimensions of contract seems to be grounded on a neoclassical-friendly idea of contractual relations. A race-less, sexless, classless, and largely cooperative market world dictates the rights and obligations of contractual relations through the notion of “implicit

⁵¹ Cherednychenko, *supra* note 48 at 14 [emphasis added].

⁵² A French case also illustrates this point. An employee, under a term of the employment contract, was asked to move and live in another region of France away from his family. The employee was dismissed for refusing to comply. The Court of Cassation ruled that the employers were obliged to respect employee’s right to respect for his family life under art. 8 of the Convention (cited in Anthony Lester & David Pannick, “The Impact of the Human Rights Act on Private Law: the Knight’s Move” (2000) 116 Law Q. Rev. 380 at 384).

dimensions.” However, implicit dimensions of contract cannot only be comprised of neglected reasonable expectations of contractual parties. The study of contract law in context thus has an urgent need for better descriptive and normative frameworks that not only illuminate the context and its interrelations with contract law but also solve unavoidable contractual justice problems.

This article also explored the advantages of adopting a *communicative institutional* view of contract law in context. From this perspective, contract law can no longer be seen as a set of legal rules of contracting that simply responds to and reflects its social context. Instead, it is the *output* of the communicative process of individuals and groups contracting under the constraints of legal rules and other social orders or rationalities. These rules involve constitutional or ground legal rules associated with *contracting* and *human rights* that in turn are set and modified by contract law and its interaction with the broader institutional environment. Given the instrumental, intrinsic, and constructive values of the freedoms associated with this broad idea of human rights and their social imperative, contract law should enhance these freedoms and be sensitive to contractual justice problems. Specific contract law implications and the empirical basis of this view remain a challenge for future research.