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Ex Ante and *Ex Post* Allocation of Risk of Illegality: Regulatory Sources of Contractual Failure and Issues of Corrective and Distributive Justice

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Abstract

The pursuit of welfare objectives through contract law rules could be exemplified in the case of illegality and subsequent nullity sanctions attached to a contract that violates certain regulatory rules. The effectiveness of contractual allocation of risk of illegality (regulatory prohibitions), therefore, varies, depending on which contract theory prevails. Maintaining the validity of a prohibited and failed contract, and allocation of the relevant risks, is crucially dependent on whether we adhere to a welfare or rights-based theory of contract. In this paper we argue that impossibility of ex ante and ex post allocation of risk of illegality is the logical outcome of the adherence to a welfare theory of contract law, as maintaining even a minimum validity of the failed contract would result in some welfare losses. According to this approach unjust enrichment could not be rectified because it would diminish the optimal enforcement of welfare objectives. On the other hand, and despite such prohibition and illegality, a rights-based theory would resist opportunistic and rent-seeking behaviour and would ensure the validity of the contract and just allocation of losses and gains, which arise from the failure of the prohibited contract.

Keywords: risk, regulation, illegality, contractual railure, rights, efficiency, distributive and corrective justice

JEL Classification: D6, D7, D8, K1, K12

1. Introduction

Whilst a contract is primarily a device for allocation of the risks unfolding in future, there are contingencies, which contracting parties may not be able to plan for. They have to either rely on contract law default rules or design some broad and general terms for allocating unknown risks. However, in certain circumstances even the parties' anticipation and contractual risk management plan may not be effective. A contractual risk allocation clause could be rendered invalid if it is related to the allocation of risks of illegality as often the effect of illegality nullifies the entire contract and, for social reasons such as deterrence, any relief under such a contract is denied. Such treatment of contractual obligations is reflecting a normative orientation of contract law under which

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the contractual rights enjoy public support only to the extent that they have certain social advantage.

In this context, the current paper examines the issues of illegality related to specific regulatory regimes, which mainly represent a legal paradigm with distributive justice as its normative justification. Apart from the general restrictive feature of such regulatory measures, which limits individuals' choices and prohibits certain contracts, regulatory rules in this sense can also provide a basis for a kind of contractual failure, where on the ground of regulatory limits, the legality of contractual allocation of risks is challenged. Unlike the category of contractual failures where non-compliance with the rules of autonomy and justice (contract law) may nullify a contract outright, in the case of incompatibility of a contract with certain regulatory laws, the dispute first centres on the degree of prohibition and then moves into its contractual implications in terms of which party should bear the consequences of the failure of the contract.

The critical point is the extent of contractual failure. Should welfare objectives be pursued by allowing the ex-failure losses lie where they fall? Can the contract withstand such a failure and allow a just redistribution of the losses arising from the failure? The answer to these questions varies depending on what normative system underpins contract law. If contract law is considered as a legal regime which is essentially part of a social welfare scheme, the realisation of such an objective would not only require the prohibition of the contrary contracts but also would not recognise its validity to deal with the consequences of the failure, no matter how unjust the outcomes would be for the parties. Deterrence, which is obviously a social objective, is meant to discourage further violation of regulatory laws. On the other hand, if contract law is a distinct paradigm representing justice between parties, the regulatory prohibition would at most prevent the performance of the prohibited act without affecting the post-failure function of contract in redistributing losses and gains. Through unveiling the basic rationales of rules, the main focus of this paper is to define the exact impact of regulatory rules on the internal structure of the contractual arrangements. The paper will also examine solutions, which without frustrating the public interest, makes the parties share the consequences of the failure.

2. The bases of contractual failure and the role of contract law

The process of exchange and trade often involves long and complicated procedures, which require a detailed assessment in allocating the risks and determining the rights and duties of the parties in the course of exchange. Contracts are intended to facilitate this process and to reduce or eliminate the uncertainty, which inherently exists in transactions involving exchange in the future (see Bowles, 1982). In this sense a contract is a kind of social ordering which functions through reciprocal adjustments along a horizontal line (Fuller, 1981). As long as the contractual relations function in the mutual interests of the parties to the contract, an equilibrium of interests encourages the parties to co-operate in maintaining and implementing the contract. In this situation, the initial motivation for co-operation between the parties which has led to the conclusion of the contract still links the parties' interests in preserving the contract, to the extent that the parties are prepared to tolerate certain types of promise-breaking (see Collins, 1996; Macneil, 1974).

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If, however, events in the course of performance of the contract do not correspond to the expectations of at least one of the parties, there could be a dispute. Disagreement over the content and scope of the contractual obligations transforms the contract from a plan for co-operation into a document in the hands of an adjudicator for the settlement of the dispute. In this situation the parties not only pursue different interests but they may also have different perceptions of what is just and fair, according to which they are competing to establish the validity and enforceability or invalidity and unenforceability of the contract (see Collins, 1996). However, it is not the views of the parties, which count, but rather the validity of the contract is measured against a system of "contract law,"[1] that is, by State-made rules imposed from above.[2]

Naturally, a contract is expected to be discharged by its performance according to the agreed terms between the parties, but contract law contains mechanisms and limits by which the contractual obligations are controlled and a contracting party might be discharged from his obligations without fulfilling the contract.[3] A party seeking relief of a contractual obligation is, therefore, required to prove that his claim falls into the categories of defences or limits to contractual obligations against which the contract loses its enforceability. The contract law defences split into two groups: formation or performance defences (see Hirsch, 1988). Duress, mistake and misrepresentation provide a defence for the party whose consent to the contract has been wrongly acquired.[4] On the other hand, law does not insist on the performance of a contract, which is impossible, either initially or owing to later events. This defence which is broadly termed impossibility relieves the defaulting party of his contractual obligations and places the risk of future non-performance on the promisee.[5] This doctrine has evolved in an effort to mitigate the rigour of the contract law's insistence on literal performance of absolute promises. (See *Joseph Constantine Carriers Ltd. v. Imperial Smelting Corp. Ltd.* [1942] AC 154, at 183, 193; *National Carriers Ltd. v. Panalpina (Northern) Ltd.* [1981] AC 675, at 701. See, also, Kull, 1991–1992.)

3. Regulatory public laws as a source of contractual failure

On some occasions the dispute and impossibility of contract involve a controversy over the application of certain regulatory public law rules which pursue objectives other than that of the justice between the parties. The involvement of regulatory laws, it is said, indicates a fundamental change in the nature of a contractual dispute (see Chayes, 1976). The *complexity*, *intimacy*, *frequency* and *interdependence* of many social interactions have necessitated a shift from formal, general and simple rules to more specific and social orientated rules (see Kennedy, 1973). Competition law and securities regulations are among those regulatory regimes, which display, in varying degree, the features of public law litigation (see Chayes, 1976).

Where the alleged failure of the contract is based on a defective consent or physical frustration, the dispute is a simple two-party litigation about private law rights, characterised as a bipolar, retrospective, self-contained, party-initiated and party-controlled process (Chayes, 1976). In contrast, when the contractual failure is attributed to the effects of the regulatory laws on the contractual undertakings, the dispute is transformed into a three-party dispute in which the public as a whole maintains an interest. The party structure of this model of litigation is extended and the subject of litigation is vindication

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of welfare objectives (Chayes, 1982; Marcus, 1987–88). The difficulty, however, is that some situations exhibit characteristics of both public and private law (see Cane, 1987; Kennedy, 1982b; Teubner, 1987). The borderlines dividing the public and the private law are also constantly altered and redefined. Even it is maintained that these situations may lead to the dissolution or the collapse of the distinction (Kennedy, 1982b), heralding that there is no public/private distinction.[6]

The denial of the public/private law distinctions, however, emanates only from the practical trouble of identifying public law rules from those of private law.[7] It is true that the expanded role of the State, and the changes in fundamental private law concepts, which have been modified by social and public considerations, have made it difficult to distinguish the boundaries of public from private law but this complexity does not mean that this dichotomy has totally disappeared or lost its purpose (see Merryman, 1996). The point is that private law certainly regulates but its regulatory objectives are not necessarily the same as those of public law regulations. What distinguish private from public law are not the mandatory or facilitative and generality or specificity character of rules but the underlying objectives.[8] Regulation, or any legal obligation, which intrudes into the normal proceeding of contractual relations, may or may not be a public law measure.

The distinction between public and private law is of great practical significance in modern private litigation in terms of determining the scope of the public law effects on a contract.[9] There are various means that help to understand this distinction and to reveal the dominant underlying purpose of legal rules. For example, in the areas of private law, legitimisation takes place through the justice inherent in the exchange of equivalents, but in the public sphere legitimacy of human activities is measured through a social contract (see Prosser, 1982). Private law represents a relation between subjects of equal legal standing across a horizontal order but public law reflects social relations within a vertical structure.[10] Unlike the facilitative and purpose-independent rules of private law that creates autonomous zones to achieve private ends, purpose-dependent public law mainly serve the public interest.[11]

The jurisprudence of interests has laid a reliable method for making this distinction by tying the difference between public and private law to the nature of the interests served, public or social interests as distinguished from private or individual interests, the collectivity as distinguished from the autonomous realm of the individuals (see Tay and Kamenka, 1983). It also corresponds to the difference between decisions made in the market and group decision making place on the political scene (Leoni, 1961). The policies of the State and public law rules are formed according to distributive justice while, no matter how general or specific the private law rules might be or whether they accidentally serve wider welfare objective, corrective justice controls the relations of the individuals. The concept of corrective justice justifies the intervention of the court in contractual relations to rectify the disturbed equality between the parties. Distributive justice claims, on the other hand, are independent of individuals' interactions. They are based on a person's status as a member of the political community (Wright, 1992). In this sense the distinction between private and public law quite specifically reflects the distinction between corrective and distributive justice (Tay and Kamenka, 1983; see also Collins, 1993).

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3.1. The applicability of public/private law distinction to competition law and securities regulations

According to these criteria, regulatory regimes could be analysed and categorised. For example, competition laws could easily fit into the domain of the rules motivated by distributive justice and, therefore, considered as public law, irrespective of their implications for private contractual disputes. Competition laws in their modern forms are not concerned to dispense justice between private litigants. They are intended to implement distributive justice and to promote welfare values. According to the Chicago School, the desirability of competition laws is to be assessed if they enhance the general consumer welfare in terms of the potential Pareto criterion rather than equity or fairness in a particular transaction (see Asch, 1985; Hovenkamp, 1985). However, unlike competition law the objectives of which are fairly straightforward, securities laws are multifaceted and pursue different or even conflicting objectives. Under the securities law many of the public/private remedies and civil/criminal sanctions overlap. It is a regulatory scheme, which combining civil and criminal law techniques, seeks to implement both corrective and distributive justice. Securities transactions and dealings are primarily subject to private law but asymmetries of information, systemic risk, sensitivity of financial markets, and a quest for the protection of the weaker party have proved private law inadequate. As a result, many regulations concerning dealings in securities have been introduced, which tend to be different from contract law both in their objectives and means.

The information provisions, remedial schemes, and structural requirements of securities regulation indicate a clear shift from the formal rules of contract law related to the information and party structure to an extended party structure and more substantive, prospective, specific and social-orientated rules. Some aspects of securities law exhibit mixed features of public and private law. Insider-trading regulation, for example, could be justified on a private law harm against the company and the harm caused to the market (Licht, 1999). Another major expression of securities regulation is mandatory disclosure provision.[12] The assumption is that once information is disclosed, it will pave the way for the *efficient* or *just* allocation of the resources. However, the controversy is over the normative justification of this extra amount of protection, which is granted to the investor as a weaker party or special market player. One approach is to consider the extra protection as an extension and reinforcement of the basic rationale of contract law; that is corrective justice. The information provisions and prospective remedies of securities regulation do not indicate a substantial change from those of contract law. The amount of information and the way to secure it are only different means to achieve the same goal: corrective justice.[13] The other approach tends to emphasise that such an increase in the amount of information is the direct result of an increase in the welfare share of the weaker party. Even if it is admitted that corrective justice and altruistic motives underpin the expansion of information disclosure under the securities laws, the effective way of giving concrete meaning to such values and principles requires an adjudicatory system, which can dispense justice among individuals according to their distribitional share (see Fiss, 1979–80; Hazard, 1965). Therefore, the degree of justice (fairness) in a contractual dispute is measured against other welfare schemes (tax and subsidies).[14]

Apart from the controversy as to whether altruistic motives are behind the move towards disclosure rules and other securities regulations or they are the result of some

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welfare share of individuals, there is another dimension to these transactions: public interest in the integrity and safety of the financial markets (Jennings and Marsh, 1987). Although asymmetric information and practices harmful to the individual investor have probably had more to do with the increasing the amount of information,[15] through the protection of investors, efficient use of society's stock capital is pursued (Wernette, 1964; Stigler, 1971; Meier-Schatz, 1986). This aspect refers to a collective interest and may not have a particular beneficiary. Such a regulatory measure goes beyond the safeguard of a fair and just transaction among the individuals. For this reason a failure to comply with certain registration or prospectus requirements could result in civil or criminal enforcement actions, administrative proceedings or disciplinary actions such as suspension or revocation of the authorisation by a regulatory agency or a self-regulatory body (Pennington, 1990). However, under the public choice theory it has been argued that there is not such a thing as public interest and, in fact, regulation is a mechanism for rent seeking by opportunist individuals and groups who disguise their private interest behind the regulation (Ginsburg, 1999).

3.2. The possibility of an ex ante *allocation of risk of illegality*

Illegality often acts as a defence to the general right that a party would otherwise have under a contract. Illegality is raised where the impossibility of performing the contract is a regulatory prohibition and in its common meaning refers to the infringement by a contract of some legal norms, which lie outside the domain of justice between the parties to a contract (see Lewis, 1989, Friedman, 1986; Corbin, 1962; Puelickx, 1986).

What matters in an illegality dispute is the extent of the impact of regulatory rules on contractual rights.[16] Illegality claims in the case of violation of regulatory laws are very common. A competition law may even contain an enforcement scheme of giving individuals an incentive of extra and punitive damages to ensure the application of such welfare-oriented rules, the violation of which might otherwise go unnoticed (see Calnan, 1995). The so-called Euro-defence, invoking Article 81 (2) (ex 85(2)) of the EU Treaty, to make an agreement null and void, is a good example of such an illegality plea, and often a welcome remedy for a defendant, as the only means for escaping his contractual obligations (see Korah, 1990; Toube, 1997). Likewise, section 1 of the United States Sherman Act provides that "every contract, combination, in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations, is hereby declared to be illegal" (The United States Sherman Antitrust Act of July 2, 1890, codified at 15 U.S.C. Section 107 (1982); 15 U.S.C. Sections 18, 13, 14, 45). Therefore, a defendant faced with the prospect of an award of damages often raises as a defence the argument that the plaintiff has violated antitrust law. If the defendant is found to be liable for breach of contract, the answer may be that "the contract violates the antitrust laws and cannot be enforced or the plaintiff has violated the antitrust laws in a way closely related to the contract and so should not be able to recover" (Posner and Easterbrook, 1981).

Similarly, the threat of civil unenforceability of an agreement is a major incentive to comply with the provision of United Kingdom Financial Services and Market Act of 2000. A party seeking to enforce its agreements, or collect debts, may well find that the

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validity of its agreement is being disputed as a result of non-compliance with regulatory requirements. Consequently, a transaction carried out in contravention of these regulatory provisions would be unenforceable against the investor who shall be also entitled to recover any money or other property paid or transferred by him under the agreement, together with compensation for any loss incurred by him (see Sections 23, 26, 27, 29, 30, 62 of the United Kingdom Financial Services and Markets Act of 2000). According to the common law doctrine of illegality and on the grounds of public policy, a violation of regulatory laws is followed by an unenforceablility sanction.[17] How can parties to such contracts avoid such results? Can they allocate the risks of regulatory prohibition *ex ante*?

Generally the parties to a contract who face unknown risks, may adopt a strategy of minimising the cost of bearing the residual risk by purchasing insurance or hedging in financial commodity. Contracting parties can also exploit their comparative advantages in risk management through contractual allocation of risk. The parties often bid for each other's risk-bearing task and it is then allocated to the party that demands the lower price (Triantis, 1992). A *force majeure* clause is a device by which the parties have the opportunity to deal with problems caused by changed circumstance. Such a clause may typically provide that the promisor shall not be responsible for any losses occasioned by war, act of God, riot, strike, or illegality and emergence of a supervening legislation. However, in the case of discharge by supervening illegality, the parties' anticipation of, and planning for such an event may be ineffective in preventing the application of an otherwise default rule (Benjamin, 1992). The public interest principle in these cases is so strong that dissolution of the contract cannot be excluded even by an express provision in the contract.[18] On this account, the contract is dissolved if its performance is prohibited by operation of regulation, even though there may have been a stipulation that this shall not be an excuse at least for alternative arrangements (Ahmed, 1984). The hard line view would be that any transaction, which is tainted by an illegality, is beyond the haven of the law.[19] As a matter of general welfare (Berg, 1993) and in order to deter such an illegal conduct, the court might be reluctant to permit either party to claim any right under a contract tainted by illegality (Collins, 1997). To reinforce welfare goals, such as deterrence, courts might be tempted to go as far as to invalidate the contract in a way, which would penalise one of the parties with an unjust result (see Buckley, 1983).

This treatment of the totality of a contract is rather extreme and, it seems that, depending on the nature of the prohibiting legislation and the way that it operates, the parties may be allowed to manage the risk posed by the intervening regulation. A *force majeure* clause to allocate the risk of illegality is quite sensible even though the regulatory laws are in place at the time of the conclusion of the contract. The parties' allocation of risk of illegality does not mean that they are collaborating to violate a legal standard. In fact, in most cases the parties cannot be sure what legal consequences will be attached to each of their possible courses of action. In other words, the illegality as a supervening event is not foreseeable at the time of entry into the contract. Such uncertainty arises, as people may not know in advance where the legal standards will be set. For example, in a competition law dispute it is difficult to predict how a court will distinguish between predatory and competitive price cut (Calfee and Craswell, 1984).

Given that the basis of contractual failure in cases of supervening illegality is public policy, it is important to bear in mind that the policy considerations raised by different

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types of illegality can vary considerably in weight and nature.[20] It is not, therefore, easy to infer a general rule which could be applied equally to all regulations which render a contract illegal. The effects of supervening legislation might be the impracticality and unenforceability of a contract or simply something different from the expectation of at least one of the parties. It may also require some penalties but not necessarily nullity. In some situations a party is being unduly penalised. This injustice seems to be the inevitable result of the application of a strict set of rules to a wide variety of circumstance, including cases where the illegality involved may be minor, may be wholly or largely the fault of the party relying on it, or may be incidental to the contract in question (Law Commission, 1999). In this respect, the concept of illegality is likely to become detached from the underlying background and gain a life of its own (Buckley, 1983). The imprecise approaches to illegality under which a claim fails if it is tainted with illegality should not be applied to modern regulatory prohibition.[21]

The practical difficulty in identifying the true nature of the relation or its aspects may lead to confusion and unjust decisions. If in such confusion every statutory illegality in the course of the performance of a contract invalidates the contract, the result would be an unjust and haphazard allocation of losses.[22] The effect of illegality should not automatically make the contract void but rather other alternatives for sharing the losses of contractual failure must be sought. Where a regulation merely prohibits one party from entering into a contract or imposes penalty upon him, it does not follow that the contract itself is prohibited. Some case law developments suggest that modern judicial thinking has developed in a way that has considerably refined the attitude of unconditional acceptance of a plea to illegality,[23] particularly if one party relies on its own illegal act in order to escape from contractual obligations.[24] In such a situation regulatory public law prohibition should not be given the automatic sanction of voidness. There may be other alternatives. One possibility is to distinguish between the prohibition of conduct and the prohibition of agreement. The other possibility could be that the statute was not intended to affect the validity of contractual obligations (Waddams, 1993). For example under section 63(2) of the United Kingdom Criminal Justice Act 1993, no contract will be regarded as void or unenforceable for the sole reason that it violates certain section of that Act. Without this section the effects of certain regulatory prohibitions such as those of insider trading could be one of common law approach of nullity and voidness.[25] Consequently and despite finding illegality and invalidity, the courts have to be allowed to exercise discretion in this context, such as that they could allow restitution as an implied contractual plan. (Lewis, 1989; Roy, 1994; Friedmann, 1984). In claims under a prohibited contract the plaintiff does not seek to enforce the illegal contract but rather to reverse what has been executed.[26]

3.3. The normative foundation of contract law theories for allocation of risk of illegality

The hard line approach under which a contract tainted by illegality loses its validity for all purposes, however, reflects an important normative assumption, often overlooked in illegality disputes. The distinction between public and private law and the normative basis of each paradigm have a decisive impact on the interaction between the two

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regimes. The possibility of redistribution of the risks of illegality in the case of contractual failure is crucially dependent on the scope of regulatory intervention. There has been a long-standing debate over the scope of regulatory intervention in individuals' freedom, reflecting a wide range of ideological attitudes in respect of the choice of regulation to achieve social objectives (Benn and Gaus, 1983; Tay and Kamenka, 1983; Rosenfield, 1985; Hart, 1983; Leoni, 1961). Even the direct regulatory intervention in pursuance of welfare goals, which merely restricts the freedom of contract without touching upon the internal structure of contract law, is highly debatable in terms of where the lines should be drawn. Although individual freedom has been shrinking for sometimes, more recently regulatory intervention has gradually become outmoded (Leoni, 1961), a trend under which "society is seen as a system of co-operation among individuals for their mutual advantage" and "the primary role of government is not to maximise the social good, but rather to maintain a framework of rules within which individuals are left free to pursue their own ends" (Sugden, 1993; Sen, 1996). Under the influence of public choice theory economic regulation has been seen as a rent-seeking mechanism. Public choice's assumptions about the motivation of legislators and private groups have been formulated largely with the "rent-seeking" paradigm in mind, the use of legislation by private interests to obtain an economic advantage beyond what the free market normally entails (Farber and Frickey, 1991).

While the extent of regulatory intervention as a direct and independent mechanism for implementation of distributive or efficiency goals is less contentious, the view that contract law enforces welfare objectives seems to be a controversial interpretation of the nature of contract law. Even if the existence or the supremacy of public interest and welfare values is established, the validity of the contract to handle its consequences depends very much on the normative foundation of contract law rules (see Wilhelmsson, 1993). The ambiguity related to illegality disputes stems from the lack of clear definition of the objectives of contract law (see Virgo, 1997). In analysing the magnitude of the influence of a regulatory public law on the validity of a contractual arrangement, the problem does not relate only to rent seeking and unnecessary restrictions which regulatory law may bring on contractual freedom. It also concerns whether, in spite of regulatory restrictions, the integrity of the contract is sustainable. The question is how contract law rules would respond in reshaping a contractual relation the validity of which is challenged on the basis of regulatory public law rules. The answer to this question lies at what theory of contract prevails.

If contract law is seen as a mechanism for advancement of welfare objectives in a regulatory dispute, a wholly innocent party could be denied the right to claim any right. A general deterrence, which is sought in denial of any relief under an illegal contract, is obviously a welfare objective. Thus, minimisation of the social losses from violations of regulatory laws is seen as a defensible ground for nullifying a contract (Ehrlich, 1982). From a welfare-oriented perspective, private contracts are upheld only to the extent that they serve social objectives in long run[27] and lead to the efficient allocation of resources.[28] Such promises are, thus, seen as fully enforceable in order to protect and encourage value-maximising resource allocation.[29]

On the other hand, relying on the concept of "corrective justice" as the basis of contract law rules, the proponents of a "rights" based view would argue that in enforcing contracts, courts should not enforce promises as mere promises,[30] or to achieve a particular social

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or economic goal but instead they ought to do justice between the parties (Benson, 1995). The function of contract law is to guarantee a "just" transaction. Corrective justice has been generally thought of as consisting of those principles that directly govern private transactions.[31] Corrective justice in this respect is mainly based on the assumption that benefits of liberty and justice always prevail over collective goals.[32] Considerations of liberty are "prior in lexical ordering" to considerations of welfare (Rawls, 1972). This means that the goal of ensuring for each participant in practice the most extensive liberty that is compatible with a like liberty for all cannot be overridden in the pursuit of any social objective.[33] The principles, which protect individual liberty, are principles asserting the existence of inviolable rights (Raz, 1986; Timbor, 1989). The rightness of rights takes precedence over their "goodness" and the force of these rights is essentially independent of their consequences.[34] They are not put into competition with other things, which are judged to be socially good.

However, if contract law and the intruding regulatory law share the same normative foundation, that is to say welfare objectives, then contract law would lack an independent ground upon which the validity of a contract could be maintained (see Tay and Kamenka, 1983; Enonchong, 1994). Under a welfare-orientated theory of contract law, deterrence and wider social purpose of the regulatory laws could be compromised if any relief is allowed under a prohibited contract. The argument would be that refusing to award the plaintiff relief will deter others from entering into or performing under similar contracts (Law Commission, 1999), which enhances the social welfare. In contrast, if contract law operates as an independent paradigm based on corrective justice, public law regulations motivated by distributive justice or efficiency can only prohibit specific performance of the contract and should not logically nullify the function of corrective justice embodied in contract law rules (see Waddams, 1994).

John Rawls' sharp contrast between rules which apply to what he terms as the "basic structure" of society, on the one hand, and "rules applying directly to individuals and associations and to be followed by them in particular transactions" on the other, illustrates how rules derived from corrective justice could belong to a paradigm distinct from those which belong to the domain of distributive justice. He believes that contract law rules should remain unfettered by welfare objectives (Rawls, 1978). While in formulating rules applicable to the former category, like tax laws, principles of distributive justice must be considered, for the latter group rules are assigned only a facilitative role: their purpose is to keep the exchange process running smoothly by eliminating coercion and reducing the transaction costs associated with the process itself. These rules are framed to leave individuals and associations free to act effectively in pursuit of their ends without excessive constraints.[35] Contract law is seen indifferent to individual needs and purposes. From this perspective welfare theories of contract (utilitarian or distributive) fail to recognise the limited idea of legal responsibility in private law (Benson, 1995). While the parties' wishes, needs or purposes may certainly shape their interaction they are irrelevant for the purpose of analysing the interaction as a transaction (Benson, 1995). While manipulation of contract law rules to achieve external social and economic goals makes contract law a perplexing system, contract law based on corrective justice is an independent, coherent and consistent system (Weinrib, 1995). Subordinating contract law to welfare goals would deny its independent status and would also create an additional opportunity for rent-seekers.

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3.4. *Reconciling corrective and distributive justice: A dialectical approach and the search for a middle ground*

Unlike distributive justice which is basically political,[36] corrective justice, and consequently contract law, has no political hallmark. The parties to the transaction are considered with respect to one single transaction. The significance of their interaction lies not in a collective interest, but in the normative correlativity of the exchange in which each party pursues his or her own goal (Weinrib, 1988a, b; Alexander and Wang, 1984; Simmonds, 1997). Weinrib in his book, "The Idea of Private Law," while explaining the public nature of corrective justice has shown how contract law could be autonomous without being detached from social reality, and how corrective justice could become public without being political (Weinrib, 1995). The idea of corrective justice, regulating bipolar relations, does not necessarily refuse a particular public conception of what is good or right.[37] Contract law regime cannot be entirely internal to the parties to the contract. A resort to external principles is unavoidable (Trebilcock, 1993). This may suggest that at least the effectiveness of corrective justice and realisation of "liberty" and "rights" in an adjudicatory process could be achieved through some kind of distributive criteria.[38]

The solution is, therefore, a theory that would unite corrective and distributive justice aspects of contracts according to principles of "autonomy" and "reciprocity."[39] Whilst a genuine autonomy is dependent on a minimum degree of welfare, it is not true that if a contract fails to promote welfare of any kind and degree, it must fail to retain its integrity and validity. A theory of justice that offers a dialectical synthesis of private right and public support provides the basis for maintaining the validity of contractual obligation in the face of a conflict with a regulatory law. The fact that contractual fairness may reflect certain distributive considerations, therefore, does not entail a rejection of the values of autonomy and liberty, which are indispensable to the voluntary nature of contractual undertakings.[40] On the other hand, adherence to corrective justice in contract law does not circumvent the social and economic goals of regulation. In a broader context the possibility of reconciling welfare and rights paradigms has been extensively examined (Mackay, 1976; Sen, 1976). Various economists and philosophers have proposed a modified utilitarian notion of social welfare that incorporates liberal notions of fairness. Any plausible fairness theory includes multiple principles and that any such pluralistic theory must specify rules for when some principles take priority over others. Under such a theory, the most important virtues of utilitarian social welfare function but do not neglect fairness concerns either (Chang, 2000; Kaplow and Shavell, 2000).

No doubt external considerations could and do restrict the scope of freedom of contract but the issue here concerns maintaining the autonomy of contract law which, adjusting to regulatory changes, would constantly reshape the internal relations of the parties to the contract in a just manner. Corrective justice, in this sense, is compatible with distributive justice. In other words, welfare values cannot logically dictate a change in contract rules, though contract law would provide alternative solutions for both meeting the regulatory demands, and of maintaining the contractual balance and justice according to corrective justice. This dynamic sensitivity of contract law to respond to the external restrictions means that the scope and the form of contractual performance may change while the nature and structure of contract law would remain intact. Corrective justice in its distinct role, and without any hindrance, would continue to function indefinitely in furthering

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what is essentially and categorically independent from welfare values. This indicates that contract law would never cease to function, no matter how cogent the external regulatory rules might be. A regulatory rule advancing distributive justice simply prohibits specific performance of the contract but an alternative scheme is always a possibility (Schwartz, 1979). Certainly a court must not assist carrying out of an illegal contract but once the prohibitory rule is applied the law should allow events have their normal consequences. Thus, though an illegal contract will not be enforced, a right holder is entitled to enforcement of his right. The parties may be permitted to reach agreement before the fulfilment of regulatory laws, and even determine where the burden of satisfying those conditions should fall.[41] In international contracts, this allocation of risk of legal prohibition is very common.[42]

There has also been some reluctance to accept a restitutionary scheme for the redistribution of losses in the case of illegality (Toube, 1997; Virgo, 1997). The law of restitution originally followed the law of contract by refusing to grant recovery to prevent unjust enrichment when an illegal contract is invoked (Friedman, 1992). However, if the contract can be rescued to deal with unjust enrichment, restitution is more likely to be able to play the same role. Theoretically, corrective justice underpins both contract law rules and the restitution of unfair enrichment (Dagan, 1997; Hedley, 1997). Maintaining the integrity of the contract in this sense makes even a resort to restitution superfluous, as the core of contractual structure remains intact in the case of external limits on the freedom of contract (illegality).

4. *Ex post* allocation of risk of illegality

The endorsement of the *ex ante* allocation of the risk of illegality is only one aspect of the operation of corrective justice. On similar reasoning and as a part of a general process of *ex post* allocation of contractual losses, *ex post* allocation of the risk of illegality must also comply with the principle of corrective justice when a discharge of contractual obligation is disputed.

Contract law normally contains some default rules for *ex post* allocation of risk of impossibility of performance of the contract. The way that the default rules are formulated represents our stand towards the underlying logic of contractual obligation and its ultimate purpose as serving merely corrective justice or distributive justice and collective goals (Trebilcock, 1993; Gillette, 1990; Scott, 1990). A welfare theorist would allow the courts to take account of considerations such as the distributional impact of default rules. In the case of illegality the outcome under a welfare approach is clear. An illegal contract is the most obvious example of welfare loss and there could be a temptation that losses stemmed from the prohibited action redistributed in a way that would reinforce the welfare objectives. The complexity of allocation of risk of illegality is not only related to each party's degree of knowledge and contractual fault but also to the regulatory responsibility and deterrence pursued through the denial of any right under an illegal contract. In such cases it would be harder to defend a rights-based formulation of the default rules of allocation of the unknown risks as in the absence of any indication by parties, it would be tempting not to ignore the wider social implication of default rules.

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For example, Posner and Rosenfield have proposed an efficiency-based formulation of default rules for the allocation of the risk of impossibility, including an analysis as to where the problem arises from the operation of supervening legislation (Posner and Rosenfield, 1977; Cooter and Ulen, 1998). Their choice of an efficient rule for the allocation of losses revolves around a choice between the discharge of contractual obligations on that occasion or treating non-performance of the contract as a breach of contract. They argue that in the case of a dispute over the effect of impossibility, discharge should be allowed where the promisee is the superior risk bearer; if the promisor is the superior risk bearer non-performance should be treated as a breach of contract. The "superior risk bearer" is to be understood as the party who is the more efficient bearer of the particular risk in question, who can more efficiently prevent that event or can insure the contract against such a risk. Although Posner has taken a cautious view about supervening illegality, this concept is somehow related to wider social considerations. Thus, he reminds us that economic analysis must remain tentative regarding illegality cases because it may not be possible to determine *a priori* which party is the superior risk bearer.[43]

It seems that Posner and Rosenfield's suggestion does not consider how just the solution might be for the parties as their assumption that through economic efficiency criteria contract law could effectuate the desire of parties (Posner and Rosenfield, 1977) is open to question (Ayres and Gertner, 1989, 1992). The economic efficiency *per se* cannot justify a reallocation of either adverse or favourable risks. This formula, of course, could be an indicator for a just allocation of losses or benefits, but it does not necessarily lead to a just solution. Moreover, determination of the superior risk bearer is complex because it often depends on factors that point to opposing directions (Trebilcock, 1988; Triantis, 1992). In a world, where we are dealing with absolute uncertainties rather than calculable risks and with events which cannot be prevented by the parties and cannot be efficiently insured, the principle that the loss should be borne by the "superior risk bearer" is not helpful (Trimarchi, 1991). While the contractual (*ex ante*) allocation of risk is effectively determined by the parties' individual determination of the lower price (Triantis, 1992) an *ex post* and objective determination is itself a very complex task. Even if this formula overcomes above deficiencies, its application to illegality cases, where determination of the greater risk bearer would involves naming the guilty party, could prove difficult. However, such a flexible formal, itself, operates on the assumption that even in the illegality cases the contract is not dissolved outright. Thus, in some cases the concept of greater risk bearer could lead to a just solution, though being a utilitarian theory, it is very unlikely that it would remain neutral as to wider social issues.

Another approach to this question is the conventional justification for frustration, which allows the losses lie where they fall. This might even be in more harmony with a welfare-orientated approach to the allocation of the losses than allocating them to the superior risk bearer formula, as in illegality cases the conventional rule certainly reflects external considerations such as deterrence. Under this theory the losses should be allowed to remain where they fall in the sense that all obligations that have been executed or have matured before the frustrating event occurs should not be disturbed, but outstanding executory obligations (if any) should be discharged (Kull, 1991–1992). To leave things as they are effectively means the total failure of the contract, which satisfies the requirement for a welfare-based theory of contract. It suits the policy of deterrence in illegality cases

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as it allows the automatic termination of contract and denial of any rights under the prohibited contract (see Collins, 1997).

Although such a formula offers predictability and certainty, it is obviously in most cases unfair. It would overlook the purpose of the doctrine of frustration, which lies in the judicial revision of a contract in order to restore the balance of fairness. If some part of the obligation can still be performed or some other alternatives could replace it, then it might be fairer to maintain the contract (Collins, 1997). Moreover, a just solution does not always require an assignment of a risk to one party or the other. There might be an occasion where the just solution would require the loss to be shared. In such a case, the allocation of risks may only be satisfactorily solved by sharing the loss rather than placing it entirely on one party or the other (see Swan, 1980). An equal sharing rule with respect to totally unforeseeable losses may be the clearest rule that can be devised. An equal loss-splitting rule for unallocated risks is as certain and predictable as the windfall principle of frustration theory and has also an egalitarian appeal. A risk-sharing is preferable to a rule that relieves the promisor entirely of his obligation and casts all the ensuing costs on the promisee, who equally, by hypothesis, has not agreed to bear them (Trebilcock, 1993). Effect of frustration in English law, for example, has been modified by suggestions that "English doctrine of frustration could be made more flexible" so as to avoid "the all or nothing situation, the entire loss falling exclusively on one party, whereas justice might require the burden to be shared."[44]

5. Conclusion

The paper sought to elaborate a delicate interaction between contract law and regulations in the formation and the failure of contracts. There has been a shift in the pattern of contractual disputes from controversies over private rights to a more public law-oriented model of contractual failure where economic regulations, intertwining private and public law, provide a different source of contractual dispute. This situation, however, does not mean that the distinction between public and private law has disappeared. Despite objections to this distinction, it is a defensible classification representing two distinct paradigms of corrective and distributive justice.

This distinction is crucial to maintain the integrity of contract law, which may be impaired if rules of contract law were employed to achieve welfare objectives. The paper, recalling the reasoning which underpin the very existence of both contract law and economic regulation, tried to examine whether the normative justification of economic regulations is forceful enough to make a prohibited contract completely void. On the basis of the dichotomy between corrective and distributive justice the assumption that contracts in violation of economic regulations are void was considered questionable. No matter how cogent economic regulations might be, the validity of a contract on the basis of corrective justice is always sustainable. Under this scheme a regulatory measure certainly restricts or prevents certain contractual obligations, but the core of contract can remain valid. On this account, the idea of pursuing distributive objectives through contract law rules was considered to be inappropriate, as it ignores the fundamental principles of *justice* and *rights*, and also creates inconsistency in the structure of contract law. The ultimate purpose of contract law is corrective justice, which should be upheld even where

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the contract fails, otherwise the invalidity of contract would lead to a haphazard and unjust allocation of losses and gains. It was established that, within the framework of contract law, and in spite of illegality, contractual schemes could be developed to prevent the complete failure of the contract and to distribute the potential risks of illegality both *ex ante* and *ex post*.

Notes

1. Even consent is socially defined (see Braucher, 1990).
2. See Fuller (1981); Hillman (1988), Adams and Brownsword (1987). The principle of autonomy must be supplemented by other values, for example, fairness, due care, or altruistic loss-sharing. See also Atiyah (1981, 1979), Seita (1984).
3. In most cases the justice which courts administer is largely similar to the moral sense of the community. See Atiyah (1981). For external (welfare values) and internal (autonomy) limits of freedom of contract. See Trebilcock (1993).
4. Mistake could be analysed as an instance of asymmetric information. Misrepresentation and fraud are also problems that arise because of asymmetric information, but to analyse them one needs to distinguish a third category of information: destructive facts. By "destructive facts" it is meant that the information, if not disclosed, will cause harm to someone's property or person. See Cooter and Ulen (1988), see also Blum (1984), Beale et al. (1990).
5. See Atiyah (1989). Sometimes, the impossibility of a contract is the result of pre-existing facts, which were unknown to the parties, sometimes it is the result of subsequent events, which were not expected or foreseen by the parties. In the former case the problem is said to be whether the contract is void for common mistake. In the latter case the problem is whether the contract is frustrated.
6. Ebenstein (1945) argued: "The division of law into private and public is theoretically untenable. From a purely legal point of view law is not divided into sovereignty relations and legal relations: there are only legal relations. The distinction between relations of law and those of force is equally untenable, for the reason that duty is the central element in the concept of law. In one sense there is a relation of force in every legal norm [...] Further, the Pure Theory of Law shows that in a more sociological analysis the distinction between public and private law is not tenable." See also Kelsen, (1970). He had similar views as he said:"... [T]his difference between "political" and "private" within the sphere of rights(law in a subjective sense) does not exist, that private rights are political rights in the same sense as those rights which alone are so described." Both Kelsen and Ebenstein in their arguments against the distinction had emphasised that rights, interests and methods in public and private law do not support the distinction. Nevertheless, different objectives as well as distinct methods and remedies employed in either public or private law provide a sufficient ground to maintain the distinction. See Klare (1982).
7. Culminating in the American Legal Realist Movement of the 1920's and 1930's, legal theorists such as Roscoe Pound, Walter Wheeler Cook, Wesley Hohfeld, Robert Lee Hale, Arthur Corbin, Morris Cohen and Karl Llewelyn devoted themselves to attacking the premises behind the public/private distinction. They ridiculed the invisible hand premise behind any assumption that private law could be neutral and apolitical. All laws, they believed, are coercive and had distributive consequences. See Horwitz (1982).
8. For a quite different view see Collins (1999).
9. See Schiesinger (1980), Tobias (1989). The public/private distinction seems, at least, less secure under the positivism than natural law regime. See Brest (1982).
10. See Cane (1987); *Anns v. Merton L.B.C.* ([1977] 2 WLR 1024 at 1034) in which Lord Wilberforce has this to say: "... so to base it would be to neglect an essential factor which is that the local authority is a public body, discharging functions under the statute: its powers and duties are definable in terms of public not private law," or *Maharaj v. Attorney-general of Trinidad and Tobago* ([1978] 2 W.L.R. 902-913 where Lord Diplock expressed doubts whether punitive damages were available: "The claim is not a claim in private law for damages for the tort of false imprisonment... It is a claim in public law..."; or in *Town Investments v. Department of the Environment* ([1977] 2 WLR 450 at 456) Lord Diplock explains the dispute as a public law one where he said: "... it is not private law but public law that governs the relationship between Her Majesty acting in her political capacity...".

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11. See Hayek (1977), Nicholas (1989), Hart (1994). The same idea of a difference in kind between judicial decisions and other decisions relating to military or political questions underlies the fundamental distinction between governmental power (gubernaculum) and the judicial function (jurisdictio) (Leoni 1961).
12. The Most important disclosure requirements of the United States securities laws are found in the Securities Act of 1933, the Securities Exchange Act of 1934, and the many regulations promulgated by the Securities and Exchange Commission under the authority of those two statutes; see also Rider and Ashe (1993), Fabozzi and Modigliani (1996), Coffee (1984), Beales et al. (1981), Legrand (1991).
13. In fact, this shift towards specific rules consolidates the underlying rationale of general rules of contract with respect to the information or power of the parties. See Weinrib (1988a), Weinrib (1995).
14. From an economic point of view, one may argue that it is true that our moral sentiments require absolute justice but when these moral objectives are translated into rules and are economically institutionalised, they encounter structural constraints imposed on any social enterprise seeking objectivity. See also Hart (1983), Ewing (1987), Kennedy (1976), Atiyah (1986), McCracken (1999).
15. Unlike the regulation whose purpose is the protection of public interest, regulations intended to protect the weaker party in a contractual relation are based on paternalistic grounds. In this case the weaker party's freedom is limited for his/her own benefit. See Kronman (1983).
16. Usually the main purpose of rendering a contract illegal is not to protect the autonomy of the parties in the form of safeguarding their freedom *vis-à-vis* each other but rather distributive justice considerations are sought to be served by these requirements. In *Tinsley v. Milligan* ([1993] 3 All ER 65), T brought an action claiming possession of the house and asserting ownership of it. M counter-claimed for an order for sale and a declaration that the house was held by T on trust for the parties in equal shares. T contended in regard to the counterclaim (i) that applying the common law maxim *ex turpi causa non oritur actio,* M was barred from denying T's ownership of the house because the purpose of the arrangement whereby the house had been registered in the sole name of T had been to facilitate the fraud on the Department of Social Security and therefore her claim to joint ownership was tainted by illegality and (ii) that, applying the equitable principle that he who came to equity had to come with clean hands, the court ought to leave the estate to lie where it fell since the property had been conveyed into the name of one party for a fraudulent purpose which had been carried out and in those circumstances the court ought not to enforce a trust in favour of the other party. The judge dismissed T's claim and gave judgement for M on her counterclaim. See also Law Commission (1999).
17. See for example *Scott v. Brown Doering McNab & Co.* [1982] 2 QB 724, in which the Court of Appeal held the contract to engage in stock market manipulation illegal. See also Nakajima (1999).
18. See Treitel (1995). It is said that in modern law, supervening illegality is a separate ground of discharge from a physical supervening. For this reason discharge by supervening illegality is governed by a number of special rules which do not apply in cases of supervening impossibility, impracticability or frustration of purpose. See Treitel (1994).
19. See Furmston (1992). See also *Tinsley v. Milligan* [1993] 3 All ER 65; *supra* note 16; *Taylor v. Bhail, The Independent,* November 20, 1995 where a dispute arose over payment, the court held that the plaintiff couldn't rely on the contract because it was vitiated by illegality, and it was unrealistic to regard the agreement as a building contract with a separate agreement to defraud. It was a single indivisible arrangement tainted by fraud which the law would refuse to enforce. The same argument also prevailed in *Soleimany v. Soleimany* [1998] 3 WLR 811–832.
20. In the case of competition law for example some countries are now adhering to a prohibition system under which certain practices are considered illegal *per se* and prohibited. Only in few countries are cartel-type practices still subject to a public interest test; in other words, they are only illegal if found to operate against the public interest. For issues of illegality of anti-competitive contract (see Geiger, 1993; Ahmed, 1984).
21. It may not be prudent to conclude the voidness of the contract quickly even though some competition laws, such as Article 81 (formerly Article 85) of EC treaty hardly leave any room for such interpretation. See also Enonchong (1985), Ibietatorremendia (1992), Rose (1996).
22. Devlin (1965), Waddams (1993), *St. John Shipping Corp v. Joseph Rank Ltd,* [1957] 1 Q.B. 267 where it was held that infringements of a safety statute did not mean that the plaintiffs could not claim the freight on the basis of contract; see also *Ashmore Benson Pease & Co. Ltd. v. A.V. Dawson, Ltd.*, [1973] 1 WLR 828 (overloading truck).

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23. *Tinsley v. Milligan*, [1993] 3 All ER 65; *supra* note 16. In that case Miss Milligan asking the court to give effect to a resulting trust existed from the facts (i) that the house was held in Miss Tinsley's name alone, and (ii) that Miss Milligan had provided part of the purchase money. She was effectively asking the court to enforce a contract. It was only these two facts which Miss Milligan needed to prove, and the reason why the house was registered in Miss Tinsley's sole name was irrelevant to Miss Milligan's claim. See also *Saunders v. Edwards* [1987] 2 All ER 651 "... [T]he illegal apportionment in the contract was wholly unconnected with the plaintiffs' cause of action...) [1987]1 WLR 1116; *Euro-Diam Ltd v Bathurst* [1988] 2 All ER 23, [1990] 1 QB 1.
24. *In Group Josi Re v. Walbrook Insurance Co. and Others*, in that case, Group Josi Re, a Belgian reinsures, had to pay out under the reinsures contracts. It had tried to avoid its contractual obligation. The English Court of Appeal did not accept such a defence and ruled that illegality is no longer a defence available to reinsures of London market companies.
25. For example under the Section 131 of United Kingdom Financial Services and Markets Act 2000, imposition of certain penalties under the Section 130 of the Act does not make any transaction void or unenforceable. Similarly Section 151 of the Act stipulates that certain contravention under the Section 150 does not make any transaction void and unenforceable. These rules try to establish a new trend under which a regulatory or even criminal prohibition should not automatically lead to the total failure of the contract, as it has been the case under the common law doctrine of illegality (see also Nakajima 1999).
26. The English courts have traditionally adopted a much tougher line, and general rule is that illegality acts as a defence to standard restituionary claim (Law Commission 1999).
27. See Braucher (1990). The theory that a contract is the expression of the free will of the contracting parties is said to be a product of the Nineteen-century when social relations were immune from State regulation and freedom prevailed against state power. See Atiyah (1979, 1989, 1986).
28. See Kennedy (1976), Kennedy (1982). Kronman argues that the non-distributive conception of contract law cannot be supported either on liberal or libertarian grounds, and defends the view that rules of contract law should be used to implement distributional goals whenever alternative ways of doing so are likely to be costly or intrusive. See Kronman (1980), Alexander and Wang (1984), Murphy and Coleman (1990), Harris and Veljanovski (1986), Collins (1992), Hart (1993).
29. See Goetz and Scott (1980), Atiyah, by relying on his historical research on the rise and fall of freedom of contract argues that economic ideological belief in freedom of contract was closely associated with the development of contract theory in 1170–1870. Further he suggests that most lawyers would be willing to agree that rules of contract law (common law) are likely to enhance the general welfare, and that they are therefore efficient as well as morally desirable. See generally Atiyah (1979).
30. This view equally opposes the belief that contract law is about *promise itself* and should not promote an independent ideal of justice by refusing to enforce bad or harsh deals. See Fried (1981), Summers (1984).
31. See Benson (1992), Weinrib (1995, 1988b), Posner (1990). If corrective justice is understood only as a formal scheme, Atiyah raises serious doubt over the viability of corrective justice as a formal and procedural basis for the justice of contract law rules. See Atiyah (1983).
32. Individual rights are political trumps held by individuals; see Dworkin (1978, 1980), Coleman (1980), Spergel (1988).
33. The normativity of corrective justice pertains to the immediate interaction of one free being with another. Its normative force derives from Kant's concept of right as the governing idea for relationships between free beings. See also Sandel (1982).
34. The important issue here is not the comparative importance of rights, but their total priority. In contrast to this independent approach, an integrated view of rights sees rights as socially important, though not necessarily uniquely so. There are different rights, which can sometime conflict with each other, and the possibility of trade-off between them has to be considered. Despite the apparently "independent" form of Rawls's principles of liberty, there is a quite a bit of "integration" implicit in the formulation and reformulation chosen by John Rawls, since consequence-independence is not enunciated as a basic principle anywhere in Rawls's extensive writings in this field.
35. See Rawls (1978). John Stuart Mill's views in this respect also deserve attention. Mill, in his attempted reconciliation of justice with utility, argued that justice and respect for fundamental rights represent a particular kind or brand of utility which men recognised as having a superior binding force to ordinary claims of utility. See Hart, Grey (1976), Buchanan (1986).

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36. The choice of distributive program is therefore political in its nature. A distribution must be among particular persons according to a criterion that embodies a particular purpose, to be chosen from many available purposes. Distributive justice implies that a political authority must define and particularise the scope or criterion of any scheme of distribution. The purpose of a specific distribution is not elaborated from within distributive justice, but must be authoritatively incorporated into the schedule of collective aims. See Weinrib (1995).
37. Hugh Collins in his rejection of neutrality of private law refers to holding people to promises as private law values (Collins, 1999). Obviously under the corrective justice, promises are not enforced only as promises and his criticism, therefore, should not include corrective justice.
38. See Hazard (1965), Hazard and Scott (1988). To Atiyah the main reason for formal rules is that they are designed to save time and trouble (see Atiyah, 1986). To achieve order and in order to prevent a disastrous tailspin into civil war, the liberal imposes a compromise on citizens each struggling for a maximum share of scare satisfaction. See Kennedy (1973), McCracken (1999).
39. See Fried (1981), Sandel (1982), Brudner (1989). This compromise is rejected and it is argued that if the principle of autonomy is construed consistently with the premise of free and equal moral personality and is taken as an unqualified starting point, it necessarily entails a purely non-distributive conception of contract law which under Hegelian philosophy is called an "abstract right". See Benson (1989), Rosenfield (1989).
40. See Sandel (1982), Fletcher (1987), Kennedy (1976), Benson (1995).
41. See Buckley (1983). Crafting rules that thwart the parties' *ex ante* expectation, such institutions might perpetuate inefficient outcomes, while Coase Theorem has provided a strong normative basis for analysing potentially inefficient legal rules, especially those that thwart the *ex ante* expectations of the contracting parties. It has also proved a vital contribution to the positive analysis of economic structure. Steans (1998).
42. For example, a provision in a contract between two private parties providing that an overseas party will observe the law of the United States in regard to any re-export of items of United States origin is an example of *ex ante* allocation of such legal risks. See Lowe (1983), van Houtte (1988).
43. Posner and Rosenfield (1977), Trebilcock (1993). To Trebilcock, Posner and Rosenfield do not clarify whether, irrespective of the parties' intentions, instrumental efficiency considerations are being invoked to impose this rule on the parties in the interests of efficient resource or risk allocation in general and notwithstanding the lack of compensation for bearing the risk. In other words, Trebilcock would argue that it is not clear whether their approach is based on actual consent to contractual obligations or whether Kaldor-Hicks notions of efficiency are being invoked to assign obligations to the parties. See Trebilcock (1993), Coleman (1992).
44. See *National Carriers Ltd v. Panalpina (Northern) Ltd.* [1981] AC 675, 707; see also Treitel (1995). In some countries courts would excuse performance without taking subsequent losses into account whereas, in others a court would ensure that the parties jointly bear the resulting losses in an equitable manner. See Comment (1991).

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