Book Review

David Campbell, *Contractual Relations: A Contribution to the Critique of the Classical Law of Contract* (Oxford: Oxford University Press, 2022) 438 pp, ISBN 978-0-19-885515-6.

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https://doi.org/10.1515/ercl-2023-2013

David Campbell is a leading theorist of the common law of contracts. He is particularly well-known for his discussion of 'relational contracts'. He has also done much to popularise and interpret the work of Stewart Macaulay and Ian Macneil outside of the USA. He has also demonstrated his skills in economic analysis of law on many occasions. However, this new monograph is only distantly related to his previous scholarship. This is a work of moral philosophy and the history of ideas. The clue to its approach lies in the subtitle: *A contribution to the critique of the classical law of contract*. Who else wrote books with indigestible titles like that? Youthful Karl Marx, of course, when he was working out his ideas in his books *A Contribution to the Critique of Hegel's Philosophy of Law*, and *A Contribution to the Critique of Political Economy*. Following in Marx's footsteps, Campbell's method is an internal critique of the ideas found in the common law of contract with a view to demonstrating that they are confused, incoherent, and morally pernicious. On this account, judges and scholars are mostly confused and wrong, though sometimes they get things right for the wrong reasons.

What is the big mistake that all the participants in the doctrines of the common law of contract have made? They have not understood, Campbell argues, the basic moral principle on which the law of contract is (or ought to be) based. What is this moral principle? Surprisingly he says that the foundational moral principle is 'freedom of contract'. Surely there is nothing new about such a claim? Campbell's claim is different from the conventional understanding of freedom of contract, however, because he says that this freedom is (and ought to be) exercised through a relationship of 'mutual recognition of each other's interests' (pp. 6–7). We are told that the classical law of contract is not based on such mutual recognition of each other's interests, but rather on the selfish pursuit of self-interest ('solipsistic self-interest' in Campbell's terminology), which is a perversion of the morality of contracting. The crucial concept of the book is 'mutual recognition'. He links this to the early philosophical reflections of Marx. It is also linked to Hegel before him and indeed the whole tradition of respect for the dignity of others that one finds in German moral philosophy, as in Kant. The underlying idea seems to me to be that society must be based on mutual respect of others, because unless we respect others,

they will not respect us, which is what we seek in self-affirmation. Similarly, markets and contracts must be based on mutual respect of others.

This view of the morality of contracting is presented as an alternative to two predominant, though in Campbell's view, deeply flawed theories of contract law. The first is the view of contract law that it enables people to pursue their selfish preferences. In effect, they use others as means to the fulfilment of their own goals. This view is attributed to the classical law of contract and it is also pervasive in the rational maximising understandings of economics. The second flawed theory of contract law believes that the selfish preferences theory of the classical law have been replaced to a considerable extent with a welfarist theory of contract law that insists that the rules must ensure that contract law works to the benefit of everyone, particularly weaker parties such as consumers and workers. Both theories are wrong, because Campbell regards them as illegitimate in some sense. He thinks that the only legitimate basis for contract law and a market society is the one he describes in terms of 'mutual recognition of each other's interests'. The flaw in the selfish pursuit of preferences theory is that there is no respect for the interests or autonomy of others. Indeed, the selfish preferences theory of contract seems to violate the Kantian injunction that one should not treat others as merely means to our own ends. The flaw in the welfarist account is that it is paternalistic in the sense of preventing individuals from exercising their autonomy, which is an attack on the moral foundations of contract law. It is illiberal because it does not protect the virtue of the market that it is 'purposeless' in the sense that everyone can choose and pursue their own goals. For example, consumer law is paternalistic, authoritarian, and reveals a communist political culture (p. 410).

An important sub-theme of the book, which has little to do with the law of contract, concerns the reconciliation of these ideas of mutual recognition through contracts with the Marxist account of a market society in terms of commodification. The Marxist account paints a bleak picture of how everyone is trapped in a market system that drives their actions in ways that lead to 'alienation' in the sense of being deprived of (or separated from) one's essential humanity. Campbell's theory of the morality of contract law clearly rejects this Marxist account because he sees the essence of contract law in mutual recognition, which is the basis of society. The last part of the book sets out to attempt to find a way of reconciling these different visions. But ultimately the Marxist account is rejected as deeply flawed. For Campbell wants to celebrate the moral virtues of a market society, in particular the supreme value of individual autonomy, and the feature of human nature that was ignored by Marx which is that everyone wants to better their position.

One more remark needs to be added about the method of the book. If the claim is that the moral foundations of contract law should lie in mutual recognition and not the selfish pursuit of one's own interests, that can make sense. That is

straightforwardly a moral claim that the value of mutual recognition is superior to the alternative. The selfish pursuit of interests may in practice have the moral virtue of maximising utility or wealth, which is presumably not an immoral aim. But I can accept that there may be a superior or more fundamental moral virtue in mutual recognition, – the right being prior to the good, -and Campbell's task is to demonstrate this superior virtue. But the book does not follow this typical route of modern moral philosophy of developing moral principles from abstract ideals. It tries to derive principles from social practices that are described in history, economics, and sociology. In so far as Campbell expressly articulates a methodology it is 'immanent critique' (p. 10). This method, as I understand it, is neither moral criticism based on abstract principles, nor a work of history and empirical sociology, but the revelations of inherent contradictions within a body of thought that has been developed to describe, understand, and regulate an aspect of human life. The body of thought in this case is 'the classical law of contract', but it also seems to be the insights of neo-classical economics (Pareto Optimality) and their doctrinal expression in freedom of contract (p. 11). The classical law is viewed by Campbell as the expression of neo-classical economics, so a critique of the latter serves as a critique of the law (and vice versa).

Campbell says that 'pure economic motivation', which is presumably the same as selfish pursuit of interest, is 'fictitious' (p. 7). Yet, I don't think that Campbell is exactly saying that no-one acts in a purely self-interested manner, with the consequence that the classical law of contract, like neo-classical economics, which assumes that they do act purely selfishly, must be confused. Apparently conceding this point, later in the book Campbell quotes Kant with approval that 'the crooked timber of humanity will always fall short of a state of moral perfection of which no rational being in the sensible world is capable' (p. 67). This selfish pursuit of interest kind of behaviour is therefore not a complete fiction as a description of human behaviour, but such behaviour is dysfunctional and immoral. Campbell is arguing that in the long-term the market can only function if everyone mutually respects the interests of each other. The logic of the market requires this mutual recognition. As Polanyi argued, the selfish pursuit of interest in a laissez-faire world proves to be impossible to sustain in the long run, so that intervention by the state or public institutions had been necessary to regulate the economy and provide protection of welfare.

Because Campbell believes that there is a close connection between contract law and economics, his articulation of the value of freedom of contract involves both an engagement with moral philosophy and economic theory. The principle of freedom of contract is seen as the key expression of both moral autonomy and Pareto Optimality. Indeed, Campbell claims that the principle of freedom of contract is 'derived from' Pareto Optimality (p. 23).

With regard to moral autonomy, Campbell approves of the ideas of liberal legal theorists such as Charlies Fried and Lon Fuller who say that autonomy means the opportunity to enter into contracts of our choice. This opportunity is celebrated as not subjecting our decisions and choices to the public interest. Campbell passes over some of the well-known difficulties with this claim such as the points that (a) freedom of contract only works if, in the public interest, the right to private property and the inability to sell one's person are ensured, and (b) that the law coerces people to perform their contracts rather than permitting them to change their mind for the sake of respecting their autonomy, though on the latter point he observes that the coercion promotes autonomy by making parties responsible for their choices (p. 17). Campbell approves of the way that this freedom of contract and neo-classical economics is free from morality in the sense of moral standards that dictate which choices made when entering contracts are morally better than others. Welfarists (who it should be recalled are dismissed by Campbell as deeply flawed), would riposte that the law of contract has always been and always will be restrictive of choices, if only because it refuses to enforce lots of choices. As well as doctrines of illegality and restraint of trade, every legal system has rules that determine whether the agreement that has been made is the type of agreement that public policy says ought to be enforced. In the common law, that task is performed primarily by the doctrine of consideration, supplemented by other doctrines and equitable principles. Instead of the principle of freedom of contract being the foundation of the classical law, it might equally be said that the state has delegated or conferred a power on individuals to make binding transactions between themselves that will be enforced by agencies of the state, but that this power is limited not by the desire of individuals but the view of the state on whether the agreement is valuable according to such criteria as efficiency, fairness, and morality. Campbell would presumably reply to this welfarist critique that, insofar as the law of contract takes all these dreadful measures that interfere with personal autonomy, it has all been a terrible mistake, a violation of principle, and what he pejoratively labels 'welfare ad hockery'.

The world of Pareto Optimality is only legitimate, says Campbell, if it establishes a social system of *mutual advantage* (p. 23, italics in the original.) He then says that a system of mutual advantage can only be established if 'the solipsistic self-interest that motivates exchange' is abandoned for 'a self-interest that makes exchange actually possible, which is based on a relationship of mutual recognition' (p. 23). So his claim is that mutual recognition is inherent in the requirement of Pareto Optimality. But this linkage between mutual advantage, which is plainly a requirement of Pareto optimality, and mutual recognition is not entirely clear. Both parties being better off as a result of a transaction does not necessarily entail that they have also given each other mutual recognition. To address this point, Campbell does establish that both parties must consent to the exchange, otherwise it will not be voluntary and

therefore presumably in each party's self-interest. But this is what Adam Smith called 'self-love' or self-interest; there is no mutual recognition here, only observance of the state's rules about private ownership of property. I do not see why Pareto Optimality leads to anything more than using others as means to our ends rather than the Kantian idea that no-one should be treated as merely a means to our ends if there is to be justice. Campbell insists, however, that the requirement of agreement in contract law is about the establishment of 'relationships of mutual autonomy' (p. 27). Notice here and elsewhere the slippage in language from mutual advantage, to mutual recognition, and to mutual autonomy (which is a concept that surely makes no sense). So, my question is whether the derivation from Pareto optimality to mutual recognition is really established. Surely Pareto optimality is entirely consistent with what Campbell calls solipsistic self-interest? That is why many people think that the classical law of contract is as it is: the classical law of contract is derived from Pareto Optimality, as Campbell says it is, precisely because it is founded on solipsistic self-interest not mutual recognition as Campbell claims.

At the beginning of the book, Campbell declares on page 4 that he is a 'liberal socialist' who believes that the market economy, when institutionalised in, inter alia, an adequate law of contract, is the best possible system for the production and consumption of economic goods. This claim, as he admits, seems a bit odd, since socialism is usually associated with the displacement of markets and private ordering with public administration of the economy and welfare provision through the welfare state. Indeed, it is a curious version of socialism that he advocates. Campbell attributes to me and others the view that this welfarism has influenced the modern law of contract by introducing all kinds of laws designed to help weaker parties – what Max Weber called the 'materialisation of law', of which the most important examples amount to what was called 'consumer-welfarism' by Adams and Brownsword (p. 5). Campbell observes that this kind of welfarist law of contract tends to supress freedom of contract, involve paternalism in the bad sense of not permitting individual autonomy and choices, and amount to a kind of unacceptable 'authoritarianism'. He goes on to say that he hopes his views would be acceptable to Hayek (p. 9) because his liberal socialism is very much akin to Hayek's views. He also approves Nozick's objection to the imposition of any end-state theory of justice. In accordance with those extreme libertarian views Campbell thinks that consumer law (and, presumably, employment law, and landlord and tenant law, and consumer credit law etc.) are really 'unacceptable authoritarianism'. For example, the laws on unfair terms in consumer contracts are illegitimate (from this moral point of view) because they interfere with autonomy. The argument for this position seems to be one of internal critique. He says that the market is essentially purposeless in the sense that it is and should be neutral between the purposes that are pursued by individuals (p. 33). It follows that people like me (and I am flattered by a couple of

pages of excoriating attack), who think it right that the law of contract and other kinds of regulation all combine to produce social justice in the sense of a fair or at least fairer distribution of welfare commit the sin of destroying the market. He says that: 'A market, indeed, that seeks to give effect to such a purpose is not a market at all'. So, Campbell thinks that the only legitimate aim of regulation of contracts is to ensure complete autonomy of the individual. He cites with considerable approval Sir George Jessel's elevation of freedom of contract to being the main the source of civilisation as we know it. If Campbell is a liberal socialist, it is clear that his socialism is quarantined from the law of contract.

Most of the book is devoted to chapters on different aspects of the English common law of contract. These chapters do not purport to describe the rules being discussed such as agreement, consideration, express and implied terms and so forth. The book tends to presuppose knowledge of the law and then engages with theoretical debates and hard cases.

Throughout this discussion there is a persistent theme. In order to ensure that contracts are based on 'mutual recognition', the law of contract must always comply with a standard of good faith. He says (at p. 148) that 'good faith is inherent in market exchange and to understand why this is so is to become conscious of the necessity of mutual recognition'. So the argument is that if contract must be based on mutual recognition (and not pure self-interest), it must also recognise a requirement of good faith in all contracts. The main error of the classical law of contract on this view was its failure to acknowledge good faith as an essential standard that needs to be observed by anyone entering or performing contracts.

Compliance with good faith can sometimes be achieved by a distinct understanding of concepts such as agreement or consideration. In other cases, good faith may require express acknowledgement as a relevant standard. Let me give some examples of how this argument proceeds through seven substantial chapters.

In connection with agreement, the common law rightly treated this requirement of consent by both parties as essential to a law of contract. But it was misled to some extent by its emphasis on the outward appearance of consent. It is true that if someone appears to consent to a contract, by for example expressly consenting to it or signing a document, that is good evidence of consent. But if the other party realises that a mistake has been made or that the terms of the contract are not what is expected, is there really an agreement? Campbell thinks not, because mutual recognition requires both parties to be aware of and respect the interests of the other. Thus, if one party knows that the other would not have agreed to the contract if they had properly understood all of the terms of the contract, Campbell says that the principle of mutual recognition/good faith requires a court to protect the integrity and legitimacy of the law of contract by concluding that there was no agreement. Unfortunately, the classical common law of contract reached the opposite

conclusion: the appearance of consent was enough for an agreement. That unfortunate deviation from moral integrity then led to many unfortunate consequences such as the imposition of unfair terms through standard form contracts. Those business practices that took unfair advantage of consumers then had to be addressed by the 'welfare ad hockery' of legislation on unfair terms in non-negotiated contracts. Such legislation receives Campbell's scorn for its unprincipled and authoritarian style. He argues that what is required is a return to the pure moral foundations of contract law in mutual recognition and good faith, which would render all such legislation superfluous.

His discussion of the requirement in the common law that a legally binding agreement must be supported by consideration is mainly an engagement with the theoretical puzzles of the law, though he is equally mocking of the consequences of the misunderstanding of the true basis of the doctrine. The puzzle that the doctrine of consideration presents concerns executory agreements. A bare or donative promise is not binding in English law in the absence of special formalities. The doctrine of consideration is supposed to require that both parties should give or give up something of value in return for a similar proposal by the other. There is no problem if goods or money are actually handed over. But in an executory contract, all that happens is both parties promise to do something (or refrain from doing something). Since such bare promises are not legally enforceable, as long as the contract remains executory, neither party has promised anything of value, with the consequence that there can be no consideration and no binding contract. Everyone knows, however, that courts routinely enforce executory contracts. The question is how enforcement be justified by the doctrine of consideration. Scholars' answers to that question vary from, at one extreme, denying that there are any executory contracts, to the other extreme of proposals to abolish the doctrine of consideration. Campbell disagrees that there is any problem with the doctrine of consideration. He insists that the classical theory forgot that the promises are made in good faith: both parties undertake to perform their promises in good faith. He says that promises made in good faith are valuable because they are morally binding, and that therefore they should also be legally binding. Unlike many common lawyers, he thinks that the law of contract should comply with moral standards by upholding a requirement of good faith.

Campbell does draw on his earlier work about the relational nature of contracts, but it takes an unexpected turn towards good faith in this book. All contracts are relational, says Campbell, but this statement now seems to be the same as the idea of mutual recognition expressed in different terminology. The requirement of good faith is understood as the need to recognise that every contractual agreement is embedded in unwritten norms of good faith behaviour. He argues that in a most important theoretical, if not doctrinal, sense, there is no such thing as an express

contract (p. 114). 'We must conceive of the express terms of contracts as always situated within implied terms which give the express terms their meaning'. The implied term is 'inherently relational'. The relations institutionalised in the implied terms make the general market economy possible by putting sales on the basis, not of caveat emptor, but of caveat venditor, without which basis that economy could not exist. Implied terms are the good faith ingredient that is required by the legitimate market.

What of relational contracts? Is there a distinct category of contracts called relational contracts to which special rules should apply? On page 336 Campbell draws a distinction between discrete contracts, which are (more or less) fully 'presentiated' (i.e. the obligations of the parties are set out fully in advance) and should be strictly enforced according to their terms, and those contracts (relational contracts) which are only partially 'presentiated' and which therefore assume a co-operative approach that permits and depends upon adjustment of obligations in the on-going relationship. Campbell does not define further the category of relational contract, so perhaps he just regards it as one end of a spectrum. He does discuss the example of *Baird Textiles v Marks and Spencer* (p. 355 onwards) as an example where the English Court of Appeal refused to recognise a contract precisely because the arrangement was unspecified, co-operative, and subject to constant adjustments. He argues that the court should have recognised a contract in that case, if only to the extent of awarding compensation for the abrupt withdrawal from the relationship. That conclusion implies that good faith in relational contracts requires self-restraint in withdrawing co-operation from the purpose of the joint endeavour.

What is there in this book for a scholar interested in European contract law? On one level, there is very little of interest, because the book is focussed on judgments in common law courts, mostly drawn from England. Like most books about contract law in the United Kingdome, there is silence about EU Directives and Regulations and judgments of the Court of Justice of the European Union. Indeed, it seems a reasonable inference from his argument that Campbell would dismiss the entire body of EU contract law as 'welfare ad hockery': it is unprincipled and possibly undermines the integrity of the market. Yet, if one thinks about the theory in this erudite, rambling book, and its critique of the incoherence of the morality of contract law, there are lessons for us all to learn.

What I found most striking was that his concept of mutual recognition, implemented by a standard of good faith applicable to formation and performance of contracts, mirrored the standard of fairness set out by the Court of Justice in *Aziz,* C-415/11. Recall that Campbell insists that mutual recognition requires both parties to be concerned for the interests of the other and not to snap up a bargain that they know that the other does not really want. This is much the same standard as that applied to the question of fairness in the unfair contract terms directive. To find an

imbalance arising contrary to the requirement of good faith, a court must assess 'whether the seller or supplier, dealing fairly and equitably with the consumer, could reasonably assume that the consumer would have agreed to such a term in individual contract negotiations.' What Campbell claims is that this requirement of good faith should always have been part of the core requirements for the existence of a contract, whether it be a consumer contract or a commercial transaction. He insists that if the law of contract had developed coherently in the nineteenth century, judges would have understood that moral coherence and the legitimacy of the market order required such a good faith standard to be the bedrock of a market society. Instead, the judges were seduced by the idea that everyone can legitimately pursue their own self-interest, using others as instruments for their purposes in the form of contracts, thereby establishing what was in the long run an illegitimate and flawed market order that had to be constantly rectified by ad hoc regulation like the unfair terms in consumer contracts directive.

Will this critique of the classical law of contract persuade the judges to reconsider the core doctrines of the classical law of contract? Such a radical outcome seems unlikely. What might be hoped is that judges may be emboldened to shape the law at the edges so that it better accords with the standard of good faith. For instance, judges might be more willing to recognise that the formal written agreement was not exactly what was intended or understood as the true agreement, or judges might be more willing to complete the details of contracts through implied terms that may not be strictly necessary but which ensure that performance of the contract will be carried out in good faith.