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Aditi Bagchi

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DIALOGUE AND DEBATE: A SYMPOSIUM ON MARTIJN HESSELINK'S RECONSTITUTING THE CODE OF CAPITAL

The challenge of radical reform in pluralist democracies

Aditi Bagchi

Fordham University School of Law, New York City, USA
Corresponding author. E-mail: abagchi@law.fordham.edu

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Abstract

Martijn Hesselink proposes a new European charter of private law that would correct the deficiencies in private law identified by Katharina Pistor. While Hesselink aims to achieve radical reform by way of radical democracy, this article argues that radical democracy is unlikely to realise a radically progressive vision of private law. Citizens of wealthy, post-industrial democracies lack certainty about both the material consequences of reform and the demands of justice. Because their caution renders them averse to far-reaching, bundled reform packages, public discourse in post-industrial societies as we find them is more likely to produce incremental than radical substantive reform.

Keywords: private law; democratic theory; capitalism; radicalism

Katharina Pistor's critique of contemporary capitalism is so pointed and compelling that it leaves us wanting some kind of plan to move forward. Martijn Hesselink offers such a plan: he suggests reform of European private law as a way to redirect markets in a more humane and just direction. Pistor emphasised the difficulties of unilateral state action to reign in capital and Hesselink responds with a transnational solution, one that plausibly could inspire a global effect.

Hesselink makes central to his argument a point that appears but is less salient in Pistor's initial critique: the way that the 'code' of capital operates is outside of democratic control, or at least, it is not the deliberate product of democratic choice. Therefore, Hesselink proposes not only a more radically egalitarian code but also a more 'radically democratic' one.[1] In this short essay, I consider whether these two aims of Hesselink might be in tension with one another.

To clarify, I am not arguing that a democratic code cannot be good, which is false, nor that democracies are unlikely to produce optimal code, which is familiar.[2] We do not and cannot know what code will produce the optimal combination of growth and equality but democratic lawmaking has produced many good law and bad laws, and there is no reason to think that our institutional capacity to come up with a good code for capital, when undertaken as a deliberate and transparent political exercise, will produce uniquely perfect or disastrous results. Instead, I will argue that popular consensus behind reform of private law is likely to be difficult to achieve

[1]M Hesselink, 'Reconstituting the Code of Capital: Could a Progressive European Code of Private Law Help us Reduce Inequality and Regain Democratic Control?' 1 (2) (2022) European Law Open 316–343.

[2]Public choice theory has long been devoted to explaining why democratic politics produces suboptimal results. See, for example, B Bishin, *Tyranny of the Minority: The Subconstituency Politics Theory of Representation* (Temple University Press 2009) (special interest capture); M Olsen, *The Logic of Collective Action* (Harvard University Press 1965) (collective action problems); W Niskanen, *Bureaucracy and Representative Government* (Routledge 1971) (bureaucratic power expansion).

and appetite for radical reform is likely to be even more limited. Therefore, if reform of private law is to be radically democratic, it is unlikely to be substantively radical.

Pistor herself seems to see incremental victories as the most realistic path forward.[3] But Hesselink has lost patience with small steps.[4] Perhaps because of the failure of the more modest attempt to integrate European sales law on even an opt-in basis, he is prepared to fight for a more complete overhaul of private law across the continent of Europe. Hesselink is aware, of course, that entrenched corporate interests will resist such an overhaul. These are the ordinary boogeymen that democratic projects regularly face. But Hesselink may underestimate the resistance of even those whose interests reform is intended to serve. While there are probably many other psychological reasons why people might resist radical reform, I will focus on two varieties of uncertainty that might generate opposition: epistemic and normative. Epistemic uncertainty here refers to uncertainty about the material effects of proposed changes to private law. Normative uncertainty refers here to uncertainty about the demands of justice on private law.

Although my argument here grapples with uncertainty, I should admit that there are foundational principles that I take for granted. We do not know what kinds of policies democratic processes will produce. We do not agree about the normative foundations of democracy or even the demands of democratic norms. Nevertheless, in what follows, I assume that if indeed we face a choice between radical reform of private law, on the one hand, and radical democracy, on the other, then we ought to choose democracy.

1. Epistemic uncertainty

Pistor and Hesselink both accept that reform of private law might reduce wealth. But how much? That is an all-important question. Because while it is easy to accept the reduction of wealth among those with more wealth than they can even enjoy, it is more difficult to persuade the next 50 per cent to give up some of their wealth in order to achieve a more egalitarian distribution. This reader of Pistor and Hesselink (and of contemporary politics) agrees that there are almost certainly many changes to private law that will not only *not* reduce median income and wealth but might actually raise them, for example, rule changes that open up the economy to non-elites or invest in education, health care or environmental sustainability. But these are not the kinds of modifications to our system that either Pistor or Hesselink have in mind. They aim to re-write the rules of contract, tort, property and corporate law (including rules affecting taxation). These too might be modified in ways that increase economic welfare for median earners, but there are also reforms that can be expected to result in less investment by firms, lower employment levels, higher prices and simple capital flight. We cannot be sure which reforms are of the former or latter variety.

Both Pistor and Hesselink acknowledge potential economic costs of reform, but they treat those costs as the price of justice. But whether justice requires these reforms itself turns on the price tag. If, for example, it turns out that the vast majority of a political community benefits from this or that feature of the code of capital, it is not clear – under Rawlsian principles of distributive justice – that justice requires rejecting that feature as opposed to compensating the least advantaged groups through side payments in the form of the welfare state or labour policies. Calculating the economic cost of altering private law rules is not an empirical sideshow; estimating those costs is an essential part of deciding the demands of justice. Epistemic uncertainty about the material consequences of private law reform undermines claims that any package of reforms is morally compulsory.

Distributive justice is unlike some other kinds of justice in this respect. A society should be prepared to pay for criminal justice. We may not forego reliable forensic tests, for example, because they are too costly. We should not ask whether the price tag of humane prisons justifies

[3]K Pistor, *The Code of Capital: How the Law Creates Wealth and Inequality* (Princeton University Press 2019).
[4]Hesselink (n 1).

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the expense. But measures that reduce inequality are of a different variety because they are motivated by their effect on material welfare.

Moreover, structural measures such as those contemplated by Hesselink and Pistor are not clearly aimed at benefiting the worst off. It is not clear whether it is the bottom decile that Hesselink's charter aims to benefit or everyone outside the top decile. Presumably, the intended benefits are various. But to the extent the desire is to benefit the middle class, we face again the live empirical question about how their material welfare will be affected by particular measures. To the extent that the aim is to benefit the most disadvantaged social group, it is not clear that overhaul of private law is a targeted measure.

Hesselink introduces another dimension of justice that Pistor does not take up: interpersonal justice. Perhaps interpersonal justice is more like criminal justice; because it does not turn solely on the allocation of material resources, side payments are not a potential solution. Interpersonal justice depends on background distributive conditions, and I have argued that individuals are obligated not to transact with others in ways that exacerbate distributive injustice. But some measures that are sometimes taken to promote interpersonal justice, such as mandatory terms, arguably reduce the material welfare of those they are intended to protect. Respect for those parties requires that we take into account their own understanding of their interests, and we can expect that not everyone will be ready to pay for interpersonal justice as some scholars conceive it. And so we return to the empirical question: what will be the material impact of any given reform?

Again, I do not purport to know how costly reforms will be or even which reforms will result in net reductions in social wealth. The technical staff at the European Commission might arrive at their conclusions, but across governmental agencies and in the larger scholarly community, experts disagree with each other. It seems to me unlikely that most voters are confident about their answers to that question either. That is, citizens of post-industrial democracies do not know the answers to economic questions that underlie the policy questions that private law reform raise.

In post-industrial democracies, we have reasons to expect many voters to be risk-averse in the face of such uncertainty. This is because of a phenomenon identified by John Kenneth Galbraith under admittedly different distributive circumstances. Galbraith argued that in the post-war United States of America (USA), the majority of citizens are basically content.[5] This claim rings hollow today, when most people seem instead to suffer from considerable economic anxiety and are unsure that their children will match let alone exceed their own economic position. However, if most people today cannot be described as content, they nevertheless have a lot to lose. At least in the USA, most people do not look around and see another economic model that they prefer. Even in the face of abundant media extolling universal health care in Canada or the United Kingdom (UK), people are basically right that there are trade-offs and that, while there are many people who would be clearly better off with those alternative models, many of those with employer-funded insurance (who compromise the vast majority of voters) are likely to be worse off in at least some respects. While people look around and envy low-cost or altogether free higher education in Europe, people also see that, in many respects, higher education in the USA is remarkably luxurious and that free education is unlikely to look like that. And because most students do not pay sticker price in the USA, and it is unclear what kind of university their child will want to attend (if any), no one actually knows how much they will ultimately have to pay or borrow for their education. If people do not see clearly superior models even on those dimensions on which post-industrial democracies presently vary, they are understandably still more uncertain about whether they will be better or worse off as a result of changes in private law that have never even been tried out anywhere.

Hesitation is not the product of mass confusion or hysteria. It cannot be dismissed – especially by committed democrats – as false consciousness or the product of media brainwashing. Popular uncertainty does not translate into devotion to the status quo; there is genuine discontent with

[5]J K Galbraith, *The Culture of Contentment* (Houghton Mifflin 1992).

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existing institutions and their outputs. But uncertainty dictates rational caution and it cuts against radical reform.

Hesselink might rely on still another species of justice to avoid the limits of our technical understanding of the material effects of proposed reform: he can argue that they are required in the service of political equality. To the extent vast inequality produces concentrated political power, justice requires remedying the maldistribution. And indeed there are many reasons to think that democratic systems to date do not deliver substantive political equality. Economic inequality weighs on the democratic project at its foundations. But to the extent Hesselink's proposed reforms are motivated by political equality, they raise another set of questions regarding the material preconditions for democracy, or what kinds of economic distributions are compatible with political equality. This question has both empirical and normative elements. Those who regard existing law as clearly illegitimate are more likely to assign the present economic distribution a dominant causal role in sustaining the code of capital. But those who are unsure or even sympathetic to private law as we know it do not see the same evidence of subverted democracy. They will need to be persuaded that democracy needs saving in this particular way. Their uncertainty about the demands of political equality leads us to another species of uncertainty that plagues radical reform.

2. Uncertainty

While it is normal and healthy for people to disagree about the demands of justice, and even more so about what kind of lives people should aspire to, high levels of polarisation make it difficult to rally around specific programmes intended to realise specific conceptions of justice. Can we look at recent electoral results in France and conclude that people want to overhaul private law or even to move politics leftward? Do 15 years under a single centre-right chancellor reveal appetite for radical market reform in Germany? Certainly, across Western countries, there is anti-elite sentiment and pervasive suspicion that our institutional foundations serve the interests of the rich. But this cynicism has produced dangerous nostalgia and hostility rather than empathy for those at the bottom of the current social order.

A radically democratic approach needs to take seriously the ways in which people actually respond to their own discontent. It does not have to take political preferences as given: radical democracy may entail a revitalised discourse that prompts people to rethink what they want out of private law. But it would be patronising to think that education, research and debate will result in a social movement backing overhaul of private law. Any institutional processes that appear to have pre-ordained outputs would only reinforce cynicism about democracy itself. Hesselink himself emphasises that radical democracy must start with pluralism: difference is not a transitional condition that integration can fix.[6] But he does not adequately grapple with the challenges of sustained disagreement for wholistic reform. Normative uncertainty among those who disagree deeply seems more likely to resolve in the middle than at the extremes, at least if democratic institutions make it difficult to run roughshod over some segment of the political community. Productive discourse implies that people persuade each other and alter their views. But given mutual respect, encountering a substantial number of citizens who believe that the rich 'deserve' their 'winnings' or who subscribe to something other than the Rawlsian principles that dominate academic writing about distributive justice is likely to leave citizens less certain rather than more certain that there is a moral imperative to assume the economic risks that they associate with radical reform. In this way, epistemic uncertainty about the material effects of reform combines with normative uncertainty about the moral imperative to embrace such reform to erect significant obstacles to radical substantive reform – at least, radically democratic reform that is response to public discourse and citizen preferences.

[6]Hesselink (n 1).

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One might argue that a radically democratic approach to private law reform does not turn just on what people think about private law as such but on what people think about the political philosophy that underlies the proposed reform. This insight from other work by Hesselink is essential.[7] If there was popular endorsement of a conception of justice inconsistent with existing private law, elites would have a mandate to overhaul private law to better align with the prevailing conception of justice. But in many post-industrial democracies, even if we could identify – by way of institutions that anoint winners absent consensus – a 'prevailing' conception of justice, it would not translate into a programme for specific reforms. The radical overhaul Hesselink anticipates will not flow in any direct fashion from a conception of justice that is a genuine product of democratic engagement because the latter can only be achieved at high levels of generality. The derivation of specific reforms from an abstract mandate involves too much normative judgement to be legitimately delegated to elites. However persuasive, for example, Pistor's arguments that durability as a feature of wealth has been obtained by unanticipated abuse of the rules of trusts,[8] eliminating the legal devices that capital has abused would require public discourse through which non-elites come to regard those legal devices as the objects of abuse. One could argue that this is too high a standard to impose on reformists, since after all, the default as we find it was never endorsed by democratic politics either. But the outputs of our present system include economic benefits to which people are attached. It is not surprising that they resist radical overhaul of the rules that sustain durability even if they never endorsed the rules we have now.

3. Incrementalism

There is another way to interpret Hesselink's call for action that might avoid the problems I raise here. One potential drawback of Hesselink's plan, necessitated by the reality of European Union (EU) institutions, is that it would 'mandate' general principles but leave to individual Member States the task of translating the charter into specific revisions of their individual civil codes.[9] Although this runs the risk of merely symbolic action by the EU, it also creates the conditions for democratic engagement at the Member State level. Given widespread worry that the union itself suffers from a democratic deficit, it would be appropriate for the charter to set the stage for specific action by Member States, which can respond to specific civic movements and national discourses led by political parties based at the Member State level. Depending on just how general the EU charter is, it is not clear how much homogeneity ultimately would be achieved across the union. But the charter would at least ensure that, whatever the specific outcomes in Member States, citizens through their local institutions would make affirmative choices to accept, reject or experiment at the margins with the code for capital with which we unwittingly find ourselves.

Because I am sceptical that radical democracy will produce radical reform in the political-economic circumstances of most post-industrial democracies, I am most optimistic about experimentation at the margins. For example, instead of eliminating intellectual property in large categories of knowledge that border on the natural sciences, we could impose a moratorium on particular categories or shorten the duration of new patents. Reforms could come with sunset provisions that force reconsideration in light of new data at a future point in time.[10] Similarly, instead of eliminating security rights in capital, we could identify specific abuses of ordered access to the capital of a distressed firm – as Pistor suggests has already taken place with respect to

[7]M Hesselink, *Justifying Contract in Europe: Political Philosophies of European Contract Law* (Oxford University Press 2021).

[8]Pistor (n 3) 43.

[9]Hesselink (n 1).

[10]See J E Gersen, 'Temporary Legislation' 74 (2007) University of Chicago Law Review 247; Y Listokin, 'Learning Through Policy Variation' 118 (2008) The Yale Law Journal 480; C K Whitehead, 'The Goldilocks Approach: Financial Risk and Staged Regulation' 97 (2012) Cornell Law Review 1267; Z J Gubler, 'Experimental Rules' 55 (2014) Boston College Law Review 129.

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derivatives – and reform those abuses.[11] If early reforms are successful, they may build confidence – and momentum – behind further reforms. In this way, tepid steps may ultimately bring us farther than the point at which the political centre now lies.

Pistor anticipates the obvious limitations of such an approach. After all, existing law was not enacted in order to facilitate abuse. Asset holders exploit rules in ways that are unanticipated; if one loophole is closed, we can expect another to be loosened. This is an undeniable disadvantage of piecemeal reform. But it is too pessimistic to conclude that the rules cannot be actually improved over time in ways that force asset holders to share their spoils, in Pistor's terminology. After all, when we look back on the arc of capitalism, things have not gotten consistently worse. And it is not just technology that has saved us; democracy itself has done its part. We have seen periods of successful redirection, as in groundbreaking labour rights or competition policy. The air is literally cleaner than it was a couple decades ago. Course correction has not usually occurred, however, in singular moments in time. There have been few political epiphanies outside of catastrophe. Even when 'labour rights' or 'competition policy' is associated in a given country with a particular statute, the statute does not represent a single event. The current statute is likely to be the culmination of legislative amendments and judicial interpretation, as well as rejected amendments and rejected legal arguments about their meaning. However flawed the code for capital is, it has components that not only elites but most citizens endorse. Those elements reflect political principles that most citizens endorse too. Democracy has the capacity to reform capitalism but it is not surprising or inherently suspicious that, outside of economic or political catastrophe, reform has tended to be incremental.

And progress is never assured, at least not as any one discursive community conceives of progress. And there, behind the optimism of Hesselink's proposal, lies the seeds of frustration. I am reminded of Adam Przeworski and John Sprague's intriguing study of socialism in post-war Europe in *Paper Stones*.[12] Their technical history began with poignant disappointment: workers lay down their arms in exchange for electoral politics expecting that they could achieve peacefully through democracy what they could not achieve through violent revolt. What went wrong? How did their voting power fail to deliver the expected results? In the USA, a more recent grappling with the frustrating politics of apparently non-self-interested voting appeared in the popular book, *What is the Matter with Kansas?* There, Thomas Frank examines why so-called red states appear consistently to support economic policies against their own interests.[13] Their voting habits have only gotten worse.

Politics, in practice, makes it hard to reconcile our views about substantive justice with our democratic commitments. We cannot expect total persuasion, and as Hesselink maintains, we should not desire wholistic institutional change without it. One of the implications of pursuing a radically democratic approach to private law may be eschewing radical reform in favour of small steps.

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[11]Pistor (n 3) 151–152.
[12]A Przeworski & J Sprague, *Paper Stones: A History of Electoral Socialism* (University of Chicago Press 1986).
[13]T Frank, *What's the Matter with Kansas?* (Picador 2004).

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