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

Interpersonal justice as partial justice

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Abstract

Despite being sympathetic to the aim of Martijn Hesselink's paper to explore how private law might be used to tackle gross inequalities, it is argued that private law is based fundamentally on the moral principles of interpersonal justice, which being a kind of partial justice as explained by Thomas Nagel are distinct and often opposed to the impartial standards of justice used in theories of social justice. European private law either has to abandon the principles of interpersonal justice in favour of a goal-oriented regulation or alternatively a richer conception of interpersonal justice may be developed that may assist to a limited extent the pursuit of greater equality.

Keywords: interpersonal justice; social justice; private law; inequality; regulation

1. The agenda of social justice and private law

The central ambition in Martijn Hesselink's essay on 'Reconstituting the Code of Capital'[1] is to explore how European private law might respond to the widespread concern about growing inequality in society, particularly the yawning gap between the super-rich and the remaining 99 per cent of the population. At first sight, the use of the private law of contract, tort and property to address these concerns seems rather wide of the mark. Do these areas of law have anything to say about redistribution of wealth?

Hesselink points to the recent work of Katharina Pistor for support for the relevance of private law to this agenda.[2] She has demonstrated how private law's rules about securitisation of income streams and other intangibles enable the wealthy and legally expert to transform their wealth from uncertain streams of income into permanent capital assets, which can then be used as security to create more wealth. Although Pistor's focus is on capital markets, the idea that the rules of private law, especially private ownership of property, provide essential support and structure for market capitalism has a long pedigree, going back at least as far Karl Marx. If private law rules provide the essential legal support for capitalism and especially provide essential infrastructure for this stage of financial capitalism that seems to be harbouring growing inequality, it makes sense to wonder if a critical revision of those rules, especially contract law and property law, might help to challenge the privileges of the rich and even push back against the rising tide of inequality.

This ambitious agenda set by Hesselink is bound to meet many obstacles and objectives. Many will say that the contemporary problem of growing inequality is mostly the consequence of the

[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 316–43.

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

failure of governments to tax in a sufficiently progressive way.[3] On that view, which is supported by a broad consensus in the United States of America (USA) and the United Kingdom (UK), there is nothing wrong with private law. Freedom of contract and protection of private law are necessary for the growth of the economy in a market society. What reform is needed, it is argued, is more progressive taxation of wealth to claw back the vast wealth of the super-rich, so that the public purse has the resources to reverse the ever-increasing levels of structural injustice in which the poor can never escape their precarious existence. Accepting the difficulty of securing political support for either much more progressive taxation or a reform of private law rules, Katharina Pistor proposed a number of procedural reforms and minor adjustments to private law with a view to making it more difficult for the super-rich to manipulate private law's rules and procedures to their sole benefit. In contrast, Hesselink pursues the more ambitious agenda of reforming the substantive rules of private law themselves in the pursuit of the goal of better social justice.

2. Interpersonal justice and private law

Although I am sympathetic to this goal of trying to use private law to improve social justice in society, this comment explores what seems to me a fundamental, philosophical and theoretical obstacle to the pursuit of this goal. The problem that I want to investigate is posed by the traditional contention that private law never directly addresses issues of social justice such as inequality in the distribution of resources. Private law, it is said by many, deals with interpersonal justice (sometimes also called relational justice). Interpersonal justice is arguably completely different from social or distributive justice.[4] Whereas social justice is concerned with the distribution of wealth, power and other goods among all the members of a particular society (or perhaps globally), interpersonal justice is only concerned with the justice between two legal persons. It follows that issues of social justice are regarded as outside the concerns of private law.

For example, in the event of an automobile accident, interpersonal justice is concerned with whether the party who has caused the accident should compensate the injured party for losses incurred, whereas social justice would ask broader questions such as how can the loss be spread among all motorists to ensure an equitable distribution across society as a whole or which party could avoid the accident more efficiently and therefore reduce the social cost of motor accidents. Traditionally, private law has focussed on the issue of compensation or corrective justice between the parties themselves, not on broader distributive questions about the allocation of benefits and losses in society as a whole. Although liability for the cost of accidents can be redistributed in many ways, including through a system of compulsory insurance for drivers, private law focuses on the justice between the two parties rather than on the question of whether the costs are spread throughout society fairly.

If one accepts this distinction between interpersonal justice and social justice, and if one accepts a second premise that private law is exclusively or at least primarily concerned with interpersonal justice, the inevitable conclusion is that private law is an unsuitable vehicle for tackling issues of social justice. Private law is focussed on criteria of justice between the parties to the relationship; social justice is focused on criteria of justice that concerns distributions to everyone in the society concerned. In the event of an automobile accident, the law of tort simply does not ask the question of social justice whether an award of damages would increase or diminish disparities in wealth in society; it will award damages based on fault (or some other criterion of liability), even if the damages have to be paid by a poor person to a billionaire. The problem that Hesselink must confront, therefore, is to overcome this challenge that private law, a form of law focussed on interpersonal

[3]AB Atkinson, *Inequality: What Can be Done?* (Harvard University Press 2015).

[4]Eg E Weinrib, *The Idea of Private Law* (Oxford University Press 1995) 80; P Benson, 'The Basis of Corrective Justice and Its Relation to Distributive Justice' 77 (1992) Iowa Law Review 515, 607; RH Stevens, *Torts and Rights* (Oxford University Press 2007); A Ripstein, 'Private Order and Public Justice: Kant and Rawls' 92 (2006) Virginia Law Review 1391–1395.

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justice, is simply not the kind of legal mechanism that can provide sustained assistance to support his agenda of securing better social justice in Europe. Private law may or may not help to support goals of social justice, but that support will be a side effect of the application of a different set of principles of interpersonal justice.

Hesselink's response to this challenge appears to be an assertion that his proposed European private law, which would be unlike traditional European codes of civil law, could accommodate both interpersonal justice and social justice at the same time.[5] I shall examine the argument to the contrary that such an ambition is unrealisable, because interpersonal and social justice are based on radically different moral principles.

3. Distributive side effects

It must be conceded, of course, that private law may sometimes help the poor and the disadvantaged. For the most part, however, that assistance will be a side effect produced in the pursuit of some other goal, such as invalidating transactions obtained by fraud or duress because they were not freely chosen. If the poor and needy are more commonly victims of deceit and coercion, the laws that protect the validity of consent in contract will have the side effect of disproportionately helping those vulnerable groups.

It is also possible to broaden the grounds on which private law can decide that a transaction was not freely chosen, thereby extending protection for further groups of vulnerable contractors. The legal concepts of duress or undue influence, for example, might be expanded to include various situations of economic necessity and hardship.[6] For instance, a person caught out in a winter storm might be able to unravel a contract with a hotelkeeper who demanded an exorbitant price for a room in the inn. Similarly, when a worker who is desperate to obtain a job to earn enough to feed her family agrees to take a job at a rate of pay i.e. below ordinary market rates and less than a living wage, it might be argued that the contract is invalid because the employer took advantage of the vulnerable worker. The rules about economic duress are certainly open to some modifications that might help to protect against structural injustice.

Yet this expansion of the concept of free consent to contracts and the grounds for vitiating consent is never going to tackle head-on the real substance of concerns about social justice. This adjustment of the interpersonal justice of private law will not permit the poor and hungry to take bread from the bakery and refuse to pay for it in the manner of the Dario Fo's drama 'Can't Pay, Won't Pay'.[7] Distributive justice side effects favouring greater substantive equality produced by private law may be welcome outcomes. But they do not seem to be examples of the pursuit of social justice.

Instead, revisions of the idea of economic duress and other techniques for invalidating unfair contracts seem to me to be based largely on more sophisticated understandings of interpersonal justice and the requirements of autonomy and choice than those found in classical accounts of private law, which were devised by reference to a narrowly conceived, negative concept of freedom. It is possible to provide greater protection for the exercise of real choice or worthwhile personal autonomy against situations of opportunistic advantage taking by others. Such a reform will no doubt assist poor and vulnerable parties in escaping from extremely disadvantageous transactions.

Nevertheless, one suspects that it will not be long before the exploited worker or the consumer who has been ripped off will enter another transaction i.e. only marginally less disadvantageous. Far from engineering a redistribution of wealth, legal protection of worthwhile personal autonomy

[5]M Hesselink (n 1).

[6]M Fabre-Magnan and P Lokiec, 'Le Vice de violence en droit du travail' (2022) Recueil Dalloz 20 janvier No 2/7935 78.

[7]D Fo, *Can't Pay, Won't Pay* (*Non Si Paga! Non Si Paga!*) (original performance in English 1974); D Fo, RW Walker and L Pertile (translator), *We Can't Pay? We Won't Pay*! (Pluto Press 1978).

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in transactions merely prevents the worst instances of unfairness in transactions. These revised rules regarding consent to contracts provide a more appealing and coherent interpretation of interpersonal justice than the classical law, but they are focussed on personal abuses of the market order that detracts from interpersonal fairness, not the structural injustice produced by the market order itself, which is the central concern of theories of social justice.[8]

4. Instrumental accounts of private law

It is not inevitable, of course, that one is forced to accept the second premise mentioned above that private law is exclusively or predominantly concerned with interpersonal justice. One way to rebut this view is to say that while it was perhaps true once upon a time that private law was solely concerned with interpersonal justice, during the last 100 years or so, private law has been regarded increasingly as just another regulatory instrument of government that can be used to secure social justice alongside other measures such as taxation and welfare payments. In support of this claim, one can point to measures of consumer law and employment law that seem to be strongly influenced by agendas concerned with social justice such as helping the weaker party to transactions. This instrumental account of private law also infuses the American law and economics movement, which, though mistaking wealth maximisation for social justice, regards private law rather like any kind of regulatory law that pursues a goal of general welfare.

I think that today few would deny that private law can be used for instrumental purposes that are connected to distributive justice. Although some might regret and criticise this practice, I think that there will be few who reject this possibility altogether. Most people will agree with Anthony Kronman that, if a private law measure such as a legal right to claim a living wage can efficiently and effectively achieve a particular target of social justice, such a law conferring a private right should be used instead of, or more likely in addition to, tax and welfare measures to help the lowest paid in society.[9]

Those who wholeheartedly endorse an instrumental account of private law will rally to the defence of the agenda of using private law to secure social justice. On this instrumental view of private law, the principal values that guide or should guide legal reasoning should be the relevant principles found in one's preferred theory of social justice. If one adopts, for instance, John Rawls's liberal theory of justice,[10] the guiding principles of private law would comprise the two principles of justice, one that protects rights and liberties, and the other that tries to ensure a fair distribution of wealth. It is true that Rawls himself resisted the view that his principles of justice might extend beyond the basic constitutional arrangements of a society to the rules of private law,[11] but others like Gerry Cohen have insisted, for reasons of consistency, that those principles of justice should be applied throughout the legal system, including the rules of private law.[12]

This amounts to 'the monist view', which holds that whatever the principles of social justice should be, they should also be applicable to the legal institutions of private law as well as those of public law.[13] Libertarian political theorists, who particularly favour individual liberty without

[8]M McKeown, 'Structural Injustice' 15 (2021) Philosophy Compass 12757.

[9]AB Kronman, 'Contract Law and Distributive Justice (1980) 89 Yale Law Journal 472; A Bagchi, 'Distributive Justice and Contract' in G Klass, G Letsas and P Saprai (eds), *Philosophical Foundations of Contract Law* (Oxford University Press 2014) 193.

[10]J Rawls, *A Theory of Justice* (Oxford University Press 1972); J Rawls (ed E Kelly), *Justice as Fairness: A Restatement* (Belknap/Harvard 2001).

[11]S Scheffler, 'Is the Basic Structure Basic?' in C Sypnowich (ed), *The Egalitarian Conscience: Essays in Honour of GA Cohen* (Oxford University Press 2006); S Scheffler, 'Distributive Justice, the Basic Structure and the Place of Private Law' 35 (2015) Oxford Journal of Legal Studies 213.

[12]G A Cohen, *If You're an Egalitarian, How Come You're So Rich?* (Harvard University Press, 2000); GA Cohen, 'Where the Action Is: On the Site of Distributive Justice' 26 (1997) Philosophy & Public Affairs 3.

[13]LB Murphy, 'Institutions and the Demands of Justice' 27 (1999) Philosophy and Public Affairs 251.

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restriction and protection of private property, typically endorse this monist view very strongly.[14] But any theory i.e. content to transplant the values of a theory of social justice directly into private law amounts to a monist account of private law.

5. Anti-monism

Ultimately, however, I think few are willing to pursue this monist viewpoint regarding private law to its logical conclusion. They draw back from its consequences for everyday social and economic life. Consider, for instance, the position of a person who, after a long period of education, has acquired a well-paid job. Suppose, in addition, that this person believes that society should be much more equal in the distribution of wealth and resources than it is at present. Should that person refuse the job, insist on a pay cut or insist on paying more taxes to the government in order to reconcile this newly acquired well-paid job with the personal egalitarian philosophy? Gerry Cohen (as a monist) seemed to think that in these circumstances, principles of justice required one to take a pay cut (whilst possibly ensuring that the saving to the employer was passed onto the lowest paid in the organisation in accordance with Rawls' difference principle).[15] But I doubt that most people would regard such conduct as rational or morally right. They would intuitively draw a distinction between, on the one hand, how they exercise their democratic vote to promote egalitarian causes and political parties at the level of the state and other governmental institutions, and on the other hand, how they conduct their personal business transactions such as negotiating a contract of employment. The values applicable to one do not automatically or easily transplant to the other.

In other words, the monist account that regards the values that steer private law as exactly the same as the instrumental concerns of the state and public law is ultimately rejected by everyone except extreme libertarians (and perhaps Marxists) as a misunderstanding of the character of private law and the nature of justice that it supports. Whilst it can be acknowledged that private law has been deeply influenced by public regulation of markets in the pursuit of various welfare goals, few find it satisfactory to go down the road travelled by the American law and economics movement and by some American Realists in which private law is reduced to an instrument of social justice without any dimension of interpersonal justice.

In my own work, 'Regulating Contracts',[16] the position staked out in the first third of the book is one that views private law as a hybrid institution, with the tradition of interpersonal justice at its core, but with a periphery of increasing amounts of regulation such as consumer protection and employment rights, which adjusts the outcomes of the private law rules to accord more closely with the goals of social justice. That account leaves us with a picture of an intellectually confused institution of private law, in particular contract law, a hybrid that combines the oil of interpersonal justice with the vinegar of welfarist interventions.

6. Monism-lite

Dissatisfied with that intellectual confusion and complexity in the characterisation of private law as a hybrid, in much of the recent theorisation about private law, the problem of transplants of political theories of social justice into private law has been handled by the adoption of a thin view of the ideals of social justice. This kind of theory of private law boils down the values of theories of social justice to some essential element such as autonomy, equality and human rights and then claims that this value also steers the construction of the rules of private law. Monism is preserved, but in an extremely thin version.

[14]R Nozick, *Anarchy, State, and Utopia* (Blackwell, 1974).
[15]GA Cohen, *Rescuing Justice and Equality* (Harvard University Press 2008) 70.
[16]H Collins, *Regulating Contracts* (Oxford University Press 1999).

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Following this method of monism-lite, theorists such as Dagan and Dorfman, for instance, deny that they are applying principles of social justice to private law in the manner of the private law instrumentalists.[17] They insist that instead they are merely using some of the values or ideals of theories of social justice to account for or criticise existing private law rules. They claim that private law is best understood as an instantiation of the values of substantive autonomy and equality. These are values that in their view lie at the core of liberal theories of social justice, which they then propose to transplant into private law (or unearth in the catacombs of private law) as the relevant standards of interpersonal justice. This is monism-lite: the abstract values that lie at the core of the theory of social justice also lie, it is said, at the core of interpersonal justice.

Similarly, having identified the core value of social justice to comprise each person having the ability to enjoy a meaningful life, Nick McBride seems to boil down the value applicable to private law as one that merely requires support for each individual's search for a meaningful life role.[18] In much the same vein, it is also possible to argue that the basic framework of social justice lies in the protection of human rights or fundamental rights.[19] From that perspective, private law is merely the concretisation of abstract human rights in the particular context of personal interactions. On this model, human rights provide the source of all aspects of law, but they have distinct articulations in public law and in the horizontal relations of private law.

These kinds of theories of private law, which do not transplant the regulatory state to private law, but merely identify some of its key moral and welfare values as providing the moral basis for interpersonal justice, seem to be more promising as an intellectual framework for Hesselink's endeavour than traditional accounts of private law. It is certainly possible to argue that values such as autonomy, equality and human rights might provide a structure or constitution for private law that would enable it to assist to some extent in the great challenges of inequality and autocracy. As we have already noted, appeals to the value of personal autonomy as the basis for determining the validity of consent to contracts as opposed to some formal theory of negative liberty can certainly provide reasons for developing private law in directions that tend to protect weaker parties against the risks that their vulnerability may entail. In the area of duress, for instance, basing the protective doctrine on an idea of liberty that requires everyone to have meaningful choices before entering into contract would extend protection to many kinds of vulnerable consumers and workers. The law of duress would protect not only those forced to agree to a contract with a gun pointed at them but also those who feel compelled by economic necessity and the lack of other options to accept exploitative work arrangements.

Despite the attractions of the approach that I have called monism-lite, the transplant method still seems to me to be troublesome as an account of the values of private law. Consider, for instance, the espousal by Dagan and Dorfman of substantive equality as a key value in private law. They argue that this value is the same as the value behind liberal concerns for greater equality in society. But is the value of substantive equality really the same when it is squeezed into the reasoning of interpersonal justice? What might substantive equality mean in practice when it applies, for example, to contracts? Does it mean that the law should ensure a rough equivalence between obligations in the contract, so that the price is roughly the same as a credible market price? That is surely not going to contribute a great deal to substantive equality: on the contrary, if equivalence works precisely, everyone should remain in exactly the same position as before, i.e. unacceptably unequal. Or does substantive equality in private law require each transaction to contribute in some way to the reduction of disparities of wealth in society? That might require a rule

[17]H Dagan and A Dorfman, 'Just Relationships' 116 (2016) Columbia Law Review 1395; H Dagan and A Dorfman, 'Justice in Private: Beyond the Rawlsian Framework' 37 (2018) Law & Philosophy 171.

[18]NJ McBride, *The Humanity of Private Law: Part II Evaluation* (Hart Publishing 2020).

[19]A Barak, 'Constitutional Human Rights and Private Law', in D Friedmann and D Barak-Erez (eds), *Human Rights in Private Law* (Hart Publishing 2001) 13; M Kumm, 'Who Is Afraid of the Total Constitution? Constitutional Rights as Principles and the Constitutionalisation of Private Law' 7 (2006) German Law Journal 341; K Moller, *The Global Model of Constitutional Rights* (Oxford University Press 2012).

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that the rich should pay more than the poor for their goods and services, in effect cross-subsidising costs between shoppers, in order to even up the distribution of goods in society.

In the work of Dagan and Dorfman, there are no such radical interpretations of the principle of substantive equality. Instead, their main point appears to be that the law of discrimination should not be regarded as a regulatory add-on to private law, but rather an expression of a fundamental principle of private law that requires equal respect for others in the market place.[20] Although I am happy to acknowledge the strength of this argument about discrimination law, it should be noted that this proposal is at most one that demands formal respect for equal autonomy in the market and the elimination of disrespectful exclusions. Substantive equality in private law turns out to be on this account no more than substantive autonomy. This proposal is a long distance from tackling the economic inequalities that worry so many people.

7. The value of interpersonal justice

The argument so far has sought to establish that the ambition to use private law to help to tackle growing inequalities in society and the associated vulnerabilities of democracy must necessarily encounter several obstacles. I have been assessing what seems to me to be a major theoretical problem: to regard private law as merely or primarily an instrument of social justice, like any other type of legal regulation of the economy, is to misunderstand its nature. Many features of private law distinguish it from most other kinds of regulation, but for our purposes the key one is that private law generally operates according to a different set of moral principles than those found in philosophies of social justice. It is concerned with interpersonal justice, not justice in distribution in society as a whole.

We then briefly considered a number of attempts to try to preserve the unity of the values of the legal system by an insistence that at least some abstract or thin version of the values in philosophies of social justice also provides the core values in private law. While that may be true with respect to some abstract values such as respect for individual autonomy and private ownership of property, the aspects of theories of social justice that most concern Hesselink and many others, such as the growing inequality in society, do not appear to have any relevance to the values expressed in standards of interpersonal justice.

The inevitable conclusion seems to be that the only way in which private law can be harnessed as a weapon against inequality is to treat it as merely another instrument of government like any other kind of regulation. That is exactly what the European Union does, of course: its regulatory private law is, in truth, just regulation that has some similarities to private law, such as enabling individuals to bring claims, but which is concerned with social goals, such as cleansing the market of misleading statements and unfair terms in order to make the market function competitively (and therefore, according to the mantras of competition law, fairly). That approach that treats private law purely instrumentally both with respect to goals and methods really hollows out private law.[21] There is hardly any space left for interpersonal justice.

That is unfortunate. There is more to private law than European techno-law. I accept that there is a distinct and important value contained in the idea of interpersonal justice. Achieving justice between two persons has a value i.e. independent from the value of achieving social justice in society as a whole. Moreover, in terms of resources, it is much easier to achieve: the debtor can be made to pay his debts, or the trespasser can be ordered to desist without much difficulty. What I do not accept is that interpersonal justice has much to do with social justice. In my view,

[20]Dagan & Dorfman, 'Just Relationships' (n 17) 1438–44. At 1421, they toy with the idea that being poor could be regarded as an immutable characteristic that would be protected under discrimination law, but they recognise that there might be insuperable operational difficulties in doing so.

[21]H Collins, 'The Revolutionary Trajectory of EU Contract Law towards Post-national Law', in S Worthington et al (eds), *Revolution and Evolution in Private Law* (Hart Publishing 2018) 315.

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interpersonal justice is best understood as a type of partial justice, as originally defined and explained by Thomas Nagel.[22]

8. Partial justice

In connection with theories of justice and equality, Nagel once drew a helpful distinction between two moral standpoints. One is the objective, impersonal standpoint, which holds that we ought to construct a just society in which everyone is treated with equal concern and respect as free and equal persons. This impersonal and impartial standpoint distances itself from our personal interests and preferences and tries to imagine what would be morally right from an objective or universal point of view. To obtain that vantage point was the prime purpose of the heuristic device adopted by John Rawls of the 'original position'.[23]

The opposite standpoint is personal and partial to our own interests. From this partial standpoint, we believe it is right to pursue our own interests and values in order to seek personal fulfilment. On this partial viewpoint, we prioritise our own personal development, our aspirations and the interests of those who are personally close to us such as our families, relatives and neighbours. In this context, partiality does not mean bias or prejudice; it rather signifies a preference for a person, a relationship or a project that matters to us.[24] We support our children and other dependents because it's the morally right thing to do, even though there may be other people who have greater needs and therefore have a stronger claim on our support from an impartial point of view in a theory of social justice.

Nagel argued that the central problem of all theories of justice in society as a whole is to find a way to reconcile those two standpoints. It is not immoral or wrong to value our own autonomy and personal development. It is not immoral or wrong to try to give priority to the interests of our children and friends (unless, of course, we have promised not to do so in the circumstances). It is not immoral or wrong to give priority to our personal projects, whether those be part of our work or leisure activities.[25] The difficult question is rather how to accommodate the justice of this partiality for oneself, one's friends and family, and one's projects, with the equally valid moral claims of everyone else in society.

In my view, the contrast between social justice and interpersonal justice matches Nagel's contrast between impartial and partial justice. The principles of social justice must always claim objectivity to be legitimate. They must be just according to principles that do not favour one's own interest. Cries for social justice are heard when people do the opposite and act in a partial way. These cries are heard when people like the 'gilets jaunes' and anti-globalisation protesters perceive that there is one rule for the rich and powerful, and another for ordinary citizens.

In contrast, the principles of interpersonal justice are primarily about the pursuit of one's own interests. I enter contracts, acquire property and construct associations with others, because those practices will help me to achieve my personal goals whatever they may be. Interpersonal justice is about supporting such endeavours by enforcing contracts, protecting property rights and enabling associations like companies to function effectively. The moral foundations of private law lie in the morality of partial justice

On this view, the core values and principles of private law are independent of the principles of social justice. It is primarily concerned with interpersonal justice alone. Supporting people in the pursuit of their life projects and ambitions may sometimes be entirely consistent with an objective and impartial theory of social justice. But interpersonal justice and private law support people in the pursuit of their interests even if those interests do not appear to promote social justice of the

[22]T Nagel, *Equality and Partiality* (Oxford University Press 1995).

[23]Rawls (n 10).

[24]S Scheffler, 'Morality and Reasonable Partiality' in B Feltham and J Cottingham (eds), *Partiality and Impartiality: Morality, Special Relationships, and the Wider World* (Oxford University Press 2010) 98.

[25]Scheffler Ibid.

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common good. As Katharina Pistor explains so clearly, private law is entirely content to support people in the pursuit of projects that will make them extremely rich in comparison with everyone else. That is what is required by interpersonal justice viewed as a type of partial justice.

To avoid misunderstanding, there is no suggestion here that the rules of private law simply imitate the morality of *homo economicus* or the morality of the pursuit of material self-interest and 'devil take the hindmost'. There are two features that distinguish partial justice from pure self-interest.

The first is the harm principle, as articulated by John Stuart Mill and HLA Hart.[26] The harm principle places a constraint on the pursuit of self-interest by forbidding conduct that harms others in the proper pursuit of their own goals in life. This harm principle is certainly satisfied where there is damage to another's property, misappropriation of property or a personal injury. Such actions are highly likely to interfere with another's pursuit of their own interests through social and economic relationships. But the harm principle can be understood much more broadly to encompass any kind of unfair interference with another's pursuit of their interests through private transactions and associations. The difficult question then becomes whether the interference is unfair.

This is, for instance, the problem at the heart of competition law. When does vigorous competition in a market become unfair because it involves or has the effect of excluding others, including new entrants, from the market? Cartels that seek to fix prices in the market will often amount to unfair competition, but the allegation of unfairness is normally rejected if the cartel is an independent trade union of workers or a professional association concerned to protect the public interest in health and safety. Similarly, in the law of contract, the harm principle produces indeterminate results. Where someone has relied on the binding force of a contractual agreement, which is then broken causing economic loss, this is clearly a recognisable form of harm, often called the reliance interest. But is the harm principle engaged where someone cancels an executory contract before any losses have been incurred? Is there the requisite kind of harm if there is disappointment, loss of profits from anticipated further transactions which are now jeopardised, or simply the denial of actual performance of the contract?

Private law wrestles with the indeterminacy of the harm principle. It does so because interpersonal justice is partial justice. It is just to pursue one's interests supported by private law in so far as that conduct does not unfairly interfere with the interests of others to do the same. Private law becomes a form of corrective justice: where someone has committed unfair harm to the interests of another, the law will require compensation to be paid to unravel the harm that has been suffered.

The second reason for distinguishing partial justice from the mere pursuit of self-interest is that the morality of partial justice is not merely or even primarily concerned with material wealth. On the contrary, one crucial dimension of partial justice consists in moral duties to support friendships and family relationships because of the value they have for our own plans in life. In the workplace, for instance, partial justice requires one's colleagues and oneself to be treated fairly by the organisation in work, by giving everyone proper recognition to the contribution to the organisation on the basis of a fair assessment of that contribution, not one governed by the current market rates for work of a particular kind.[27]

9. Between instrumentalism and interpersonal justice

If interpersonal justice in private law is correctly perceived as resting on the morality of partial justice rather than the impartial theories of social justice, it seems clear that Hesselink's project of using private law to challenge extreme inequality on the ground of the moral requirements of social justice cannot succeed unless the nature of private law itself is transformed into a purely instrumental legal technique. But if it assumes this instrumental form, private law ceases to possess

[26]J S Mill, *On Liberty* (originally published 1859), J S Mill *On Liberty, Utilitarianism and Other Essays* (M Philp and F Rosen (eds), 2nd edn, Oxford University Press, 2015); HLA Hart, *Law, Liberty and Morality* (Oxford University Press 1968).

[27]H Collins, 'Fat Cats, Production Networks, and the Right to Fair Pay' 85 (2022) Modern Law Review 1.

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its distinctive character that sets it apart from other kinds of legal regulation by reason of its attachment to interpersonal justice. Hesselink's project would then simply become one using regulation to tackle substantive inequality and unfair distributions of power.

As we have already noted, regulation that assumes the form of conferring on an individual a private right of action for denial of a right, such as a right to a living wage or a fair rent, is certainly one possible way of fulfilling goals of social justice. Such an enforcement mechanism that confers a private right of action creates a similarity with private law and contractual claims, but I doubt that such a statutory claim really qualifies as a private law claim, because it is not supporting what the parties have chosen autonomously in the pursuit of their goals in life. Instead, the price of this contract is fixed by an external body, the state regulator, rather than by the choice of the parties to adopt particular terms in the pursuit of their personal goals. The individual right of action is to enforce a public law norm.

In short, once the interpersonal justice that lies at the core of private law is understood as an instantiation of partial justice, private law can never pursue the same goals as impartial social justice without changing its character into public regulation. European private law, by which I mean the Directives and Regulations of the European Union, is almost entirely a public regulation of that kind. In the absence of any clear competence for the European Union to address directly issues of gross substantive inequality, however, these legislative instruments of consumer and employment law that shape the internal market, together with competition law, may be one of the few ways in which the European Union can legitimately steer the continent in those directions of social justice.

The main alternative to an instrumental use of private law to pursue goals of social justice is to revise the principles that comprise interpersonal justice. Such revisions would be motivated by trying to secure better interpersonal justice between private individuals, not because the revisions might have desirable effects for social justice. We have noted above, for instance, how more sophisticated ideas of what it means to exercise personal autonomy when entering contracts might lead to revisions of areas of the law such as misrepresentation and economic duress. Similarly, it seems possible that a principle of substantive fairness between the parties might be justified as a principle of interpersonal justice. In other words, it would be wrong according to standards of interpersonal justice that one party to a contract should be able to exploit another regardless of whether the result of that exploitation increased or diminished inequality in society as a whole. Standards of interpersonal justice might also be revised to abandon the rather atomistic view of individuals found in classical private law, in which third parties are not regarded as having any legitimate interests in the performance other contracts between other parties. Not only is this atomistic view unrealistic in the contexts of families and private associations, but it also proves unjust in a variety of complex business arrangements such as supply chains where many parties function interdependently.

Such revisions of the moral standards of partial justice that underlie private law would be motivated by a greater depth in our understanding of those principles. It seems likely that such revisions would function in a way that tended to support principles of social justice, but that coincidence would be neither necessary nor sufficient for the revisions to be justified. The dominant question in private law would remain the one of what is right or just as between the parties to this transaction or dispute. It is simply that our answer to that question should now be revised in the light of modern systems of production and contemporary values.

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