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

Progress towards what? On the need for an intersectional paradigm shift in European private law

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Abstract

Hesselink proposes a progressive code of European private law as a radical response to Pistor's *The Code of Capital*, which exposes private law's complicity in staggering wealth inequality and social injustice. In this contribution, I argue that the proposal for a progressive code is insufficiently radical, because it is not fully equipped to address root problems of socially unjust private law. I suggest that a fuller accounting of root problems is necessary as a precondition for a 'radical' response: a more fundamental rethinking of private law based in more inclusive theorising of its role in social injustice. I sketch some of the ways in which intersectional approaches can assist in a fuller accounting of root problems by elevating and highlighting how mutually constructing systems of privilege and oppression give rise to social injustices that shape people's lives. Notably, accounting of private law's complicity in social injustice should engage private law's coding of capital as entangled with race and gender. I argue that intersectionality is needed to enable the sort of paradigm shift, progressive visions and radical responses Hesselink aspires.

Keywords: European private law; intersectionality; feminist theory; social injustice; gender; race

1. Introduction

Private law is complicit in creating, maintaining, and exacerbating social injustice. In response, some legal scholars propose minor tweaks and revisions, while others envision more radical reform. In 'Reconstituting the Code of Capital', Hesselink draws on Pistor's important analysis of the relationship between capital and private law to argue for a more radical approach in the form of a progressive European code of private law.[1] Where Pistor offers incremental strategies to address private law's role in rising socio-economic inequality, Hesselink seeks to propose a more radical reconstitution of the code to combat social injustice. He aspires a 'paradigm shift' and calls for a more radical response, one that goes 'more to the root of the problem' of socially unjust private law.[2] In this contribution, I argue that this proposal is insufficiently radical, because it is not fully equipped to address root problems of socially unjust private law.[3]

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

[3] My response proceeds from the assumption that a radical reconstitution of the code is possible. Compelling doubts are raised about the likelihood of radical reform based on radically democratic support, see Bagchi, 'The Challenges of Radical Reform in Democracies' 1 (2) (2022) European Law Open 374–79. In this contribution, I focus solely on the claim of radical

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Both Pistor's analysis of private law's complicity in staggering wealth inequality and Hesselink's analysis of private law's complicity in social injustice are compelling. Their arguments about what should be done are motivating for those who work on European private law and for all of us affected by its functioning. In this contribution, I will sketch some of the reasons why I understand the proposal for a progressive code, while perhaps comparatively progressive, as insufficiently radical. I argue that it is insufficiently radical because it insufficiently goes 'more to the root of the problem' of socially unjust private law and fails to be inclusive of the sort of analyses and insights that would uncover and highlight root problems. I will argue that a fuller accounting of root problems is necessary as a precondition for 'radical' response: a more fundamental rethinking of private law based in more inclusive theorising of its role in social injustice.

In the following pages, I sketch some of the ways in which intersectional approaches can assist in this diagnostic process of a fuller accounting of root problems. I refer to intersectional approaches to theorising private law's relation to social injustice, as those that seek to elevate and highlight how mutually constructing systems of privilege and oppression give rise to social injustices that shape the material conditions of people's lives. It is insights from intersectional analyses, I contend, that are most needed to enable the sort of 'paradigm shift', progressive visions and radical responses Hesselink aspires.[4] Incorporating intersectional approaches to diagnose and respond to root problems of socially unjust private law would change visions for progress and articulations of the desired paradigm shift.

2. Understanding the root of the problem

In this section, I critique some of the language that Pistor and Hesselink use to diagnose private law's problems and remedy its failures. For both Pistor and Hesselink, private law's coding of capital poses a threat to equality today. Pistor meets this threat with incremental 'roll back' strategies, while Hesselink imagines a progressive civil code to 'restore' equality.[5] This language of 'restoration', which is meant to support a radical response, suggests implicit and underlying ideas about root problems and possibilities for progress.

A. Private legal privilege

Pistor's analysis of private law's problematic coding of capital focuses on the creation and maintenance of wealth inequality. Private law is part of the basic institutions that structure society and shape power relationships between private actors, and across and between social groups. Pistor shows that private law is not some tangential element in a system supported by other more primary building blocks, but is a crucial building block itself, because '(. . .) capital owes its wealth-creating capacity to its legal coding.'[6] Capital, according to Pistor, should be understood as '(. . .) a legal quality that helps create and protect wealth.'[7]

Pistor shows that anything (and anybody) can be an asset turned into capital through the right legal coding.[8] Yet through selective processes in private law, only some things (and some people) have undergone transformation in this way. And importantly, only some have gained the advantage of wealth accumulation as legal coding ensures the legal privileging of a select set of assets

reform in the sense of addressing root problems, I do not discuss the questions or concerns of (radical) democracy which are also taken up by Pistor and Hesselink.

[4]Hesselink (n 1) 318. ('(. . .) the question arises nevertheless whether something more could be done, something more radical, going more to the root of the problem. Rather than an incremental approach perhaps what we need is a paradigm shift in our thinking about – and our dealing with – the relationship between capital and private law').

[5]Hesselink (n 1).

[6]Pistor (n 1) 12.

[7]Ibid.

[8]Ibid., 205.

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through recognition and enforcement by the power of the state.[9] This selective legal privileging of some assets and its holders plays a central role in Pistor's critique.

B. Social injustice at the bottom

In response to this analysis of private legal coding of capital, Hesselink proposes a progressive European private law code. While Pistor offers incremental 'roll back' strategies, Hesselink's ambitions are more radical. The proposal for a reconstituted code is meant to go 'more to the root of the problem'. Hesselink labels the problem by marking staggering wealth inequality as a problem of social injustice, finding consensus based on influential contemporary theories of social justice:

> One reason why Pistor does not further elaborate on her normative yardstick may be that she assumes that the state of affairs she depicts is likely to be problematic from the points of view of several of the most convincing and influential contemporary theories of justice. She would be quite right because there seems to exist an important degree of overlapping consensus in this regard.[10]

These contemporary ideas of justice inform the diagnostic process of identifying social injustice in private law's coding of capital. These are echoed in contemporary ideas of private law justice which shape the proposed radical remedial response, at least in terms of its basic structure and essential characteristics. For Hesselink, a progressive code should aim to bring 'more social equality (less poverty)' and 'more interpersonal equality (less exploitation)' as a matter of social justice.[11] The aim of the proposal is to 'make some progress', presumable for those made most vulnerable to social injustice, rather than attempting to return to an 'ideal past we've lost'.[12]

C. Restoring equality?

Particularly those at the bottom of the economic order are meant to be prioritised in a radical vision of social equality, which builds on enduring ideas in European private legal discourse which invoke contemporary ideals of social justice.[13] But the language used leaves much uncovered in terms of the diagnosis of root problems through materialisation and contextualisation which is pivotal for Hesselink's proposal to have the potential to represent a 'radical' remedial response.

The question of the root problems of socially unjust private law informs how and when reform may represent progress for those made most vulnerable to social injustice given their actual material circumstances. In the language of progress and 'restoration' resonates a tension that might undermine the aims of the proposal from the onset.

Underlying the idea of a radical response is the idea that a deeper, materialised understanding of social injustice is necessary – one that goes more to the root and one that is more grounded in the actual circumstances that shape people's lives, particularly those made most vulnerable to deprivation and exploitation. Yet, Hesselink's proposal is embedded in language that seeks to 'restore' equality and envisions the taking back of democratic control by a European public. It is quite unclear to what this 'restoration' of equality refers, especially as the language of restoration lives alongside the rejection of the idea that there is an 'ideal past we've lost' and an explicit call to 'move

[9] Ibid., 4.

[10] Hesselink (n 1) 319.

[11] Ibid., 321.

[12] Ibid., 318.

[13] See for instance, Study Group on Social Justice in European Private Law, 'Social Justice in European Contract Law: A Manifesto' 10 (2004) European Law Journal 653; H-W Micklitz, *The Politics of Justice in European Private Law: Social Justice, Access Justice, Societal Justice* (Cambridge University Press 2018).

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forward'.[14] Ideas of 'restoration' certainly do not always centre people made most vulnerable to social injustices nor serve their interests in social justice. Perhaps the choice of words regarding restoration is a slip of the pen, given that the proposal for a progressive code hopes to locate the 'better times' in a yet-to-be-realised future.[15] What is more, the proposal offers an account of the civil code as 'the ultimate symbol' of colonialism, enabling plunder and enslavement.[16] It is clear then that restoration is not meant to speak to a more equitable historical state of affairs, for instance along gender, racial, and class vectors.

Yet, restoration implies an antecedent position, in this case, presumably a more equitable situation as it regards the positions of those made most vulnerable under capitalism, in part, by private law's doing.[17] It is conceivable that this language of restoration is not used in error but appeals to a sense of restoration of ideals as provided by contemporary political theories and notions of social justice that reside in European private law discourse. The antecedent position being one that has been imagined in the theorising of justice and the theorising of more just private law. In other words, a position that exists in visions of more just social orders. Yet, theories of justice in contemporary Western political philosophy have been criticised for their abstraction away from material realities and historical contextualisation. For instance, concerns of racial, gender and disability injustice have played a marginal role at best in the theorising of social justice in influential contemporary political theories. Various types of critiques point out how minoritised and marginalised people tend to be excluded from the egalitarian parties that are imagined in the thought experiments from which principles of justice are derived.[18] Concerns about when and how those made most vulnerable enter conversations and considerations of social justice highlight potential obfuscation of root problems, which impact analyses of private law's role in social injustice. These concerns also arise in relation to European private law discourse about vulnerability to identify who should, potentially, be centred in social injustice considerations. For instance, the consumer is frequently foregrounded, but not often in ways that seek to reveal root problems and structural forces that shape material circumstances.[19] If reconstituting the code aspires to offer a more radical response to root problems, how can concerns about exclusionary theorising of private law's role in social injustice be addressed?

3. Capital's entanglements

A useful approach could be to centre those who are most vulnerable to social injustice and start with the actual circumstances that shape their lives. A proposal to reconstitute the code of capital should, as Hesselink states, take seriously the need of contextualisation of private law's role in social injustice both in the diagnosing of root problems and visions for remedies and progress.[20] A fuller accounting of root problems is necessary to enable the possibility of desired progress

[14]Hesselink (n 1) 318.

[15]Yet, this language is consistently used by Hesselink (n 1) throughout the proposal for progress: 'take back democratic control and restore equality', 324 'equality and democratic control would be restored', 324 'restoring socio-economic and political equality', 334 and 'restoring equality and democracy', 334 and 338.

[16]Ibid., 340.

[17]Building on Pistor's analysis Hesselink poses the question of 'what exactly is wrong with how private law shapes capitalism', Ibid., 318.

[18]See for instance, various critiques of exclusionary features of theorizing justice based on gender, race, and ability: CW Mills, *The Racial Contract* (Cornell University Press 1999); C Pateman, *The Sexual Contract* (Stanford University Press 1988); M Nussbaum, *The Frontiers of Justice: Disability, Nationality, Species Membership* (Harvard University Press 2006).

[19]Consumer vulnerability is addressed in multiple ways, see for instance D Leczykiewicz and S Weatherhill (eds), *The Images of the Consumer ins EU Law: Legislation, Free Movement and Competition Law* (Hart Publishing 2016); I Domurath, *Consumer Vulnerability and Welfare in Mortgage Contracts* (Hart Publishing 2017). Some analyses address issues of disability and poverty, which invites questioning of the role of mutually constructing systems of oppression that give rise to structural injustices.

[20]See Hesselink (n 1) 323.

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towards more just futures and contribute to our understanding of 'radical' responses. In this section, I sketch some of the ways in which intersectional approaches can do the sort of work necessary to build and envision progressive private law, which responds to aspirations for more radical change.

A. Intersectionality, law, and social justice

The term intersectionality was coined by Crenshaw in feminist and critical race theory, to capture the idea that people's lives are impacted and defined by their social positions at the intersections of complex and entangled systems of privilege and oppression.[21] Arising from a long history of (and continuing development in) Black feminist work, intersectionality engages subjectivity as constituted simultaneously by gender, race, class, and sexuality – amongst others.[22] In the legal context, intersectionality has exposed productively how marginalised subjects are made invisible through law and legal theorising, thereby undermining struggles for social justice. For instance, Crenshaw illustrated how, through categories of gender- and race-based discrimination, the experiences of Black women remained invisible under legal regimes.[23] On the one hand, patriarchal normativity focussed race-based discrimination on gender-dominant experiences of men, where on the other hand, racial normativity focussed gender-based discrimination on racially dominant white experiences. Crenshaw thus illustrated how these normativities manifested in legal illegibility and invisibility of injustices impacting Black women.[24] This intersectional analysis thus invoked a critical reflection on the legal and political subject central in legal thinking and understanding of law's relation to inequity and injustice. It showed that 'representations of gender that are "race-less" are not by that fact alone more universal than those that are race-specific'.[25]

While intersectionality was coined and taken up in feminist and critical race theory as an approach to analyse experiences of oppression and expose intersectional oppressive dynamics,[26] it has since travelled and developed in a multitude of spaces. Scholarship has expanded, for instance, to engage the potential and limitations of intersectionality as theory and methodology and as a lens for social activist and political interventions.[27] In this broad understanding of the scope of intersectionality, experiences of oppression are deeply connected to analyses of how social positions are shaped as the result of multiple injustices, and to the underlying complex and

[21]K Crenshaw, 'Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics' 8 (1989) University of Chicago Legal Forum 139; K Crenshaw, 'Mapping the Margins: Intersectionality, Identity Politics, and Violence against Women of Color' 43 (1991) Stanford Law Review 1241.

[22]See for instance, A (Gloria T) Hull (et al), *All the Women Are White, All the Blacks Are Men, But Some of Us Are Brave* (Feminist Press 1981); bell hooks, *Feminist Theory from Margin to Center* (South End Press 1984); The Combahee River Collective, *(1977) The Combahee River Collective Statement* (Zilla Eisenstein [self-published] 1977); PH Collins, *Black Feminist Thought: Knowledge, Consciousness, and the Politics of Empowerment* (Unwin Hyman 1990).

[23]Crenshaw Demarginalizing the Intersection of Race and Sex (n 21) 141–3.

[24]See also, Hull (et al) All the Women Are White (n 22). Intersectional approaches have revealed similar obfuscation in other legal spaces. See for instance, D Spade, *Normal Life: Administrative Violence, Critical Trans Politics, and the Limits of Law* (Duke University Press 2011).

[25]K Crenshaw, 'Postscript' in H Lutz, MT Herrera Vivar and L Supik (eds), *Framing Intersectionality: Debates on a Multi-Faceted Concept in Gender Studies* (Routledge 2011) 224.

[26]See Crenshaw, Demarginalizing the Intersection of Race and Sex (n 21); JC Nash, 'Re-Thinking Intersectionality' 89 (2008) Feminist Review 1, 2.

[27]S Cho, KW Crenshaw, and L McCall, 'Toward a Field of Intersectionality Studies: Theory, Applications, and Praxis' 38 (2013) Signs 785. For an account of intersectionality as method see CA MacKinnon, 'Intersectionality as Method: A Note' 38 (2013) Signs 1019. For remarks on intersectional feminist legal method in the European context see L Tjon Soei Len, 'On politics and feminist legal method in legal academia' in M Bartl and JC Lawrence (eds), *The Politics of European Legal Research* (Edgar Elgar 2022) 31.

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mutually constructing systems that give rise to them.[28] Intersectional insights that arise from such analyses show how capitalism is entangled with multiple systems, including those that give rise to gender and racial injustice. Intersectional approaches to diagnosing and remedying problems of social injustice start with a commitment to engage the ways in which multiple dimensions of injustice interlock and intersect in people's lives.

Those engagements lead to theoretical insights without claiming or aspiring to be a 'grand theory'.[29] In highlighting the relevance of intersectional approaches for the project of reconstituting the code of capital, I don't propose intersectionality as an alternative to other ideas of justice (whether those live in theories of justice, or in notions of social justice in European private law discourse). Rather, intersectional approaches can do the sort of work necessary to build and envision progressive private law, which responds to Hesselink's aspirations for more radical change. This radical aspiration is about 'going more to the root of the problem', which depends on better diagnostics of socially unjust private law. Intersectional approaches offer improved diagnostics as they uncover mutually constitutive dynamics otherwise obscured. Intersectionality draws attention to and problematises universalising, essentialising, mutually exclusive categories and ideas that underlie and inform understandings of law's relationship to justice, freedom and democracy.[30] Notably, insights into the workings of capital and its inextricable entanglements with, for instance, gender and race can highlight root problems of socially unjust private law otherwise obscured. Centring marginalised experiences and voices to move towards a fuller accounting of the faces of inequality, inequity, and injustice that impact those most vulnerable in our social, political, and economic order offer an avenue to make visible how private law's coding of capital is gendered and racialised. This is one avenue through which intersectionality can assist in the deep contextualisation and attentiveness to the material circumstances that shape the lives of those made most vulnerable in society.

B. Intersectionality and progressive private law

In this way, intersectionality seems pivotal for Hesselink's ambitions underlying the proposed progressive code. He states: 'Throughout, our understandings of justice, equality (interpersonal and distributive), and autonomy (private and public) should be thoroughly substantive (or "materialised" [. . .] it should take serious account of the actual circumstances (socio-economic and other) in which people find themselves'.[31] But if this sort of materialisation is 'necessary throughout', intersectional approaches should have a central place in an analysis of the basic frame of a progressive code and in the perspective of and approaches to justice that we use to mould progressive interventions. Intersectionality is a way to 'take serious account' of people's life circumstances when envisioning progress in a reconstituted code.

Yet so far, the current proposal for progress has insufficiently taken on this stated need for materialisation and inclusive theorising. Instead, intersectional approaches seem to be marginalised or relegated to exclusion in the footnotes, either on the basis of being 'wholly unrelated to the coding of capital' or as being among the 'other injustices in European private law than those following from the code of capital'.[32] Both reasons leave unclear what 'intersectional' means in this

[28]A narrower usage of the term can potentially separate 'intersectionality' from analyses of intersecting systems of oppression, see for instance S Haslanger, 'Why I Don't Believe in Patriarchy: Comments on K Manne's *Down Girl*' 101 (2020) Philosophy and Phenomenological Research 220.

[29]See Crenshaw (n 25) 232.

[30]For instance, CW Mills, 'Theorizing Racial Justice' (2020) Tanner Lecture 61 critique of Rawls claiming an equation of class justice with social justice by overlooking racial underpinnings. But also, see intersectional critique directed at Mills for overlooking the role of patriarchy in the gendered privilege of Black men, see Gines, 'Black Feminist Reflections on C Mills's Intersecting Contracts' 5 (2017) Critical Philosophy of Race 19. Response to CW Mills, 'Intersecting Contracts', *Contract and Domination* (Polity Press 2007) 165–99.

[31]Hesselink (n 1) 323.

[32]Ibid., 336 (n 106). It is not clear what Hesselink means when he refers to 'intersectional justice' when he lists it among and separate from climate, racial, and gender injustice.

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specific reference, given that 'capital' is inextricably entangled with race, gender, sexuality, and nationality – among others – in intersectional scholarship. It is hard to comprehend the progressive code as *progressive* when the entanglement of multiple vectors of injustice are beyond the scope of the diagnosis of root problems.

As an intervention to private law's complicity in social injustice, the attempt to reconstitute the code and claim its progressiveness seems premature. The radical potential of private law is undermined when we understand its coding of capital in isolation of other, intersecting mutually constructing dynamics of privilege and oppression. To clarify, I do not mean to claim that this attempt to reconstitute the code of capital has overlooked or postponed *other* concerns of injustice (eg, also gender injustice or also racial injustice) in an undesirable fashion.[33] Rather, the point is that this intervention of targeting private law's coding of capital is non-intersectional and fails to go to root problems from the onset, even though it aspires to be radical in precisely this way. An approach to elevate root problems should not move to shape remedies based solely on the insights of how private law codes capital – how insightful and important that analysis may be – but should more deeply invest in the understanding of how private law has coded *this* pattern of wealth distribution and perhaps even why private law has coded capital *in this way*. My critique intends to place a question mark behind the idea that a reconstitution of private law based on a diagnostic process of gender-less, race-less capital is inclusive, progressive, or radical in social justice terms. In other words, I don't intend to raise a 'what about' question, but rather ask: this reconstituted code would make progress towards what?

C. An intersectional paradigm shift

If a progressive European code takes on the ambition to be part of an attempt to 'set things right', it is important to have a fuller accounting of social injustice and its relationship to European private law. It is the insights of the inextricable entanglements of capital, I contend, that are needed to enable the sort of 'paradigm shift' that Hesselink envisions. This contribution does not aim to offer an (comprehensive) overview of the various ways in which intersectional work reveals capital's entanglements,[34] but rather to illustrate the potential value of engagement for diagnostic and remedial purposes.

Intersectionality invites the examination of private law's role in the political, social, and economic order, not only around economic power and accumulation of wealth under capitalism, but also around a deeply racialised and gendered order of production, reproduction, and reaping of the benefits of exploitation and extraction. These parts of the puzzle are too often neglected in discussions about the economy,[35] and they remain nearly invisible in the discourse on the role that European private law plays in injustice and could play towards more radical interventions and remedies.[36]

Attempts to make the complex and interlocking entanglements visible could build on examinations of the mutually dependent workings of race and gender with capitalism.[37] The mutually constituting relationship between capital and gender is at the heart of familiar feminist stories of

[33]See Ibid. Hesselink's claim: '(. . .) there exist other injustices in European private law than those following from the code of capital. However, these matters are beyond the scope of this paper, which envisages a specific intervention, ie, to argue that a progressive ELPL-code may be our best hope for reigning in capital, and, thus, for reducing inequality and regaining democratic control. This explains the absence of any discussion here of the important role a progressive EPL-code could (and ought to) play in addressing eg, climate, racial, gender, and intersectional injustice (. . .)'.

[34]In this context, bell hooks' use of 'white supremacist capitalist patriarchy' is pertinent. See bell hooks (n 22); bell hooks, 'Theory as Liberatory Practice' 4 (1991) Yale Journal of Law and Feminism 12.

[35]See A Agenjo-Calderón and L Gálvez-Muñoz, 'Feminist Economics: Theoretical and Political Dimensions' 78 (2019) American Journal of Economics and Sociology 137.

[36]See MW Hesselink, *Justifying Contract in Europe: Political Philosophies of European Contract Law* (Oxford University Press 2021) 307.

[37]This work takes many forms, one example is G Bhattacharyya, *Rethinking Racial Capitalism: Questions of Reproduction and Survival* (Rowman and Littlefield 2018).

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gendered social reproductive labour, of distinctions of family/market and private/public, which tell us that the *primary* subsidies to capitalist wealth creation and the holders of capital come from women.[38] Gendered subsidisation of capital comes from women who disproportionately do 'non-economic', unpaid labour that 'precedes "work", or underlies it or runs alongside to make the stuff of economics possible'.[39] And those who are relegated to the bottom of the market and whose wages barely cover their subsistence are often poor women of colour, who when engaged in care and domestic labour often enable racially privileged middle-class women to outsource such gendered labour.[40] It has been 'workaday wives, doting mothers, put-upon sisters, almost invisible spinsters, aunties and whores, mammies and ayahs, maids and lovers and landladies' who have undertaken the life-sustaining activities that were and continue to be the preconditions for economic activity and a functioning order, yet who have often been marginalised in our understanding of how excessive wealth is created and how its disproportionate distribution comes to be.[41]

Private law codes these forms of subsidisation (for instance, through contract), and this coding tends to follow patriarchal and racial logics. In European legal thinking, the conventional ways to understand such private law coding are through interpersonal and distributive framing. These ways of approaching and understanding private law's role in social injustice include using the lenses of discrimination and distribution. By thinking about discrimination, for instance, we may reveal potentially indirect or direct, and potentially unconscious or malicious forms of differential treatment across gendered and racialised people and groups for profit making, capitalist purposes. We may find that private law – like anything else – can be used for racist and sexist purposes in the course of economic activity (by clearly identifiable bad apples: racists and sexists). Another familiar lens for understanding the relationship is to attend to distributive outcomes. Notably, distributive analysis may reveal the gendered and racialised distributive unjust economic outcomes of private law. These conventional frames reveal important aspects of private law's relation to social injustice, and they are certainly not the only ways in which the relationship between private law and social injustice can be understood.

Yet, I worry that non-intersectional renditions of these approaches would fall short of offering a sufficiently full accounting of root causes necessary to envision radical remedies and support claims of progressiveness of a reconstituted code.[42] Namely, often these analyses position instances of injustice as potential exceptions to an otherwise just private legal system. Gendered and racialised aspects of social injustice can be and often are framed as marginal, irrational, and exceptional instances of private law's coding of capital. The problem of wealth accumulation and its disproportionate distribution remains separate, or at least separable, from vectors of gender and race – amongst others. In this view, racial patriarchal elements can be removed from the private law code and a relatively clear pathway for a transformation to a progressive code can rely on familiar ideas of justice that produced antecedent, *status quo* versions of the code. Exceptional violations of justice can be isolated from the sort of moral order that progressive principles can envision and establish.

Bringing in intersectional approaches to understanding private law's relation to social injustice raises a different set of questions and invites alternative ways of uncovering and understanding root problems, including the gendered and racialised subsidising of capital.[43] For instance, instead

[38]This work is not necessarily or always intersectional, often centring racially privileged experiences.

[39]Bhattacharyya, Rethinking Racial Capitalism (n 37) 40. This suggests that, in fact, mothers are 'the mother of all subsidies'. See Pistor, The Code of Capital (n 1) 222.

[40]H Lutz (ed), *Migration and Domestic Work: A European Perspective on a Global Theme* (Routledge 2016).

[41]Bhattacharyya (n 37) 40.

[42]I don't intend to claim that these conventional analyses have no value, but merely that when they represent non-intersectional interventions, they are insufficiently radical in the way that Hesselink aspires.

[43]To be clear, I present 'intersectional' in competition with 'distributive' analyses or analyses of 'discrimination', but by and large European private law discourse on social justice has not engaged intersectional approaches to questions of, for instance, distribution. Intersectionality is differently positioned in discourse on European discrimination law, see for instance D Schiek, 'On Uses, Mis-Uses and Non-Uses of Intersectionality Before the Court of Justice' 18 (2018) International Journal of

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of understanding private law, that is, the code of capital, as treating or impacting gendered and racialised 'others' differently, we may ask how private law in a racial patriarchal order structures the patterns of capital.[44] How, for instance, does private law help to naturalise the subsidisation of capital by poor women of colour in the European context?[45] Such examinations would connect people's positions to structural injustices and offer insights into the root causes of their material conditions within and *vis-à-vis* the European social, political, and economic order. It offers a different way of thinking about the relationship between capital and private law in Europe – an intersectional paradigm shift.

4. Intersectional approaches to European private law?

In this last section, I remark on a possible obstacle to intersectional approaches in the knowledge production processes of European private law. Progressive European self-understandings joined with legal training can make the comprehensibility and legibility of private law's coding of capital considering its entanglements complex, especially when the mutual dynamics are not revealed in explicit and overt ways.[46] I offer several puzzle pieces which offer a glimpse of how explicit private law entanglements in social injustice have reproduced and transformed in the United States (US) context. Exposing private law's complicity in social injustice by identifying how it works with, rather than against, mutually constructing dynamics of privilege and oppression would be a core aim of intersectional approaches in European private law. If we aspire radical reconstitution of the code, European private law discourse needs European intersectional work which examines and contextualises the unique configurations of European private law's entanglements.

A. Progressive European identities

European egalitarian and progressive self-understandings can form an obstacle to embrace intersectional approaches in European private law. If racial patriarchal dimensions of the social order are in question, or only acknowledged when blatant and explicit, intersectionality will suffer in terms of credibility in legal academia. Some have described a (Western) European 'way of being in the world' as deeply connected to colourblind ideals through which 'the "American type" of racism' is positioned as external to European conceptions of self.[47] This can make it particularly hard to expose and make legible insidious and implicit ways in which private law may potentially draw upon and reproduce racist, misogynist, xenophobic logics, incorporating and constructing

Discrimination and the Law 82; D Schiek and A Lawson (eds), *European Non-Discrimination Law and Intersectionality: Investigating the Triangle of Racial, Gender and Disability Discrimination* (Ashgate 2011).

[44]See Bhattacharyya (n 37) 103. ('Racial capitalism is not an account of how capitalism treats different 'racial groups', but it is an account of how the world made through racism shaped patterns of capitalist development').

[45]I used this language of subsidisation, because it connects to the idea of private law subsidizing capital. Others have called this cost externalisation, see Bhattacharyya's reference to Maria Mies: ('Housewifization means the externalization (. . .) of costs which otherwise would have to be covered by the capitalists. This means that women's labour is considered a natural resource, freely available like air and water.') Ibid., 46.

[46]I have remarked on these potential obstacles elsewhere, see Tjon Soei Len, On politics and feminist legal method in legal academia (n 27).

[47]See for instance, F El-Tayeb, *European Others: Queering Ethnicity in Postnational Europe* (University of Minnesota Press 2011). ('To reference race as native to contemporary European thought, however, violates the powerful narrative of Europe as a colourblind continent, largely untouched by the devastating ideology it exported all over the world. This narrative, framing the continent as a space free of 'race' (and, by implication, racism), is not only central to the way Europeans perceive themselves, but also has gained near global acceptance.') See also Möschel's analysis of France's colourblind view of equality and its paradoxes in M Möschel, *Law, Lawyers and Race: Critical Race Theory from the US to Europe* (Routledge 2014) 152–65. Important shift have occurred in recent years as a result of powerful social movements, including the Black Lives Matters and #MeToo.

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ethnic-, racial-, and gender-based social injustice.[48] Common ways of thinking about private law may also contribute to resistance, especially when private law's relation to social justice is approached as irrelevant, agnostic, benign, or remedial. Intersectional work that endeavours to show how European private law has been counterproductive to social justice and complicit in social injustice includes putting together puzzle pieces to examine how private law has coded capital in configuration with race and gender.

B. An illustration of puzzling reproductions

Pistor remarks that urban housing is one of the most important sources of wealth today.[49] But for whom is housing coded as wealth creating? As an example of private law entanglement with capital, race, and gender, housing offers a key illustration. We cannot understand the patterns of wealth associated with urban housing and the role that private law has played in creating these types of patterns by looking at capital, as if it exists independently of other logics. In the US context, several influential works show how, as a source of wealth, Black homeownership has been structurally undermined, particularly for Black women. These studies offer glimpses of the role private law plays in the creation and maintenance of racial patriarchal patterns of unequal wealth through real estate property in the US.[50] For instance, in an analysis of racial housing segregation, Rothstein notes how private law, notably contract law, functioned to support racial exclusion from capital. In the first half of the 20th century, Rothstein identifies racist promises as the basis of racial exclusion from capital. Notably, racial clauses (enforced prior to 1948) in deeds and pacts restricted future sales to white people and prohibited future sales to people of colour.[51] Rothstein quotes a restrictive covenant from 1925 which states '(. . .) no part of said premises shall be used (. . .) for any structure other than a dwelling for people of the Caucasian Race'.[52] Rothstein describes how such clauses travelled from bilateral contracts to contracts between owners in a neighbourhood, and into bylaws of mandatory community and neighbourhood associations.[53] Research reveals how white homeowners, real estate agents, developers, lawyers, and courts across the US adopted similar private legal strategies which preserved racial exclusion from capital.[54] When the state stopped endorsing such private law strategies, racial exclusion from capital morphed into objective standards of 'property value' and 'risk' through racist ideas that home values declined through the proximity of Black families.[55] What continued were the extractive and exploitative contractual lending arrangements that made Black contractors structurally at risk of losing their home based on inflated monthly payments that undermined the availability of disposable income for repairs and maintenance.[56] Houses owned by Black families declined in value and White people moved away from neighbourhoods with increasing Black homeowners, based on reasons in which race and capital were inextricably entangled.

In 'Race for Profit', Keeanga-Yamahtta Taylor shows how Black women became the image of 'unsophisticated buyers' in this context, through racial patriarchal capitalist logics. Black women

[48]Möschel (n 47) 165.

[49]Pistor (n 1) 5.

[50]See K-Y Taylor, *Race for Profit: How Banks and the Real Estate Industry Undermined Black Homeownership* (University of North Carolina Press 2019); R Rothstein, *The Color of Law: A Forgotten History of How Our Government Segregated America* (Liveright 2017).

[51]Rothstein (n 50) Chapter 5.

[52]Ibid., 78. Such sentiments are familiar and enduring also in the European context, as illustrated by housing advertisement practices which use phrases like 'no foreigners desired' or 'whites only', see H Silver and L Danielowski, 'Fighting Housing Discrimination in Europe' 29 (2019) Housing Policy Debate 714.

[53]Rothstein (n 50) 79.

[54]Ibid., Chapter 5.

[55]Ibid; Taylor (n 50).

[56]Ibid., 97.

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who engaged in low-income homeownership programmes, which involved poor people becoming owners of poor housing, were 'portrayed as unsophisticated and domestically dysfunctional, evidenced by the alleged difficulty with the simple maintenance of their homes'.[57] And Black women were depicted 'as "ignorant" and "foolish" for buying houses that were in such disrepair.'[58] The details of how Black women consumers faired on the housing market due to legal coding are certainly more complex than acknowledged here, but these narratives of wealth and urban housing reveal evident entanglements of private law with capital, race, and gender. This research reveals how attempts towards market inclusion – including seemingly progressive shifts in private law – reproduced and coexisted alongside continued racial and gendered exclusions from wealth-creating forms of homeownership. Of course, this analysis must include movements in law and policy beyond private law as well, as private law's coding of capital does not exist in isolation. But if we are seeking to understand private law's role in wealth creation, in this instance through housing, centring race and gender with capital is crucial to understanding root problems of social injustice. Racial gendered exclusions from wealth-creating forms of homeownership continued through progressive attempts towards inclusion. For Black women, homeownership was not legally coded to be a form of wealth creation, but as an anchor to (exacerbating) poverty.[59]

C. European intersectional contextualisation

Of course, private law's role in Black women's exclusion from wealth-creating forms of homeownership can be read *exactly* as the 'American type' of racism that does not occur in Europe. European private law needs its own contextualisation and stories of its entanglements with capital, race, and gender.[60] European legal discourse needs to bring in examinations of the unique ways in which its private laws have coded racial patriarchal capital to the detriment of some and the benefit of others.[61] In offering this illustration, I merely intend to show the sort of work that can help expose how explicit forms of racial patriarchal market exclusions can transform into the insidious forms that private law may reproduce and maintain. Ideas about 'sophisticated' buyers, 'average' consumers, and 'risky' contractors are familiar under European private law which need their own racial gendered contextualisation. Intersectional approaches are central to uncover how seemingly progressive law may unintentionally rely on and draw in racist, misogynist, xenophobic logics, incorporating, and constructing ethnic-, racial-, and gender-based social injustices. If radical aspirations for European private law should have a chance to address root problems, we ought to abandon the language that frames progress in terms of restoration. Reform should build on work that seeks to uncover how private law codes patterns of wealth, which must engage capital's entanglements with race and gender in the European context.

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[57]Ibid., 168.

[58]Ibid., 169.

[59]Ibid., Chapter 5.

[60]For some European contextualisation see for instance Möschel, Law, Lawyers and Race (n 47). Although housing discrimination is widespread in Europe there are few studies which have centred race and gender inequities in housing sales and lending. Yet, race, ethnicity, and religion, for instance, play a prominent role in the ways that some consumers are perceived as 'unreliable', 'risky', 'unsophisticated' making them less attractive as neighbours, tenants, and homeowners in Europe. See Silver and Danielowski, Fighting Housing Discrimination in Europe (n 52) 716.

[61]Scholarship outside European private legal discourse and legal discourse generally contextualises European entanglements of race, gender, and capital, see for instance. L Pagulich, 'European Modernity & the Racialization of Roma' (2022) Paper on file with author.

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