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

What kind of private law for what kind of Europe? A rejoinder to Martijn Hesselink's 'progressive code'

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Abstract

Martijn Hesselink's 'progressive code' stands on a century-old leftist tradition. What makes the project unique, however, is the transfer from the nation-state context to the European context and its reliance on principles instead of a fully composed catalogue of rights and obligations. My main criticisms are ultimately the lack of a convincing and fully developed background on both sides of his intellectual construct: the public and the private sphere. Martijn Hesselink has an idealising notion of the public sphere, which he does not yet support with a corresponding EU constitutional theory of the public sphere, and he marginalises society as its own private sphere. The understanding of the public sphere needs to be theoretically and conceptually better grounded in order to be convincing and he would have to recognise that the role and function of the private sphere remain a blind spot in the 'progressive code'.

Keywords: public and private sphere; public and private rationality; society and private law society

A progressive code for Europe – what an exciting idea that frees the debate about Europe's future from all the intellectual and the political ballast of nearly 20 years about the feasibility of a European Civil Code. Martijn Hesselink's 'progressive code' revitalises theoretical and political debates from the turn of the 19th to the 20th century on the missing 'socialist oil' (O v Gierke)[1] in the German Bürgerliches Gesetzbuch which entered into forth on 1 January 1900 and which triggered a vibrant debate far beyond Germany. The lack of social justice re-appeared in the fight over 'economic democracy' (Wirtschaftsdemokratie) during the Weimar Republic.[2] The political and legal 'fight' (Kampf ums Recht Jhering) did not leave visible traces in socialist/social codifications over the 20th century. Two spring to mind though, the 'Zivilgesetzbuch der Deutschen Demokratischen Republic, from 1975 (Civil Code of the German Democratic Republic)[3] and the Law of Obligations from the former Yugoslavia from 1976.[4] The Civil Code from the former GDR was repealed after unification and replaced through the BGB. The Yugoslavia Law of Obligations survived in all former members of Yugoslavia, including Slovenia and Croatia. In

[1] Otto von Gierke: The Social Role of Private Law. Translated by Ewan McGaughey German Law Journal , Volume 19, Issue 4, 01 July 2018, pp. 1017–1116. https://doi.org/10.1017/S207183220002294X.

[2] H Dedek, 'Private Law Rights as Democratic Participation: Kelsen on Private Law and (Economic) Democracy' 71 (2021) University of Toronto Law Journal 376.

[3] https://beck-online.beck.de/Dokument?vpath=bibdata%2Fges%2Fddrzgb%2Fcont%2Fddrzgb.htm&anchor=Y-100-G-DDRZGB.

[4] M Djurovic, 'Serbian Contract Law: Its Development and the New Serbian Civil Code' (2011) European Review of Contract Law.

the western democracies, the 1968 student revolt revitalised old debates from the beginning of the 20th century and led to substantial reforms of labour law, family law and the invention of consumer law. There were very few attempts to redraft the existing codifications in order to insert Gierke's 'socialist oil'. The Netherlands are a success story, whereas the two big reform projects in Belgium and France, which breathe the spirit of the 1968, failed. In Germany, critical scholars undertook the ambitious attempt to strengthen the social interpretation by re-interpreting the codified private law. However, the so-called 'Alternativ Kommentar'[5] had a short life and did not really make it into the court room, at least not by that time.

Martijn Hesselink's 'progressive code' stands on a century-old leftist tradition. What makes the project unique, however, is the transfer from the nation-state context to the European context and its reliance on principles instead of a fully composed catalogue of rights and obligations. Europe is obviously equated with the European Union (EU), although this is nowhere explicitly discussed. My main criticisms of Hesselink's 'progressive code' are ultimately the lack of a convincing and fully developed background on both sides of his intellectual construct: the public and the private sphere. Martijn Hesselink has an idealising notion of the public sphere, which he does not yet support with a corresponding EU constitutional theory of the public sphere, and he marginalises society as its own private sphere. The understanding of the public sphere needs to be theoretically and conceptually better grounded in order to be convincing – this is my first point and he would have to recognise that the role and function of the private sphere remain a blind spot in the 'progressive code' – this is my second point. However, before I engage with my criticism, I will first lay down the connections between 'progressive code' and 'justifying contract', where the twofold deficits derive from.

1. Justifying contract and progressive code in tandem

In 'justifying contract in Europe', Martijn Hesselink presented 'a bird eyes' view' on six different philosophical strands (1) libertarian; (2) utilitarian; (3) communitarian; (4) liberal egalitarian; (5) civic republican; and (6) discourse theory which would, could, legitimate six different models of contract. The author deliberately avoids taking a particular stand. The book is meant to be an immanent critique of the philosophical underpinnings and the potential consequences with regard to six parameters of analysis: (1) democratic basis; (2) national, European; or global; (3) binding force and remedies; (4) weaker party protection; (5) public policy and good morals; and (6) optionality. A closer reading, however, reveals that Martijn Hesselink is strongly sympathising with 'discourse theory' (Habermas).[6] The strong plea for a 'progressive code' is the next consequential step on what looks like an agenda – the presentation of a 'model code' based on his favourite political philosophy. However, the subject matter is no longer 'contract/contract law' but 'private law'. This is a decisive move and a heavy enlargement of the original project – the 'justifying contract', one which requires to look beyond contract law and engage with private regulation.[7]

'Justifying contract' and 'progressive code' combined could, should, must be read and understood as an attempt to relocate the role and function of private law in the development of a future European legal (economic) order, the 'economic constitution' to which Martijn Hesselink briefly refers. Not least due to the failure of the Draft Common Frame of Reference – the project of a European Civil Code, European legal scholarship, has been – and still is – dominated by

[5]R Wassermann (ed) Kommentar zum Bürgerlichen Gesetzbuch (Luchterhandverlag 1980)

[6]H-W Micklitz, 'Thoughts on Martijn W. Hesselink, Justifying Contract in Europe, Political Philosophies of European Contract Law' (forthcoming 2022) European Review of Private Law.

[7]In my book review, I am pointing to the lack of a 7th chapter.

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constitutional legal thought, be it in the search for and the definition of a European Constitution or a European polity, usually in connection with the Charter of Fundamental Rights and the European Convention on Human Rights, which cuts across old and new challenges.[8] A comprehensive literature provides evidence. In such a discourse private law has no real place. What is true for constitutional theory, however, is equally true for private law theory. There is a blossoming literature on private law theory, private law philosophy and transnational law theory, but the interaction or the connection to constitutional legal theory all too often falls by the wayside. It seems as if the two disciplines remain bound to their particular perspective.[9]

Is 'progressive code' different? Does it bring the two strands of thought closer together – the debate on the public sphere vs the private sphere? The focus is obviously on private law, on the interaction between private parties. Private law is being read and understood through the lenses of Pistor's 'code of capital', reconstructed in private law language, it is private regulation/private ordering, contract and enforcement through arbitration and national courts in financial services. The nexus is social justice between private parties and distributive justice through private law/private regulation. Both are used interchangeably. 'Progressive code' insinuates that the private law on financial services is at the forefront of the development and shapes all other private law relationships. I agree.[10] One might raise the question whether the law on financial services has started a life on its own and whether and to what extent there is place for a private law outside financial services, in other words, whether the 'code of capital' is universal in the sense that it penetrates all other private law relations. One might equally wonder whether it is enough to look at the 'code of capital' or whether the elaboration of a 'progressive code' would be required to engage with sustainability and digitilisation too. But this gap, if it is one, is no argument against 'progressive code', it is more a clarification or an extension. What remains open is the answer to the question of where to locate 'progressive code' within the conceptual and theoretical debate on the future of private law. Martijn Hesselink's answer is crystal clear – progressive code, this will be shown next, must be anchored in the public sphere.

2. The public sphere and constitutional theory

In building on H. Collins[11] 'progressive code' aims at the development of '*an EU Charter of Private Law Justice*', '*to reduce inequality*' through *'a few dozens of principles'*. This is miles away from the Draft Common Frame of Reference and equally miles away from the widespread and very fashionable scholarship dealing with rule drafting. Progressive code could be understood as a reaction to the failure of the Draft Common Frame of Reference, of thinking in categories of 19th- and 20th century codification. The claim for a 'progressive code' is no longer derived from 'European integration is good', or from 'peace through trade' like in the Schuman declaration, but from the economic and political weight that Europe can bring to bear when it comes to reshape the 'code of capital' in the name of 'social justice'. The proposed principles are not defined, not even sketched out – they should be 'just' and apt to overcome the inequalities the 'code of capital' has produced. Such a plea quite necessarily shifts the focus away from the private to the public or in legal terms from private law to public/constitutional law, from the potential content of the principles to their 'democratic' making. With a 'progressive code' people should '*regain democratic c*ontrol'. The 'progressive code' should be '*radically democratic and not technocratic*'. Martijn Hesselink

[8]O Pollicino, *Judicial Protection of Fundamental Rights on the Internet: A Road Towards Digital Constitutionalism* (Hart 2021).

[9]On the difficulties to initiate a deeper dialogue between private law and public law even below the level of legal philosophy see the special issue edited by F Cafaggi 'European Journal of International Law, Impact Factor – The Food is Bad and What's More There is Not Enough of It;– The Beginning of an Existential Debate; Masthead Changes' 23 (2012) European Journal of International Law.

[10]J Vogl, *The Specter of Capital* (Stanford University Press 2015).

[11]H Collins, *The European Civil Code* (Cambridge University Press 2008).

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formulates a credo reiterated throughout the text – in particular through the connection of 'democratic' with 'radical', and underpinned by references to Habermas and Rodotà (see n. 64):

> The EPL-code, in order to be a private law constitution from the people for the people, should be based on democratic deliberation that categorically and robustly includes the participation of groups and individuals at the various peripheries of European society. These include: citizens who currently own no capital; citizens from members states with comparatively minor political power; citizens from various minority groups; and – most difficult to ensure – non-citizens to whom the code would apply. As Habermas puts it more generally, 'In the final analysis, private legal subjects cannot come to enjoy equal individual liberties if they do not themselves, in the common exercise of their political autonomy, achieve clarity about justified interests and standards. They themselves must agree on the relevant aspects under which equals should be treated equally and unequals unequally.

In order to decipher 'radically democratic' and the way the requirement could be understood I hark back to 'justifying contract'. In Chapter 3, Martijn Hesselink discusses how the six different political philosophies are relating 'European Contract law', as concretised in Chapter 2 'Context', to 'Democratic Basis'. The parameters of analysis include *inter alia*, the rule makers – judges, legislators, academics and regulatory silos – legitimacy – democracy – voting and deliberation – constitutionalisation.[12] The only political philosophy which seems to provide guidance to 'radically democratic' is 'discourse theory'. Here we find all elements which show up in the extract, a strong preference for democratic legislation, accompanied by a rejection of judge made common law as well as professorial law,[13] the call for deliberation and the integration of citizens and non-citizens.[14] However, all these categories remain rather abstract, we do not learn what 'radically democratic' means when it comes to the making of the 'progressive code'.

The strong request for its non-technocratic character suffers from a similar deficit. A couple of pages later Martijn Hesselink writes

> This radically democratic demand also means that the work on the EPL-code cannot be expert-driven. A democratic public that is 'desperately trying to regain control over its own destiny', (Pistor) will not leave its destiny in the hands of experts. What different social groups might do instead is seek their own expert advice, for example about effective ways of reigning in capital through private law. However, a technocratic code of private law is the last thing the EU needs. As the social justice manifesto put it, 'attempts to conceal important decisions regarding the scheme of social justice in the market order behind technocratic processes will merely lead to widespread disenchantment with the ideals and the legitimacy of the European Union.

As Martijn Hesselink was involved in the elaboration of the Draft Common Frame of Reference, the statement begs a question on the potential role on academic advice. The answer is to be found in a footnote (70):

[12]M-W Hesselink, *Justifying Contract in Europe* (Oxford University Press 2021) Chapter 2 Context; 1. European Contract Law, 16 and Chapter 3 Democratic Basis, 1. Introduction, 68.

[13]H Schepel, 'Professorenrecht? The Field of European Private Law' in H Schepel and A Jettinghoff (eds), *Lawyers' Circles. Lawyers and European Legal Integration* (Elsevier Reed 2004) 115.

[14]More or less at the same time with *Justifying Contract*, the *Leviathan*, published a special issue, Vol 37, Nomos 2021 under the editorship of M Seeliger and S Sevignani with the intriguing title *Ein neuer Strukturwandel der Öffentlichkeit*. In light of the 'renewed structural change' Habermas seems to be more cautious on the explanatory power of his own theory, in *Überlegungen und Hypothesen zu einem erneuten Strukturwandel der politischen Öffentlichkeit* (Nomos 2021) 470.

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> None of this reflects scepticism with regard to academic expertise. It merely constitutes a recognition of the limits to expert knowledge when it comes to values and their demands . . .

Let us dive deeper into 'non-technocratic'. In line with Neil Walker, Martijn Hesselink criticises 'the fetishism of discourses of expert rationality within specialist epistemic communities.'[15] P. Leino-Sandberg's[16] empirical analysis of the role and function of legal expertise strengthens the distrust against the way the European Commission is drafting EU policy and hence EU law. The 'knowledge' they generate in epistemic communities is meant to substitute the lack of a shared vision of the common cause.[17] The non-technocrats shall overcome these constraints. Whilst I am sympathising with such an assessment, it does not provide for a solution on how the downside of expert knowledge can be overcome. The devil as usual is in the detail, here in how 'knowledge' can be integrated into the legal system. Two dimensions of technicity have to be kept distinct – the technicity of the legal jargon, which excludes laypersons from the discourse and the technicity which is inserted into private law from the outside in particular through technical standards. Each of them raises very particular problems.

The first is a rather old problem, which is discussed again and again in critical legal theory. Can the legal jargon be replaced through colloquial language or is the legal jargon an integral and constitutive part of 'law'? Martijn Hesselink seems to insinuate that the legal jargon is serving as a barrier when it comes to the definition of 'values', to the formulation of a 'handful of principles of social justice', to be developed together with laypersons. However, he admits that an additional step is needed, one which merges the 'principles' and the existing European legal order: He writes

> The 'core EU principles of social and interpersonal justice (whose scope need not to be limited specifically to private law or the internal market) would have to be introduced at the next treaty reform in order to truly ensure justice in the internal market'.[18]

These principles shall stand side-by-side with the market freedoms and the competition paradigm. The EU Charter of Private Law Justice would lead to a second 'constitutionalisation' of private law, second because the ECHR and the ECHFR have made their way into private law, at least to some extent. The first constitutionalisation has been criticised for being no substitute for social/distributive justice. Individual rights, this is the argument, cannot replace institutional safeguards.[19] Two questions: how shall the anchoring of the justice principles be organised? Are the democratic institutions at the national and the European level bound by what the citizens and the non-citizens have agreed? Or shall these principles be submitted to a political process where the drafters are gradually substituted by the established legal experts? This is to say that a 'progressive code' requires at the same time a 'progressive constitution', which ensures deliberation in the Habermasian sense, one where the interaction between society and state/s/EU comes to the fore.

The second category – the technical standards – is equally not new but has gained prominence in EU regulation. Think of the directives adopted under the New Approach, respectively the New Legislative Framework to complete the internal market or the directives following the

[15]MW Hesselink, 'Injustice in European Private Law' (2020) available at: https://ssrn.com/abstract=3752748 or http://dx.doi.org/10.2139/ssrn.3752748, under 3.3. legal doctrine as democratic exclusion, available at: https://ssrn.com/abstract=3752748 or http://dx.doi.org/10.2139/ssrn.3752748.

[16]P Leino-Sandberg, *The Politics of Legal Expertise in EU Policy Making* (Cambridge University Press 2021); H-W Micklitz, 'Legal Professionalism and Legal Expertise in EU Law Making' in E Korkea-aho and P Leino-Sandberg (eds), *Legal Expertise in EU Policy-Making: Changing Roles for the Legal Profession* (Cambridge University Press forthcoming 2022).

[17]L Jaume, *La Liberté et la Loi* (Fayard 2000) 352.

[18]M-W Hesselink, 'Reconstituting the Code of Capital: Could a Progressive European Code of Private Law Help Us Reduce Inequality and Regain Democratic Control?' 29 (2022), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4075004.

[19]GD Kochenov et al. (eds), *Europe's Justice Deficit?* (Hart Publishing 2015).

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Lamfalussy procedure to build a Banking Union and a Capital Market or the envisaged reliance on harmonised European standards in the regulation of digital economy. I would go as far as arguing that the EU is using technical standards as a substitute for binding secondary EU law. However, there is a very practical and down to earth problem. The technicity of the technical standards does not only exclude laypersons but also lawyers. The 'citizens' and the 'non-citizens' are dependent on external expertise, which downgrades their autonomy and makes them dependent.

Radically democratising technicity is not thinkable without a very different organisation of the interaction between technology, natural sciences and society.[20] Let us assume that the discourse between citizens, non-citizens, self-selected technical experts and self-selected academic and non-academic (sic) leads to a 'legal principle' such as – to stay with the digital economy – the right to be forgotten, the right to comprehend algorithms and let us equally assume that technological advice through self-selected computer scientists (perhaps hackers)[21] ensures that it is technologically possible to eliminate personal data or that the famous black box can be opened and that machine learning techniques can be translated from technology into language that the citizens and the non-citizens can understand. Should a 'progressive code' not be about de-technification and the comprehensibility of rules and standards, which Martijn Hesselink has in mind, but rather about the law (and the public) becoming more aware of its normative role and not leaving normative interpretation to experts. After all, technical standards hide their normativity behind 'expertise'. Would it not be for lawyers (or, according to Martijn Hesselink, the public sphere) to regain the interpretative authority over the normativity of technical rules instead of 'de-technicising' the rules as such? This seems to be the way the ECJ is ready to go in its more recent attempts to submit so-called 'harmonised standards' to judicial review.[22]

I see a twofold argumentative gap – firstly in the transformation of the radically democratically made 'principles of justice' and secondly in the integration of technical expertise into the EU legal order. Unfortunately, neither 'justifying contract' nor 'progressive code' is diving into constitutional law, constitutional theory, constitutionalism let alone the extensive legal scholarship on the European Constitution and European Constitutionalism.[23] European constitutional legal scholarship provides insights on the personal qualifications of who should have a say, the voting possibilities of non-citizens, the underdeveloped European polity, democratic deliberations, and constitutional downsides of the over-reliance on technical expertise, usually combined with a wealth of proposals and ideas how a potential 'progressive constitution' would and should look like.[24] This strand of thought remains outside Hesselink's research agenda so far.

[20]U Beck, *Risikogesellschaft Auf dem Weg in eine andere Moderne* (Suhrkamp 1987); Y Benkler, 'A Political Economy of Utopia?' 18 (2019) Duke Law & Technology Review 78.

[21]G Teubner, 'Societal Constitutionalism: Alternatives To State-Centred Constitutional Theory?' in C Joerges et al. (eds), *Transnational Governance and Constitutionalism* (Hart Publishing 2004) 3; E Mogelen, 'Anarchism Triumphant: Free Software and The Death Of Copyright' 4 (1999) *First Monday*; *4*(8). https://doi.org/10.5210/fm.v4i8.684 quoted by Y Benkler, 'Practical Anarchism: Peer Mutualism, Market Power and the Fallible State 41 (2013) Politics and Society 213, 214, which is of direct relevance in this context.

[22]R Vallejo, The Private Administrative Law of Technical Standardization 40 (2021) Yearbook of European Law 172, more broadly on the potential of the ECJ to break up institutional structures see G Tagiuri, 'How EU Law Politicizes Markets and Creates Opportunities for Progressive Coding' 1 (2) (2022) European Law Open 390–401.

[23]J Dickson and P Eleftheriadis (eds), *The Philosophical Foundations of European Union Law,* Yearbook of European Law (Oxford University Press 2013) and my review 'The European Union Project', Review Article on J Dickson and P Eleftheriadis (eds), *The Philosophical Foundations of European Union Law*, Yearbook of European Law (Oxford University Press 2013).

[24]There is such a long list of contributions that it is even dangerous to quote a particular selection. Within the last 2–5 years, quite a number of books have been published, looking at constitutionalism, at democracy, at polity, etc.

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3. The public sphere and the private sphere/private legal theory

In 'progressive code', Martijn Hesselink does not explicitly discuss the interaction between the public and the private sphere. However, the wording:

> The EPL-code, in order to be a private law constitution from the people for the people, should be based on democratic deliberation that categorically and robustly includes the participation of groups and individuals at the various peripheries of European society

connected to the relevant passages in 'justifying contract' demonstrates the linkage to Habermas understanding of the dominance of 'democratic deliberation' in the public sphere. The concept is specified in two directions – first the integration of non-citizens and second the rejection of 'technocrats'. The latter seems to stand for in-house EU legal experts as well as in-house EU economists (in the regulation of financial services) or in-house EU bound knowledge from other potential disciplines. It does not seem far fetched to extend the rejected category to all those 'experts' who are coming from the outside but who are integrated in one way or the other into the various consultative committees. These professionalised – not professional[25] – experts are colonialising the political (democratic) institutions. Hesselink has in mind all those EU citizens and non-EU citizens who do not form part of these expert circle and who enjoy the freedom to deliberate in an open democratic process on the potential content on the 'Justice Charter'. At least this is the ideal.

Even more revealing and more outspoken is Martijn Hesselink's clarification in (n 4) that the idea of the 'modules of capital' and 'progressive code' has to be understood as a critique of transnational private law theory, which assumes that a 'law without the state' exists and that private rules can function outside the state. Martijn Hesselink thinks of and analyses private law from the perspective of the democratic state; he does not engage with the possible contribution of the society to generate the knowledge he is looking for. The individual and their private sphere is submitted to the utopia of a code which has to be realised through public democratic deliberation. Such thinking ignores that private law has a long tradition of constituting society, of institution building and of generating justice, not only formal but also material justice. To avoid misunderstandings: all I am saying is that it is worth looking deeper into the private sphere and its 'potential' to overcome the deficiencies of the 'code of capital'. I am not claiming that the private sphere can replace the public sphere when it comes to patterns of justice. Justice cannot be left to the market. I am admitting that there are many loose ends in the debate about the private sphere. Instead I would like the potential of the private sphere to be taken seriously. Studying the private sphere shields the call for a 'progressive code' against overburdening the public sphere with unrealistic ideals and allows to point to private responsibilities in the shaping of a just private law order. Let me explain.

Habermas and Martijn Hesselink assert the priority of political reflection procedures over the distributive rationality of what F. Böhm called the private law society – Privatrechtsgesellschaft[26] and what would be the private sphere more generally. Discourse theory trusts the rationality of the democratic institutions and distrusts the rationality of the 'private law society'. Hesselink draws a distinction between rationality and reasonableness (justice). Private law may develop its own rationality but it is unable to produce the kind of social justice he is asking for in progressive code. Social justice can only be generated in the public sphere. This begs the question of what kind of 'public sphere' Martijn Hesselink has in mind. The democratic institutions of the EU are weak and

[25]On legal professionalism, H-W Micklitz, 'Legal Professionalism and Legal Expertise in EU Law Making' in E Korkea-aho and P Leino-Sandberg (eds), *Legal Expertise in EU Policy-Making: Changing Roles for the Legal Profession*, (Cambridge University Press forthcoming 2022).

[26]F Böhm, 'Privatrechtsgesellschaft und Marktwirtschaft' 17 (1966) *ORDO: Jahrbuch für die Ordnung von Wirtschaft und Gesellschaft* 75; see for a deeper discussion S Grundmann, 'Chapter 6 – Societal Order and Private Law' in S Grundmann et al. *New Private Law Theory, A Pluralist Approach* (Cambridge University Press 2021) 131.

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suffer from a democratic deficit, if measured against an often idealised model of Western national democracies. Progressive code is a 'European model', but it seems as if the democratic credentials it requires are only available in the Member States and not the EU. European private law reality is shaped through the 'private law beyond the nation state', and this reality provides for a much more sophisticated picture and a more optimistic picture than Martijn Hesselink makes us believe. Private law beyond the nation state has freed space for private regulation, which is subject to extensive empirical research. Private regulation must not necessarily lead to new injustices but may even contribute to remedy injustice.[27] The existing European private law acquis provides for a thin version of social justice, what I call access justice. European private law has the potential to break up institutional structures[28] – and if fully connected to 'private responsibilities' might realise not only interpersonal but even social justice.[29]

Martijn Hesselink's 'progressive code' suffers from a kind of bias which does not do justice to the rationality of the private sphere and its potential to strive for social justice. There is a strong reason to believe that the rationality of the public sphere in creating social justice is not that superior to the private sphere as Habermas and Hesselink think. The legal scholarship on the reasons behind the decline of the welfare state provides evidence on all sorts of distortions, on the consequences of burdening the state with the management of social justice regulation, on the impact of social justice regulation on law, on legal certainty, on social inclusion and exclusion, on the risk that the 'state' (which is equated with the nation state) is creating societal expectations, which it cannot meet thereby producing dissatisfaction and giving rise to populism, etc. This kind of research, which is NOT advocating neo-liberalism, raises uncomfortable questions which cannot be set aside just by relying on the 'public sphere' and on 'democratic deliberation'.[30]

The plea to take the private sphere into consideration requires a clarification of what is meant by society, liberal society or private law society. 'Progressive code' is of little help and the same is true with 'justifying contract',[31] where the variations of liberalism and ordo-liberalism are mixed together without doing justice to the differences in particular when it comes to the role and function of society, of the private sphere and therefore private law. Hayek defends the *liberal society*, Böhm the *private law society*, then there is the *civil society* which may have very different meanings, in the transnational context it is the arena of collective action in the public space beyond the state, in the Western world it may be alluded to *democratic society*, as a particular source of democratic legitimacy,[32] in the new Member States of Central and Eastern Europe civil society is a *normative concept* which carries civic values.[33] Martijn Hesselink has the 'democratic society' in mind, as a bottom-up initiative which includes those who usually have no voice. Whatever such a 'bottom-up' initiative might look like, it must be organised and institutionalised in the public sphere. Such an understanding tends to understand society beyond the publicly organised and institutionalised form as an unstructured accumulation of individuals, thereby setting aside the

[27]For a stock taking in the transnational perspective TC Halliday and G Shaffer (eds), *Transnational Legal Orders* (Cambridge University Press 2013). It would be nice to have a similar and updated collection on European private regulation.

[28]See A Beckers, 'A Societal Private Law – A Comment on Hesselink's Proposal for a Progressive EU Private Law Code' and G Tagiuri, 'How EU Law Politicizes Markets and Creates Opportunities for Progressive Coding' 1 (2) (2022) European Law Open 390–401.

[29]H Dagan, *A Liberal Theory of Property* (Cambridge University Press 2021) and my review 1 (2) in particular with regard to private responsibilities, 'Hanoch Dagan's Liberal Theory of Property as a Third Way between Neo-Liberalism and New Socialism?' (forthcoming 2022) European Review of Contract Law.

[30]Again, so much has been written that I hesitate to refer to particular authors beyond K-H Ladeur, *Der Staat gegen die Gesellschaft Zur Verteidigung der Rationalität der Privatrechtsgesellschaft* (Mohr Siebeck 2006), with many references in particular to the rich French literature which is usually neglected in Anglo-American writings.

[31]M-W Hesselink, *Justifying Contract in Europe* (Oxford University Press 2021).

[32]'Civil society' definition and meaning in Collins English Dictionary. J Habermas in particular is relying heavily on the civil society, which could provide legitimacy to regulatory action, at least the Habermas prior to the Covid crisis.

[33]In the new Member States, the wake-up call is not *Cassis de Dijon* (Germany) or *Sunday Trading* (UK), but references dealing with mortgages and currency credits.

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capacity to collective self-organisation.[34] It is exactly this capacity which is stressed by the ordo-liberals and by the liberals in the American sense.

There are substantial difficulties though. The notion and conceptualisation of 'society' within private law theory are still underdeveloped. Any such theory would have to take into account that the society is not a homogenous entity. Social and political science revealed how the politicisation of the civil society and its inherent tensions has led to fragmentations.[35] There is no such thing as 'the society'. The difficulties do not stop here. National societies *exist*. They are a given societal reality. This is different when it comes to the 'European society'. There might be something like a European society in the making or at least different fragmented societies. The EU, the European Commission and the European Court of Justice are contributing to the building of a European society. In that perspective, the European society is a normative project in the hands of the European institutions and the Member States – which results in a top-down perspective. Hesselink's 'progressive code' would obviously subscribe to such a consequence, at least when it comes to upgrade the 'grassroot' model to the Treaty order.

This is not the place to fully engage into deepening the meaning of society and its importance for the European private law order.[36] I will be roughly pointing to F. Böhm's understanding and then use K.-H. Ladeur's[37] defence of the 'private law society' in 'Der Staat gegen die Gesellschaft' (The State against the Society). I will focus on rationality under the assumption that rationality in the private sphere is bound to patterns of justice. I will take the two as protagonists, which necessarily ends up in simplifications.[38] Franz Böhm begins with a strong statement on the origins of the private law society and then provides for a definition which contains a normative message:

> The lawyer knows what private law is. The national economist knows what a market economy is. But what is a private law society? The term is not commonly used in science. Neither jurisprudence nor economics nor sociology uses it. And yet one of the great aims of the French Revolution was to transform the pre-revolutionary society into a private-law society . . .
>
> What is important here is the insight that the functioning of the market-economy steering system presupposes the existence of a private-law society. All members of the society must enjoy the status of private autonomy, the private autonomy of no member may be limited, no one may have more competence than private autonomy confers. In their dealings with each other, all members are limited to being satisfied with the possibilities provided by private law for the realisation of their purposes and plans. In other words, private autonomy may not contain any title of command and control. All decisions for the realisation of which the use of force is necessary and which must be endowed with general binding force should require the volonté générale. However, the state or the municipalities should be the sole bearers of the volonté générale.

The image of the private law society sounds idealistic and has been criticised not only due to its formalistic understanding of equality and the unequal bargaining power but also due to its

[34]See K Ladeur, *Der Staat gegen die Gesellschaft Zur Verteidigung der Rationalität der Privatrechtsgesellschaft* (Mohr Siebeck 2006) 391 under reference to C. Calliess.

[35]E Grande, 'Zivilgesellschaft, politischer Konflikt und soziale Bewegungen' 31 (2018) Forschungsjournal Soziale Bewegungen 52, available at http://dx.doi.org/10.1515/fjsb-2018-0007.

[36]For a deeper analysis see H-W Micklitz, 'Society, Private Law and Economic Constitution in Europe' in G Gregoire and X Miny (eds), *The Idea of A European Economic Constitution* (Brill forthcoming 2022).

[37]K-H Ladeur, *Der Staat gegen die Gesellschaft Zur Verteidigung der Rationalität der Privatrechtsgesellschaft* (Mohr Siebeck 2006) 7.

[38]See for a much deeper debate the many contributions of G Gregoire and X Miny (eds), *The Idea of A European Economic Constitution* (Brill forthcoming 2022).

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'authoritarian liberalism'.[39] Franz Böhm instead insists on the moral supremacy of the private law society where the individuals are regarded as the prime holders of the responsibility for the societal order, where the state, however, has to take the necessary means to prevent the abuse of private power. Franz Böhm's understanding of the interaction between society and state comes close to the understanding of the American Society and the American Constitution, which differs from the dominating understanding at least in the continental European countries.[40] I take Franz Böhm's writings on the economic constitution and the private law society as an argument which underpins the urgent need for a deeper engagement with role and function of 'society', an argument which is even more important in the European context, where no such society exists and where European institutions and the Member States are involved in the making. The society Franz Böhm has in mind is not the one Hayek promotes or the one advocated for by neo-liberals. Stefan Grundmann[41] demonstrated that statutory mandatory law could be compatibilised with ordo-liberalism. What remains problematic, though, is that Böhm puts the individual into the centre and does not engage with the potential of collective self-organisation and collective institution building.

Karl-Heinz Ladeur[42] filled the blind spot through his research on the long-standing tradition of human co-operation in the liberal society. The focus on collective liberalism demonstrates the leeway of the self-organising power of the private law society and trust in the unfolding of the private law society's own rationality. Ladeur defends the rationality of the private law society against the one-sided focus of constitutional theory/law on the rationality of the public sphere. This goes along with Zingales who highlighted the mismatch between the ordo-liberal trust in the rational market behaviour and the distrust in the irrational political behaviour of the very same persons.[43] If we take the research of the politicisation of the civil society into account, the distinction between rationality in the public and irrationality in the private sphere collapses. There is rationality and irrationality in both the private and the public sphere, or to put it differently, both the public and the private sphere are 'political'.[44] Ladeur does not only insist on the potential of the private law society, on its Eigen-rationality but also criticises the state for interfering ever deeper into the private law society. The welfare state, this is his argument, could not and should not steer the private law society into a politically desired direction. In its focus on the achievement of particular policy objectives, the welfare state is said to neglect its task of institution building. Institution building, however, would be crucial in order to cope with the strong increase of complexity through social regulation. Ladeur sees the state much more in a position of a broker that has to adopt collision rules which mediate between state and society and to establish new perhaps hybrid institutions.[45]

There is no room to do justice to the pros and cons of Ladeur's defence of the private law society. However, his theory helps to highlight the type of questions the progressive code provokes and which require answers. Martijn Hesselink does not specify in what forum the deliberation should take place. One might very well assume that the assembly of non-technocrats, citizens and non-citizens cannot be organised with the standard democratic institutions. New institutions

[39]D Haselbach, *Autoritärer Liberalismus und Soziale Marktwirtschaft* (Nomos 1991).

[40]U Rödel et al., *Die Demokratische Frage, Ein Essay* (Suhrkamp 1989).

[41]S Grundmann, 'The Concept of the Private Law Society: After 50 Years of European and European Business Law' 16 (2008) European Review of Private Law 553, see potential to further develop Böhm's theory in emphasising that the private law society needs to be protected against private and public power.

[42]K-H Ladeur, *Der Staat gegen die Gesellschaft. Zur Verteidigung der Rationalität der Privatrechtsgesellschaft* (Mohr Siebeck 2006).

[43]L Zingales, 'Towards a Political Theory of the Firm' 31 (2017) Journal of Economic Perspectives 113.

[44]On the distinction between 'politics' and 'political', O Marchardt, *Die politische Differenz: Zum Denken des Politischen bei Nancy, Lefort, Badiou, Laclau und Agamben*(Suhrkamp 2010).

[45]Where he comes close to C Joerges writings, see Economic Constitutionalism and the 'Political' of the 'Economic', G Gregoire and X Miny (eds), *The Idea of A European Economic Constitution* (Brill forthcoming 2022) 789.

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need to be built. Martijn Hesselink's plea reads like a confirmation of Ladeur's finding that new complexities require different institutions, perhaps hybrid ones, where the 'state' and the 'society' may interact. One major difference remains: the overall idea of progressive code is to develop a charter of social justice which overcomes the numerous 'injustices' Martijn Hesselink had identified elsewhere. What shall happen if the members of the new institution – who appoints them? – elaborate principles of justice which are highly conflictual and not shared by all members of the society, which reflect only parts of the society? Progressive code seems to presuppose the existence of a 'progressive society', which, as long as it does not yet exist, has to be educated top-down via law, at least once the principles have been integrated into the Treaty. A possible solution to overcome tensions, already widely discussed, is the introduction of reflexive mechanisms which pave the way for experimentalism. However, one might wonder whether experimentalism is in line with the idea of the Charter of Private Law Justice.[46]

I could continue with my questions and speculations, but I do hope that I have made clear that 'progressive code' requires a full engagement with the rationality of the private sphere and with its potential to yield even social justice. As progressive code stands it is a missed opportunity to overcome the still underdeveloped exchange between public and private law theory/philosophy. Again the rationality of the private sphere cannot replace the rationality of the public sphere. Both are inherently linked and they have to be thought and conceptualised together.

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[46]CF Sabel and O Gerstenberg, 'Constitutionalising an Overlapping Consensus: The ECJ and the Emergence of a Coordinate Constitutional Order' 16 (2010) European Law Journal 511.

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