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CORE ANALYSIS

Reconstituting the Code of Capital: could a progressive European code of private law help us reduce inequality and regain democratic control?

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Abstract

Katharina Pistor's powerful critique of the key role that private law plays in creating private wealth, producing inequalities, and undermining democracy, raises the urgent question of what could be done to set things right or, at least, could be a step in the right direction. This article argues that a progressive European code of private law could be a meaningful part of the solution. A progressive private law code would be a code aimed at making progress towards a more just society, where there is less inequality and where we have more democratic control over our future. The progressive EPL-code would be completely different, in crucial respects, from the civil codes of the member states. It would be European (not national), be mandatory (not optional), have 'constitutional' ie primary EU law status (not merely secondary), consist of fundamental principles (not detailed rules), prioritise justice (not economic growth), and be radically democratic (not technocratic).

Keywords: European private law; distributive justice; interpersonal justice; democracy; inequality

1. Introduction

Katharina Pistor's powerful critique of the key role that private law plays in creating private wealth, and in producing inequalities and undermining democracy, raises the urgent question of what could be done to set things right – or, at least, be a step in the right direction. This article argues that a progressive European code of private law (EPL-code) could be a meaningful part of the solution.

By a progressive code of private law, I mean a code aimed at making progress towards a more just society, in particular one where there is less inequality and where we have more democratic control over our future. In order to avoid any confusion, it is important to underline upfront that the progressive EPL-code would be completely different, in crucial respects, from both the civil codes of the Member States and the draft common frame of reference (DCFR) that became central to the European civil code (ECC) debate in the 00s and early 10s.

The article unfolds as follows. First, it presents Pistor's trenchant diagnosis and her proposed remedies. Then, it takes a step back asking what exactly is wrong with the code of capital and arguing that the problem is its injustice. Next, it discusses the main characteristics that a progressive EPL-code would need to possess in order to ensure meaningful progress. This is followed by a discussion of whether such an EPL-code would even be within the EU's remit. The next section addresses possible anxieties about the code being socialist. After which the article goes on to discuss the EPL-code's content. Subsequently, it explores whether the code could realistically

and legitimately claim to be a transnational model for private law justice. Finally, the article wraps up offering some brief conclusions.

2. The code of capital

A. Pistor's trenchant diagnosis

In her recent book *The Code of Capital* (2019), Katharina Pistor offers a trenchant diagnosis of the key role that general private law plays in creating capital, and thus, in producing and entrenching social and political inequalities.[1]

As she demonstrates in several salient case studies, legal professionals in private law firms in New York City, London and around the globe rely on the general doctrines of property, contract, trust, company and bankruptcy law – the legal 'modules' of the code of capital, as she calls them[2] – to create new assets for their clients and turn them into capital by ensuring them with the attributes of priority (over competing claims to the same asset), durability (extending priority rights over time), universality (providing them with effect *erga omnes*, that is, towards others who had no part in the transaction), and convertibility (into state money).[3] Thus, contrary to the myth of the invisible hand, she demonstrates how private parties in global markets rely on states and their laws, notably their national private laws, to 'code' assets in such a way that they create and protect private wealth.[4] Financial products (that do not exist outside the law) and intellectual property rights (that enclose and privatise what would otherwise be in the public domain) are two of the most obvious instances, but there exist numerous others. Pistor also shows how willing states have been to facilitate the creation of capital in this way. As she points out, this is not even a question of regulation versus deregulation; it is about the nature and content of general private law rules and doctrines that determine private entitlements (as subjective rights). By legally recognising and enforcing the assets that lawyers create as private rights states structurally subsidise the production and further accumulation of capital. This has led to enormous wealth for a few, while leaving societies with staggering economic inequalities and the public with fading political control over its own future.

As Pistor put it in one of the debates on her book, 'capital is dependent on state law, because the privileges it enjoys require the subordination of countervailing interests, if necessary, by the use of force. To succeed, capitalism therefore needs a friendly state as a host state that is willing to enforce contracts and property rights'.[5] The basic insight that markets, and hence their capacity to create economic prosperity, depend on legal institutions is not new: it has been central to the disciplines of economic law, institutional economics, and, more recently, legal institutionalism,[6]

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

[2] Pistor seems to borrow the modular view of private law from Henry E Smith, 'Property as the Law of Things' 125 (2012) Harvard Law Review 1691–726, who proposed a 'modular theory of property', which, he argues (Ibid., 1725), 'explains how property law furnishes some basic building blocks of private law'. As Thomas W Merrill, 'Property as Modularity' 125 (2012) Harvard Law Review 151–63, points out, 'modular systems are often contrasted to hierarchical systems'.

[3] Ibid. Pistor, *Code of Capital* (n 1), 13–15.

[4] As A Chadwick, 'Capital Without Capitalism? Or Capitalism Without Determinism?' 30 (2021) Social & Legal Studies 302–11, 306, points out, in foregrounding the key role of national private laws, backed up, crucially, by state power, Pistor's account also directly counters the transnational private law narratives of a post-Westphalian global law without a state.

[5] K Pistor, 'Coding Capital: On the Power and Limits of (Private) Law: A Rejoinder' 30 (2021) Social & Legal Studies 317–26, 320.

[6] Pistor's book is an exemplary instance of legal institutionalism. Cf. Simon Deakin, David Gindis, Geoffrey M Hodgson, Kainan Huang and Katharina Pistor, 'Legal Institutionalism: Capitalism and the Constitutive Role of Law' 45 (2017) Journal of Comparative Economics 188–200. As legal institutionalists rightly point out, law cannot be reduced to an epiphenomenon of the economy. The market's dependence on the normative force of legal institutions, that they rightly emphasise, raises in its turn, of course, the central importance of normative questions about the law.

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and law and political economy (LPE).[7] However, the key role of the general rules and doctrines of private law specifically in the creation and accumulation of wealth has never been exposed so clearly and cogently. And even if at times perhaps she overstates her case, as critics have pointed out, because there also exist other economic causes of inequality,[8] while public market regulation would be part of a more complete picture of the law of capitalism,[9] the fact remains – and this is Pistor's key insight – that in the background (indeed in backrooms) general private law is a key institution of capitalism and a core driver today of socio-economic inequality and political disempowerment.

B. Pistor's proposed roll-back strategies

In the final chapter of the book, Pistor switches from political economy to normative argument. She offers a list of eight measures which in her view ought to be taken, and which she refers to as 'roll-back strategies'.[10] These include: a full ban on any new private law privileges for capital; reigning in choice of law; reducing arbitration; empowering affected third parties through procedural means such as class actions; a ban on purely speculative contracts; national democracies joining forces; and deeply rethinking legal education. She is aware that these roll-back strategies may be less than readers of her book might have hoped for, but she suggests that what she calls 'persistent incrementalism' may be a viable strategy 'to push back and ensure that democratic polities may rule themselves by law.'[11] While this may be true, 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. And rather than merely aiming at rolling back, which frankly sounds a bit nostalgic, as if there was an ideal past we've lost, perhaps we should try also to move forward and make some progress. However, to that end we would need to have a clearer idea of what would constitute progress.

3. The injustice of capital's code

A. What is wrong with the code of capital?

While using the normative language of 'should', Pistor does not make explicit the normative yardstick by which her roll-back strategies would constitute an improvement. That makes their chances for success somewhat harder to assess. It also raises the deeper normative question of what exactly is wrong with how private law shapes capitalism. Before we start fixing, don't we need a better sense of what the problem is? And if we want to make progress, don't we need to know which direction we should take? For example, the problem could be that some people live miserable lives, by some objective standard, and we should try to improve their lives with reference to that standard. Or, the problem could be that people's subjective preferences remain unsatisfied, perhaps – in the aggregate – on a massive scale. Or, indeed, the code of capital, as it currently operates, could constitute an injustice towards particular individuals or groups.

Yet, throughout the book, it becomes very clear that her two main concerns are rising inequality and withering democratic control. These both are core social justice concerns. In other

[7]See e.g. J Britton-Purdy, Amy Kapczynski and David Singh Grewal, 'Law and Political Economy: Toward a Manifesto' (LPE Blog 2017) <https://lpeproject.org/blog/law-and-political-economy-toward-a-manifesto/>; Poul K Kjaer (ed), *The Law of Political Economy: Transformation in the Function of Law* (Cambridge University Press 2020).

[8]See e.g. A Tooze, 'How "Big Law" Makes Big Money' 67 (2020) New York Review of Books 25–27; Marco Goldoni, 'On the Constitutive Performativity of the Law of Capital' 30 (2021) Social & Legal Studies 291–6.

[9]S Picciotto, 'Private or Public?' 30 (2021) Social & Legal Studies 311–7.

[10]Pistor, *Code of Capital* (n 1) 229.

[11]Ibid.

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words, what's wrong with the current code of capital is that it is unjust. It violates principles of social justice, in particular those principles which aim to ensure equality and democracy. 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.

B. Unjustified privileges and rising inequality

Social injustice

Pistor's central inequality concern is with how private law creates legal privilege for some at the expense of others – what she calls the 'feudal calculus'.[12] As she explains, legal privileges are at the root of social inequality: 'rising inequality is the logical conclusion of a legal order that systematically privileges some holders' assets, but not others.'[13]

Unjustified privileges are a core social justice concern by most accounts. Think, for example, of Rawlsian justice as fairness, where the first principle of justice protects the fair value of political liberties (preventing for example political domination by the superrich), while the second principle requires, in its first part, fair equality of opportunity (equal access to offices, positions, education, culture etc) and demands, in its second part, that any socio-economic inequalities existing in society benefit not merely the happy few (or even the middle class) but work to the benefit also of those who are least well off (the 'difference principle').[14]

At the same time, clearly, any concerns about legal privileges also go to the heart of private law, whose central object is the creation, recognition and protection of the private entitlements held by individuals (and legal persons), which are legally enforceable as subjective rights in their various relationships with others. Indeed, one of the greatest merits of Pistor's account is that it shows the impossibility of keeping distributive justice concerns outside the justification and critique of private law.[15] As she explains,

[12]Pistor, *Code of Capital* (n 1) 5. As Samuel Moyn, 'Law as the Code of Inequality and Wealth' (LPE Blog 2019), observes, Pistor's book 'unmasks how law has never moved far from its central "feudal" function of locking in the ascendancy of some to the detriment of others'. Pistor borrows the term 'feudal calculus' from Bernard Rudden, 'Things as Things and Things as Wealth' 14 (1994) Oxford Journal of Legal Studies 81–97, 83: 'The feudal calculus lives and breeds, but its habit is wealth not land'.

[13]Pistor, *Code of Capital* (n 1) 223.

[14]It is perhaps possible to read Pistor's concern with privilege and inequality as mainly or exclusively about the superrich, ie the 1 per cent or even the 0.1 percent. It is true that the book opens with a reference to the World Inequality Report 2018. That report concluded (286) that 'perhaps [its] most striking finding is that, at the global level, the top 0.1 per cent income group has captured as much of the world's growth since 1980 as the bottom half of the adult population'. However, to the extent that the mere fact that some individuals are extremely wealthy constitutes a social justice problem in itself – i.e. apart from anything else, e.g. that they enjoy disproportionate socio-economic and political power, or that they enjoy privileged access to what should be open to all, or indeed that none of it works also to the benefit of others – which is far from clear (see e.g. Tim M Scanlon, *Why Does Inequality Matter?* (Oxford University Press 2018), 36–37), none of the roll-back strategies that Pistor proposes seem remotely capable of fixing it. They are all far too imprecise. Private law rules are meant to apply to the public in general, not a mere 0.1 per cent of them. And each of her strategies addresses problems very different (or at least, much wider) than the excessive wealth of a very small group of people. A 100 per cent tax on their incomes above the accepted level (and expropriation in the case of their already accumulated wealth) seems the only viable way to do it. However, throughout the book, when Pistor speaks of 'levels of inequality' (2), 'rising inequality' (3, 166, 222–3), 'sustained inequality' (6), 'growing inequality' (22) and 'substantial inequalities' (41), her understanding of the problem of inequality, and of the role of private law in it, seems much wider than the mere extreme wealth of the top 0.1 per cent. And that wider concern, as I argue in the main text, is best understood as a justice concern.

[15]For the general insight that the distribution of wealth depends on the bargaining power in market transactions ensured by private law rights, see the classic of American legal realism, Robert L Hale, 'Coercion and Distribution in a Supposedly Non-Coercive State' 38 (1923) Political Science Quarterly 470–94 ('income is the price paid for not using one's coercive weapons').

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> the legal code confers attributes that greatly enhance the prospects of some assets and their respective owners to amass wealth, relative to others—an exorbitant privilege. Choosing the assets and grafting onto them the legal attributes of priority, durability, universality, and convertibility is tantamount to controlling the levers for the distribution of wealth in society. . . . Many legal scholars have already drawn attention to the fact that the operation of the market hinges on legal institutions that facilitate price discovery. I go a step further and argue that the legal coding accounts for the value of assets, and thus for the creation of wealth and its distribution.[16]

It is the legal code, in particular the doctrines of general private law that provide the modules for coding capital, which is a root cause of distributive injustice. If we ignore this important fact, it will be impossible to prevent major distributive injustices from occurring; all we are left with, then, are attempts to respond to existing injustices through a tax and transfer scheme of *re*distribution. However, clearly, from a justice point of view mere redistribution (which targets only distributive outcomes) is fundamentally inferior to the prevention of injustice from occurring in the first place by targeting the main mechanisms (the 'levers', in Pistor's terms) of distributive injustice (and, wider, social injustice).

This is why private law cannot be exempted from scrutiny in terms of social justice. As Pistor explains, private law currently operates as a subsidy for capital. Society spends major resources (taxpayer's money) to ensure that new financial products et cetera, as they are created in law firms, will be recognised in courts of law and, if necessary, enforced by state officials. As she writes,

> the legal protections capital enjoys are arguably the mother of all subsidies. Without the code's modules and the possibility to fashion them to one's liking, neither capital nor capitalism would exist. The code's modules are available off the shelf, but their power depends on the widely held expectation that they will be enforced, if necessary, by state power.[17]

In other words, if we want to fight social inequality we will have to target the modules of the code of capital, that is, the core doctrines of the main branches of general private law.

Interpersonal injustice

Throughout, Pistor's inequality concern is exclusively with the uneven distribution of wealth between different groups in society, that is, social (or distributive) inequality; she does not discuss interpersonal (or relational) inequality.[18] However, the code of capital has an enormous impact also on interpersonal relations governed by private law. In particular, the legal attributes of priority, durability, universality, and convertibility, that the law bestows upon assets, thus, as Pistor elucidates, turning them into capital, also directly shape myriad interpersonal relationships between owners and concrete non-owners of the specific things (or the immaterial assets) at hand. Priority defeats concrete competing claims that the law makes become posterior; durability means that even patience of non-owners will not pay; universality ensures that all and any non-owner will have to respect the property right or similar absolute right (notably security rights); and

[16]Pistor, *Code of Capital* (n 1) 19.

[17]Ibid., 222. Compare Seana Shiffrin's point that we do not have a natural right to legal support for all our projects and, therefore, it is only natural for a society to exercise its own judgment in determining which transactions it will lend its legal support (Seana V Shiffrin, 'Paternalism, Unconscionability Doctrine, and Accommodation' 29 (2000) Philosophy & Public Affairs 205–50.

[18]Pistor, *Code of Capital* (n 1) 3: 'Through this book I hope to shed light on how law helps create both wealth and inequality. Tracing the root causes of inequality has become critically important not only because rising levels of inequality threaten the social fabric of our democratic systems, but also because conventional forms of redistribution through taxes have become largely toothless'.

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convertibility means for example that if a person 'violates' someone else's property (or similar right) they will be liable to pay damages in tort.[19]

Thus, in addition to the unjust societal inequalities (between social groups) caused by unjustified property rights and by other unjustified privileges bestowed by the law upon certain assets the same private law also creates unjust interpersonal inequalities. For example, contractual exploitation and domination – and more generally unequal bargaining power and unbalanced contractual relationships between private parties (who may be individuals or firms) – are often the direct consequence of economic inequality. In other words, in those cases social (or distributive) inequality is reproduced and exacerbated as interpersonal (or relational) inequality.[20]

This has two implications. First, in all those cases the reduction of social inequality is likely to lead directly to the reduction of interpersonal inequality. In other words, abolishing unjustified legal privileges by reconstituting the code of capital with a view to bringing more social equality (less poverty) would have the knock-on effect of also bringing more interpersonal equality (less exploitation). Moreover, vice versa, private law rules targeting exploitation and domination with a view to combating inequality in transactions will have the additional benefit of preventing new social equalities from occurring and existing ones from increasing.[21]

Therefore, although interpersonal and social justice concerns are distinct concerns the modules of the code of capital have an impact on both and, consequentially, their reconstitution, if done right, in many cases would contribute to both social (or distributive) and interpersonal (or relational) justice.[22] Think for example of contract law doctrines such as economic duress,[23]

[19]As H Dagan rightly points out, all property rights are deeply relational and, therefore, they must also be justifiable relationally, ie in conformity with principles of relational justice. See Hanoch Dagan, *A Liberal Theory of Property* (Cambridge University Press, 2021). Dagan himself understands relational justice as mutual respect for autonomy. See also Hanoch Dagan and Avihay Dorfman, 'Just relationships' 116 (2016) Columbia Law Review 1395–460. However, that seems too narrow. Even in relationships where parties fully respect each other's right to self-determination injustices may still occur.

[20]See A Bagchi, 'Distributive justice and contract' in Gregory Klass, George Letsas and Prince Saprai (eds), *Philosophical Foundations of Contract Law* (Oxford University Press 2014) 193–212, 199, arguing that 'we should interpret interpersonal entitlements in such a way that they do not exacerbate distributive injustice'.

[21]See Shiffrin, 'Paternalism, Unconscionability Doctrine, and Accommodation', 224, who observes with regard to the American doctrine of 'unconscionability' that it 'works directly to staunch the flow of resources from the disadvantaged to those who are better off, both by voiding exploitative contracts and by deterring their formation. These are some of the very effects that the redistributive transfers brought about by the tax system would aim in part to reverse'.

As to the relationship between distributive (or social) (in)justice, on the one hand, and interpersonal (or relational) (in) justice, on the other, I understand each as these types of justice as pertinent to different justificatory contexts, and insofar as empirical (and hence contingent). In a society, a question may arise as to whether a certain distribution is unjust. Principles of distributive (or social) justice aim to provide answers to such questions; mutatis mutandis the same applies for interpersonal relations and interpersonal (or relational) justice. The relationship between these two questions, and the respective sets of principles for answering them, is also contingent, even though, as I argue in the main text, in situations where both questions arise, i.e. where justificatory contexts (partially) overlap, the answers will often converge (but not always). See further, Ibid.

[22]In this article, I treat the terms 'social (in)equality/(in)justice' and 'distributive (in)equality/(in)justice' as mostly interchangeable; and I do the same with regard to 'interpersonal (in)equality/(in)justice' and 'relational (in)equality/(in)justice'. However, in spite of their obvious overlaps in meaning, each term also has its specific connotations. The precise meaning and use of each of these terms depends on the theory of justice in which they figure or on which they rely. Usually, social justice is considered a somewhat wider category than distributive justice, while relational justice is sometimes meant as a specific conception of interpersonal justice (in competition notably with corrective justice understandings). It could be said that, roughly, the former pair represents vertical (state – private parties) and the latter horizontal (private party – private party) relationships. However, if we understand social justice as referring to the just society, then not only vertical relationships but also horizontal ones are properly understood as a social justice concern. See further, Martijn W Hesselink, 'Justice in European Private Law' in Marija Bartl, Laura Burgers and Chantal Mak (eds), *Uncovering European Private Law* (forthcoming).

[23]Pursuant to the new Art 1143 of the French Civil code, there is duress, and the contract can be annulled, 'where one contracting party exploits the other's state of dependence and obtains an undertaking to which the latter would not have agreed in the absence of such constraint, and gains from it a manifestly excessive advantage'. The provision codifies and expands the Cour de cassation's case law on 'violence économique'. Cf 'Réforme du droit des obligations – un supplément au code civil 2016 – à jour de l'ordonnance n° 2016-131 du 10 février 2016, 11'.

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unconscionability,[24] and unfair exploitation.[25] Think also of doctrines such as illegality and immorality, that determine the boundaries of market-alienability and commodification.[26]

C. The erosion of democracy

Much the same applies for Pistor's other core concern, that is, democratic self-government. As Pistor contends, the current role of private law in coding capital

> stands in direct tension to the aspiration of democratic polities for which law is the primary tool of collective self-governance. In the current configuration of rights and law, this tool is bent toward capital. . . . The logical result of such a system is rising inequality and the disenfranchisement of the democratic constituents, of "we, the people" in determining if and how law should be employed to protect some at the expense of others.[27]

Clearly, the disenfranchisement of democratic constituents is unacceptable (by definition) from the point of view of any justice theory in which democracy is a core concern. And a right to democratic self-determination is central to most theories of social justice, be it as one of the central capabilities that a minimally just society ought to ensure at least to a threshold level,[28] as an essential political precondition for living together in society as free and equal persons (ensured by the basic political liberties),[29] or as indispensable to freedom as non-domination (democratic control over government),[30] or indeed simply as a right to political autonomy.[31] Again, the differences in understanding of democracy in various justice theories, while salient in other contexts, should not concern us too much here, because they overlap sufficiently for each of them to share Pistor's concern about how the code of capital undermines democracy and to accept her claim that if we want to save democracy we need to regain democratic control over our private law, which provides the legal modules that shape capitalism. As Pistor warns us, 'for democracy to prevail in capitalist systems, polities must regain control over law, the only tool they have to govern themselves, and this must include the modules of the code of capital.'[32] Note that Pistor's claim is not merely that the code of capital erodes democratic control over private law. Rather she contends, quite convincingly in my view, that it undermines – much more widely – democratic control over our destiny.

Adam Tooze suggests that 'perhaps the best way to read Pistor is as offering a highly sophisticated program for a leftist economic populism'.[33] However, we should not confuse indignation with populism.[34] And it is very clear that Pistor's concern is with popular (not: populist)

[24]See 2–302 Uniform Commercial Code; § 208 Restatement Second of Contracts.

[25]Art II.-7:207 DCFR. In her book, Pistor mainly elaborates on the role of property (understood broadly, as also including security rights, intellectual property et cetera). However, salient examples of the constitutive role of contract law in creating and protecting wealth easily come to mind, ranging from global values chains to the privatisation of warfare.

[26]Path-breaking, M. Jane Radin, 'Market-Inalienability' 100 (1987) Harvard Law Review 1849–937. See further, Martijn W Hesselink, *Justifying Contract in Europe: Political Philosophies of European Contract Law* (Oxford University Press 2021) ch. 7.

[27]Pistor, *Code of Capital* (n 1) 223.

[28]M C Nussbaum, *Creating Capabilities: The Human Development Approach* (Belknap Press, 2011) 34, lists as one of the ten central capabilities, under 'control over one's environment', 'political', the capability of 'being able to participate effectively in political choices that govern one's life'. See also Amartya Sen, *The Idea of Justice* (Belknap Press 2009) Part IV.

[29]J Rawls, *Justice as Fairness: A Restatement* (Belknap 2001) § 13.4.

[30]P Pettit, *On the People's Terms: A Republican Theory and Model of Democracy* (Cambridge University Press 2012) chs. 3 and 4. Note that Pettit regards political legitimacy as distinct from social justice rather than as a key part of it. See Ibid., 130.

[31]Forst, *The Right to Justification* (Columbia University Press 2011), ch. 5.

[32]Pistor, *Code of Capital* (n 1) 224.

[33]Tooze, 'How "Big Law" Makes Big Money' (n 8) 27.

[34]Cf. Stéphane Hessel, *Indignez-vous!* (Indigène Éditions 2010).

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sovereignty and collective self-determination. Similarly, we should also take care to avoid collapsing private law democracy into majoritarianism and mere legislative positivism. Political autonomy and collective self-determination are about much more than the right (however important) to participate in periodical elections. Democracy requires robustly deliberative and participatory institutions and practices as well as a thriving public sphere. What should determine political outcomes in a democracy is 'the unforced force of the better argument', as Habermas puts it,[35] not the coercive force of arguments backed up by money. And as Rawls points out, 'excessive concentrations of property and wealth [are] likely to lead to political domination'.[36] There is no popular sovereignty or collective self-determination where there is domination. In other words, rising inequality and the erosion of democracy are two sides of the same coin. And this coin could not be minted without private law.

D. Immanent critique: substantive private and public autonomy

Arguably, without engaging in any ideal theory of justice (and the philosophical disputes among those), we can even criticise our system of private law on its own terms, i.e. as failing to live up to its own promises. Jürgen Habermas argues that the best way of making sense of the system of private law we have here and now, is as a system aspiring to express and ensure both private and public autonomy, understood in both cases substantively rather than merely formally.[37] If this normative reconstruction of our contemporary private law systems makes sense, as I think it does, then Pistor's political-economic analysis also provides us with strong reasons for radical immanent critique. Clearly, as Pistor's sharp diagnosis demonstrates, the system of general private law today, by providing modules for encoding capital, can be said to respect and express private and public autonomy only if we understand each of these notions in their most formal sense possible – in practice, merely nominally.

Immanent critique also points us in the direction of a way forward towards a more justifiable system of private law. What we should try to achieve, then, is a more robustly democratic private law that ensures a more egalitarian society and, vice versa, a more egalitarian private law than ensures a more robustly democratic society. It is Habermas' fundamental insight that we cannot have one without the other: the system of rights and democracy, as well as private autonomy and public autonomy, mutually presuppose each other. The addressees of the system of private law must be able to understand themselves as their co-authors, which will not be the case in the absence of a fair distribution of access to private rights (in particular, property and contractual rights).

And in each case, in order to be normatively meaningful and justifiable, the understanding has to be substantive rather merely formal. Throughout, our understandings of justice, equality (interpersonal and distributive), and autonomy (private and public) should be thoroughly substantive (or 'materialised', after the German term *Materialisierung*) rather than formal.[38] In other words, it should take serious account of the actual circumstances (socio-economic and other) in which people find themselves. Just like a mere formal right to influence the law (not being excluded from participating in general elections) will not suffice to make private law become democratic, so too does a mere formally equal access to subjective private rights (eg property and contractual rights) and their legal protection not make private law become egalitarian.

This abstract insight is now underscored very concretely by Pistor's powerful account of the political economy of capital. Capitalism thrives with merely formal (nominal) democratic control and private autonomy, while it undermines democracy and equality understood substantively.

[35]Habermas, *Between Facts and Norms* (MIT Press 1996) 306.

[36]Rawls, *Justice as Fairness* (n 29) § 13.1.

[37]Habermas, *Between Facts and Norms* (n 35) section 9.3.

[38]Ibid. For a historical reconstruction of the private law discourse of modernity and the place of 'materialisation' within it, see Marietta Auer, *Der privatrechtliche Diskurs der Moderne* (Mohr Siebeck 2014).

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This insight also points in the direction for solutions – for how to make progress in re-coding capital. Here too substantive private and public autonomy mutually presuppose each other, normatively speaking: the recoding of private law in a more egalitarian way has to be democratic and in order for us to regain democratic control private law has got to become more egalitarian.

4. A progressive European code of private law

A. Taming capital by restructuring its code

As Habermas puts it, with reference to the materialisation of private law, 'the intention is to tame the capitalist economic system, that is, to "restructure" it'.[39] One possible way forward that comes to mind would be through a European code of private law (EPL-code) based on a strongly materialised conception of private autonomy and with a thoroughly democratic basis. This possibility was not considered by Pistor in her book, but it seems to match well with her core analysis and conclusions. If done right, such an EPL-code could radically transform the modules of the code of capital, and, in doing so, allow the European public to take back democratic control and restore equality. It would break with the current code of capital (i.e. chiefly the common law of the State of New York, and of England), that is based on formal rather than substantive equality and is made by legal experts in law firms and courts rather than by the democratic legislature. Thus, it would bring democratic control over – and ensure substantive equality in – the main elements of the code of capital. And even if the coding of capital is only part of the story of inequality, as has been suggested,[40] then still re-constituting the private law of capital could be a corresponding part of the solution.[41]

Could readers who are convinced by Pistor's diagnosis and roll-back strategies also – and perhaps a fortiori – support the less incremental and more radical idea of such a progressive European code of private law if it could indeed successfully recode capital in such a way that equality and democratic control would be restored, at least to an important degree? It seems they could if certain crucial conditions are met.

To be clear, such a progressive EPL-code should not be confused with the kind of civil codes that were adopted in most EU member states in the 18th and 19th centuries. It would be quite distinct. In order to successfully re-code capital the new code of private law would need to have a set of specific characteristics, to which I will turn now.

B. European, not national

The code would have to be European essentially for reasons of political power. The EU would stand stronger than individual countries against the pressure from global markets.[42] While foreign investors might exit individual states if these decided to constrain capital minting options, it would

[39]Habermas, *Between Facts and Norms* (n 35) 410.

[40]See e.g. Tooze, 'How "Big Law" Makes Big Money' (n 8) who points to the more classical Marxist accounts of exploitation and extraction. But on the role of general private law in preventing exploitation, see further below.

[41]Goldoni, 'On the Constitutive Performativity of the Law of Capital' (n 8) 295, argues that Pistor overestimates what he calls the 'performative force of law'. He believes that 'a change in the formal legal rules might "irritate" the underlying logic of action of another subsystem, but it would not be enough to produce lasting and impactful effects'. He is entirely right, of course, that there is a limit to the transformative power of law. Therefore, an EPL-code can only be a part of the solution. How much change it can achieve would indeed depend on how well the new code would be embedded in society. The degree and quality of democratic deliberation and participation (especially its inclusiveness) would be of crucial importance in this regard.

[42]Much more pessimistic of the EU's capacity to tame capitalism is Wolfgang Streeck, *Buying Time: The Delayed Crisis of Democratic Capitalism* 2nd edn (Verso 2017). He regards the EU as an intrinsically neoliberal project and advocates a return to national democracy. Critical of this 'nostalgic option' of a 'withdrawal behind the Maginot line' of national sovereignty, Jürgen Habermas, 'Demokratie oder Kapitalismus? Vom Elend der nationalstaatlichen Fragmentierung in einer kapitalistisch integrierten Weltgesellschaft' 5 (2013) Blätter für deutsche und internationale Politik 59–70, 61.

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be a much more hazardous move for them to turn their backs on the entire EU and its internal market. In other words, this is a classical case where the subsidiarity principle would be met: given the fact of a globalised economy, no single EU state would stand a chance in trying to tame capital domestically, by transforming the private law modules in which it is coded.

C. Mandatory, not optional

In order to be effective, the private law restrictions on the ways in which capital is created must be mandatory, not merely optional. While most provisions in the national civil codes of member states (as well as in the DCFR) are default (or suppletive) rules that can be set aside by the parties to private transactions, the progressive code should focus on mandatory rules, which apply whatever the parties write in their contracts. In addition, the code should also be internationally mandatory, as 'overriding mandatory provisions' (*lois de police*).[43] This means that it cannot be set aside through a choice of law for a non-EU legal system. This is a crucial requirement, given that the current code of capital, as Pistor highlights, fundamentally relies on the possibility of shopping for the most capital-friendly legal system. Under current EU private international law, the parties are free in principle to submit their transactions to whichever law best suits their interests.[44] In practice, in most cases this means a choice of law for one of two specific legal systems outside the EU, that is, the law of the State of New York and English law. As Pistor puts it (without specific reference to the idea of an EPL-code), 'there should be far fewer opportunities for asset holders to go on a legal shopping spree.[45]

Two decades ago, in a paper called 'Hard Code Now!', Ugo Mattei already argued that the EU needed a mandatory code.[46] This went against the grain of soft law solutions such as restatements, and the idea of an optional code, or one consisting mainly of default rules, that were popular at the time. As he formulated it,[47] 'put simply, given the available institutional background, a hard European Civil Code seems a prerequisite for the development of an effective set of rules of the game capable to keep economic activity under control.' At the time, his appeal met with little response. Today, it seems, the time has come to reconsider his proposal.

D. Primary (constitutional), not secondary EU law

The European code of private law – or at least its basic structure – would need to have the status of primary EU law, on a par with the market freedoms and competition law. As Pistor points out, 'states have actively participated in turning stationary capital into roving capital by breaking down legal barriers and expanding its holders' private autonomy.'[48] This applies a fortiori for the EU where private autonomy became sovereign under the banner of internal market freedoms, which enjoy the constitutional status of primary law. Needless to say that, in order to reign in capital, private law will have to roll back the excessive expansion of private autonomy, and especially

[43]Cf. the definition in Article 9, Para 1, Rome I: 'Overriding mandatory provisions are provisions the respect for which is regarded as crucial by a country for safeguarding its public interests, such as its political, social or economic organisation, to such an extent that they are applicable to any situation falling within their scope, irrespective of the law otherwise applicable to the contract under this Regulation'. Given that the whole reason for enacting an EPL-code would be that it is necessary for safeguarding the political, social, or economic organisation of the EU (properly understood), that condition would be met by definition. Vice versa, when it comes to the content of the code (which will be discussed below) this definition (and the very idea of *lois de police*) could also provide a helpful standard for determining what should be included in the code.

[44]For contracts, see Art 3 (Freedom of choice) Rome I Regulation.

[45]Pistor, *Code of Capital* (n 1) 225.

[46]See U Mattei, 'Hard Code Now! A Critique of "Softness' and a Plea for Responsibility in the European Debate over Codification' 2 (1) (2002) Global Jurist Frontiers, republished in Ugo Mattei, *The European Codification Process: Cut and Paste* (Kluwer Law International 2003), ch. 5.

[47]Ibid., 121.

[48]Pistor, *Code of Capital* (n 1) 220.

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redefine it in much more substantive terms, which would be wholly ineffective if it had only the status of secondary EU law and, therefore, could be overruled constantly by the market freedoms. Put differently, the (re)constitution of European private law would also mean a shift away from the modular structure of private law ('modules available off the shelve'[49]) towards a more hierarchical one (with primacy for a limited set of core principles of private law justice).

Self-evidently, the constitutionalisation of core principles of justice for European private law would mean a radical break with the current constitutional framework of the EU. However, it is important to point out that this would be entirely compatible, nevertheless, with the very idea of a properly functioning internal market, as long as that idea is not reduced to the notion of a growing market. It is difficult to see how an internal market where market freedoms are not checked by justice demands can be understood as a properly functioning market (let alone, for that matter, a 'social market').[50]

E. Fundamental principles, not detailed rules

Creative lawyers in the leading law firms will always find their ways around detailed regulation, carving out new ways of creating and protecting capital and convincing courts that the asset at hand falls outside the scope of the specific regulation and, hence, within the scope of general private law doctrines. (In this context, lawyers usually refer to the need for 'legal certainty', which in private law is just another term for the secure protection of entitlements, which is of course of crucial importance for accumulating capital.) By contrast, principles are much more difficult to escape.[51]

A great advantage of a system of principles (a principled system) aiming to preserve justice in European private law is that it will be much more difficult for private actors and their sophisticated lawyers, than it is under a set of targeted (sector-specific) market regulations (the kind of regulatory private law that Hans Micklitz has pointed our attention to),[52] to carve out exceptions to create new privileges undermining social justice and democracy through regulatory arbitrage. This is the great advantage of a (re-)constitutive over a (re-)regulatory approach: any amount of regulatory private law could not achieve what a (constitutionalised) code of private law principles could accomplish. (And vice versa, which means that (ideally) the two are complementary.)

Therefore, the European code of private law should consist of fundamental principles for the basic structure of private law, not detailed rules on specifics. A few dozen would probably suffice. Something quite similar was already proposed by Hugh Collins in his book *The European Civil Code: The Way Forward*.[53]

Taking together this point and the previous one, the EPL-code could become a central part of the 'economic constitution' of the EU, to which the creation and protection of capital in the EU would always be subjected. It would provide the 'ground rules' for the allocation and distribution of wealth in society.[54] In particular, it would prevent and sanction unjust market

[49]Pistor, *Code of Capital* (n 1) 159.

[50]See Art 3, Para 3 TEU.

[51]Think only of the general principles of EU law, such as the principle of non-discrimination on grounds of age. See Case C-144/04, *Mangold*, ECLI:EU:C:2005:709; Case C-555/07, *Kücükdeveci*, ECLI:EU:C:2010:21.

[52]See H-W Micklitz, 'The Visible Hand of European Regulatory Private Law: The Transformation of European Private Law from Autonomy to Functionalism in Competition and Regulation' 28 (2009) Yearbook of European Law 3–59.

[53]See H Collins, *The European Civil Code: The Way Forward* (Cambridge University Press 2008) 132–6, arguing that the EU should enact a 'European Civil Code', which, however, should be a 'code of principles', embodying the 'European economic constitution', and expressing 'appropriate standards of justice and social solidarity'.

[54]See Ibid., 103–4.

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conduct,[55] would define principled restrictions on commodification, and, thus, would pose constitutionally entrenched moral limits to the internal market.[56]

Having said that, the very idea of an economic constitution may insufficiently express that the focus should be on justice. Therefore, and depending also on its size, the EPL-code could perhaps best become an EU Charter of private law justice.[57]

F. Prioritise justice, not economic growth

The first aim of the EPL-code would be to ensure justice, not economic growth. Any objective for the internal market to be a competitive and growing market, as expressed for example in the Lisbon strategy,[58] would remain subject to the normatively prior demands of justice. Justice means both social (including distributive) justice and interpersonal (or relational) justice. As said, the internal market is not even properly functioning unless it is also sufficiently just.

A key justice concern, underlined by Pistor as we saw, is inequality. The progressive private law code would aim directly to significantly reduce the kind of interpersonal and social inequalities that are currently produced and exacerbated by the code of capital. As said, the difference between formal and substantive equality is key in this regard. While the code of capital fully ensures formal (i.e. nominal) equal access to capital accumulation, in practice it remains a privilege for only a very few. In contrast, the aim of a progressive EPL-code would be to ensure that private law works for all. And in order to do so it will have to consider, on a structural basis, the actual characteristics of the parties and the real circumstances in which they conclude their private transactions.[59] In practice, this will mean not only that certain types of assets will no longer enjoy legal support, but also that new ones will be recognised and protected. As Pistor explains,

> coding new rights in law may be another path out of the dilemma we currently face, caught between capital holders that claim the law for themselves and a democratic public that is desperately trying to regain control over its own destiny by electing whoever promises to do so. It will make visible the critical role of law in determining an asset's worth but also demonstrate that the power to determine the contents of law lies ultimately with the people as the sovereign of democratic, constitutional systems; not with asset holders, and neither with the lawyers, their master coders. Only from such a deliberate effort can come a true transformation, not an elimination, of rights and of law.[60]

A discontinuation for certain financial products and similar of their current legal recognition and protection might have a negative impact on economic growth.[61] However, from a justice point

[55]See M W Hesselink, 'Unjust Conduct in the Internal Market: On the Role of European Private Law in the Division of Moral Responsibility between the EU, Its Member States and Their Citizens' 35 (2016) Yearbook of European Law 410–52.

[56]See Lyn KL Tjon Soei Len, 'Equal Respect, Capabilities and the Moral Limits of Market Exchange: Denigration in the EU Internal Market' 8 (2017) Transnational Legal Theory 1–16.

[57]This would be in analogy, of course, to the Charter of fundamental rights of the European Union (2010). Jean Carbonnier famously regarded the entire civil code as 'la constitution civile – la véritable' (see Jean Carbonnier 'Le Code civil' in Pierre Nora (ed), *Les lieux de mémoire* (Gallimard 1986) vol. 2, 293–315, 309). That goes much too far. However, an EU Charter of private law justice, stating fundamental principles of justice in European private law, could be understood rightly as the EU's civil constitution.

[58]With the adoption of 'the Lisbon strategy' by the European Council in 2000, the EU set itself the strategic goal of becoming 'the most competitive and dynamic knowledge-based economy in the world, capable of sustainable economic growth with more and better jobs and greater social cohesion' (Presidency Conclusions, Lisbon European Council 23 and 24 March 2000).

[59]Contrast P Benson, *Justice in Transactions: A Theory of Contract Law* (Harvard University Press 2019).

[60]Pistor, *Code of Capital* (n 1) 233–4.

[61]This is not even necessarily the case, given that certain assets that currently enjoy legal privileges may not be productive of new wealth at all, as the Ricardian notion of economic rent-seeking underscores.

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of view that should concern us only if trickle-down economics worked. Instead, as is well-know, it is a fallacy.[62] Therefore, our real concern – and first priority – should be with coding new rights that improve the condition of the least well off rather than with upholding the legal privileges of the few.

G. Radically democratic, not technocratic

Finally, and most importantly the EPL-code should allow the public to take control over the way capital is created and, thus, over its own future. The people should gain the power to decide when and how to code capital. This should be the objective of the EPL-code as well as the way to draft and enact it.[63]

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.[64] 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.[65]

It is important to underline that 'the people' and 'the public' should not be understood here as monoliths. To the contrary, the premise for democratic deliberation and participation is 'the fact of reasonable pluralism of worldviews', that is, a reasonable disagreement among citizens about fundamental values and key priorities, together with 'the fact of oppression', namely that agreement in society about values and the meaning of life could be obtained only with the oppressive use of force.[66] This is what distinguishes democrats from populists, who set up the people against the elite, understanding both as monoliths,[67] rather than as internally diverse.[68]

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',[69] 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

[62]See e.g. J E Stiglitz, *Globalization and Its Discontent* (Allan Lane 2002), 78.

[63]It could be argued that a constitutionalised code of principles is directly at odds with this demand because principles would grant wide discretion to judges to overrule ordinary legislation. Admittedly, such a risk does exist. However, it should not be overstated. There remains a fundamental difference – gradual to be sure, but important nevertheless – between genuine judicial interpretation and judicial activism. Democratic control (and political agency) means providing direction, not micro-management. Judicial activism is intrinsically antidemocratic because it changes the direction. Cf. Dieter Grimm, 'The Democratic Costs of Constitutionalisation: The European Case' 21 (2015) European Law Journal 460–73, 465.

[64]Cf. S Rodotà, 'The Civil Code within the European "Constitutional Process"' in Martijn W Hesselink (ed.), *The Politics of a European Civil Code* (Kluwer Law International 2006) 115–24, 123–4: calling for 'an explicit political initiative' and 'a genuine democratic process'. Rodotà was one of the drafters of the Charter of fundamental rights of the European Union.

[65]Habernas (n 35) xlii.

[66]See Rawls, *Justice as Fairness* (n 29) 34.

[67]Cf. J-Werner Müller, *What is Populism?* (Penguin 2017).

[68]This is also why Pistor's book, as said, should not be labelled as a 'program for populism'. In its pluralist understanding of a democratic people, it differs categorically e.g. from Chantal Mouffe, *For a Left Populism* (Verso 2018).

[69]Pistor, *Code of Capital* (n 1) 233.

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through private law.[70] 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.'[71]

5. Social justice in European private law

The previous section outlined some of the main characteristics that a code of private law would need to possess in order to stand a realistic chance of fighting inequality, and of empowering the public, by reigning in capital. The next question is whether such a progressive EPL-code would be within the remit of the EU's competences and responsibilities. The short answer is: yes, squarely.

A. The EU's commitment to social justice

The EU has committed itself to promoting social justice.[72] This means, it would seem, that at least the main socio-economic institutions of the EU ought to comply with fundamental principles of social justice. We can refer to these core socio-economic institutions as the EU's basic structure. In other words, arguably, the EU has committed itself to ensuring that its own basic structure meets the standards of social justice. Plausibly, even in the absence of any explicit treaty commitment to that effect, the EU would be morally responsible for the justice of its own basic structure, but we do not need to go into that now.[73] The critique can remain entirely immanent here, i.e. on the EU's own terms, as a matter of the EU living up to its own promises.

B. An unjust market is not functioning properly

Doubtlessly, the internal market is part of the EU's basic structure. This means that the internal market is directly subject to principles of social justice. Pursuant to Art 114 TFEU, the EU has the competence do adopt measures which have as their object the functioning of the internal market. In other words, in case of malfunctioning of the internal market the EU is allowed to legislate.[74] This means that to the extent that the internal market is not properly functioning when its operation violates principles of social justice, the EU, insofar, has the legal competence to adopt directives or regulations, in accordance with the ordinary legislative procedure (where the European Parliament is co-legislator), to ensure its proper functioning.

It is difficult to see how a market that structurally produces inequalities and disempowers the public could be compatible with any plausible conception of social justice for the EU. And as Pistor demonstrates very clearly, the problem is not a question of specific market regulation ('European regulatory private law') versus deregulation.[75] At the heart of the problem are the classical rules and doctrines of general private law. Rising inequality and dwindling democratic control are the direct consequence of the way general private law permits legal professionals

[70]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. On the epistemic dimension of democracy (Habermas) and the burdens of judgment (Rawls), see, respectively, Jürgen Habermas, 'Political Communication in Media Society: Does Democracy Still Have an Epistemic Dimension? The Impact of Normative Theory on Empirical Research' in Habermas (ed), *Europe: The Faltering Project* (Polity 2009) 138–83, 169, and John Rawls, *Political Liberalism* (Columbia University Press 2005) 54.

[71]Study Group on Social Justice in European Private Law, 'Social Justice in European Contract Law: A Manifesto' 10 (2004) European Law Journal 653–74, 673–4.

[72]Art 3, Para 2 TEU.

[73]See Hesselink, 'Unjust Conduct in the Internal Market' (n 55).

[74]See also Art 26 TFEU.

[75]European regulatory private law was uncovered by Hans-W Micklitz, Yane Svetiev and Guido Comparato (eds), *European Regulatory Private Law – The Paradigms Tested* (EUI Working papers, LAW 2014/04).

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to mint capital for their clients. Therefore, any measure going to the root of the problem of social injustice in the internal market will have to target general private law. And arguably the best way – perhaps the only one – to achieve this is through a progressive EPL-code.

In summary, the EU's commitment to social justice and its competence in case of internal market disfunction point to a social justice responsibility and a legal competence for an EU code of private law along the lines sketched above. Admittedly, an EPL-code based on Art 114 TFEU, while enjoying quasi-constitutional status in the national legal orders of the member states (because of the primacy of EU law over national law, including national constitutions, reinforced by direct horizontal effect if the code were enacted as a regulation), it would have only secondary EU-law status, and therefore would have to yield in case of any clashes with market freedoms (which are to be expected). Therefore, 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.

C. Shared competence and proportionality

It might be argued, however, that the EU is not the only one responsible for ensuring the proper functioning of the internal market. After all, the EU shares its internal market competence with the member states.[76] Therefore, it could be argued, perhaps the responsibility for justice in the internal market is also one shared with the member states. And maybe the private law aspects of the internal market, and its justice, should remain the responsibility of the member states. However, whatever merit that argument could have in the abstract, the reality is that the EU has already massively legislated on private law subjects. And the private law *acquis* is almost without exception based on Art 114 TFEU and its predecessors, i.e. the internal market competence.

Indeed, some of the most salient examples in Pistor's account of the code of capital, and how it creates inequality and undermines democracy, are cases of positive EU private law. Think, for instance, of the almost complete dismantling of the real seat principle by the CJEU's case law on the free movement of capital and services and the freedom of establishment.[77] Think also of the free choice of law, with only few exceptions, enshrined in the Rome I regulation.[78] In other words, these specific roll-back measures proposed by Pistor would directly require EU private law revision. Compared to those, the proposal for an EPL-code makes only a quantitative, not a qualitative difference. And as long as each of the provisions in the EPL-code is targeted to remedy the malfunctioning of the internal market, by aiming directly at combating social injustice in the internal market, the proportionality principle will also be met.[79]

6. A socialist proposal?

A. Institutions of a just basic structure: the myth of a division of labour

At this point, the reader may wonder: wouldn't such a progressive EPL-code be blatantly socialist? Perhaps. That depends in part on what one means by socialism. Note, however, that a progressive EPL-code, as outlined above, could be fully compatible, for example, with liberal-egalitarian justice as proposed by John Rawls. In his last book, *Justice as Fairness*, when discussing the institutions of a just basic structure,[80] Rawls explicitly considered the possibility that social justice could only be realised through a form of socialism, in particular what he called a 'liberal socialist regime'. In such

[76]See Art 4, Para 2(a) TFEU.

[77]See Case C-212/97 *Centros*, ECLI:EU:C:1999:126; Case C-208/00 *Überseering*, ECLI:EU:C:2002:632; and Case C-167/01 *Inspire Art*, ECLI:EU:C:2003:512.

[78]Regulation 593/2008 of 17 June 2008 on the law applicable to contractual obligations (Rome I).

[79]Art 5 TEU.

[80]Rawls, *Justice as Fairness* (n 29) Part IV.

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a regime, while private ownership in the means of production is abolished, markets based on transactions governed by private law continue to exist (as opposed to 'state socialism', which has a planned economy governed by a one-party regime). Towards the end of his life Rawls had become increasingly pessimistic about the possibility of realising social justice through the kind of welfare state that his *Theory of justice* was widely considered to be a defence of. And it has been argued recently that only such a democratic socialist regime could ensure what Rawls called 'the fair value of equal political liberties'.[81] Other institutional arrangements, including in particular welfare-state capitalism, would allow for significant concentrations of wealth which, as Rawls saw, would inevitably end up undermining democracy.[82] That would not only be a problem in its own right (because it would violate the first principle of justice as fairness, which protects basic political liberties); the concentration of political power in the hands of a wealthy minority most likely would also render it politically impossible to realise the second principle of justice as fairness, which demands equal access to positions (the first part of the second principle) and permits socio-economic inequalities only to the extent that they benefit also the least well off group in society (the difference principle, which is the second part of the second principle).[83] In sum, a liberal socialist regime may indeed be our best hope for reigning in capital by recoding it via a radically democratic and thoroughly egalitarian code of private law.

One final point on Rawlsian justice in order to avoid any misunderstanding. As is well known, Rawls regards the basic structure of society as the first subject of justice.[84] This means that institutions outside the basic structure are not necessarily subject to principles of social justice. A society can still be just even if some of its institutions are unjust, as long as the basic structure ensures background justice. Remember that by the basic structure Rawls means the main political and social institutions of a society and the way in which they shape the division of advantages and disadvantages of social cooperation. Now, some theorists have argued that private law is not part of the basic structure of society and, therefore, – crucially – not subject to principles of social justice. To be sure, on that view private law would still be subject to justice principles, but only to principles of justice between the parties to the transaction at hand (interpersonal, relational, or corrective justice principles), not also to principles of social (or distributive) justice. Indeed, there are passages where Rawls himself suggests that there should be a 'division of labour' between institutions responsible for background justice and those responsible only for interpersonal justice.[85]

[81]W A Edmundson, *John Rawls: Reticent Socialist* (Cambridge University Press 2017). See also Lea Ypi, 'The Politics of Reticent Socialism' 2 (3) (2018) Catalyst.

[82]See Rawls, *Justice as Fairness* (n 29) 137–8, where he explains how welfare-state capitalism violates the principles of justice. Rawls considered one other regime type to be compatible with the two principles of justice, i.e. a 'property owning democracy', which Rawls understood as an alternative to capitalism, and where private ownership of wealth and capital are actively dispersed by strong institutions. See Ibid. § 43ff. Rawls seems to leave open the question of whether a property-owning democracy could ensure the fair value of equal political liberties just as well as liberal socialism, where the main means of production are not privately owned. In contrast, Edmundson, *John Rawls: Reticent Socialist* (n 81) argues, with some reason, that this may not be the case. In the end, much will depend on how these institutional regime types will be given shape in practice (including the systems of general private law they would have). Also, the distinction between large concentrations of private wealth, one the one hand, and private ownership in the means of production, on the other, may be largely obsolete in our postindustrial age. Indeed, Pistor does not distinguish between private wealth and capital (cf. Pistor (n 1), 10) and neither, for that matter, does Thomas Piketty, *Capital in the Twenty-First Century* (Harvard University Press 2014). Critical, however, of Piketty using wealth and capital interchangeably (for the reason that increases in private wealth are often unproductive), Joseph Stiglitz, 'Inequality, Wealth, and Capital' (Summer 2015) Queries 56–59.

[83]Incidentally, the key role within Rawlsian social justice of the fair value of equal political liberties, sustains the importance of the lexical priory of the first over the second principle, which is sometimes criticised by fellow egalitarians.

[84]J Rawls, 'The Basic Structure as Subject' in Rawls, Political Liberalism (n 70) lecture VII.

[85]See e.g. Rawls, Justice as Fairness (n 29) 53; Rawls, Political Liberalism (n 70) 266. Rawls' argument is grounded in reasons of expediency. In this respect, it is akin to efficiency versions of the division of labour argument, while it differs from moralist versions. As to the former, welfarists argue that if a society wants to ensure distributive justice (a question on which they remain agnostic, considering it a matter of counting preferences, in this case preferences for justice – or a 'taste for fairness'), e.g. Rawlsian justice as fairness, this should happen exclusively through tax and transfer (i.e. as *re*distribution) rather than also

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What is at stake here is that these theorists deny any responsibility for private law (even for its basic structure) for ensuring social justice (including, in particular, distributive justice). However, as will be clear, if Pistor's account has demonstrated one thing, then it is that general private law provides the modules for the code of capital and that its role has immense implications for the distribution of wealth as well as for democratic self-government. In other words, Pistor has shown us that the core branches of private law (at least their main principles and doctrines) are a central part of the basic structure of our societies today. Put differently, those who deny that general private law (or at least its basic structure) is part of the basic structure of society are implicitly denying – against the evidence – the validity of Pistor's main claims about our political economies (or they rely on a notion of social justice as *re*distribution, which however is inferior from a point of view of Rawlsian justice – if we take seriously the primary good of the social bases of self-respect).[86] Rawls is entirely right when he points out that 'principles applying to agreements

through private law, because that would be more efficient. The (economic) reason is that the pursuit of distributive justice via private law would distort market prices and, consequentially, incentives (double distortion). As a result, there would be a smaller pie for society to divide. Therefore, welfarists warn, trying to achieve distributive justice through private law hurts the poor. (This argument is flawed even on its own welfarist terms, as Daphna Lewinsohn-Zamir, 'In Defense of Redistribution Through Private Law' 91 (2006) Minnesota Law Review 326–97, has shown, because it overlooks that distribution is not merely a matter of outcomes but also of origin (it is source-dependent): for example, people would prefer to have a private law that refuses enforcing exploitative contracts in the first place rather than to receive a hand-out from the welfare state after the fact, once they have become destitute.) As said, John Rawls's argument for a division of labour on grounds of practical feasibility comes close to the economic argument in terms of costs and benefits. In any case, the ultimate basis for either is empirical. Ronald Dworkin's view, by contrast, is more normative. He introduces the metaphor of swimming in your own lane: all that private parties have to do is refrain from crossing the boundary with someone else's lane. And it is the exclusive purpose of private law to determine those boundaries (Ronald Dworkin, *Justice for Hedgehogs* (Belknap Press 2011) 287). Ripstein further articulates the idea of a moral division of labour between private law and public law. In his view, private law should be entirely formal: it should not take into account the actual characteristics of the real parties (their power, their vulnerabilities et cetera). The reason is that people have no individual moral responsibility to prevent that other people will become poor; that is the collective responsibility of society as a whole. See Arthur Ripstein, 'Private Order and Public Justice: Kant and Rawls' 92 (2006) Virginia Law Review 1391–438; in the same sense, Ernest J Weinrib, *The Idea of Private Law* (Harvard University Press 1995) ch 3. If there was still any doubt that the division of labour argument against distributive justice through private law is fundamentally misguided, both in its efficiency/expedience and its moral variant, then Pistor's book has dealt it the fatal blow. As her account shows implicitly, the division of labour is a mirage. Explicitly against the division of labour, see Hesselink, 'Unjust Conduct in the Internal Market' (n 55); Dagan and Dorfman, 'Just Relationships', *loc cit*.

[86]On the primary good of the social bases of self-respect, see Rawls, *Political Liberalism* (n 70) 180; Rawls, Justice as Fairness (n 29) § 17.2. Arguably, the idea of background justice does not even get off the ground in the absence of the (primary) distribution of private rights through private law. While possession is a fact, property is legally constituted. (Cf. Immanuel Kant, *The Doctrine of Right*, § 44, discussing the difference between the state of nature and a civil condition: 'although each can acquire something external by taking control of it or by contract in accordance with its concepts of right, this acquisition is still only provisional as long as it does not yet have the sanction of public law, since it is not determined by public (distributive) justice and secured by an authority putting this right into effect'). Therefore, redistribution presumes legal ownership in goods and other resources, without which there would be nothing to redistribute. While it is true that interpersonal/market transactions governed by private law take place in a context of background distributive justice (or injustice, as the case may be) it is also undeniable that without key private law institutions there would be no background and indeed no foreground since market transactions presume legal entitlements. The point that there exists no morally relevant pre-institutional entitlement (hence no moral right to pre-tax income, which means that '*re*distribution' is a misnomer), made forcefully by Liam Murphy and Thomas Nagel in *The Myth of Ownership: Taxes and Justice* (Oxford University Press 2002), has now been reinforced by Pistor's insight that without institutionalised legal entitlements there is at best factual possession of an asset (which relies at best on might, not right) but no legally recognised subjective right to it – the flipside of which is that social *in*justice depends on unjustifiable private law entitlements. Another way of putting this is in terms of 'predistribution'. Predistribution means preventing distributive injustice from occurring (cf. Martin O'Neill, 'Predistribution: An Unsnappy Name for an Inspiring Idea' *Guardian* 2012). It is normatively superior to redistribution through tax and transfer because justice it is source-sensitive (not a mere matter of outcomes). And private law has a key role to play in it. Indeed, in preventing contractual exploitation, unjustified property rights et cetera, a just private law is constitutive of predistribution. As Scanlon, *Why Does Inequality Matter?* (n 14) 102–4, puts it, 'the question of predistribution—that is to say, of the legitimacy of an overall framework within which property is acquired and exchanged, and income earned ... is the more fundamental question'. And it is this more fundamental question of distributive injustice that Pistor's book raises so forcefully.

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directly (for example, the law of contract) do not *alone* suffice to preserve background justice'.[87] However, what he seems to have overlooked – as have others as well, but has now been brought home forcefully by Pistor – is that in societies like ours, with globalised market economies based on transactions governed by private law, – even under ideal circumstances – it is impossible to preserve background justice without involving also general private law (in particular, its core principles and doctrines).[88] In this regard, it is important to note that under Rawlsian justice the question of which institutions in a society are part of its basic structure is not primarily normative, but empirical (to be answered obviously in light of the principles of justice). And the answer may well differ from one society to another. This is simply the mirror image of the question of which institutional regime is most suitable for ensuring social justice.[89]

B. Against liberty as licence

Warnings against state socialism have been a familiar trope in the EU private law debate, usually coming from ordo-liberal market-fundamentalists. They will always cry foul in the name of liberty, as they did even when the European Commission proposed a modest directive on unfair terms in consumer contracts, when they claimed that it would have established within the EU 'the system of control and regulation underlying the socialist law of contract' (which was enough for the Commission to cave and exclude core contract terms from the scope of consumer protection).[90] However, this should not discourage us from seeking the right institutional response to the threats that the coding of capital through the means of private law poses to democracy and equality today. As Pistor puts it, 'capitalism, it turns out, is more than just the exchange of goods in a market economy; it is a market economy in which some assets are placed on legal steroids.'[91] The exorbitant legal privileges private law grants to capital are unjustifiable and unsustainable. And an EPL-code that is progressive (or liberal socialist, if you like) may well be the right institutional response.

In a democratic society we reciprocally respect each other's equal right to self-determination and democratically establish its concrete modalities and limits. The right to self-determination has a public and a private aspect. As to the latter, private autonomy is made possible through the system of private rights and obligations constituted by private law. It is important to distinguish such a thoroughly democratic system of private law from the idea of a pre-institutional and pre-democratic right to the public recognition and enforcement of whichever private transaction one wishes to undertake. Indeed, it is the direct aim of a progressive code of private law to reign in such libertarian private autonomy as licence. At the same time, a thoroughly democratic and egalitarian private law will fully recognise and respect the equal substantive right to individual and collaborative self-determination (substantive private autonomy). In the words of Lea Ypi, 'Freedom is not

[87]Rawls, Justice as Fairness (n 29) 53 (emphasis added).

[88]As A Bagchi, 'Distributive Injustice and Private Law' 60 (2008) Hastings Law Journal 105–48, 134, points out, under non-ideal circumstances (i.e. our circumstances), any plausible case for a division of labour collapses anyhow: 'at least in non-ideal theory, where the state has not achieved distributive justice, individuals have active imperfect social duties and rights'. Or, put differently, whenever background justice is not assured by public law (especially tax and transfer), then a society has two options, i.e. either (1) to suspend the enforcement of private rights until the background justice on which its legitimacy depends is ensured; or (2) to pursue distributive justice objectives also through private law where possible.

[89]Rawls refrains from making a choice in the abstract, because, as he explains, much will depend on the concrete society at hand, its traditions et cetera. See explicitly regarding the choice between a property-owning democracy and liberal socialism (as said, the only two regimes he thought were compatible with the two principles of justice), Rawls, *Justice as Fairness* (n 29) 139: 'When a practical decision is to be made between property-owning democracy and a liberal socialist regime, we look to society's historical circumstances, to its traditions of political thought and practice, and much else. Justice as fairness does not decide between these regimes but tries to set out guidelines for how the decision can reasonably be approached'.

[90]H Erich Brandner and Peter Ulmer, 'The Community directive on Unfair Terms in Consumer Contracts: Some Critical Remarks on the Proposal Submitted by the EC Commission' 28 (1991) Common Market Law Review 647–62, 649.

[91]Pistor, *Code of Capital* (n 1) 11.

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sacrificed only when others tell us what to say, where to go, how to behave. A society that claims to enable people to realize their potential, but fails to change the structures that prevent everyone from flourishing, is also oppressive.'[92]

C. Real socialism

The opposite criticism would hold that even a progressive EPL-code, however egalitarian and democratic would not go far enough, because it would leave the market system as such untouched. On this view, the real problem goes deeper. It is not the accumulation of capital, or the excesses in its creation, but the very idea of market transactions and the legal support for it. It is true that if we endorse Marx' surplus value theory, then not only contracts concluded on the labour market are intrinsically exploitative, but also many other goods and services (perhaps most) should be decommodified. Similarly, we could reduce the scope and relevance of private property through a radical expansion of legally recognised and protected commons, as Ugo Mattei urges us to do,[93] or even replace private property altogether with 'the rights of the common', as Hardt and Negri propose.[94] Indeed, we could fundamentally challenge the very idea of individual subjective rights.[95] To the extent that critique based on such radically different conceptions of law, justice and values is pertinent, and their implementation is also compatible with the mutual respect we owe each other in a society characterised by a reasonable pluralism of worldviews, they would indeed speak directly against an EPL-code, however progressive it might be, as a solution to the problems caused by the code of capital (and a fortiori against the more incremental roll-back strategy proposed by Pistor). I have my doubts, but it is beyond the scope of this article to explore these strands of critique any further.

D. Realism and transition

Another objection against the idea of a progressive EPL-code might be that it is naïve. If the common law systems of New York State and England are hegemonic today in facilitating the minting of capital, as Pistor underlines, and if our century will become the 'Chinese century', as Peter Drahos has recently claimed,[96] then wouldn't it amount to a suicidal form of protectionism if the EU imposed a progressive code of private law on transactions in its internal market? It is true, as said earlier, that any gain in socio-economic and political equality might well come at the price of reduced economic growth; the economy may even shrink to a degree. However, within limits, that may be a price well worth paying for restoring socio-economic and political equality. Indeed, it is intrinsic to the very idea of the Rawlsian difference principle. Therefore, the lure of economic growth, with its false promise of trickle-down, should not distract us from the political possibility of restoring equality and democracy by resetting the code of capital.

This brings us to the next charge – a utopian lack of realism. Given the current state of the world, what gives us reason to believe we might be able to achieve a better one? The question of transition from our current state to one that is more just is real. Is it possible to set aside the current code of capital? And can this be achieved without a violent revolution? Is peaceful transition possible? In 1923, the Institute for Social Research in Frankfurt was founded with the explicit mission to understand why the German November Revolution of 1918-1919 had failed.[97] The first generation of Frankfurt school members remained committed to the Marxist

[92]Lea Ypi, *Free: Coming of Age at the End of History* (Allen Lane 2021) 305.

[93]See U Mattei, *Beni comuni* (Laterza 2012) 5.

[94]See M Hardt and A Negri, *Assembly* (Oxford University Press 2016) 85: 'The problem with property is not merely that some have it and some don't. Private property itself is the problem'.

[95]C Menke, *Critique of Rights* (Polity 2020).

[96]P Drahos, *Survival Governance: Energy and Climate in the Chinese Century* (Oxford University Press 2021).

[97]See S Jeffries, *Grand Hotel Abyss: The Lives of the Frankfurt School* (Verso 2017) ch. 3.

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idea of a workers' revolution, even though they became increasingly pessimistic that it would ever happen. (Similarly, they took Marx' theory of surplus value for granted, the implication of which is that market exchanges lack justificatory force.[98]) If we leave the option of revolution to one side for now (either because it will not happen or because it would inevitably lead to bloodshed and end up in authoritarianism), then which realistic peaceful alternatives for transition are we left with? Normative political theory is often rejected, especially by socialists, as unrealistic. However, as Forst points out, the dichotomy between idealism and realism is a false one:[99] 'A critical conception of justice cannot get off the ground without principled argument, although it neither needs to nor ought to design an "ideal" model of the well-ordered society that would only have to be "realized" by intelligent and well-meaning politicians, which is at best a naive and at worst a technocratic conception.' And radical critique will need idealising proposals in order to de-reify and shift our current understanding of what is realistically possible here and now.[100] This applies as much for European private law as for anything else. By making and discussing proposals that would radically change – revolutionise, in a sense – the role of private law we can contribute to making alternative futures become more realistically attainable. As Pistor underlines,[101]

> the fact that capital depends on state law and state enforcement of private contracts and deeds gives agency to lawmakers, legislatures, courts, and regulators. If they can free themselves from the cognitive (and in some cases) financial grip of capital, they may help advance the project of democratic self-governance. The basic task would be to roll back control by current asset holders and their lawyers over the code of capital by limiting the choices lawyers have at their disposal when coding capital, but also by granting special legal protections to assets (and their holders) that have been neglected in the past.

To this we may want to add that while perhaps incrementalism is the more prudent strategy, we may need the more revolutionary strategy of a European code of private law to make real progress. Whether that strategy is realistic we will only know with certainty after the fact.[102]

Within the EU, the (unelected) European Commission has the exclusive right of initiative for new EU legislation.[103] It may indeed be unrealistic to expect the Commission to propose a progressive EPL-code any time soon. However, the European Parliament could seize the initiative by adopting a parliamentary resolution in which it outlines the main principles of the code, in a way quite similar to its recent resolution on corporate accountability.[104] Yet it is important to underline that such a legislative resolution should be only the end point of an inclusive democratic deliberation involving every relevant section of civil society. Alternatively, the code could be adopted by way of a convention, leading to a targeted treaty reform. That would be fitting if

[98]See e.g. T W Adorno, *Negative Dialectics* (Continuum 1973) 146, 189, 342.

[99]R Forst, 'A Critical Theory of Transnational (In-)Justice: Realistic in the Right way' in Thom Brooks (ed.) *The Oxford Handbook of Global Justice* (Oxford University Press 2020) 451–72, 467.

[100]R Forst, *Normativity and Power: Analyzing Social Orders of Justification* (Oxford University Press 2017) 5.

[101]Pistor, *Code of Capital* (n 1) 224.

[102]Sceptical, U Mattei and Fernanda Nicola, 'A "Social Dimension" in European Private Law? The Call for Setting a Progressive Agenda' 41 (2006) *New England Law Review* 1–66, 31, arguing that 'an incremental transformation towards a progressive dimension in private law is impossible'. Yet their own 'gradualist' proposal to restructure the field of European private law 'by creating strategic alliances on specific targets' (Ibid., 65) seems hard to distinguish from the incrementalism they reject, especially when compared to the paradigm shift in the relationship between capital and private law through a (constitutionalised) progressive EPL-code proposed here. In favour of a paradigm shift through a European civil code, as 'a discontinuity in the European building process' and 'an essential element in the transition from a Europe of the market to a Europe of the rights', see Rodotà, 'The Civil Code within the European "Constitutional Process"' (n 64) 119, 121.

[103]Art 17 TEU.

[104]See European Parliament resolution of 10 March 2021 with recommendations to the Commission on corporate due diligence and corporate accountability (2020/2129(INL)), Annex: requested proposal for a Directive of the European Parliament and of the Council on Corporate Due Diligence and Corporate Accountability (P9 TA(2021)0073).

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we understand the code as the EU's economic and civil constitution. It would also fulfil the demand, raised above, that the EPL-code should have the status of primary EU law, on a par with competition law and the market freedoms.

7. The content of the new code

A. The main private law modules

What should be in the code? The EPL-code would obviously have to cover the main fields of private law that operate in creating and protecting capital – what Pistor refers to as the legal modules from which capital is coded. Pistor mentions property, contract, bankruptcy, company and private international law,[105] to which I would add tort, because of its key role in sanctioning – and hence also in preventing – interferences with (intellectual) property.

If the aim is to reign in capital,[106] then, by definition, a central focus should be on the main legal attributes that, as Pistor demonstrates, can provide, in principle, any asset with wealth creating and protecting powers, namely priority, durability, convertibility and universality. Reconstituting the code of capital means ensuring that these attributes will work for the many, not merely a few. And the way to do it is to entrench justice objectives and constraints in the very definition, scope, and modalities of subjective private rights. More concretely, this could mean different things. For example, the extent of an attribute could be reduced. A natural starting point would be the redefinition of ownership in less universal and more relational terms.[107] A second obvious example is the durability of intellectual property rights. Yet another would be the priority of security holders over general creditors. These are well known battlefields in the politics of private law. A different possibility would be decoupling: perhaps durability is not so bad without convertibility, universality more acceptable without durability.[108]

Some private lawyers will be quick to point out that we need a more granular understanding of the roles played by these various attributes. Some, and not only common lawyers, will even argue that we can only get it right if we work on a case-to-case basis – which, however, would bring us back directly to where we are now. Therefore, yet another approach to be considered, perhaps the most radical one, would be to formulate principles starting from a different taxonomy, based, for example, a combination of justice principles and the attributes distinguished by Pistor.

Contrary to national civil codes (and to the DCFR) the EPL-code would not provide a comprehensive codification of each of these branches of general private law. Rather, it would limit itself to stating (and constitutionalising) the main principles that should govern the basis structure of these fields of private law, with a view to ensuring substantive equality in the internal market and radically democratic control over it. The remainder, that is the various detailed rules and doctrines, would be left for the national laws of the member states to determine. Put differently, the

[105]E.g. Pistor, *Code of Capital* (n 1) 3.

[106]Perhaps it is worth underlining that this paper does not engage in any economic reductionism. Clearly, there exist other important justice grounds for a progressive EPL-code, which are wholly unrelated to the coding of capital. Similarly, 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, i.e. 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 e.g. climate, racial, gender, and intersectional injustice, and, vice versa, the central place these core justice concerns should have in any progressive EPL-code.

[107]Contrast the definition in Art VIII.–1:202 DCFR (Ownership), which would bring us back to the 19th century: '"Ownership" is the most comprehensive right a person, the "owner", can have over property, including the exclusive right, so far as consistent with applicable laws or rights granted by the owner, to use, enjoy, modify, destroy, dispose of and recover the property'.

[108]I thank Candida Leone for this suggestion.

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EPL-code would not provide a comprehensive system of private law, only a partial one. To be more precise, it would contain and provide its basic structure.

As said, such a European private law code would best be formulated as principles, rather than as specific rules, and should enjoy EU primary law ('constitutional') status. Ordinary rules of private law (national law and secondary EU law) would then be subject to this limited set of fundamental private law principles.

B. Focus on preventing injustice

Clearly, the starting point for designing the code's basic structure should be quite a different one from that of traditional civil codes (as well as the DCFR). Its core structure should be determined by social justice considerations. In particular, the focus should be on injustices (social and interpersonal) and how to prevent them.[109]

This includes, notably, what Judith Shklar calls 'passive injustice'. As she points out, 'the free market may, indeed, be as efficient as is claimed, but that does not mean all of its ill effects are above political judgment. Some may be a result of passive injustice'.[110] It is passively unjust to keep in place a system of private law that enables the creation and accumulation of capital that gives rise to the inequalities and democratic disempowerment we face today.

C. Horizontal human rights

The code should include a catalogue of horizontal human rights. Contrary to what is often thought, horizontal effects of human rights (between private parties) are prior, both historically and conceptually, to their vertical effects (towards the state).[111] Since human rights are rights that we all have towards each other by virtue of our humanity their primary effect is *erga omnes*. This can be seen most clearly with regard to non-discrimination. The horizontal right to non-discrimination is direct and primary, based on interpersonal justice, not merely derivative from the state's responsibility for social justice.[112] While the standard view on constitutional rights in many jurisdictions is that horizontal effects between private parties are indirect, via state action (including the action of the courts),[113] and hence derivative, in reality their effect ought to be understood as direct and primary.[114] Therefore, if the vertical effect of human rights enjoys constitutional protection, as constitutional rights, then a fortiori the direct horizontal effect of human rights should also be constitutionally protected, as horizontal human rights. Instead, in the European legal order today the constitutionally protected status of the direct horizontal effect of its 'fundamental' rights is still fragmented, rather than unequivocal and general.[115]

[109]See further, M W Hesselink, 'Injustice in European Private Law' (forthcoming, available on SSRN at <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3752748>), and with a specific focus on contract law, Martijn W Hesselink, 'The Right to Justification of Contract' 33 (2020) Ratio Juris 196–222.

[110]J N Shklar, *The Faces of Injustice* (Yale University Press 1990) 75.

[111]See R Forst, 'The Justification of Human Rights and the Basic Right to Justification: A Reflexive Approach' 120 (2010) Ethics 711–40, 739–40; Martijn W Hesselink, 'Private Law and the European Constitutionalisation of Values' *Amsterdam Law School Research Paper No. 2016-26* (available on SSRN: <https://ssrn.com/abstract=2785536>); Hanoch Dagan and Avihay Dorfman, 'Interpersonal Human Rights' 51 (2018) Cornell International Law Journal 361–90.

[112]See most recently, Dagan, *A Liberal Theory of Property* (n 19) 195ff.

[113]Paradigmatic is the case law of the German Federal Constitutional Court, esp *BVerfG*, 15 January 1956, *BVerfGE* 7, 198 (*Lüth*) and (especially for contract law) *BVerfG*, 19 October 1993, *BVerfGE* 89, 214 (*Bürgschaft*).

[114]See C Menke, *Critique of Rights* (Polity 2020) 169: 'The declaration of basic rights is the establishment of the form of subjective rights. Its primary subject matter is the relation of individuals to each other'.

[115]Direct horizontal effect is confirmed most clearly by the CJEU for non-discrimination rights in employment relationships. See Aurelia Colombi Ciacchi, 'The Direct Horizontal Effect of EU Fundamental Rights' 15 (2019) European Constitutional Law Review 294–305.

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Codifying the direct horizontal effect of human rights would have the additional advantage of sorting out which fundamental rights are in fact protected in interactions between private parties (and vice versa, it clarifies which private rights are constitutionally protected).

There is a wider point to be made. The new limits the EPL-code should impose on the legal coding of capital should be considered as immanent to the system of private rights and obligations. For human rights, as said, this entails that their horizontal effects should be understood as direct and primary effects. Similarly, for abuse of right, for example, it means that the code should adopt the 'internal theory' (*Innentheorie*): subjective rights should be understood as being limited by justice constraints that are immanent to these rights, not imposed in exceptional cases from the outside.[116]

D. No expert blueprints

Since the EPL-code must be radically democratic, academic experts should not be the first to make concrete proposals as to its specific content, let alone present a full draft. Perhaps they could propose some fundamental questions to be addressed, together with some of the main possible answers and their foreseeable implications. However, even this might risk to unduly frame the democratic debate. It is probably best if private law experts get involved only once the main political choices have been made.[117]

8. A model for transnational private law justice?

A. A European private law code as an agent of global justice

One final question – perhaps the most difficult one – is whether such a thoroughly egalitarian and radically democratic European code of private law, once enacted, could serve as a model for justice in transnational private law. Put differently, could a European code of private law, if done right, be an agent of global justice, taming global capitalism and restoring equality and democracy around the world? As Ugo Mattei put it, 'if a leading jurisdiction such [as] Europe begins to change its attitude towards lawless capital globalisation in favour of a more social model of economic development, this could be a first move of countertrend away from global hegemony and exploitation.'[118]

The question has two aspects. First, is it realistic to expect that a progressive code of European private law could serve as a global model and set a global standard? This is the external aspect of the realism question that was raised above for internal European socio-economic affairs. The two aspects are related, of course. If the EU does not even manage to tame capital, through a paradigm shift in the role of private law, within its own internal market, then why would any other country be interested in the EU model? And, vice versa, if the EU were able to set a global standard for equality and democracy through private law then it would be much easier for the EPL-code to survive internally as well. It would no longer be a case of protectionism but of hegemony. This brings us to the second question, which is a normative one: supposing the idea of providing a European model for a fundamentally egalitarian and radically democratic private law were a realistic objective to pursue, would it also be legitimate?

[116]In the same sense, Dagan, *A Liberal Theory of Property* (n 19) ch. 5.

[117]In this sense (with regard to the idea of a fully-fledged European civil code), Martijn W Hesselink 'The Politics of a European Civil Code' 10 (2004) European Law Journal 675–97.

[118]Mattei, 'Hard Code Now!' (n 48).

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B. A Brussels effect?

As to the positive question of whether an EPL-code is likely to become a global model of private law justice, there seems to be reason for caution.

In her illuminating discussion of what she calls 'the Brussels effect', i.e. the EU's unilateral power to regulate global markets, Anu Bradford lists five conditions that must be met for this effect to occur, i.e. market size, regulatory capacity, stringent standards, inelastic targets, and non-divisibility.[119] Under those conditions, she argues, the EU does not have to do anything except regulate its own market. The effect will occur because private parties (especially multinational companies) will voluntarily adopt the EU's more stringent standards globally.[120] And, crucially, the result of this external dimension of the internal market is upward regulatory convergence towards a high global standard (i.e. the opposite of a race to the bottom). The most salient example is probably the General Data Protection Regulation (2016).

While an EPL-code, it seems, could easily meet most of these conditions, one stands out as potentially problematic: inelastic targets, where the market actors are non-responsive to regulatory change. As she points out, 'the Brussels Effect only occurs when the EU regulates *inelastic targets*, such as consumer markets as opposed to capital. Unlike capital, consumers are not able to flee to less-regulated jurisdictions, compromising the EU's regulatory clout.'[121] This may constitute a problem if the aim of the EPL-code is to re-code capital. To be sure, there is a difference between regulating the capital market, on the one hand, and transforming the private law rules and doctrines on which the creation and protection of various assets, as subjective rights, relies, on the other. And even if an important element of the code were that it would reduce the possibility of choice of law that currently permits firms to shop around for the most favourable private law regime, which would mean that market actors would be barred from voting with their feet lest they forego EU market access, firms would certainly see no reason to apply the stricter EU code also in their dealings outside the internal market. Therefore, it may well be that a Brussels effect is less likely to occur – or is likely to occur only on a much smaller scale – with regard to a code stating principles of general private law (however stringent) than for example with regard to consumer law. Much will depend in practice on whether the code would also reign in (against the CJEU's established case law on free movement) the freedom for corporations to decide where to incorporate.[122]

C. A benign private law hegemon?

To the extent that an EPL-code could have some external effect beyond the EU, the next question is whether such an externality would be acceptable and should perhaps even be actively sought.

Maybe it would be selfish for the EU to keep a progressive EPL-code for itself instead of offering it to the world as a model. Ugo Mattei asks the question: 'Is the European civil code only to serve the interests of the Europeans? Alternatively, is Europe a sufficiently strong world power (both in terms of economy and of culture) that its legal system can influence global developments in the present moment of high uncertainty about what path we should walk in the future of world capitalism?'[123] His answer is that European private lawyers should 'think worldly'; they should

[119]A Bradford, *The Brussels Effect: How the European Union Rules the World* (Oxford University Press 2020) ch. 2.

[120]Ibid., 2.

[121]Ibid., xvii.

[122]In her discussion of inelastic targets, Bradford, *op cit*, 49–53, contrasts regulation explicitly with corporate law. However, the rules on freedom of establishment, if not regulatory, remain a legislative choice over which the EU's citizens should regain democratic control, if need be, through Treaty change, counterbalancing market freedoms with justice principles, for example along the lines suggested here. It is therefore somewhat misleading to claim, as Bradford does (Ibid. 53.) that 'elasticity is an inherent feature of the [regulatory] target itself, such as capital – which is typically elastic', because capital is itself constituted by private law, which has the capacity in principle to grant it more or less elasticity.

[123]Mattei (n 93).

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'imagine a legal structure of the European market capable of working as a model and consequently serv[ing] the global community and not merely the European interests.' However, even if this were true (on which below) the question remains of course whether the global community of private lawyers has any reason to 'think Europeanly' (again).[124]

Bradford is similarly optimistic. She sees the Brussels effect as an opportunity for other countries 'to outsource their regulatory pursuits to a more resourceful and experienced agency'. On this view, those countries are having a free ride, having their regulatory preferences satisfied at zero costs.[125] Yet, even if we assumed that in this case there existed such a thing as a free lunch, and if the sovereignty concern at the heart of the neo-imperialism critique is 'unlikely to offer a fatal normative critique to the Brussels Effect', as she claims, this will be true only if we adopt the consequentialist normative frame of preference satisfaction, that focuses only on outcomes (which may indeed well correspond to regulatory preferences in countries affected by the Brussels effect), and not also on the more deontological concern for political agency (being the co-authors, as a democratic public, of their own laws).[126]

D. Political agency

This brings us to the question of political autonomy and agency. In order to be legitimate, for any legal system – including a system of private law – it has got to be the case that its addressees can understand themselves, with good reason, as its co-authors.[127] And when it is argued that a model of private law justice should be judged on its substantive merits rather than on its origins, the important question remains: who should do the judging? Justice is not a matter of mere good outcomes: justice is source sensitive. And social justice has to be grounded in political agency. The people to whom the private law will apply can only decide for themselves, in a truly inclusive democratic deliberation which involves everyone, including especially those at the periphery of society who are least likely to be among the beneficiaries of the code of capital, what the merits are of any model of private law. This is all the more true if a core aim of reconstituting EU private law is to make progress in terms not only of equality but also of democracy. Clearly, democratic control cannot be regained as long as a society is dominated, through the exercise of political-economic power, by another society's private law code, however progressive and however democratic the means through which it was adopted in that other society (in our case, the EU) might have been.

E. Private law colonialism

It is worth reminding, in this regard, that the civil code, the ultimate symbol of legal modernity and the triumph of legal reason,[128] was also the ultimate symbol of colonial private law that made legal reason instrumental to plunder and enslavement. Colonialism went hand in hand with the spreading of European private law models over the world. And still today, terms like 'legal families' and 'legal transplants' are used as euphemisms in comparative legal scholarships for what in

[124]Contrast Mattei and Nicola, (n 102) 39. 'Many people in the world ... would welcome a truly responsible piece of economic legislation, something that Europe owes to humankind to make good its less than respectable exploitive past. A radically reformed European legal system, prestigious because of the culture behind it, could become, in the global world, a true world model'.

[125]*Op cit*, 253.

[126]Clearly, extraterritorial legislation would be even worse. However, as Joanne Scott, 'Extraterritoriality and Territorial Extension in EU Law' 62 (2014) American Journal of Comparative Law 87–126, has shown, extraterritoriality of EU law, where it would claim applicability to persons without any relevant territorial connection with the EU, is extremely rare.

[127]Habermas, *Between Facts and Norms* (n 35).

[128]F Wieacker, *A History of Private Law in Europe* (Clarendon Press 1995) ch. 19.

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fact amounts to a form neo-imperialism.[129] Therefore, there is good reason for caution when it comes to the legitimacy of proposing a European code of private law, however progressive it may otherwise be, as a model for the world. The last thing the world needs today, it would seem, is European missionaries going around preaching the merits of their own private law model, especially if the proselytising is in fact backed up (again) by economic-political power.[130]

In its most benign form, the idea of the EU offering a model of private law justice to the world relies, implicitly or explicitly, on the notion that there exist standards and principles of justice that are universally valid and the validity of which can be known more or less similarly in different places in the world. However, it has been argued – also with regard to justice – that what may be true in the global north is not necessarily true also in the Global South. This relativistic notion is expressed in terms like the 'epistemologies of the South'.[131] Similarly, I have been referring to the EPL-code as a 'progressive' one. However, what if the idea of making progress towards justice through law is a European enlightenment ideal that is itself fundamentally flawed, as was recently suggested by Amy Allen?[132] On the other hand, however, it seems hard to maintain the most radical decolonial critique of modernity without falling into the performative contradiction of offering reasons against reason.[133]

The more important point here is that even if we refuse to give up on the modern project of (self-)critical reason and continue to understand justice as at least in part a matter of universal moral truth (which enables us for example to denounce colonialism, patriarchy and capitalist exploitation as fundamentally and universally unjust), as I think we should, then still it is not obvious, to say the least, that Europe is the natural or best place to look for these truths. There is good reason for caution in this regard because European countries (and more recently the EU) have a long record of confusing justice and morality with their own interests. Therefore, it is entirely understandable, for example, that in many academic disciplines (starting from history) scholars in the Global South have been engaging actively in decentring and provincializing Europe.[134] From the point of view of many countries today the EU is no longer an important normative reference. Put differently, the EPL-code might not even be noted as a global model of private law justice.

A truly postcolonial view on Europe's role in the world requires strong self-critical reflection on what, if anything, we genuinely have to offer the world – in this case – in terms of progressive private law. Even if other countries are similarly involved – and perhaps much more – in their own struggles against the inequality and the democratic disempowerment imposed by the code of capital, then almost certainly in many cases the specific local needs in different countries as well

[129]On the former, see Daniel Bonilla Maldonado, *The Legal Barbarians: Identity, Modern Comparative Law and the Global South* (Cambridge University Press 2021) 20 ff. With regard to the latter, cf. Pistor, 'Coding Capital: On the Power and Limits of (Private) Law: A Rejoinder' (n 5) 322: 'Transplanting law from the core to the periphery has its origins in colonialism'.

[130]Contrast European Parliament resolution of 26 May 1989 on action to bring into line the private law of the Member States (OJ C 158, 26.6.1989, p. 400), requesting that 'a start be made on the necessary preparatory work on drawing up a common European Code of Private Law', based in part on the consideration that 'a modernized, common system of private law is a means of directly or indirectly broadening the Community's links with countries outside itself, with particular reference to the Latin-American countries'.

[131]Boaventura de Sousa Santos, *The End of the Cognitive Empire: The Coming of Age of Epistemologies of the South* (Duke University Press, 2018).

[132]See Amy Allen, *The End of Progress: Decolonizing the Normative Foundations of Critical Theory* (Columbia University Press, 2016).

[133]For such critique, see e.g. Aníbal Quijano, 'Coloniality and Modernity/Rationality' 21 (2007) Cultural Studies 168–78; Walter D Mignolo and Catherine E Walsh, *On Decoloniality: Concepts, Analytics, Praxis* (Duke University Press, 2018), strongly endorsed recently, for comparatively law, by Lena Salaymeh and Ralf Michaels, 'Decolonial Comparative Law: A Conceptual Beginning' 86 (2022) RabelsZ 166–88.

[134]See D Chakrabarty, *Provincializing Europe: Postcolonial Thought and Historical Difference – New Edition* (Princeton University Press, 2007).

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as the most fitting solutions are very different.[135] Sure enough we should refrain from exercising any copyright, but beyond that it is for other countries to decide whether any elements of a progressive EPL-code might provide a source of inspiration in their own respective struggles for emancipation from the code of capital. Provincializing European private law is an urgent task, but it is not one for Europeans – that would defeat the purpose.[136]

Meanwhile, here in Europe we may want to check very carefully whether other countries have any private law models to offer that we may want to borrow from them for our progressive EPL-code. In particular, we could learn perhaps from countries in the Global South, where transplants of the legal modules of the code of capital have been less successful than in countries in the global north. This would require us to understand their experience as instances of successful resistance against the code of capital rather than as failed law.[137] Finally, when it comes to postcolonial private law, it should be added that there are much more direct and legitimate ways of paying our colonial debt, that is, by paying due compensation for colonial plunder and enslavement as required by basic private law principles of unjustified enrichment and restitution.[138]

9. Conclusion

At first sight, the idea of reconstituting capital through a progressive European code of private law may seem a total non-starter, at least in the eyes of European private law scholars from the first generation. Was the European civil code project not dead and buried after the spectacular failure of the proposal for a Common European Sales Law in 2014? Will the cabal for an ECC never stop? However, one benefit of the CFR/CESL experience (perhaps the most important one) is that now we know what we should not do, both in terms of aims (not a comprehensive doctrinal 19th-century civil code) and in terms of method (not an expert driven project). Of course, some observers knew this all along.[139]

The saddest part of the DCFR/CESL experience was that much of the left turned against the idea of an EEC. They only saw and portrayed it as intrinsically regressive and didn't believe in the possibility of a progressive European private law code. In particular, they did not consider it a potential tool for more social justice in the EU. Nor did they appreciate its potential for taming capital. To be true, the DCFR gave them little reason for enthusiasm,[140] and the Commission's

[135]For a critique of the idea of private law transplants even within the context of the EU (at the time), see Gunther Teubner, 'Legal Irritants: Good Faith in British Law or How Unifying Law Ends Up in New Divergences' 61 (1998) Modern Law Review 11–32.

[136]Chakrabarty, (n 134) ch. 1.

[137]On this 'potential of the decoding of capital on its own terms in the periphery', see Iagê Z Miola, '(De)coding Capital in the Periphery' 30 (2021) Social & Legal Studies 296–302, 300. As Miola points out, this resistance often takes place through legal modules other than private law or through a combination, as in private–public partnerships. On the harmful fiction of failed law, see Jorge L Esquirol, 'The Failed Law of Latin America' 56 (2008) American Journal of Comparative Law 75–124. In the same sense, Pistor, 'Coding Capital: On the Power and Limits of (Private) Law: A Rejoinder' (n 5) 322, with reference to empirical findings of failed legal transplants from the core to the periphery: 'The problem was not the process but the purpose; and the latter was only too well perceived within the recipient countries'.

[138]On the EU's responsibility for reparations, see Gurminder K Bhambra, 'A Decolonial Project for Europe' 60 (2022) Journal of Common Market Studies 1–16.

[139]H-W Micklitz, 'Failure or Ideological Preconceptions? Thoughts on Two Grand Projects: The European Constitution and the European Civil Code' in Kaarlo Tuori and Suvi Sankari (eds), *The Many Constitutions of Europe* (Routledge 2010) 109–42.

[140]Having said that, in social justice terms it would have meant an improvement compared for many existing national private law systems. See Martijn W Hesselink, *CFR & Social Justice* (Sellier 2008). In this regard, cf. also the opposite concern expressed by Horst Eidenmüller, Florian Faust, Hans Christoph Grigoleit, Nils Jansen, Gerhard Wagner and Reinhard Zimmermann, 'The Common Frame of Reference for European private Law—Policy Choices And Codification Problems' 28 (2008) Oxford Journal of Legal Studies 659–708, 706–7: 'Especially alarming is the fact that the Draft paves the way for a massive erosion of private autonomy which goes far beyond existing tendencies to "materialize" private law'.

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choice ultimately for a CESL that was merely optional was also particularly unfortunate – even though the label of 'neoliberal' was exaggerated.

What I hope this paper has demonstrated is that the idea of European code of private law is not intrinsically conservative or regressive. Quite the contrary, if done right, it may be the best chance we have in Europe to reign in capital, addressing the root problem, that is, the legal modules in which capital is coded. It is submitted here that all those convinced by Pistor's superb diagnosis, and who are supportive of her roll-back strategies, should also – indeed, a fortiori – support a progressive European code of private law.[141]

Moreover, as I have argued, not only committed socialists but also liberal egalitarians adhering to Rawlsian justice as fairness may have to conclude that such a code is our best chance today in Europe to achieve the difference principle, to maintain fair equality of opportunity, and to ensure the fair value of equal basic political liberties.

In any case, as Thomas Piketty points out, 'one cannot just be "against" capitalism or neoliberalism: one must also and above all be "for" something else, which requires precisely designating the ideal economic system that one wishes to set up, the just society that one has in mind, whatever name one finally decides to give it'.[142] And, as I have argued, a progressive European code of private law could be a key institution of a better economic system, which may perhaps not be an ideal system, but at least one that works significantly better for the many not just the few, thus constituting a core building block for a more just society.[143]

However, it should be stressed that such a progressive European code of private law would have entirely different characteristics than the familiar civil codes of the member states (and the DCFR). It would be European (not national), be mandatory (not optional), have 'constitutional' that is, primary EU law status (not merely secondary), consist of fundamental principles (not detailed rules), prioritise justice (not economic growth) and be radically democratic (not technocratic).

To be sure, 'recoding takes hard work', as Slobodian rightly points out.[144] As it happens, this is also a familiar characteristic of a functioning democracy.[145]

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[141]As explained above, this article did not offer a self-standing account of how general private law produces inequalities and undermines democracy, let alone a general theory of private law as a socio-economic institution. Rather, it built explicitly on Katharina Pistor's account.

[142]T Piketty, 'Long Live Socialism!', in idem: *Time for Socialism: Dispatches from a World on Fire, 2016–2021* (Yale University Press 2021), 9–32, 10.

[143]A core building block but, as said earlier, not more than that. Cf. Ibid., 18: 'Important as it is, this transformation of the legal system will not be enough'.

[144]Q Slobodian, 'The False Promise of Enlightenment' (Summer 2019) Boston Review reviewing Pistor's book (and two others).

[145]T van Rahden, *Demokratie: eine gefährdete Lebensform* (Campus Verlag 2019).

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