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

The paths to a progressive European code of private law

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Abstract
Debate on Martijn W Hesselink's article: Reconstituting the code of capital: could a progressive European code of private law help us reduce inequality and regain democratic control?

Keywords: European code; private law; social justice; freedom of contract

Law is a dry subject, especially civil law, whose abstraction has emptied it of its substance, i.e., of the link between the rules it contains and the flesh-and-blood human beings they are supposed to govern.

Martijn Hesselink's project to think of a European Code of Private Law imbued with a little more social justice is therefore certainly stimulating and timely. Mainstream lawyers, who see law as a pure technique that can be used at will, have long since abandoned the concept of justice, which they reproach with being loaded with ideology and subjectivity, or even theology, as if the words 'security', 'efficiency, 'competitiveness', 'attractiveness' or 'performance', which are constantly hammered into private law today, first and foremost by the European Union, were perfectly neutral and of an infallible truth that requires no demonstration. The new dogma according to which each individual has no other objective than to pursue his or her own interest is in fact historically dated.[1] Quoting Santayana's aphorism – 'those who do not remember the past are condemned to repeat it' – Albert Hirschman denounces the maintenance of the illusion, shared even by Keynes, that this unbridled utilitarianism brings peace to a society.[2] In reality, as stated in the 1919 Constitution of the International Labour Organisation included in the Treaty of Versailles, and as reaffirmed in the Philadelphia Declaration of 10 May 1944, there can be no lasting peace without social justice.[3] Jean Jaurès, the great figure of socialism in France, said this more radically in his speech of 25 July 1914, a few days before his assassination: 'le capitalisme

[1]See A O Hirschman, *The Passions and the Interests. Political Arguments for Capitalism before Its Triumph*, 1st ed. (Princeton University Press 1977).

[2]*Op. cit*., p 119. On this ideology, see Bernard Mandeville's famous 1714 text, *The Fable of the Bees*, which is supposed to demonstrate the maxim that 'private vices make public virtue'. On this fable, see D-R Dufour, *Baise ton prochain. Une histoire souterraine du capitalisme* (Actes sud 2019).

[3]See A Supiot, *L'esprit de Philadelphie. La justice sociale face au marché total* (Seuil 2010); by the same author, *La justice au travail* (Seuil: Libelle 2022), where he recalls that, in the famous passage in Montesquieu's Persian Letters on 'sweet commerce', Montesquieu was in fact saying that 'Si l'esprit de commerce unit les nations, il n'unit pas de même les particuliers. Nous voyons que dans les pays où l'on n'est affecté que de l'esprit de commerce, on trafique de toutes les actions humaines, et de toutes les vertus morales: les plus petites choses, celles que l'humanité demande, s'y font ou s'y donnent pour de l'argent' ('If the spirit of commerce unites nations, it does not likewise unite individuals. We see that in countries where only the spirit of commerce is present, all human actions and all moral virtues are trafficked: the smallest things, those which humanity demands, are done or given for money').

porte en lui la guerre comme la nuée porte l'orage' ('Capitalism carries war like the cloud carries the storm').

The project to make a 'progressive European Code of Private Law' is ambitious, and its realisation is not so easy. Several obstacles will have to be overcome. First, of course, it will be necessary to devise rules that introduce a little more justice into private relations (II). But this will not be enough. It will also be necessary to ensure that this Code is effective, that is, that it is not possible to escape its application. This implies setting some kind of metanorms or secondary rules understood, as in Hart, as rules of another order or type. Unlike Hart's secondary rules, however, these are more precisely rules to ensure that litigants cannot dispense with the application of this Code and these primary rules (III). The introduction of such a Code presupposes that the concept of freedom of contract is used properly (IV) and that the means are found to get out of the strong path dependence in which we find ourselves (V). First of all, however, it is necessary to clear up some ambiguities about the meaning of the word 'progressive' (I).

1. Some ambiguities about the word 'progressive'

The use of the epithet 'progressive' deserves some preliminary explanation.

One of the great difficulties of the project undertaken is that those who call themselves 'progressive' or 'liberal' (in the American sense of the term) are often the very ones who have largely deconstructed – or it would be more accurate to say: undertaken to break – many of the legal tools that limit the ravages of capitalism and commodification. In France, the philosopher Jean-Claude Michéa denounced this 'religion of progress'[4] which means that the 'left' has in fact abandoned the working classes by concentrating its demands on societal and identity-related issues. 'Is it not symptomatic', he asks ironically, 'that when "post-modern" left-wing intellectuals still use the word "worker" it is almost always to refer only to "sex workers"?'[5] As he has repeatedly pointed out, it is the same 'liberalism' in the French sense of the word (one could say the same 'capitalism'), accompanied by the same devastation, that is rampant in the economic and societal fields, reducing individuals to 'elementary particles' interchangeable,[6] dislocated and tossed about in a 'liquid society',[7] in short, to the 'man dreamed by the market'.[8]

Martijn Hesselink rightly mentions, among the new assets created by legislative capitalism, 'financial products (that don't exist outside the law) and intellectual property rights (that enclose and privatise what would otherwise be in the public domain)'. However, 'progressive' lawyers[9] have also pushed for the creation of new assets, especially the human body (in particular for human reproductive purposes), in the name of 'free' disposal of the body or 'private autonomy'.

[4]Michéa helped to make known in France the valuable work of C Lasch, who also proposed a history of the ideology of progress: see *The True and Only Heaven: Progress and Its Critics* (W. W. Norton & Company 1991). See already S Weil' criticism in *L'enracinement. Prélude à une déclaration des devoirs envers l'être humain*, 1949: 'la superstition moderne du progrès est un sous-produit du mensonge'; or 'le dogme du progrès déshonore le bien en en faisant une affaire de mode' ('The modern superstition of progress is a by-product of lies'; 'the dogma of progress dishonours the good by making it a matter of fashion').

[5]J-C Michéa, 'La gauche doit opérer un changement complet de paradigme' *Le Comptoir* (26 Feb 2016). He explains that 'sans les nouvelles pistes qu'ouvre sans cesse le libéralisme culturel [. . .], le marché ne pourrait pas s'emparer continuellement de toutes les activités humaines, y compris les plus intimes' ('without the new avenues constantly opened up by cultural liberalism [. . .], the market would not be able to continually take over all human activities, including the most intimate') ('Pas de société socialiste sans valeurs morales communes', interview, *L'humanité*, 15 March 2013).

[6]M Houellebecq, *Les particules élémentaires* (Flammarion 1998). By the same author, an equally enlightening title: *Extension du domaine de la lutte* (Éditions Maurice Nadeau 1994).

[7]Z Bauman, *Liquid Modernity* (Polity Press 2000); *Liquid Times. Living in an Age of Uncertainty* (Polity Press 2007).

[8]B Edelman, 'La Cour européenne des droits de l'homme et l'homme du marché' Recueil Dalloz (2011), 897.

[9]Not all. See in particular M J Sandel's valuable book, *What Money Can't Buy. The Moral Limits of Markets* (Farrar Straus & Giroux 2012). On the critique of commodification, see of course also M J Radin's famous book, *Contested Commodities* (Harvard University Press 1996).

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The extension of the market domain to human bodies is however the most destructive,[10] because it leads to the poor, who have nothing else to sell, ending up selling themselves, and we thus see the formation of what we have called elsewhere a 'reproductive proletariat'.[11] Marx had already said so, referring to the 'one who is bringing his own skin to market and has nothing to expect but – a tanning'.[12]

Martijn Hesselink also denounces 'private law colonialism', and he is right to point out that 'the last thing the world needs today, it would seem, is European missionaries going around preaching the merits of their own private law model', but is not that what we still do in other areas where we are sure we hold the truth, for example, on issues of identity, marriage or filiation? Are those he denounces who 'cry foul in the name of liberty' really, in these societal areas, those he calls 'ordo-liberal market-fundamentalists'?

We have tried to show elsewhere that, in all fields, liberty defined as the omnipotence given to personal autonomy, with a very often largely fictitious and abusive interpretation of consent, leads to 'voluntary servitude'[13] of the weakest who, renouncing the protection of the law, are reduced to accepting to put themselves at the disposal of the strongest.[14]

2. What content for a progressive code?

This semantic clarification done, the question that brings us together can be translated, in the light of Martijn Hesselink's article, as how private law could help us reduce inequality and regain democratic control. Regular references will be made to Katharina Pistor's stimulating book, *The Code of Capital*,[15] which has laid the foundations for a critique of current private law.

The great merit of Katharina Pistor's book is indeed to show that all areas of private law have strong political stakes, and that they can contribute to the establishment or perpetuation of inequalities. The analysis is salutary, because if in certain fields, in particular family law, personal opinions and ideologies are permanently tracked down and debunked, they are in reality no less prevalent in other disciplines, even if lawyers in contract law, liability law and even business law have been more successful in pretending to be axiologically neutral.

The recent reform of contract law in France by a legislation of 2016 has thus highlighted the ideological conflicts of the subject. One of the major achievements of this reform was the admission of what French lawyers call 'la théorie de l'imprévision', namely the power of the judge to revise the contract in the event of an unforeseen change in economic circumstances which results in the performance of the contract becoming excessively onerous for one of the parties. The parties are initially invited to renegotiate the contract themselves, but from now on, in the event of disagreement, the judge may ultimately, at the request of one of them, revise the contract himself, to the great displeasure of the supporters of a contractual 'laissez-faire' approach. At the time of the approbation of the text before parliament, certain professors of law (who are in reality rather business lawyers consulting for the strong parties) succeeded in convincing, under the pretext of a

[10]See J-D Rainhorn and S El Boudamoussi (dir.), *New Cannibal Markets. Globalization and Commodification of the Human Body* (Paris: Fondation Brochier/Maison des Sciences de l'Homme 2015).

[11]In M Fabre-Magnan, *La gestation pour autrui. Fictions et réalités* (Fayard 2013). In Rome, the *proletarius* was the poorest and lowest class of citizens, whose only wealth was their children (*proles*). St. Augustine thus stated that 'those who were engaged in bringing children into the world were proletarians' ('proletarii illi, qui eo quod proli gignendae vacabant'). However, things have become worse for the new proletarians, who must now alienate even their children to others. One can only hope that the current war in Ukraine, which shows warehouses lined up with the cradles of hundreds of babies who can no longer be delivered to those who ordered them, will open the eyes of 'progressive' lawyers a little.

[12]Last sentence of Chapter VI of Book I ('The Buying and Selling of Labour-Power'), Section 2, of *Capital* (original sentence: 'jemand, der seine eigne Haut zu Markt getragen und nun nichts andres zu erwarten hat als die – Gerberei').

[13]In the famous and classic words of Étienne de La Boétie, *Discours de la servitude volontaire*, published in 1576.

[14]This is the thesis of our book: M Fabre-Magnan. *L'institution de la liberté* (Presses Universitaires de France 2018).

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

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technical and neutral analysis, that this mechanism and therefore the judge's power of revision in the event of an unforeseen change in circumstances should not be applicable to obligations resulting from transactions in securities and financial contracts. In the same vein, they obtained that the prohibition of simultaneous representation of several parties in conflict of interest will not be applicable to legal persons. It does not need much explanation to see who benefits from these two exceptions and they are textbook cases to illustrate and confirm Katharina Pistor's thesis.

All major concepts and subjects of private law could be taken up in the light of the issues of social justice. Katharina Pistor's book focuses on some crucial aspects, in particular the creation of new types of assets, intellectual property or contracts. In all these areas, the legislator and judges could indeed give a completely different direction to the regulation in order to integrate social issues and also, as the two are often linked, environmental issues.[16] We must put an end to the idea that the proper functioning of the market is the only objective for private law. This is why, if we can agree with Martijn Hesselink's wish to create a European rather than a national code (the European scale is essential in order to get a grip on a number of activities and companies that have been allowed to grow excessively), and if we are, like him, perfectly convinced that 'rising inequality and the erosion of democracy are two sides of the same coin', this project would first require a profound structural reform of Europe, which has constantly constitutionalised – and thus removed from democratic political debate[17] – an ordo-liberal economic policy.

Many other branches of private law than those mentioned could play a major role in the development of a progressive code of private law.

Tort law thus plays a decisive role in the construction of an unequal society,[18] even if it always manages to fly under all the radars, including the particularly powerful and illuminating ones of Katharina Pistor and Martijn Hesselink. Numerous examples could be cited where the allocation of risks and the distribution of responsibilities create or perpetuate social injustices, for example, in production chains, and in all cases where fictitious companies make it possible to shield and exonerate the real culprits. Here too, 'progressive' lawyers contribute, in some areas, to this same movement of organising irresponsibility. For example, when they argue that, following the example of distant cultures, nature should be given a legal personality when, in reality, this technique leads to deresponsibilisation effects that are the opposite of the desired objective.[19] Similarly, proposals for the personification of robots will in fact have the effect of making it possible to socialise risks (the attribution of liability to robots can only be financed by the creation of compensation funds) when profits will at the same time undoubtedly be privatised by their designers or manufacturers.[20]

However, several avenues could be explored to build a tort law more oriented towards social justice. We can mention all the developments on corporate due diligence and corporate accountability, recently taken up at European level. Certainly, a lot of resistance will have to be overcome to strengthen this project. Thus, in French law, which has been at the forefront of the 'devoir de vigilance' issue, the ardour of the legislator[21] was cooled by the 'Conseil constitutionnel', which, in

[16]See already on this project, U Mattei and A Quarta, *The Turning Point in Private Law. Ecology, Technology and the Commons* (Elgar Studies in Legal Theory 2019).

[17]See the words of the German constitutionalist Dieter Grimm, according to whom the democratic deficit of the European Union 'finds its main source in the transformation of the European treaties into a constitution' ('Quand le juge dissout l'électeur' *Le Monde diplomatique* (July 2017)) 19; from the same author, *Europa ja – aber welches? Zur Verfassung der europäischen Demokratie* (Beck C. H. 2016).

[18]See S Veitch, *Law and Irresponsibility. On the Legitimation of Human Suffering* (Routledge-Cavendish 2007).

[19]On this thesis, see our article: 'Du bon usage de la personnalité juridique en matière de responsabilité écologique' *Revue Germinal* n° 2, *La République écologique* (May 2021) 155 and seq.

[20]Fortunately, the European Union seems to have abandoned the idea of personalising robots in this way and is apparently moving towards a system of liability for the persons who create, maintain or control the risk associated with the AI system, accompanied by an insurance obligation to cover these new risks. See the European Parliament resolution of 20 October 2020 with recommendations to the Commission on a civil liability regime for artificial intelligence (2020/2014 (INL)).

[21]Loi n° 2017-399 du 27 mars 2017 relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre.

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a largely questionable decision of 23 March 2017, emptied part of the reform of its scope so as not to increase too much the liability of companies. Nevertheless, a foundation stone has been laid on which to build new developments.

The European scale would also be important to design a company law in line with a progressive private law code. Here too, the movement is made in small steps and several techniques are conceivable. Thus, by a recent law of 22 May 2019 concerning the growth and transformation of companies, an Article 1835 was introduced into the French civil code to indicate that 'the company statutes may specify a "raison d'être", consisting of the principles with which the company equips itself and for the respect of which it intends to allocate means in the performance of its activity'.[22] This very interesting and fruitful notion of 'raison d'être' of companies makes it possible to display and ensure compliance with objectives that are not only financial and monetary but also ethical or environmental. The new Article 1833 resulting from the same law is even more explicit, stating that the company 'takes into consideration', in its management, 'the social and environmental issues of its activity'.[23] A judge could draw many legal consequences from this statement, because we know that in law an indicative is equivalent to an imperative.

It is clear that in all areas of private law, there is no lack of techniques to bring about a little social justice, but rather political will and power. Contrary to the Thatcherian motto, there *is* indeed an alternative.

3. How to make a progressive code effective?

To achieve the objective of reducing inequality, it is not enough to provide a code that contains protective and fair rules; it is also necessary that the parties cannot escape them and dispense with their application. Because in recent years, capitalism has thrived on mechanisms to get rid of the protections and limitations of law. It is against this that we must also fight, otherwise progressive rules that would have been provided for in a code would be rendered useless and meaningless.

Katharina Pistor rightly addresses the question of private international law, which increasingly allows the choice of law applicable to the dispute and thus permits to escape binding rules. The issue shows ideological struggles which often have as their terrain the two limits to party autonomy which are the public policy exception (which leads to the law chosen by the parties being disregarded when its content clashes with the fundamental values of the forum) and the mandatory rules mechanism (which allows certain rules which are intended to be applicable to international relations to be applied independently of any choice by the parties). Strong parties, often aided by lawyers' interpretations, try to limit these mechanisms as much as possible. European Union law tends to go in this direction, and thus to adopt once again an instrumental market logic,[24] in particular by subjecting the public policy exception to restrictive conditions; the Court of Justice of the European Union has, for example, recognised its competence to control to a certain extent this concept which was supposed to be specific to each Member State.[25]

In the same vein, more and more disputes are escaping state rules and jurisdictions through arbitration. Katharina Pistor explains this point which, she recalls, has given rise to major battles

[22]'Les statuts peuvent préciser une raison d'être, constituée des principes dont la société se dote et pour le respect desquels elle entend affecter des moyens dans la réalisation de son activité'.

[23]'La société est gérée dans son intérêt social, en prenant en considération les enjeux sociaux et environnementaux de son activité'.

[24]See in this sense T Marzal, 'La cosmologie juridique de la Cour de justice de l'Union européenne illuminée par le droit international privé (de l'utilité nouvelle des notions d'ordre public et lois de police)' tome 58, *Archives de philosophie du droit*, , *L'ordre public* (2015) 267 and seq.

[25]CJCE, 28 mars 2000, aff. C-7/98, *Krombach c/ Banberski*: '23 Consequently, while it is not for the Court to define the content of the public policy of a Contracting State, it is none the less required to review the limits within which the courts of a Contracting State may have recourse to that concept for the purpose of refusing recognition to a judgment emanating from a court in another Contracting State'.

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in American law. The French legal system has been swept along by the same liberalisation movement,[26] even if there are still some pockets of resistance[27] and some attempts[28] to limit or control the use of arbitration. However, French law is increasingly favourable to private justice, including in domestic matters, where the legislator recently decided that arbitration clauses would no longer be null and void but simply unenforceable against the consumer ('inopposables'),[29] who now has the choice of whether or not to accept recourse to arbitration.[30] The general trend is thus that of an autoomisation of arbitration,[31] which is increasingly disengaged not only from domestic law but also from classical private international law.[32]

A final, more stealthy and even more perverse technique for evading the law, with the authorisation of the legislator itself, must be mentioned. French law is a good example of this possible drift. The recent 2016 reform certainly makes it one of the most protective European laws for the weaker party,[33] but it could find itself completely emptied and devoid of any scope. Indeed, the Report submitted to the President of the French Republic to accompany the text of the reform of the law of contracts of 10 February 2016 surreptitiously states that 'the rules contained in this text being default rules unless otherwise provided, the second paragraph specifies that the duty of good faith is a matter of public policy'.[34] This was to explain why, after a first paragraph of the new Article 1104 providing that 'contracts must be negotiated, formed and performed in good faith', a second paragraph explicitly states that 'this provision is a matter of public policy'. It is thus in a simple *obiter dictum* relating to an article on good faith that the rapporteur sets out this formula, which is surprising to say the least, according to which the whole reform of the law of contract is

[26]See J-B Racine, *Droit de l'arbitrage* (PUF), 'Thémis droit' (2016) 130 and seq.; J El Ahdab and D Mainguy, *Droit de l'arbitrage. Théorie et pratique* (LexisNexis, "Manuels" 2021) 258 and seq. On this liberal ideology, see Th Clay, 'L'arbitre, juge de l'économie mondiale' *Regards croisés sur l'économie* (La Découverte 2017) 141.

[27]Mainly consumer law and to some extent labour law, although some exceptions seem to be accepted now: arbitration agreements concluded after the termination of the employment contract are valid, as well as, it seems, those concluded in collective labour relations. See the above-mentioned book by J. El Ahdab and D. Mainguy, p 267 and seq.

[28]See, for example, in international arbitration, a recent *PWC* decision of the First Civil Chamber of the *Cour de Cassation* of 30 September 2020 (n° 18–19.241), which attempts to strengthen consumer protection by deciding, contrary to the classical principle of French arbitration law according to which only the arbitrator is the judge of his or her jurisdiction (the so-called 'competence-competence' principle), that state judges remain competent to assess whether the arbitration clause does not deprive the consumer of his or her right to simple and immediate access to the judge guaranteed by European law. The judgement also approves the judges of the Court of Appeal for having considered that the arbitration clause was unfair insofar as it was not shown that this standardised clause had been individually negotiated.

[29]New Art 2061 of the civil code resulting from a law of 18 November 2016: 'Lorsque l'une des parties n'a pas contracté dans le cadre de son activité professionnelle, la clause ne peut lui être opposée' ('Where one of the parties has not contracted in the context of his professional activity, the clause may not be set up against him/her').

[30]The *Cour de Cassation* had already ruled in favour of the simple unenforceability of the arbitration clause for employees: see Social Chamber of the *Cour de Cassation*, 30 November 2011, n° 11–12.905, and n° 11–12.906.

[31]On this movement, see Th Clay and Ph Pinsolle, 'General Introduction' in *The French International Arbitration Law Reports 1963-2007* (with Th Voisin), JurisNet (2014), republished in French: 'De l'autonomie de la convention d'arbitrage à l'autonomie de la sentence arbitrale' *Journal du droit international, LexisNexis* (2015) 13 and seq.

[32]See L Larribère, *La réglementation de la convention d'arbitrage international: étude critique et comparative en droits français et américain*, to be published by the LGDJ, 'Bibliothèque de droit privé', 2022, which shows that, in a way, the arbitrator in the United States is more constrained than the arbitrator in France, insofar as the arbitration agreement is, in American law, a contract like any other and is therefore subject to judicial review of the validity of this agreement and its applicability to the dispute; in French law, on the other hand, the courts are prohibited from judging ex ante the validity of the arbitration agreement, which in his view can only be explained by the recognition of an arbitral legal order (§204 and seq), as a part of the French doctrine has been defending for a long time: see E Gaillard, *Aspects philosophiques du droit de l'arbitrage international* Martinus Nijhoff, "Académie de Droit international de La Haye" (2008).

[33]One could cite, for example, the considerable extension of the notion of duress by the recognition of an abuse of dependence (not only economic but also psychological or emotional) which leads a party to obtain an excessive advantage, a new defect of consent which would be very valuable in labour relations: see M Fabre-Magnan and P Lokiec, 'Le vice de violence en droit du travail' *Recueil Dalloz* (2022), chron., 78–85.

[34]'La présente ordonnance étant supplétive de volonté sauf disposition contraire, le deuxième alinéa précise que le devoir de bonne foi est une disposition d'ordre public'.

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made of default rules 'unless otherwise provided'. In other words, the newly reformed contract law would only be applicable if the parties decide that it should be. Otherwise, they would be free to change all the rules they wish as long as they agree on this point. It is clear that any progressive rules in the Code are deleted with a stroke of the pen, since the strong parties will be able to dispense with them by a simple mention in their contract, which is indeed becoming more and more frequent in practice.

Formally, this report has no legal value, and one can hope to be able to rely on the French judges not to consider themselves bound by this *obiter dictum* and to intervene if justice requires it. This is what they have done on other occasions. Thus, in a famous case *Camaieu International*,[35] several companies had concluded a transactional agreement under the terms of which the company Camaieu International undertook, in particular, 'to refrain from copying the products marketed by *Créations Nelson*, under the brand name *Comptoir des Cotonniers* or any other brand that it markets', expressly specifying 'that the undertaking referred to in the preceding paragraph constitutes an exclusively moral undertaking, any possible breach of which cannot be considered as a failure to comply with the terms of this protocol'. An English or American judge would undoubtedly have refused to hear a dispute over this contract, and therefore to make it binding, taking seriously the express gentleman's agreement clause it contained. On the contrary, the French *Cour de Cassation* stated that 'by undertaking, albeit morally, "not to copy" the products marketed by *Créations Nelson*, *Camaieu International* had expressed the unequivocal and deliberate will to bind itself to the competing company; that the Court of Appeal [. . .] therefore deduced exactly that this clause was binding on the interested party and that it could be legally enforced against it'. Therefore, if the party who is the victim of the breach regrets his renunciation and finally needs the assistance of the judge, the latter will agree to intervene to his or her rescue and grant him or her the protection of the law. Katharina Pistor would perhaps rather say that this example confirms her thesis that the judge is the guarantor of the only thing that counts for the 'masters of the code', that is, to force the execution of contracts under all circumstances.

In any event, the general development described above undoubtedly satisfies the 'masters of the code', because it effectively gives them on a platter what they would never have dared to ask for: namely, that the law guarantees them the binding force of the contract, which is otherwise governed by the rules they want, when they want and where they want.

It seems to us, however, that the rule *Pacta sunt servanda* is not unambiguously on the side of the strong parties. If this is sometimes the case, it is because erroneous and even perverse interpretations of freedom of contract have been allowed to flourish, which ties in with our opening remarks on the notion of progress and the troubled role played by 'progressives' and 'liberals'.

4. On the proper use of freedom of contract

Undoubtedly, strong parties need the support of the legal system to validate and enforce their agreements. In this sense, Katharina Pistor is right when she points out that 'a good start' for a fairer Code 'would be the principle that purely speculative contracts, or wagers, are not enforceable in a court of law'.[36] French law illustrates her thesis. In the civil code of 1804 (date of promulgation of this code), there is an Article 1965 which states that 'the law grants no action for a gambling debt or for the payment of a bet'. In other words, this type of debt is not enforceable before the courts. However, some lawyers succeeded in obtaining from the legislator, in a statute of 8 January 2009, that it be expressly specified that 'no one may, in order to avoid obligations resulting from financial contracts, rely on Article 1965 of the civil code, even if these operations are resolved by the payment of a simple difference'.[37] It meant recognising that this type of operation

[35]Commercial Chamber of the *Cour de Cassation*, 23 January 2007, n° 05–13.189.

[36]K Pistor, 227.

[37]Article L. 211-35 of the Monetary and Financial Code.

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is indeed of the same nature as a game or a bet! But it also meant admitting that the legal system was nevertheless willing, by way of exception, to lend a hand.

More generally, the history of freedom of contract shows the role it played, throughout the Lochner era, in limiting the first social laws. Its current revival is explained by the contemporary deviation of capitalism and its intellectual victory. It would make it necessary to update Patrick Atiyah's famous book on 'The Rise and Fall of Freedom of Contract'[38] the sequel to which should be entitled 'And again the rise'.

The strong parties are thus left free to determine not only the exchange or transaction that they have in mind but also to set the rules and standards to which this contract will be subject. They are thus left to draw up contracts without law or, more precisely, contracts subject to a law that they themselves have forged.[39]

But if this is the case, it is because we have forgotten that, as Lacordaire said in words that are now largely repressed, 'entre le fort et le faible, entre le riche et le pauvre, entre le maître et le serviteur, c'est la liberté qui opprime, et la loi qui affranchit'[40] ('between the strong and the weak, between the rich and the poor, between the master and the servant, it is liberty that oppresses, and the law that sets free'). We have forgotten that liberty is only valid within a framework that protects and guarantees it, and that it is not the freedom to get rid of this framework as well, on pain of leading to a reversal of this liberty.[41]

If one reads correctly the most famous article of the French civil code relating to contracts (now Article 1103), it is clearly stated: 'Contracts which are lawfully formed have the binding force of legislation for those who have made them' ('Les contrats légalement formés tiennent lieu de loi à ceux qui les ont faits'). Only contracts that have been 'lawfully' formed, that is, contracts that respect the rules and limits laid down by law, can have the force of 'legislation' for the parties. Contractual justice only makes sense in this context. When Fouillée states, in his famous formula, 'Qui dit contractuel dit juste'[42] ('Who says contractual says fair'), he is not referring to a contract disconnected from any law, but to a contractual freedom inserted in a normative framework guided by a justice of solidarity.[43]

Binding force can and should therefore only apply to a contract whose formation process and content comply with legal requirements.

In particular, only contracts to which the parties have genuinely consented should be binding, which is not the case where one of the parties was in such a state of dependence that his or her agreement cannot be considered to have been given in full autonomy. This is to some extent what German law also says in other words when it proposes a substantial and not merely formal interpretation of the principle of freedom of contract: thus, the famous *Handelsvertreter* (7 February 1990) and *Bürgschaft* (19 October 1993) judgements in which the judges considered that autonomy of will presupposes a certain capacity and a minimum of bargaining power, which are therefore integrated into a renewed and enriched concept of

[38]P S Atiyah, *The Rise and Fall of Freedom of Contract* (Oxford University Press 1979).

[39]On this point, see R Libchaber, *Le contrat au XXI^e siècle. L'ingénierie juridique et les nouveaux contrats d'affaires* (LGDJ 2020).

[40]52nd Conference of Notre-Dame of 16 April 1848 entitled 'Du double travail de l'homme' and included in Volume IV of the Conferences of Notre-Dame de Paris, R P Henri-Dominique, *Lacordaire, Poussielgue frères* 9 (Paris 1872), T. III, years 1846–1848, 494.

[41]This is what we have tried to show in M Fabre-Magnan *L'institution de la liberté* (Presses Universitaires de France 2018).

[42]A Fouillée, *La science sociale contemporaine* (Paris 1880) 410.

[43]See in this sense, J-F Spitz, "Qui dit contractuel dit juste': quelques remarques sur une formule d'Alfred Fouillée' *Revue trimestrielle de droit civil* (2007) 281 and seq, who shows that 'à la fin du 19e siècle, Alfred Fouillée avait clairement perçu cette idée que la justice du contexte est la condition du caractère authentiquement contractuel des accords qui y sont passés' ('At the end of the 19th century, Alfred Fouillée had clearly perceived this idea that the justice of the context is the condition of the authentic contractual character of the agreements that are made there'). *Adde*, in the same sense, A Supiot, *La force d'une idée, suivi de L'idée de justice sociale d'Alfred Fouillée* (Les Liens qui Libèrent 2019), who shows, at 27, that the meaning of the formula is not to oppose all state intervention.

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freedom of contract.[44] The consents we are satisfied with today are often mere masquerades of consent, especially when they are reduced to a 'double click' accompanied by documents that are materially impossible to read.

The interpretative drifts have also consisted in forgetting that the contract is fundamentally a bond, based on trust and reliance between the parties, and not an anonymous and disembodied asset or property that can circulate freely: the 2008 subprime crisis was a momentary reminder of this, but the lesson was quickly forgotten. Smart contracts are based on the same ideology imbued with the dream of getting rid of human beings in order to design an automatic mechanism, but this development once again requires getting rid of the legal regime of contract performance, which in turn justifies and excuses certain non-performance in the name of values higher than the free circulation of goods and capital.

All this is to say that the rule *Pacta sunt servanda*, especially with this formulation, the history of which we know,[45] should not be thrown out with the bathwater. The binding force of the contract also protects weaker parties and is in line with social justice. It is, for example, a response to the practice of the efficient breach of contract, advocated in particular by the 'pope' of neo-liberal and utilitarian analysis, Richard Posner, who invites us precisely to dispense with it and 'never blame a contract breaker'.[46] The recent evolution of labour law in France is another example: Employers, who also see the binding force of contracts as an obstacle to flexibility, have demanded and obtained the right to increasingly disengage from individual employment contracts, notably through collective agreements, when previously it was only possible to derogate from these contracts in a way that was more favourable to the employee (what was known as the 'principle of favour' and which has now been reduced to rubble). Most importantly, a society cannot be viable without trust, which implies that promises are kept.[47]

5. Getting out the path dependence

Martijn Hesselink recalls Katharina Pistor's observation that the 'current code of capital' is 'chiefly the common law of the State of New York and England'. If, as he adds, 'done right, such an [a progressist] 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', this presupposes maintaining a legal cultural diversity and starting by not conducting all discussions in English. Examples could be multiplied of the collapse to which the 'all-English' approach leads. For example, in French there are two words for 'regulation': '*régulation*' or '*réglementation*', and the two have neither the same symbolism nor the same definition, the notion of '*réglementation*' marking precisely more the idea of a binding and protective framework from which the parties cannot get rid of. Similarly, the English formulation of 'rule of law' loses the reference to the state that is present in the German concept of '*Rechtsstaat*' or in the French equivalent of '*État de droit*'. Yet this reference is once again a reminder of the drift represented by the contractualisation and

[44]See O O Cherednychenko, *Fundamental Rights, Contract Law and the Protection of the Weaker Party: A Comparative Analysis of the Constitutionalisation of Contract Law, with Emphasis on Risky Financial Transactions*, *Sellier* (European Law Publishers 2007); from the same author, 'Fundamental Freedoms, Fundamental Rights, and the Many Faces of Freedom of Contract in the EU', in M Andenas, T Bekkedal, and L Pantaleo (Eds), *The Reach of Free Movement* (T.M.C. Asser Press 2017) 273 and seq.; Ch Mak, *Fundamental Rights in European Contract Law: A Comparison of the Impact of Fundamental Rights on Contractual Relationships in Germany, the Netherlands, Italy and England* (Kluwer Law International 2008).

[45]See F Spies, *De l'observation des simples conventions en droit canonique* (Sirey 1928), which cites as the origin of the maxim the canon Antigonus of the Decretals of Gregory IX issued in 348: 'Pax servetur, pacta custodiantur'; J Barmann, 'Pacta sunt servanda. Considérations sur l'histoire du contrat consensual' *Revue internationale de droit comparé* (1961) 18 and seq.

[46]R Posner, 'Let us never blame a contract breaker', 107 Michigan Law Review (2008–2009) 1349.

[47]For more developments, see our book: *Droit des obligations*, tome 1, *Contrat et engagement unilatéral* (6th ed, Presses Universitaires de France,. 2021) §1115. On this same idea, see S V Shiffrin, 'The Divergence of Contract and Promise' 120, n° 3 (1 Jan 2007) Harvard Law Review, 708 and seq.

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privatisation of the law which Big Tech have seized upon. It marks a territorial anchorage that is a limit to domination and hegemony.[48]

A progressive European private law code should be inspired by various European traditions, but there is a steep slope leading to a generalised standardisation of Europe, where attempts to maintain some diversity are immediately countered.

France is again an example of the forces at work in this direction. Traditionally, French law is undoubtedly one of the most protective of weaker parties. It tries, in many areas, to maintain a certain cultural exception, for example, still on the maintenance of an author's moral right in the face of the copyright of American law. Foreigners often blame French arrogance for what is an (increasingly desperate) attempt to fight against the standardisation of the world by the market. The great English historian Perry Anderson, a keen observer of French society, regrets the gradual disappearance of the influence of French culture, and the time when the French irritated others, while today they are more likely to bore them, because of their consensual blandness and their intellectual rallying to the established order of the globalised world.[49] Unfortunately, the observation is correct. Faced with pressure from the market, and in order to no longer be the bad pupil in the World Bank's 'Doing business' reports, French law is gradually giving way[50] and joining the 'global race'[51] to the bottom that it is however not very desirable to win.

We may therefore be a little pessimistic, given that current society is so impregnated, particularly at the European level, with an economic and scientific dogma. It is therefore to be feared that the paths towards a progressive European code of private law will remain heavily constrained by a path dependency.

However, it is probably better to be the pessimist who thinks that things cannot be worse than they are now, when the optimist would tend to say that they could be.

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[48]See the famous controversy between Montesquieu and Condorcet, recalled by A Supiot in Montesquieu, *Lettres persanes* (Points classiques 2021), Letter 2, at 18 and seq. From the same author, 'L'inscription territoriale des lois' *Esprit* (November 2008) 151 and seq.; and for the English version: 'The territorial Inscription of Laws' in *Soziologische Jurisprudenz*, *Festschrifte für Gunther Teubner* (Berlin: De Gruyter 2009) 375 and seq.

[49]See P Anderson, *La pensée tiède. Un regard critique sur la culture française* (Seuil 2005). In English, his essay in the September 2004 *London Review of Books* (available on the Internet) was even more cruelly entitled "dégringolade" (in French in the text . . .).

[50]However, French law is still at a turning point, and we can hope for an upturn, which will also depend on the attitude of judges which, in many areas, have almost as much power as in the common law countries. See, for the law of contract, P Gaiardo, *Les théories objective et subjective du contrat. Étude critique et comparative (droits français et américain)*, LGDJ, "Bibliothèque de droit privé", 2020.

[51]As the British Prime Minister David Cameron expressly said, notably in his statement to his 2013 party conference: 'We are in a global race today'.

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