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

A societal private law

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Abstract

This comment discusses on how legal change can originate from society and the private sphere. It argues that Hesselink's perspective is too strongly oriented on public sphere and ignores the societal sphere including its transformative potential. The comment centres the concept of private law institutions and institutional change that is a core element in both Katharina Pistor's diagnosis on coding of capital in law and Martijn Hesselink's related proposal to reform private law institutions through a comprehensive principle-oriented code. The comment first introduces the idea of legal institutionalism in Pistor and Hesselink to then add to it an additional perspective from a new institutional theory that identifies the transformative potential within the social institutions themselves. It is then argued that the law, rather than being in need of radical change, needs to be radical in being responsive to the societal institutions. The contribution concludes by outlining on the basis of three examples – contract, tort and private international law – how societally responsive private law institutions can look like.

Keywords: private law; legal institutions; new institutionalism; collective self-governance; code of capital

Katharina Pistor's work is powerful and persuasive. With its focus on the centrality of the law behind economic institutions,[1] it is an open invitation to us lawyers to think deeply our role in producing wealth and inequality and, on that basis, discuss how to re-imagine our role to reduce such social inequality. If capital is coded in law, then it is only a natural consequence that capital needs re-coding through law to then change reality. Pistor herself has remained more sceptical about a quick and radical change and accepts, in the Code of Capital as in many of her earlier works, that institutional change is a time-consuming and incremental process.[2] However, other supporting receptions in the legal literature have taken a more radical approach and advocate for fundamental change of the way in which we think private law. Hesselink's suggestion is clearly a contribution to that strand; it might even be one of the most radical ones in advocating for change through democratic deliberation. His bold and seemingly simple proposal to develop a progressive European Union (EU) code is an idea that, in its almost utopian ambition and

[1]Most explicitly on this legal centrality in Pistor's book M Goldoni, 'On the Constitutive Performativity of the Law of Capital' 30 (2021) Social and Legal Studies 291.

[2]This has already become clear from Pistor's earlier writings K Pistor, 'Contesting Property Rights: Towards an Integrated Theory of Institutional and System Change' 11 (2011) Global Jurist Frontiers 1. Pistor relies on related theories of institutional change in political economies, amongst others W Streeck and K Thelen, 'Introduction: Institutional Change in Advanced Political Economies' in W Streeck and K Thelen (eds), *Beyond Continuity: Institutional Change in Advanced Political Economies* (Oxford University Press 2005), 1–39.

orientation, is one that is hard to disagree with. Who would not be in favour of fostering justice and democracy, and all of this through the law? We lawyers – identified by Pistor as the 'masters of the code' working on the tools that lead to injustice without having any democratic legitimation – can finally do something good. We, as citizens and not lawyers, can fight for justice and democracy; we should exchange arguments on the best possible way forward on handling global capital, develop related concepts and principles, and, take an inclusive stance rather than being the experts that conceal their normative choices in technical language. And all of this can, if we follow Hesselink, be achieved by means of one central legal document, a European private law code, that has an explicitly materialised programme oriented on justice. Its aim is to re-constitute the central private law institutions – or 'modules' as Hesselink calls them relying on Pistor's terminology – with a view to serving the many in an equal manner, not the few who are wealthy with the resources to hire the best lawyers.

Despite the alluring nature of this proposal, my comment is to contribute to some disillusion. In essence, my aim is to introduce an opposing perspective to the idea of tasking the citizens with deliberation in public sphere with the aim of introducing an all-encompassing legal code. My suggestion is that we need to pay more attention to the potential of the private and societal sphere, not only in terms of criticising its reliance on the law to code capital, but also how society can bring about societal change. In short, I argue that, rather than working towards a top-down law-organised change[3] that relies on the state (here EU) institutions, more attention should be given to the societal forces and their potential to change law from within. My comment thus discusses the possibilities to initiate change from society bottom-up and from within the existing private law institutions (or modules, as Hesselink calls them throughout his article). Rather than relying only and mainly on the formalised process and participatory logics of politics, we need to understand the importance of political processes in society that private law can and should constitute and institute.[4] My argument unfolds in three steps. My starting point is the concept of social institutions, both in their social and (private) legal meaning. For this purpose, I will first engage with the idea of legal institutionalism that underlies much of Pistor's work and that serves as the basis for Hesselink's materialised re-constitution of private law through codification (Section 1). I then continue (Section 2) by introducing a contrasting and arguably more radical perspective on the concept of institutions based on new institutional theory in political and social theory. In this context, I also integrate Pistor's earlier work on institutions and institutional change that, slightly different to the elaborations in the Code of Capital, recognises more strongly the fluidity and political nature of institutions. Accordingly, institutions are, despite being stable complexes in society to uphold societal expectations, internally much more dynamic and made of political conflict. I also relate this understanding of institutions to the field of private law and its role in participating in institutions. In the last section, I will make my abstract and conceptual analysis on institutions, institutional change and transformation tangible by relating it to concrete examples stemming from the field of contract law, tort law and private international law. My central argument here

[3]I qualify Hesselink's proposal as top-down throughout this comment because of the focus in his proposal on one legal document that should govern the societal sphere and his reliance on the political and state institutions for self-governance; I contrast this to my own bottom-up approach that relies on the forces within society and their role in bringing about institutional change through the existing private law (and economic) institutions. Hesselink might disagree with a qualification of his proposal as top-down because he sees it originating in the public deliberation of citizens and their collective self-determination, i.e., also bottom-up. My qualification of Hesselink as top-down is, however, due to the dependence on the citizen's self-determination on the state and the state institutions to produce the sphere of deliberation and enforce the progressive code that he envisages; it is in this aspect that I see his proposal as a top-down-induced proposal that is state-centric whereas my bottom-up perspective is society-centric.

[4]In this regard, I am also relying to a distinction between politics (as a system related to the state) and the political (as the inherent political structure within society) that I developed in earlier works borrowing from the theory of O Marchart, *Post-Foundational Political Thought: Political Difference in Nancy, Lefort, Badiou and Laclau* (Edinburgh University Press 2007).

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is that instead of imposing values onto the private sphere through general principles, private law arguably needs to be designed to remain responsive to the conflicting dynamics within society. We may not need a legal code that is developed from scratch to transform our legal modules, but work with the legal rules we have to re-orient them towards an institutionally responsive private law.[5] Only such an approach is appropriate to recognise the societal embedding of law.

1. Legal institutionalism in Pistor's Code of Capital and Hesselink's Progressive code

As Hesselink rightly notes, Pistor's work on the Code of Capital builds centrally on her earlier works on legal institutionalism.[6] As this idea is at the heart of her book and it is significantly relied upon by Hesselink for his own ideas on re-constitution,[7] it is worth disentangling its foundational concepts. Legal institutionalism, as has been outlined in earlier writings, is an approach that treats institutions as the constitutive infrastructure of social systems.[8] By understanding law as a constitutive element for institutions in the capitalist (economic) system, Pistor's work is central in emphasising the legal dimension to such institutional thinking.[9] The central economic institutions are stabilised by law and enforced by the state institutions. This means that property, contracts, corporation and localisation of disputes as bundles of expectations in the economic systems would not be stable if not constituted and enforced by legal means.

However, the problem, as identified by Pistor in the Code of Capital, is not so much the fact *that* law stabilises economic institutions through state enforcement, but rather *how* it does so. With its formalism and indeterminacy, the law remains prima facie indifferent to the underlying social conflicts and injustices, as Hesselink calls it. And even worse, the formal nature of the law is prone to making the law a willing instrument in the hands of those that have economic power, privilege and resources. In a nutshell, it is capital holders that can afford hiring the best lawyers for making use of the law's indeterminacy. That allows them to make the formal rules serve their interests and creatively bend the law to suit their needs.[10] This results in what Pistor has framed very pointedly in a comment in a book symposium: '. . . these structures operate quasi-autonomously from societies. They serve primarily participants in global trade and finance who rely on them and trust them as long societies do not interfere with them. (. . .) law has clearly been utilized to serve private, rather than social goals, private, not national, capital formation.'[11]

Hesselink clearly 'buys-in'[12] to this understanding of private law institutions being modules for creating capital. He uses this description of the law to build his own proposal on re-constitution through a progressive code: '. . . if we want to fight social inequality, we will have to target the modules of the code of capital, i.e. the core doctrines of the main branches of general private law'.[13] And 'an EPL-code could radically transform the modules of the code of capital, and, in

[5]On this concept of an institutionally responsive private law D Wielsch, 'Contract Interpretation Regimes' 81 (2018) Modern Law Review 958 (institution-preserving and –generating); A Beckers and G Teubner, *Three Liability Regimes for Artificial Intelligence: Algorithmic Actants, Hybrids, Crowds* (Hart Publishing 2021) 14ff.

[6]Pistor 2011, n 2; S Deakin, D Gindis, G Hodgson, K Huang and K Pistor, 'Legal Institutionalism: Capitalism and the Constitutive Role of Law' 45 (2017) Journal of Comparative Economics 188.

[7]M W Hesselink, 'Reconstituting the Code of Capital: Could a Progressive European Code of Private Law Help us Reduce Inequality and Regain Democratic Control?' 1 (2) (2022) European Law Open 316–343.

[8]Pistor (n 2) 2f.

[9]Deakin, Gindis, Hodgson, Huang and Pistor (n 6) 189.

[10]See, also for this description of Pistor's work, S Picciotto, 'Private or Public?' 30 (2021) *Social and Legal Studies* 311, 315.

[11]K Pistor, 'Coding Capital: On the Power and Limits of (Private) Law: A Rejoinder' 30 (2021) Social and Legal Studies 317, 324.

[12]These words about needing to 'buy-in' to Pistor's description in order to be persuaded by his own work are Hesselink's own when presenting his proposal in the conference 'European Transnational Private Law', at the University of Helsinki, 16 September 2021.

[13]Hesselink (n 7) 320.

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doing so, allow the European public to take back democratic control and restore equality.'[14] It is formalism that needs to be eliminated and replaced by a true substantive/materialised understanding of the fundamental concepts of private law.[15]

From this concept of legal institutionalism, a particular understanding of the law and its central private law categories emerges. Private law and its central institutions are stable, formal and prone to being exploited by private power while, at the same time, only functioning because of the support by the state and the public. Hence, if all private law is public because it depends on state enforcement,[16] it is also the public (comprising, according to Hesselink, citizen's political agency) that can and, according to Hesselink, should regain control over its private law. Private law rules and principles should be subjected to the democratic process, so it is 'us' as the people – not 'they' as capital holders – who determine how private law is used and accordingly equipped with state enforcement.

2. New institutional theory: towards societal institutions

However, how would such a conclusion on democratisation and materialisation of private law change if we portray the private institutions that the law lends its enforcement power to differently? How would we view the role of the law if institutions are not per se stable and prone to serving a particularistic (capitalist) class, but also equally capable of embodying other societal interests? And what if we treat law as a participating factor in private institutions, not as its constitutive infrastructure?

In the Code of Capital, Pistor portrays private law institutions as mainly serving capital holders with only marginal potential for contestation.[17] However, in earlier works, Pistor has recognised much more prominently the dynamic nature of institutions. She defines institutions as 'the space for contesting the scope of rights and responsibilities of stakeholders with regards to an asset, entity or relation in an attempt to generate third party support.'[18] Change of entire systems (such as the capitalist economic system) must be driven by institutional change and such institutional change is heavily fostered by (human) agency and societal forces in their attempt to contest the system's legitimacy within the institutions.[19] And from this follows that the claim for collective self-determination and self-governance is not one that is exclusively applied to participation in the public sphere; to the contrary, it should equally be enabled in the various private institutions that govern the societal sphere.[20]

A suitable sophisticated theoretical account on institutions that embraces such a view but takes it even further is recently introduced by the Italian philosopher Roberto Esposito. His theory rests on three fundamental characteristics of institutions and the role of the law: Firstly, rather being intrinsically connected to the state and formal law, institutions are much more strongly associated with society and societal forces. Institutions are not dependent on the state, but they can also become an ordering mechanism that extends to all organised societal forces[21]: 'institutionalism

[14]Ibid., 324.

[15]Ibid., 323.

[16]Very explicitly on the latter element, Pistor 2021 (n 11) 319: 'I wish to reframe the conventional distinction between private and public law. All law is at its core public. Even contract law, because the choice of couching private arrangements in legal terms implicitly invokes the possibility of using the state's coercive powers to enforce it.'

[17]K Pistor, *The Code of Capital: How the Law Creates Wealth and Inequality* (Princeton University Press 2019) 23f contains some elaborations about contestation of land rights by indigenous groups.

[18]Pistor (n 2) 2.

[19]Ibid., 11. Pistor identifies multinational corporations, self-regulating transnational organisations as well as NGOs as such cosmopolitan agents of change, 12.

[20]See, on this point, F Cafaggi and K Pistor, 'Regulatory Capabilities: A Normative Framework for Assessing the Distributional Effects of Regulation' 9 (2015) Regulation and Governance 95.

[21]R Esposito, *Institution und Biopolitik* (Diaphanes 2022) 41 (own translation).

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(. . .) relies on a paradigm that is open to the pressures of society and to the exigencies of history, it has to respond to the urgencies of necessity and to the needs of life.'[22]

Secondly, while being themselves stable bundles of expectations in society that cross system boundaries,[23] institutions in their internal configuration are not at all static. Instead, they are highly dynamic and conflictual. As Esposito has it: 'the institution was not born ex nihilo but always from something that was also already instituted, something to be preserved and innovated at the same time.'[24] From this follows that political conflicts, between preserving and innovating, are at the centre of institutions and they form, what Esposito qualifies the 'instituting praxis'.[25] Institutions never serve one interest 'for' or 'against' society; they are and should be viewed as a reflection of society including its most fundamental conflicts. The self-determination of society takes place within these conflicting institutions, within the interpretation of contracts, the allocation of property rights and the localisation of disputes.

Thirdly – and this leads to the role of law and lawyers – Esposito's account does not see the law as purely constitutive for such dynamic societal institutions, but as part of the institutions. The political conflicts within institutions *take place in legal form*: 'Never was the fight in and about law as open and uncertain as today. It [the law] can serve as legitimation of existing power relations or work towards their transformation. It can benefit privileged social blocks as much as the marginalised or poor.'[26] This also means that 'law evolves not simply on the basis of the tensions and conflicts inherent in society but is immanent to it. The law does not depend on a transcendental will of a sovereign but is completely identical with the instances and movements that cannot be reduced to established codes and laws.'[27] This suggests that rather than being in need of fundamental transformation, law constantly participates in transforming or preserving an institution in a particular way. Law can always choose a side in the conflict and hereby contribute to a particular direction of the 'instituting praxis'. More concretely, it can choose the side of capital holders or the side of those being detrimentally affected, the side of increasing wealth or the side of fostering equality.

This means that private law is not constitutive for the capitalist economic institutions but constantly participates in their making and validation. Private law validates (or questions) the institutions through each and every of its decision and thus can contribute to their change in each and every of its decisions. It also means that such institutions, rather than being stable and serving a particular interest group in society, must be understood as containing the seeds for moving in opposite directions. And it means – in very concrete terms – that the different areas of private law, private law 'modules', *are already* constituted in a manner that they may connect to the opposing sides. Private law rules can support the speculative markets in their attempt to code and increase capital as much as it can be the backbone of the social movements, and the individual victims, that oppose them. Miriam Saage-Maaß, a practising human rights lawyer, has brought up that point very clearly: 'legal systems have their own dynamics not immediately influenced by power, which creates spaces for dissent and resistance. Legal language allows for dissent as there is never only one reading of the law. Law itself is the result of struggles for hegemony and is therefore subject to constant change.' And as she concludes: 'If societal constellations were different, law would be different.'[28] A true materialised private law does thus not have to necessarily be a

[22]R Esposito, *Instituting Thought: Three Paradigms of Political Ontology* (Polity Press 2021) 13; Esposito (n 21) 89.
[23]N Luhmann, *Rechtssoziologie* (Rowohlt Taschenbuch Verlag 1972) 64ff.
[24]R Esposito, 'The Creative Force of Institutions' 115 (2022) *Cultural Critique* 143, 147.
[25]Esposito (n 22) 13.
[26]Esposito (n 21) 84 (own translation).
[27]Ibid., 42 (own translation).
[28]M Saage-Maaß, 'Between Utopia and Affirmation of the Status Quo, Voelkerrechtsblog', 20 June 2020, https://voelkerrechtsblog.org/between-utopia-and-affirmation-of-the-status-quo/.

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re-constitution from above, but it can take the form of an emancipatory project that builds upon societal forces and takes the already engrained material institutional dimension within the reading of the existing legal rules seriously.[29]

3. An alternative way of re-constituting private law: responsiveness to social institutions

A private law that is responsive to these forces in social institutions would then see the development of private law evolve in a fundamentally different way compared to what Hesselink proposes. It is not entirely new private law principles that we need to deliberate upon as citizens, but a recognition of our role as citizens in a society that can use the law in the public interest. In order to not remain abstract and make my argument tangible, I will conclude my comment by outlining, on the basis of three examples that are brought up by Hesselink in his text, the differences between his vision of a progressive code and an institutionally responsive private law as outlined here. I will focus on the institutions of contract, tort and the specific role of choice in private international law.

A. Contract

Both Pistor, in the Code of Capital, and Hesselink portray the contract as an institution that has its basis in a market transaction and is supported accordingly by the law through the means of state enforcement.[30] By means of widely ignoring the possible structural imbalance between the contracting parties and the content of the contract apart from very few exceptions,[31] contract law has become a mere constitutive infrastructure on which the capital holders can rely to code new assets. The solution that Hesselink proposes is to re-think contract law and open for public deliberation the purpose and conditions of contract formation rather than ex ante relying on the idea of private autonomy.[32] His idea is to engrain into contract law a materialist understanding of private autonomy that restricts what contracts can be entered into and how contracts are formed.[33]

However, contract scholars have already shown that the very concept of autonomy has been important for the contract to evolve as an important institution in many societal contexts. Contracts formed by private parties can indeed form the legal basis for a market transaction, the purpose of which is to increase wealth, but it can equally serve as an instrument of liberation and empowerment, as a mechanism that truly governs the social relations. Think of the famous theoretical works on relational contracts,[34] 'contracting worlds'[35], or contract governance,[36] that all remind us of the many social dimensions of contracting that the law can foster. The formalism of contract law thus enables not only injustice, but also cooperation and social relations. We also find very concrete examples of contracting outside market transactions, an astute example being

[29]It is in this societal institutional understanding where neo-marxist theories on the law (S Buckel, *Subjectivation and Cohesion: Towards the Reconstruction of a Materialist Theory of Law* (Brill 2020) and positivist institutionalist theories of law, (for example, N MacCormick, *Institutions of Law: An Essay in Legal Theory* (Oxford University Press 2007)) could have a common ground. That argument requires further elaboration, however.

[30]Pistor (n 17) 209ff; Hesselink (n 7).

[31]Hesselink (n 7) mentions economic duress, unconscionability, unfair exploitation.

[32]Ibid., 325: 'private law will have to roll back the excessive expansion of private autonomy, and especially redefine it in much more substantive terms.'

[33]Ibid.

[34]I R MacNeil, 'Contracts: Adjustment of Long-Term Economic Relations under Classical, Neoclassical and Relational Contract Law' 72 (1978) Northwestern University Law Review 854.

[35]G Teubner, 'Contracting Worlds: The Many Autonomies of Private Law' 9 (2000) Social and Legal Studies 399.

[36]S Grundmann, F Möslein and K Riesenhuber, 'Contract Governance: Dimensions in Law and Interdisciplinary Research' in S Grundmann, F Möslein and K Riesenhuber (eds), *Contract Governance: Dimensions in Law and Interdisciplinary Research* (Cambridge University Press 2015).

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the analysis of contract in Laura Knöpfel's anthropological studies on the relation between corporate mining companies and local communities.[37] Far from being only an instrument of domination and commodification on the side of companies, the relations between companies and its neighbouring communities, read through a lens of private contracts, can lead to a far-reaching corporate responsibility and installment of community rights that contract law, precisely because of its formalism, can equally choose to enforce.[38] On this basis, it becomes clear that the contract, with all its formalities, is a social institution that different, partly even opposing, social contexts rely upon. It is an instrument used by capital holders, a basis for a market transaction, but equally an instrument that communities can choose to govern relations with opposing parties and where contractual rights can improve their position and lead to empowerment. And because contract law constantly navigates in the enforcement process between supporting the parties' intention and the social context of contract,[39] contract law may support such different readings, even if not intended or foreseen by the parties or even against their autonomy. The instruments in contract law, in particular the rules on contract interpretation[40] and third-party considerations,[41] already provide for such an opportunity. It may, therefore, not be – as Hesselink suggests – necessary to reconstitute our private law entirely, but instead, to make visible how the interpretation (and use or non-use) of specific doctrines by courts in a decision to enforce a contract is the taking of a stance in a political conflict on when and how contract can be used.

B. Tort

To add to these rather general considerations in the field of contracts and party autonomy, let me add the example of tort. This provides more room to engage in concrete cases and practical examples. Hesselink recognises tort as a central private law module and refers to it primarily in the context of supporting – through sanctions – the institution of (intellectual) property.[42] Although he does not make it clear throughout the text, it is likely that the rules on tort would also qualify as one of the areas that should be transformed and integrated in a principled manner into the progressive private law code.

However, tort and wrongful behaviour not only fulfil the function of supporting property rights through sanctions for illegal interference, but also can serve as an instrument of empowerment. Most notably, tort has become a private law module that has taken on the task to re-interpret, gradually, but steadily, one of the most stable and capital-leaning private law rules: The company law principles of separate legal personality and limited liability.[43] And it has subsequently also become an instrument on the side of society that has allowed it to frame its core political issues in legal form.

Based on so-called strategic litigation cases, human rights lawyers have found – rather successfully – avenues in which to pierce the corporate veil through tort law and that, a bit ironically, precisely in the jurisdictions that Pistor and Hesselink have emphasised as leaning strongly towards capital holders. In a series of rulings,[44] the United Kingdom (UK) courts have recognised

[37]L Knöpfel, 'An Anthropological Reimagining of Contract in Global Value Chains: The Governance of Corporate – Community Relations in the Columbian Mining Sector' 16 (2020) European Review of Contract Law 118.

[38]Ibid., 137.

[39]For example, C Sieburgh, 'The Principle of Social Conformity: Society as a Third Party in the Law of Contract' in K Boele-Woelki and W Grosheide (eds), *The Future of European Contract Law: Essays in Honour of Ewoud Hondius* (Kluwer Law International 2007).

[40]Wielsch (n 5).

[41]A Bagchi, 'Other People's Contracts' 32 (2015) Yale Journal of Regulation 211.

[42]Hesselink (n 7).

[43]Pistor (n 30) 47ff. rightly shows how legal personality and limited liability/corporate veil can be used to lock-in assets to protect them against legal liability.

[44]See the line of cases starting from *Chandler* v *Cape* (2012) EWCA Civ 525; *Lungowe* v *Vedanta Resources* (2019) UKSC 20, *Okpabi* v *Shell* (2021) UKSC 3.

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that English tort law has had *an always-existing possibility*[45] that within corporate groups, parent companies owe a duty of care with respect to those affected by entities that the company is able to control. The first rulings concerned equity-based relations within corporate groups with the result that parent companies can be liable for the damages caused by subsidiaries. And very recently, the idea of a tort law duty of care has also become a test ground for contractual relations in supply chains.[46] Thus, tort law and specifically the open-ended concept of the duty of care have become one of the most fertile grounds upon which to build a different narrative than what company law and separate legal personality have brought forward: That complex group structures, created to exploit loopholes in national laws to lock-in assets and prevent liability, may also be accompanied by a group-wide duty of care and possible liability towards all those affected by the 'anonymous matrix'[47] of transnational corporate operations.

Building upon this development, a clear case where tort law is becoming an avenue for deciding political conflicts is the field of climate litigation. In the absence of a functioning and future-looking approach in the (democratic) political institutions on how to tackle climate change, it has been the courts that begin to accept arguments about states, and increasingly private actors including corporate groups and supply chains, having responsibility in relation to the climate, future generations and the population's core human rights to health.[48] This has even led the International Panel on Climate Change to highlight related litigation as 'another important arena for various actors to confront and interact over how climate change should be governed'.[49] And it has become such because societal actors, from individual litigants[50] to civil society organisations, have brought 'legal arguments, within the judicial system, that aim to expand responsibility, [that] argues for a potentially different reading of the law, which would also translate in different economic realities.'[51] This is not to say that the political system and its decisions over climate change are entirely irrelevant. But it shows that the political conflict over how to tackle climate change as societal problem does not only take place in the formalised deliberative political process on how we want our (future) society to be governed and who should bear responsibility; it also happens in the opposing narratives created by civil society and states,[52] translated into the private law rules of tort and decided in court rooms. It is the courts that take the legal stance in that political conflict between claiming societal actors and defending states and corporations that redefine the purpose of the legal institution of tort.[53]

[45]Explicitly *Okpabi* v *Shell* (2021) UKSC 3, para 151: 'the liability of parent companies in relation to the activities of their subsidiaries is not, of itself, a distinct category of liability in common law negligence (para 49). The general principles which determine such liability "are not novel at all" (para 54). Such a case does not involve "the assertion, for the first time, of a novel and controversial new category of case for the recognition of a common law duty of care".' Extensively on the legal dogmatics of embedding parent company liability within the tort of negligence, L Roorda, 'Broken English: A Critique of the Dutch Court of Appeal Decision in Four Nigerian Farmers and Milieudefensie v Shell' 12 (2021) Transnational Legal Theory 144, 148: 'neither new nor special'.

[46]*Hamida Begum* v *Maran Ltd* (2021) EWCA Civ 326.

[47]G Teubner, 'The Anonymous Matrix: Human Rights Violations by "Private" Transnational Actors' 69 (2006) Modern Law Review 327.

[48]The most notable decisions come from the Netherlands, *Urgenda Foundation* v *The State of the Netherlands*, 20 December 2019, ECLI:NL:HR:2019:2006 (state responsibility), *Milieudefensie* v *Shell*, 26 May 2021, ECLI:NL:RBDHA:2021:5337 (corporate responsibility).

[49]See International Panel on Climate Change (IPCC), AR6 WGIII, Report 2022, 29.

[50]See *Luciano Lliuya* v *RWE AG*, Case No 2 O 285/15, On Appeal at the Essen Regional Court (Germany).

[51]Saage-Maaß (n 28).

[52]P Paiement, 'Urgent Agenda: How Climate Change Litigation builds Transnational Narratives' 11 (2020) Transnational Legal Theory 121.

[53]There is of course also criticism towards such court-centric approaches because judges are not democratically legitimised and do not decide such political issues through public deliberation, on the problem H Micklitz, 'Democracy and Private Law' in S Grundmann, H Micklitz and M Renner (eds), *New Private Law Theory* (Cambridge University Press 2021).

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C. Private international law

A final example I want to introduce relates to the area of private international law and the element of choice that both in Pistor's diagnosis and in Hesslink's proposal is met with great suspicion. The choice for parties to pick and choose the legal system that suits their needs has been one of the reasons why only two legal systems, New York and the UK, have become the core legal systems for capital coding.[54] It comes as no surprise that Hesselink in his proposal for a progressive code would like to restrict choice by including mandatory rules: 'In order to be effective, the private law restrictions on the ways in which capital is created must be mandatory, not merely optional'.[55] I do not disagree that choice of law (and the forum including the choice for private dispute settlement as arbitration) provides for forum shopping and allows capital holders to pick the most suitable solution and that this may need to be countered. But the question is whether the only answer should be a reduction of choice or whether, conversely, it is reduced choice that is the problem. Choice of the law and forum is not by default an instrument available to capital holders. It equally may be a tool to empower those affected by corporate activities to choose the law and forum according to their needs. It is to a certain extent ironic that while in relation to global capitalism choice of the applicable law and the forum for solving disputes is identified as one of the most problematic aspects for evading democratic control, the instrument of choice has become, in other contexts, discussed as a tool to enhance justice and empowerment of victims. The most prominent example is the area of business and human rights: Here, choice for courts other than the victim's home country and a choice between different potentially applicable laws has been discussed as a positive contribution to enhancing access to justice.[56] Accordingly, discussions in the context of the currently negotiated international treaty on business and human rights point in exactly the direction of increasing rather than restricting choice: The treaty draft in its current version proposes rules that provide more choice for victims and sue corporations wherever they have assets or operate.[57] The direction seems clear: If corporations may pick and choose the law applicable and the forum to decide their disputes, such choice needs to be equally available to those affected by their operations. It is not the concept of choice that is problematic, but only the fact that choice is currently available to only some actors.

4. Conclusion: On the role of society and (democratic) politics

My argument on private law institutions and its change from within directs us to the societal sphere for change rather than solely to the public sphere; occasionally throughout this piece, I have made the contrast between my proposal for a societal private law and Hesselink's reliance on public deliberation and a citizen's self-determination for a progressive code quite strong. This also served the purpose of showing that Hesselink seems to have not put much emphasis on the societal sphere in his work. Society and the individuals seem, in his understanding, to only unfold within the democratic sphere as citizens with their political agency, not in their own rights as societal actors that participate in the private sphere.[58]

[54]Pistor (n 17) 132ff. cf also her proposal to roll-back choice on page 225: 'there should be far fewer opportunities for asset holders to go on a legal shopping spree'.

[55]Hesselink (n 7) 325.

[56]See already G Skinner, R McCorquodale and O De Schutter, *Access to Judicial Remedies for Human Rights Violations by Transnational Business* (International Corporate Accountability Roundtable (ICAR), CORE, The European Coalition for Corporate Justice (ECCJ), 2013).

[57]See Open Ended Intergovernmental Working Group Chairmanship, Legally Binding Instrument to Regulate, in International Human Rights Law, the Activities of Transnational Corporations and Other Business Enterprises, 3rd Revised Draft, 17 August 2021, Art 9 (on jurisdiction) and Art 11 (on the applicable law).

[58]On this, see also the comment by Micklitz, What kind of private law for what kind of Europe? A rejoinder to Martijn Hesselink's 'progressive code' 1 (2) (2022) European Law Open 402–412, Section 3.

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What does then my position mean for the public sphere, for the democratic process of self-determination and its role in reducing the inequalities that Pistor has diagnosed? Does my argument mean that the public sphere and political agency are irrelevant? Is my argument explicitly anti-democratic?

By no means. First of all, in reality, there are of course commonalities between the two positions. There is never only society or the state; to ignore society is as problematic as is ignoring the state. And the public sphere is by no means irrelevant for driving institutional change. When societal actors rely on the law to make their arguments and use the law to advocate for change, then it does make a difference on what the statutory rules state. In addition, there is not always an equality of arms in the access to the formal legal resources. Therefore, additional regulatory intervention in some cases is certainly in order, and legislative processes deriving from the political sphere can also drive societal change.[59] Yet, my aim was to show that the public sphere is not the only one that we have at our disposition to initiate change and that an all-encompassing radical change may not be necessary; the radical change can lie in the incremental decisions. Rather than putting all our hopes into an idealistic process of collective self-determination through the political state institutions, collective self-determination and democratisation processes also need to be instituted within society and in relation to private regulation.[60] It is also companies with their own regulatory systems (that affect others) that need to be democratised,[61] not only company law and its capital-enabling rules that need re-thinking in the context of a political, and ultimately legislative, process.

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[59]An example for such change through legislation is the recent attempt on first a national and now EU-level to introduce corporate due diligence obligations, see EU Commission, Proposal for a Directive on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937, COM (2022) 71 final. Such ideas surrounding due diligence as a responsibility for corporation to consider societal interests and integrate stakeholders in their decision-making have been existing for a decade now (originating from the 2011 UN Guiding Principles on Business and Human Rights). However, they have only now attracted wide attention and become used by societal actors with the concept becoming integrated into legislation.

[60]See for suggestions of how to re-think self-governance in the context of transnational private regulation Cafaggi and Pistor 2015 (n 20).

[61]On which see A Duval, 'Ruggie's Double Movement: Assembling the Private and the Public Through Human Rights Due Diligence', Working Paper, prepared for publication (on file with the author).

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