

Pluralism as Inability to Choose

Celebrating the Normative Diversity of EU Contract Law*

Giacomo Tagiuri

1. Introduction

With *Justifying Contract in Europe* Martijn Hesselink offers us, as participants in debates about EU law, better, meaning deeper, more nuanced, and more rigorous, normative arguments to both justify existing contract law in Europe and to discuss how the law ought to look like. Better normative arguments, it is Hesselink's conviction, may contribute to democracy as they are prone to improve the quality of public deliberation. The arguments are presented to the reader through an ingenious device, namely by having six leading political theories (libertarianism, utilitarianism, communitarianism, liberal egalitarianism, civic republicanism and discourse theory) answer six normative questions about European contract law (e.g., should contract law have a democratic basis? Should it provide for weaker party protection? Etc.). The book brings the six theories, and sub-streams thereof, to questions they had often not explicitly considered, an approach fraught with difficulties, but which Hesselink overcomes thanks to the seriousness and modesty through which he carves each theories' answers. The book delivers on its promise to practice the principle of charity and offer no straw men, which unavoidably comes at the expenses of sharp and easy answers: different voices within one theory or tradition often support opposite conclusions.

The book does not discuss the six normative questions in the abstract, but grounds them in existing EU law, a choice that is political as much as it is methodological: "The status quo is always in need of justification just as much as any reform (or revolution)."¹ I agree with Hesselink that such an emphasis on justification of existing laws and doctrines does not make his project conservative. To the contrary, the nuance and depth the book brings to each normative question can turn transformative. By confronting us with answers that may not be prominent in current debates, and, even more so, with less explored or less obvious reasons that support relatively familiar answers, the book expands the limits of our normative imagination. Consider the question of weaker party protection in contracts, mainly the protection of consumers. Yes, weaker party protection is desirable, but this is not only the imperative of some notion of social justice as different streams of liberal egalitarianism would postulate. Weaker party protection can also be serving civic republican values such as non-domination or thick notions of autonomy as

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1 Martijn W. Hesselink, *Justifying Contract in Europe: Political Philosophies of European Contract Law* (Oxford: Oxford University Press, 2021), 446.

self-authorship that border perfectionism. Albeit arguably a narrower justification, consumer protection may also be normatively justified as it supports seamless transnational exchange and thus enhances economic growth, which is the reason why utilitarians may support it. In turn, communitarians might justify weaker party protection including consumer protection as it strengthens bonds of solidarity and better aligns existing law to pre-existing social imaginaries. To be sure, the reasons of those who would reject weaker party protection also point at intuitively meaningful values and interests. A libertarian concern for paternalism, for example, may remind us that there is value in making mistakes, or that only some level of risk and uncertainty may deliver certain goods (think consumption as a field for self-expression). As I will argue in this article, it may not be necessary, desirable, or even possible to choose the precise reasons why we support a certain answer – say contract law should protect weaker parties – nor to discard all concerns coming from those supporting the opposite solution – no consumer protection.

From this perspective, while the book offers a very rich range of insights – nuance and depth – about each theory and normative question it considers, this might not be its main or most unique contribution. I locate the book's most unique contribution in its rhetorical and methodological commitment to pluralism, which, although Hesselink may disagree, I find to be also a normative and political commitment. Starting from this observation, I then discuss the normative implications of this type of pluralism for the ways in which different reasons are reconciled and reflected in the law. In the conclusions, I also speculate on what this may mean for the EU and EU Law. As I suggest, the type of pluralism the book evokes and celebrates, if not explicitly theorizes, offers a powerful rejection of accounts that see EU law as dominated by a narrow set of values and normative commitments.

2 Which Type of Pluralism?

The book's starting point is Hesselink's radically democratic hunch that, he explains, also implies a pluralistic hunch. This pluralistic hunch is taken to coincide with what Rawls calls the 'fact of reasonable pluralism', meaning, in Hesselink's words, 'the fact that reasonable disagreement concerning worldviews is to be expected as a permanent condition of modern constitutional democracies'.² Hesselink later elaborates on the type of pluralism he subscribes to.³ As he explains, the book does not take a stance on the question of how a theory should deal with others, meaning whether a theory should aspire to prevail as true (*normative monism*) or accept the valid claims of other theories (*normative pluralism*) either with no possible hierarchy among them (*unconstrained pluralism*), or with some principle or notion of justice that constrains and/or to which the various other values must contribute (*constrained pluralism*). In other words, the book is

2 Hesselink, *Justifying Contract in Europe*, 9. Hesselink returns to this in the conclusion: 'a plurality of articulated and principled answers to the same question exist.' (at 447).

3 Hesselink, *Justifying Contract in Europe*, 65-67.

Giacomo Tagiuri

committed to uncovering the existing plurality of political theories but does not discard the possibility that one theory may be true, valid, right, or best, and, hence, that European contract law is or should be grounded only on one theory. In the conclusions, Hesselink observes that the book's structure and style may have the 'rhetorical effect of making pluralism more plausible',⁴ but he insists that the book has not much to offer to the question of whether we ought to 'find one single theory to have the best answer' or to 'discover some truth or merit in more than one theory'.⁵

Hesselink observes that the answers offered by the theories are often heartfelt and all deserve respect. He also acknowledges that zigzagging is possible, meaning siding with one theory for its answer to one question while embracing another theory for a different question.⁶ Zigzagging, he suggests, would mean that one is likely to be a normative pluralist. The book, however, does not explicitly contemplate the possibility of heartily subscribing to, or being genuinely persuaded by, the answer of more than one theory within the same question. The language of irreconcilability and compromise, to which the book frequently returns, suggests that it would be difficult or unlikely to genuinely be persuaded by more theories within the same question. I found this surprising, because being unable to choose was exactly my reaction when reading several chapters of the book. On weaker party protection, for example, I found myself persuaded by many of the answers, wondering if it is possible to be a libertarian and a communitarian at the same time. I believe that consumer protection is desirable for a plurality of reasons: because it furthers some notion of social justice, may enhance autonomy, build community, or promote economic growth and a larger pie. These different rationales may not be mutually incompatible and can be reconciled in the actual law. In turn, I am not insensitive to the libertarian arguments that certain values may be lost through statutory consumer protection, or too much of it. And even accommodations to these opposing concerns may be carved out within a system robustly committed to weaker party protection: think about the possibility to opt-out of consumer protection accorded by certain jurisdictions to some categories of consumers.⁷

To be sure, the persuasiveness of several of the theories' answers at the same time is, to Hesselink's credit, the product of the care and skill through which he practices the principle of charity. My reaction may also be due to the fact that I have not made up my mind yet, not thought deeply enough about the question or problem at issue, or misunderstand the subtleties of the distinctions between the various theories. This possibly makes me guilty of what Hesselink describes as giving in to

4 Hesselink, *Justifying Contract in Europe*, 447.

5 Hesselink, *Justifying Contract in Europe*, 65.

6 Hesselink, *Justifying Contract in Europe*, 448.

7 Hanoch Dagan and Michael Heller, *The Choice Theory of Contracts* (Cambridge: Cambridge University Press, 2017), 82 (discussing several such rules as they appear in US jurisdictions such as Massachusetts and Texas).

‘pure intuitionism’⁸ or settling for simple-minded ‘perspectivism’.⁹ Still, I would like to suggest that there is something normatively important in the intuitive persuasiveness of most, if not all, answers the theories offer to each question. I suggest that this is reflection of the fact that each answer defends, values, or pursues the enhancement of rules, or features of the rules, that are intuitively desirable at the same time, and potentially not in contradiction. Non-interference, the maximization of people’s preferences, community, autonomy, non-domination, and democratic deliberation would all seem valid aspirations to be reflected in different areas of contract law or as features of the said law.

Here comes my nuance on the book’s argument: within the same question, different answers by different theories may be persuasive to us at the same time, so that we can have a heartfelt commitment to more than one theory’s answers. From this perspective, zigzagging, and the ability to change or revise our opinions, may not be sufficient solutions to the type of inability to choose among different answers that I seek to point to. This inability to choose may have something to do with deeply rooted and shared moral intuitions and may not be erased even by the superior strength or logical consistency of certain reasons. By remarking this I do not wish to suggest that to strive for better, more consistent, and articulate reasons is irrelevant. To the contrary, I agree with Hesselink that this is essential for robust democratic deliberation to emerge. But while Hesselink emphasizes the irreconcilability of the answers, hold as part of the conflicting worldviews of different groups in a democratic society, I emphasize the mutual and heartfelt coexistence of several answers within the same person or group. Hence, while compromise is the main solution Hesselink envisages for solving conflicts between the different answers,¹⁰ I suggest that there may be mechanisms for reconciling different answers or reasons that are not adequately captured by the notion of compromise. These mechanisms may represent a normative ideal for the formulation of private law rules in Europe.

3 Compromise or Reconciliation?

To further illustrate my point above, consider the book’s discussion of the question of democracy, which I understand to be, at a minimum, the question of whether some form of popular (in contrast to expert) input should influence the formulation of contract law rules. For such a question, the book makes clear, there is not only different answers, but also sizeable disagreement concerning how exactly popular will is best translated into rules. As Hesselink acknowledges, what we typically associate to democracy – the law of parliament – has a spotty democratic pedigree, especially when it comes to private law rules – starting from private law

8 Hesselink, *Justifying Contract in Europe*.

9 Hesselink, *Justifying Contract in Europe*.

10 As Hesselink explains, ‘Give and take’ and ‘balancing’ are the tools to achieve the compromise, and ‘European Contract Law will and should be a compromise between different ideas and views of contract law in Europe’. In Hesselink, *Justifying Contract in Europe*, 10.

Giacomo Tagiuri

codifications. In turn, the judicial and administrative development of contract law rules such as under common law systems (and also EU law) which we typically think of as less democratic, may have an inbuilt democratic dimension, for example because it allows to devise a rule only when one is really needed, or may be designed to be more democratic, for example through forms of stakeholder representation in judicial or administrative proceedings.

Libertarians would accept that democracy is desirable if it does not infringe on natural law rights that precede political institutions, but they may insist it is better served by the common law than by a legislature, whose role should be limited to codifying formal and abstract rules of just conduct. Utilitarians would endorse democracy only if popular input in the formulation of contract law rules would yield higher utility than similar rules produced by an expert body insulated from the people, again a question on which there is considerable empirical disagreement. Communitarians have a distaste for democracy insofar as it means that private law is produced by parliament through compromise, rather than through organic and incremental development of private law doctrines through juristic adjustment. However, arguably at least some communitarians are concerned with the cultural consistency of private law also as a way to support a *demos* cohesive enough to support representative democracy. The liberal egalitarian tradition is naturally committed to democracy, including as the form of decision-making that delivers equal respect for individual liberty or self-determination. However, the camp is so wide and diverse that it may be impossible to extract a common view on the desirability of democratically legitimated contract law and how to best achieve it. The civic republican commitment to democracy is more cohesive, because democracy is the only political regime that ensures freedom as non-domination. In Habermas' discourse theory, all law, both public and private, owes its legitimacy to the democratic principle, meaning the ability of law to 'meet with the assent of all citizens in a discursive process of legislation that in turn has been legally constituted'¹¹ – democracy and democratic deliberation being here understood mostly as processes of reasons giving.

This summary certainly does not do justice to Hesselink's discussion, but it tries to show how the democracy of private law rules may be pursued for very different reasons or in pursuance of different values, most, if not all of which, are intuitively desirable: community and bonds of solidarity, efficiency and growth, freedom and equality. In turn, technocracy and expertise, through decisional mechanisms that improve the quality of private law rules may pursue the same plurality of values, at least efficiency and redistribution. Impact assessments, to be sure, can be and are used to measure impact on many things, not just economic growth.

Hesselink concludes his chapter on democracy by observing that

'the existence of strongly divergent views on whether contract laws should be democratic and what this would entail does not mean that the answer to these

11 Hesselink, *Justifying Contract in Europe*, 126.

questions is necessarily indeterminate or that all the theories are equally right. It merely shows that the question is controversial. Ultimately, it remains a matter of argumentation. Reasons are all we have got. And arguably some reasons are stronger than others.¹²

I would disagree with this characterization of what the discussion above leaves us with. Hesselink's discussion of democracy shows, if not that all theories are equally right, that they all point at intuitively desirable features of European contract law, which deserve respect in a pluralist society. If this is true, what would seem needed is not a system in which the stronger reasons prevail, but one where reasons can be reconciled and possibly mutually optimized. From this perspective, finding a compromise between the different theories is not only mediating between different groups in society that subscribe to one or more theories, but reconciling different values, or moral institutions, that may coexist within one person or group. This would seem to suggest a more robust rejection of monism and a more decisive embrace of pluralism than the book explicitly acknowledges. If all theories are seeking something valuable for most people at the same time, it would seem simply unjust that one theory prevailed, and simply undesirable to design or interpret contract law in pursuance of only one theory, especially in a transnational society which is arguably best defined by its diversity like the EU.

4 Concluding Remarks: Celebrating the Normative Diversity of EU Law

The EU legal system may possess experience, if not a comparative advantage over national legal systems, with models of reconciliation between different values, or indeed political theories, that do not assign priority to one value, and instead pursue a logic of reconciliation. That is for example how Azoulai describes the CJEU approach in the *Viking* and *Laval* cases¹³ insofar as the Court proceeds by assuming that there is not a fundamental contradiction between freedom of establishment and the fundamental right to strike, nor a prevalent value.¹⁴ I may be introducing an overly fine distinction here, but I do not think that the language of compromise used by the book adequately captures these types of solutions. Compromise suggests a mutually destructive logic, where each theory gives up something by acknowledging the claims of others. Reconciliation suggests a logic of mutual optimization, whereby the various theories are enriched, even learn something, by contamination and accommodation of the demands of other theories. Such solutions require acknowledging that there are no separate

12 Hesselink, *Justifying Contract in Europe*, 142.

13 Case C-438/05, *International Transport Workers Federation*, ECLI:EU:C:2007:772; Case C-431/05, *Laval un Partneri Ltd*, ECLI:EU:C:2007:809.

14 Loic Azoulai, 'The Court of Justice and the Social Market Economy: The Emergence of an Ideal and the Conditions for Its Realization', *Common Market Law Review* 45, no 5. (2008): 1335-1355 (at least that is how the Court sets up the interaction between different values, although Azoulai acknowledges this model stays largely an ideal, and problems in the actual balancing remain).

Giacomo Tagiuri

normative spheres, but ‘interests which may concur’ and ‘voices in concert’.¹⁵ From this perspective, *Viking* and *Laval* stand in contrast to *Albany*,¹⁶ where one set of values (workers’ rights) clearly prevails over another (competition). I take Hesselink’s book to show that we may need more of these models of reconciliation.

As others have been showing, EU law may have institutional mechanisms that allow such models to flourish in areas such as competition law or the regulated industries; the result may be win-win interactions between national and EU law, and assemblages of values that mutually optimize the prescriptions of Hesselink’s various theories.¹⁷ This points to a vision of the EU economic constitution which is robustly committed to pluralism. On this vision, as I have argued elsewhere, what the EU constitutionalizes is not neo-liberal market discipline, but openness and deliberation in the resolution of conflicts between different forms of economic organization, including models of governing private law relationships.¹⁸

All in all, Hesselink’s book offers a powerful rejection of accounts that identify different evolutionary stages of the law, and specifically of private law, with no or little overlap among each other. Think of much of systems theoretical thinking as applied to private law, where a specific legal rationality is seen to characterize all law in a given evolutionary stage (e.g., formal, re-materialized, procedural). Each type of law, formal and re-materialized, Hesselink’s book shows us, is necessary and desirable. Such different legal orientations cohabit, respond to different problems of our social world, and pursue moral intuitions that coexist in many if not most of us. But also think of more recent critiques of EU law which see it as product of narrow expert communities if not a ‘liberalization machine’ or an intrinsically neoliberal project,¹⁹ in contrast to a national law which is democratic and responsive to values. The book shows and celebrates the pluralities of values that may and should inform the justification and development of European contract law. Uncovering and celebrating the normative diversity of EU contract law may be the book’s main contribution to contemporary EU legal scholarship.

15 Azoulai, ‘The Court of Justice and the Social Market Economy’, 1349.

16 Case C-67/96, *Albany*, ECLI:EU:C:1999:430.

17 Yane Svetiev, ‘The EU’s Private Law in the Regulated Sectors: Competitive Market Handmaiden or Institutional Platforms?’, *European Law Journal* 22, no. 5 (2016): 659-680; Yane Svetiev and Giacomo Tagiuri, ‘The Opportunities and Dislocations of Technological Change: EU Law as Coping Mechanism’, *Columbia Journal of European Law* 24, no. 3 (2018): 612-636.

18 Giacomo Tagiuri, ‘Can Supranational Law Enhance Democracy? EU Economic Law as a Market-Democratizing Project’, *European Journal of International Law* 32, no. 1 (2021): 57-89.

19 Hesselink, *Justifying Contract in Europe*, 156 (explicitly rejecting this account).