

Reasoning Towards Utopia

A Reflection on M.W. Hesselink, *Justifying Contract in Europe*

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1 The Limits of Theory

Normative theory is of course a contradiction in terms. A theory on its own cannot tell us what we ought to do. What we consider the right course of action depends on our goals, values, preferences, and desires. Do we seek justice, fairness, freedom, or amusement? The things that we hold up as goods to be sought may and do reasonably vary between reasonable people. In particular, any reasonable person will consider more than one thing to have moral or normative status – perhaps justice *and* fun, or freedom *and* democracy – and there will have to be trade-offs made between these goals. What seems to be the optimal trade-off will be a product of one's personal preferences, worldview, religion, and so on.

All a theory can do is suggest a pathway to achieving some of these goals. A political theory may suggest that certain institutions, arrangements, or laws will lead to increased presence of some outcome. The theory is then not normative. It is descriptive, and predictive. It does not say what is good, but suggests merely that A leads to B. The normative weight comes from B, from the outcome, not the causality: the truth of a theory and the desirability of its predicted outcomes are independent matters. Hence a capitalist can believe in Marxism, but for him it will be a guide to what must be avoided, not what must be done.

In principle a political theory could be tested empirically and if it passes the test then it could be usable in policy. In practice, the irritating complexity of the world and of human beings makes this almost impossible. So many other factors intervene and disrupt the process – wars, politics, populism. Moreover, political theory is often as vulnerable as economics to the critique that it stereotypes human beings to the point of parody. Thus, while some model of democracy or freedom or justice (hereafter: DFJ) may show how optimum outcomes could arise if everyone follows certain rules or principles or practices, that tells us little about reality, for when a group of human beings try living this model some will get bored and wander off, some will drink too much, some will fall in love with each other, and some will feel a great urge to hit someone. They will not all be rational DFJ-seekers. What is then the value of a perfectly liberal/Rawlsian/Kantian set of laws and institutions if the society containing it descends into chaos because the population refuse to behave as the model would like?

What calls itself normative political theory does not then have much *prima facie* predictive value. Rather, these theories are little sketches of utopia, mini-models of what might happen if only everyone could agree on certain things or behave in a

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certain way. ‘Utopian theory’ would probably be a more accurate name. They are there to stimulate thought, provoke ideas, and perhaps, in the way that utopias do, they can play a role in thinking about policy, but their lack of empirical, sociological, or psychological sophistication puts them a million miles away from being able to tell us what to do right now.

2 The Normative Role of Coherence

So why then test the idea of a European contract law (hereafter: ECL) against these so-called normative theories, as Hesselink does in his new book? What does the outcome of such a test actually tell us? One might posit a cynical answer, that since the theories are beloved of a certain group of academics, they are a gauntlet that has to be run for anyone who wants to put a policy idea forward in that academic sphere. It is an initiation rite, a process to be gone through in order to allow a proposal to move to the next stage of consideration, perhaps equivalent to making sure that a text contains nothing blasphemous or atheistic a few hundred years ago. Once the secular priests of DFJ have issued a stamp of approval, the empiricists can start on the real work.

Hesselink is not that cynical. He is not instrumentalizing theory to drive forward a legal project, but rather, it is the law-theory relationship which is his project: that is clearly what fascinates him, and what he wants to explore. He wants to know how the parts fit together. On the other hand, it is clear in the book that Hesselink is interested in this question from a normative perspective. It is not the relationship merely as an academic puzzle that he wants to unpack, but as something that can help guide good behavior. He believes, perhaps, not so much in the fashionable evidence-based policy as in theory-based policy – or at least theory-compatible policy.

So, once again, we return to the question: what can this relationship tell us? Which ‘oughts’ can be extracted from an examination of the idea of ECL in the light of leading political theories? We cannot, for the reasons above, come to the conclusion that ECL is a good thing. Even if it were to fit every theory perfectly, there would still be the question of consequences. No theory is a complete model of society, and nor are they when all combined. We still do not know whether following them would in fact lead to catastrophe.

Hesselink is justly cautious on this front. The book is not a plea for harmonization of contract law. Its central argument is not normative, which fits the fact that he does not indicate a strong preference for one theory over another – although he allows some sympathies and doubts to seep through. He treats them all as worthy of serious consideration. By contrast, it is probably difficult to believe them all simultaneously, so that any normative argument would require taking a stand on which ones are best or truest. He undoubtedly has views on this, but that is not the stand that he takes in this book.

If anything, he seems more concerned with a negative perspective: do any of these theories stand in the way of ECL. In short: not, ‘do they require or approve it’, but ‘do they object to it’. On the whole, he finds that they do not. ECL is, potentially, compatible with leading ideas about DFJ. Whether or not the pathway to ECL turns out to be passable, it is at least not blocked by these theories.

3 Which Values Should ECL Be Measured Against?

There is still the question whether he chose the right theories. Which ones fit his criteria of ‘leading’ is the kind of debate that can bring joy to an academic community for years. I will leave that discussion to others. He has, however, surveyed quite a few, and they are certainly major ones.

However, I was troubled by the closely related, but not identical, question of whether he chose the right values. The book has what might be called a democracy bias: it focusses on very classical political virtues. But even for a person committed to those values, and even for someone committed to the theories at hand, the question remains whether these can be meaningfully considered in isolation from other policy needs. If DFJ, classically conceived, is a rough but fair summary of what we want from our laws and politics, then perhaps they can. But supposing it is not? Supposing there are other imperatives that are even more urgent, which demand to be put alongside, or made a part of, DFJ? When I read this book, two questions spontaneously came into my mind. One was ‘what about climate?’ and the other was ‘what about people with trans identities?’

That is not to say that these questions are unrelated to DFJ. I certainly do not mean to set up an opposition between them. However, they are specific questions, and the theories in the book do not offer specific answers. One can follow the reasoning on how ECL measures up against the chosen theories, and still not know what it means specifically for climate, gender, or race. Does that matter?

The questions that came to me may have been a reflection on my teaching in the weeks before. No doubt others could be put too. However, they are both unavoidable, urgent, contemporary issues. Climate change, it hardly needs pointing out, is the great threat facing humanity today, dominating policy agendas to a growing extent. People with trans identities and their desire for recognition, and the reluctance of others to give that recognition, create challenges which, while they may not have the existential force of climate change, have the capacity to divide societies, and to become a focus for culture wars which can make a jurisdiction dysfunctional, even ungovernable. They go to questions of identity and behavior which are at the heart of how societies are organized, so that responses could be profoundly disruptive.

Contract law has much to do with them. It shapes economic relations, and in turn contributes to power relations, as well as reflecting ideas about individual autonomy, solidarity, and responsibility whose application goes beyond the sphere of economic exchange. How emissions are to be reduced is self-evidently connected

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to how the economy is organized. What determines the labels we bear and the behavioral expectations that we and others have of us is a product of the relationship we consider ourselves to have with our neighbors. The micro-model of how two people (ought to) interact within a group, which is contract law, is an essential part of how that group (properly) functions as a wider whole.

So, in asking whether contract law can or should be Europeanized, to not ask what this means for climate, people with trans identities, and indeed other issues that might be added to this list (equality between the sexes and races? World peace? The stability of family life?) is to only do half a job. It strips the argument of normative force. What is the point of having a just, fair, contract law while the world burns? What is the meaning of freedom of contract if people feel trapped in gender roles? Measuring ECL only against classical DFJ theories is a bit like asking whether the Romans would have approved of ECL: interesting, but what does one do with the answer?

4 Theorizing in a Time of Crisis

I am not, however, suggesting that the need is for more theory as such. Certainly, there are theories on race, gender, and ecology which could be added to the line-up to give a broader theoretical perspective on ECL. These, on the whole, would not reject DFJ's importance, but would give it a more contemporary meaning, incorporating broader and newer normative concerns.

My point is rather that theory of this type, what is often called 'normative' only takes us so far. If we care about an issue, we want to know what will happen. DFJ is an important, to some extent timeless, lens. However, if we are to use it to gain a normative perspective then the classical political virtues that it contains will have to be seen in a new way, no longer as a product of *a priori* institutions or rules, but as a state of affairs essentially bonded to outcomes: no democracy without equality; no normative status without results. A good DFJ theory is one that predicts what will work.

That is not to say that all normative arguments should be empirically based, at least not quite. A societal arrangement can have symbolic, communicative, or cultural value almost irrespective of how it actually works. A ban on murder is not only important because it reduces murder rates. Normative value, if not complete normative arguments, can coherently be found without looking at effects. A classical DFJ theory cannot show us which laws are good, but it can show us bits of goodness that might be found in law.

However, where issues are urgent or existential, in a time of crisis, consequences loom larger. We have no use, as a world, for arrangements that send the right message on climate or gender without that message being received. If crisis theory does not specifically engage with actual consequences, rather than just modelling utopias, it can become part of the problem, rather than the solution.

Reasoning about the coherence of ECL and theories of DFJ therefore gives us glimpses of a powerful socio-economic question – should there be ECL? – without providing the tools to answer it. That could be called thought-provoking, and the articles in this special issue are proof that it is. However, it can also be frustrating, at least to the practically-minded reader. It can feel like a peacetime exercise in a time of war. In this mildly, necessarily, revolutionary age there is a tendency, even in academia, to want a plan of action; to want normativity, now. One has to admire Hesselink's integrity in refusing to provide this. Still, a part of me wishes he would.

5 Fighting Yesterday's War

The question of whether there should be ECL requires, like any other policy choice, broad consideration of what will happen if that step is taken, particularly consideration of the most burning challenges of the day. Output legitimacy, in a time of crisis, trumps input. Theories might, perhaps, with a little luck, help predict what the consequences will be, and so guide our experiments, but not if they focus only on DFJ as traditionally conceived. That looks increasingly like fighting yesterday's war. It runs the risk of being quaint.

There is of course a kind of contract lawyer, or at least there used to be, who rejects this instrumentalization of contract. They subscribe to what might be called apocalyptic morality and would rather see the world collapse with a perfect and autonomous system of private relations than set contracts in as a tool for social engineering. Hesselink has a far broader view than this. In asking whether ECL can fit theories of democracy, freedom, and justice, he is also asking how contract law can contribute to democracy, freedom, and justice, for surely a just contract law is a contribution to justice, and so on. However, humanity's growing impact, combined with its growing capacity to collectively act, mean that we expect ever more from our law, and the list of issues fighting to be admitted to normative considerations is ever longer. DFJ, as traditionally conceived, is no longer the half of it. 'What should we do?' becomes infinitely complex when so much is necessary, even more is possible, and everything is embedded in everything else. Good luck to the person who wants to theorize that.