CONTRACT AS INEQUALITY

CONTRATO COMO DESIGUALDADE

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ABSTRACT: Mainstream contract theories are built on ideals of formal equality and autonomy as independence. In the last decades, however, substantial inequalities came to be pervasively acknowledged, challenging some major tenets of these mainstream theories. This article elaborates on the wide-ranging acknowledgement of inequality in contract law and discusses its theoretical and epistemological implications, drawing on recent papers by Aditi Bagchi, Hanoch Dagan, and Martijn Hesselink.


RESUMO: As mais conhecidas teorias do contrato orientam-se por ideais de igualdade formal e autonomia como incolumidade. Nas últimas décadas, entretanto, desigualdades substanciais passaram a ser largamente reconhecidas, desafiando uma série de pressupostos dessas teorias. Este artigo trata do amplo reconhecimento da desigualdade no direito dos contratos e discute, a partir de textos recentes de Aditi Bagchi, Hanoch Dagan e Martijn Hesselink, suas implicações teóricas e epistemológicas.


SUMÁRIO: 1. Introduction. 2. The rise of inequality. 3. Implications for contract theory. 3.1. Aditi Bagchi. 3.2. Hanoch Dagan. 3.3. Martijn Hesselink. 4. Conclusion. 5. References.

1. INTRODUCTION

Legal scholars tend to assume that contract law and inequality are unrelated subjects. Though hardly discussed, this assumption is usually grounded on two reasons. The first lies in the belief that problems arising from substantial inequality, and especially from background economic inequalities (i.e. income, pay or wealth inequalities), should be corrected exclusively by public law, so by mechanisms foreign to contract law in particular and to private law in general. This reasoning is
an old law & economics favorite, and relates closely to the defense of tax law as the best, if not the only, legitimate redistribution mechanism. The second reason for the absence of discussions on substantial inequality within contract theory involves the role played by notions such as promise and autonomy as conceptual building blocks of contract law. Indeed, at least in their most common usages, these are solipsist categories. They imply that individuals cannot impose obligations to each other, but only to themselves. And even those who think of contract as something more than promise or autonomy admit these concepts at the core of contract theory. Consequently, discussions connected to inequality issues are swept off contract law scholarship.


The aim of this short paper is to elaborate on the idea of contract as inequality, relating it with three recent and interrelated strands in contract theory. For ease of reference, I will also mention some texts and scholars that oppose these strands.

“Contract as inequality” is a label that conveys two ideas. The first is that we cannot render contemporary contract law intelligible without recognizing inequality – especially, but not only, economic inequality – as its core. The second is that the very notion of inequality has become the best, if not the only satisfactory matrix available to evaluate and organize contemporary contract law scholarship. Since this second idea purports a theoretical elaboration on legal knowledge (as set out in legal literature), I am going to call it “epistemological”. In order to carry the epistemological idea further, I take some recent papers by Aditi Bagchi, Hanoch Dagan, and Martijn Hesselink as vehicles of inequality-sensitive contract theories, as opposed to theories based on formal equality and autonomy as independence.

The first idea to be discussed here, as has been said, is that inequality can make sense of contemporary contract law as a unitary field. This idea attempts to address, albeit with regard to contract theory, the challenge implicitly offered by Duncan Kennedy in his well-known 2006 chapter, *Three Globalizations of Law and Legal Thought*. After discussing the key features of the first two globalizations – the globalizations of classical legal thought and the social –, Kennedy was appalled by the absence of any discernible “large integrating concept” (let us call it LIC) in the third globalization. Truly, while the first two globalizations were marked by the will theory and the idea of social interdependence, the third, contemporary globalization, as he argues, could not be grasped by one single idea. Kennedy preferred to describe the structure of globalized legal consciousness after the Second World War as “the unsynthesized coexistence of transformed elements of classical legal thought with transformed elements of the social.” If the hypothesis that guides my analysis is confirmed – and the preliminary data I gathered so far seems to confirm it – it will be possible to take inequality as the contemporary LIC of contract law.


Notice that saying inequality is a LIC does not mean that practitioners and legal scholars explicitly refer to it when they write contracts (and about contracts). Inequality allows us to articulate legal thinking, even though the legal community does not care about it. On the other hand, a concept must not necessarily remain implicit in order to be a LIC. The idea of “will”, for instance, is ubiquitous in contract law scholarship. It is true that the word is out there since time of the Romans, but it only got the current semantic wideness during the 19th Century. In civil law countries, we still think about the defects of bargaining process as “vices of the will”, and even our latest civil codes (as the Brazilian Civil Code of 2002 or the Argentine Civil Code of 2014) still carry dozens of references to this idea. (Incidentally, most of the few statutory rules and remedies against substantial inequalities in civil law are still built upon the idea of will and its uncanny “vices”). The concept of social interdependence, on the other hand, was hardly present in legal scholarship before Kennedy noticed it. Still, it seems correct to recognize interdependence as a LIC.

The rest of the text is divided in two parts. In the first, I explain the hypothesis that inequality has become the LIC of contract law in some detail, focusing on the gradual acknowledgement of background economic inequalities in contract regulation. In the second, I discuss the theoretical consequences of grasping contracts in general as inequalities. As it was said, special attention is given to the ideas put forward by professors Bagchi, Dagan, and Hesselink. I articulate the previous two parts in a brief conclusion.

2. The Rise of Inequality

The kind of contract law embedded in civil law codifications of the 19th Century (as well as in the common law treatises of the subsequent period, such

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as Williston’s *The Law of Contracts*\(^{10}\) was averse to the explicit recognition of substantial inequalities, except from those arising from the so-called “VICES of the will” (such as duress, mistake or undue influence). Many reasons can explain this fact. One of them is the strict association between contract law and commutative justice established by medieval scholars and especially by the 16th and 17th Century lawyers and theologians known as late scholastics.\(^{11}\) Other, perhaps more manifest, is the dissemination of the ideology of formal equality,\(^{12}\) as conveyed by European bourgeoisie over the 19th Century and brought into the hermeneutics of the so-called “great codifications” of the period, and especially of the French Civil Code of 1804.\(^{13}\)

This formal-equality driven contract law would soon be challenged. The early contenders were representatives of what Duncan Kennedy called “the social”: from pioneers like Rudolf von Jhering and Oliver Wendell Holmes to more proximate authors like Léon Duguit, Georges Gurvitch, Otto von Gierke, and, in Brazil, Orlando Gomes.\(^{14}\) These scholars have acknowledged that a significant part of the contractual relations in their time – in particular, the relations based on the opposition between capital and labor – might not be suitable to the formal, commutative contract models established in civil law codifications. For them, it would be necessary transform existing law.

The social people were partially successful in their ambitions. I say “partially” because their purpose was not only crafting socially oriented labor codes and restatements – at this point, in fact, they were quite effective, as we will see in a minute. They also aimed to a more ambitious goal, namely, to spread labor law’s unequal rationality to the entire body of contract law and practice.

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Discussions about the locus materiae of labor law in Brazil between 1940 and 1960 are a good example of this latter purpose. After the enactment of the Brazilian Restatement of Labor of 1943 (Consolidação das Leis do Trabalho, or CLT), Brazilian scholars went on to distinguish the rationality conveyed in this statute from the allegedly standard, formally egalitarian private law rationality. This epistemic isolation of labor law was not an accident: as it was already recognized by prominent scholars such as Tullio Ascarelli, “labor law lead to a wealth distribution different from that derived from the mere game of individual strengths, being thus an instrument to change the present social structure.” It is not surprising that Orlando Gomes, the most notorious representative of the social in Brazil, has advocated a huge hermeneutic expansion the Restatement of Labor: the rules of labor law, he argued, should not be restricted to the regulation of individual and collective agreements between employers and employees (as it was explicitly stated in the first article of the labor Restatement); quite the contrary, they should discipline every single contract involved in the production and trade of goods and services. Gomes insisted that the (then new) rationality of labor law ought to be widened to cover the entire body of the (already old) contract law. His ultimate purpose was to bring social change by turning contract law and theory upside down.

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Labor law was the first but not the only island of contractual inequality recognized by contemporary legal thought. Throughout the 20th Century, a small archipelago gained momentum: three good examples are tenancy statutes, competition laws and consumer protection codes enacted in the last few decades. In the first case, consider the 1972 U.S. Uniform Residential Landlord and Tenant Act, the Italian Leggi sulle locazioni of 1978 and 1998, or the Brazilian Lei do Inquilinato of 1991. In competition law, the unequal islands are even older. In the U.S., they date back to the Sherman Act of 1890 and the Clayton Act of 1914, and continue through the Robinson-Patman Act of 1936 (which sought to protect local retailers against the attack of the more efficient chain stores, by making it illegal to discount prices) and more recent and specific statutes. In Brazil, competition law also dates back to 1945, and is now regulated by a 2011 statute. Italy – let’s keep the countries in comparison – was quite late here. In spite of the support of the left-liberal association “Amici del Mondo”, of which the aforementioned scholar Tullio Ascarelli was a prolific member, the first statute on competition law would only be enacted in 1990, thanks to the efforts of the politician and professor Giuliano Amato. Finally, regarding consumer law, consider some American statutes enacted from the late 60s like the Truth in Lending Act of 1968, the Fair Credit Reporting Act of 1970, Fair Credit Billing Act of 1974, and the Fair Debt Collection Practices Act of 1977, as well as the Brazilian and Italian Consumer Codes of 1990 and 2003, respectively, not to mention the many European directives on the subject.

The idea of contract as inequality, however, is not limited to the emergence of such islands of unequal treatment. It also concerns the extension of the rules insulated in these statutes to fields in which they originally did not apply, as well as the development of new (and sometimes quite confusing) algorithms, concepts and categories that take background inequalities as their normative guideline\(^{20}\) (as it happens in the controversial project of the new Brazilian Commercial Code).\(^{21}\) In short, the hypothesis concerns the general acknowledgement of substantial, economic inequalities in contract law and practice beyond specific, self-contingent statutes, rules and remedies.

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Let me illustrate. The art. 2º of the Brazilian Consumer Protection Code of 1990 defines the Code’s addressees as “any person who purchases or uses a product or service as the final recipient.” There was much discussion in Brazil about the scope of this definition, especially with regard to the application of the code to large companies (as consumers) and banks (as suppliers). Nowadays, these issues are almost all settled. However, the Code continues to be applied by analogy, and without any systematic guidance, to contracts for which it was clearly not designed to apply, that is, contracts that do not involve the purchase or use of a good or service by its “final recipient”. The most common trigger to this attitude seems to be the judge’s perception of parties’ economic inequality. This phenomenon gained force in recent years, and seems to have also occurred, mutatis mutandis, with labor, tenancy, and competition statutes.

The general recognition of substantial inequalities in contract adjudication faced significant resistance, as was to be expected. There are those who denied relevance to the phenomenon, reducing it to specific mistakes or acts of undue benevolence. But even scholars who admitted the application of inequality-oriented codes outside its ordinary scope tended to take a cautious stance, restricting this to extraordinary situations.

That wariness does not seem to be particular to Brazil, or even to civil law countries in general. As Aditi Bagchi recently noticed, the “public discourse on statutory regulation has been more receptive to the normative commitments of common law of contract than the common law has been receptive to the relatively new public policy goals embodied in statutes. Hundreds of statutes overtly and obviously invoke distributive concerns to justify regulation of contract, from housing to employment to financial derivatives. Yet this new reality of contract law has not legitimated distributive justice as an ambition of contract.”


Contract theory still seems to be attached to an “unsynthesized coexistence of transformed elements of CLT with transformed elements of the social”, to quote Kennedy once again. For some contracts are taken as exemplarily social, and other as typically classical. The idea of contract as inequality seems to be a path out of this dichotomy.

3. IMPLICATIONS FOR CONTRACT THEORY

The pervasive acknowledgement of substantial inequalities in contract adjudication may explain why some mainstream contract theories do not seem to fully comply with current legal practice. It goes for a wide range of theories, from the longstanding will theory to recent socio-cultural, neo-pandectist trends, passing through neoclassical law & economics (surprisingly alive outside US, though theoretically decried in its birthplace), not to mention the commutative justice revival. In all these cases, the wide recognition of background inequalities in contract practice is taken as something that should be corrected or even reversed.

This point may be illustrated by a recent interview given by two thoughtful German scholars from the aforementioned neo-pandectist school. “From what I learned from my Brazilian colleagues,” said one of them about the suitability of the Brazilian contract law to contemporary market requirements, “the [Brazilian] Consumer Code from 1990 was extremely successful in practice, it really changed the whole business environment and led to a new business culture, so to speak. At the same time,” and here comes the rebuke, “things have gone too far in some respects, the protection of the consumer may in certain points have reached a level which is very difficult to justify. And as I said before, nothing comes without a price. So the price of the very high level of consumer protection is, in the end, often paid by the consumer himself. Likewise, some products might entirely disappear from the market, because the legal framework, or the lack of legal certainty, renders them unprofitable.” Ultimately, this is an articulation of the conventional argument of the “boomerang effect”, according to which the protection of individual consumers hurts the class of consumers – maybe the most famous instance of Weber’s paradox of unintended consequences.

I believe the theoretical proposals from authors such as Aditi Bagchi, Hanoch Dagan, and Martijn Hesselink go in the opposite direction. Although their ideas differ, they appear to share at least two key points. First, the idea that the classical contract theory based on formal equality and autonomy as personal independence is not able to give an account of the challenges posed by contemporary contractual practice. Second, the idea that scholars engaged in contract theory cannot forgo distributive discussions. In this case, on the opposite corner are not just utilitarian (neoclassical law & economics), libertarian (commutative justice), and communitarian (socio-cultural) scholars, but also “division-of-labor egalitarians”, as Dagan calls those for whom the distributional issues are relevant, but must be addressed exclusively by public law.

Let me briefly discuss the articulation of these ideas in their writings.


31. v. Weber, Max. Economy and society (Guenther Roth & Claus Wittich eds.). Berkeley: The University of California Press, 1968, p. 586 (“By a peculiar paradox, ascetism actually resulted in the contradictory situation already mentioned on several previous occasions, namely that it was precisely its rational ascetic character that led to the accumulation of wealth.”).

3.1. Aditi Bagchi

In a world in which we all had similar wealth, or at least the same opportunities, discussions about distributive justice would be generally unimportant. But in a world in which background inequalities have been recognized even under freely bargained contracts, these become inescapable issues. Focusing on distributive injustice, Aditi Bagchi’s recent works have given particular attention to this perception.\(^\text{33}\) Her writings seem to identify two types of restrictions on the incorporation of distributional discussions to the field of contract theory. The first, structural, concerns the normative frameworks from which we think about contract law. The second, substantial, is related to the arguments used to fend off distributive questions from contract theory.

In common law countries, the normative framework for the theoretical discussions regarding contract law is the practice of promising. “Since the morality of promising does not obviously have anything to do with distributive justice,” explains Bagchi, “philosophical writing about contract has largely ignored matters of distribution even though they are intuitively related to the fairness of exchange.”\(^\text{34}\) In civil law Countries, on the other hand, the most common normative framework for theoretical inquiries on contract law is the idea of autonomy, both in its moral (or social) and legal (or institutional) versions.\(^\text{35}\) What matters here is to verify to which extent we can enforce rules (nomos) over ourselves (auto). At first glance, the exercise of autonomy must not be relational. It follows that distributive issues tend to be neglected here, though a fair distribution can be seen as an autonomy enabler.

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As for the substantial aspect, Bagchi points out three main arguments used to keep distributive issues out of contract theory. The first concerns the arbitrariness of imposing distributive duties on an individual given that distributive injustice is a systemic problem. The second stresses that even the victims of distributive injustice have agreed (contracts of adhesion apart) with the terms of the contract, and cannot, therefore, be harmed by them. The agreement, in this case, is the foundation of contract justice. A variation of this second argument, made explicit by Bagchi in a recent work, takes the agreement not as a proxy, but as a hint of justice, that is, considers the agreement a reliable sign that the contract is fair. The third argument commonly employed to keep discussions of distributive justice alien to contract theory is consequentialist, and preaches that pursuing distributive justice by contract would lead to an opposite effect vis-à-vis the one intended by its enthusiasts (like the aforementioned “boomerang effect”).

Until recently, the practical consequence of these normative frameworks was either the non-systematic, ad hoc assessment of contracts built upon radical distributive injustices, or the belief – of course benign – that these unjust contracts were to be fixed in the field of morals, with no need for legal remedies. Alongside lawyers, important economists and philosophers tend to agree that contract law is not an appropriate mean to promote distributive justice. I take Bagchi’s papers as an effort to challenge this trend: not to sustain the need of fixing every inequality in contract practice, but to seek for a minimal standard to deal with unjust contracts. Or, in her words, “to illuminate legal practice in a way that makes sense of it, on terms that are recognizable to its ordinary practitioners.”

3.2. Hanoch Dagan

Hanoch Dagan’s theory should be taken with caution, as it may indicate, at least at first glance, the endorsement of classical contract theories. This is so for two reasons. First, because Dagan proposes an autonomy-enhancing theory of private law, and autonomy is the cornerstone of the formalistic theories. Second, because his pluralist account of private law can be associated with political views akin to libertarianism.

However, Dagan takes idea of autonomy in a particular sense. In his writings, autonomy means self-determination, not personal independence. The author explicitly rejects the reduction of autonomy to negative liberty, even if negative

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36. Bagchi, Aditi. Contract as Procedural Justice. *Jurisprudence*, v. 7, 2016 (distinguishing pure theories, as the first one, and perfect theories, as the second, and rejecting both in favor of imperfect theories).

liberty is relevant as a mean to more significant ends. His defense of pluralism involves the recognition of areas of practice in which the idea of inequality plays a prominent role. “Notwithstanding the great unifying force of the so-called classical contract theory,” Dagan notes, “contract law is not the shapeless, ‘general’ law taught to generations of first-year students. Diverse family, work, home, and consumer contract types are at least as central to our shared contracting experience as are widget sales. Furthermore, it should be no surprise that the values plausibly animating marriage, employment, and consumer transactions differ from each other and from those driving commercial sales, and moreover that the contract types within each of these contractual spheres offer individuals choices among divergent values.”

It is possible that the analysis referred to in the first part of this paper show that the rationality of some transactions Dagan mentions (especially in labor and consumer law) has become pervasive, instead of insulated in statutory law. Indeed, my first findings point in this direction. Still, and unlike authors who reject the very possibility transcontextual regulation, I believe that the idea of contract as inequality is compatible with pluralist accounts of contract law, insofar as its endorsement does not imply standard prognoses. That is, even if we recognize background inequalities everywhere – say, even in b2b contracts –, it does not follow that we must adjudicate every single contract – and especially these b2b contracts – with a view to render them substantially equal. Instead, recognizing contract as inequality by and large may be the best way to prevent ad hoc remedies and disclosure political stakes.

3.3. Martijn Hesselink

The acknowledgment of private law pluralism as a positive claim seems to be indisputable, though normative theories of contract hardly go beyond classical, monist accounts of the field. As liberal theories of contract, Dagan and Bagchi’s ideas go in the opposite direction, as well as Martijn Hesselink’s. I think his theory has also some particularities that render it even more in line with the idea of contract as inequality.


39. In Europe, Micklitz, Hans.-W.; Svetiev, Yane; Comparato, Guido (eds.). European regulatory private law – the paradigms tested (EUI Working papers, LAW 2014/04); in the U.S., Schwartz, Alan; Scott, Robert. The Common Law of Contract and the Default Rule Project. Virginia Law Review, v. 102, 2016, p. 1523-1588 (the efforts by academics, codifiers, and restaters to supply transcontextual defaults rules were doomed to fail).
Moving away from traditional contract law scholarship, but in line with contemporary political theory, Hesselink’s contract theory takes democracy broadly, seeing it not only as a place to exercise voting rights, but also as an arena to contrast different reasons that distinguish private law pluralism. In this sense, his theory is a procedural one: “It is based on the idea that contract law is a compound – ideally harmonious – of arguments and reasons deriving from different backgrounds. It is based on the idea that there exists no ex ante true or right answer with regard to the question what our contract law should be; there is no Archimedean point from which we can observe the truth of contract law, no foundational substantive principle from which we can logically derive the rules of contract law and erect the edifice of a comprehensive contract law system.” 40

Building on his previous work on the political ideas subjacent to different contract theories, 41 Hesselink exemplifies what he calls “prima facie good reasons” proposed by legal scholars from different parts of the political spectrum. For instance, we should not waste social resources, as utilitarian law and economics scholars correctly point out, but the distribution of wealth – as well as opportunities or reasons for self-respect – should be subject to democratic deliberation in order to be legitimate. Similarly, it is true that legal traditions matter, as neo-pandectist communitarians advocate, but once the current addressees of contract law (and third parties, I would add) consider it inappropriate, there seems to be no good reason to prevent them to revise their rules. 42

Once we admit that every contract conveys some degree of inequality – and Hesselink has already pointed out that even b2b contracts might be drastically unequal –, 43 giving voice to all those who would be subject to contract law seems to be a good way to distinguish legitimate from illegitimate inequalities.

4. Conclusion

The feeling that mainstream contract theories are not suitable for contract practice is not new. In 1952, the German legal historian Franz Wieacker already

42. Hesselink, Martijn W. Democratic Contract Law, cit., p. 111.
noticed that postwar legal scholarship had lost the “image of society” that 19th and early 20th Century legal scholars had.\footnote{Wieacker, Franz. A History of Private Law in Europe: With Particular Reference to Germany (Tony Weir trans.). Oxford: Oxford University Press, 1996, p. 463.} Twenty-five years later, the Italian legal comparatist Rodolfo Sacco regretted the fact that younger scholars “see crisis everywhere”, and attributed that stance to “the loss of the system, the compass of the old.”\footnote{Sacco, Rodolfo. Metodo del diritto civile e scontri di generazionali. In: Cesare Massimo Bianca et alii (eds.). La civilistica italiana dagli anni ’50 ad oggi tra crisi dogmatica e riforme legislative. Milano: Giuffrè, 1991, p. 1003.} These readings are consistent with the evanescent features assigned by Duncan Kennedy to the third globalization of legal thought, which in his opinion, and in contrast with the thesis and antithesis embodied by the first two globalizations, cannot be seen as a synthesis.\footnote{Kennedy, Duncan. Three Globalizations of Legal Thought: 1850-2000, cit., p. 63.}

The purpose of this short sketch of ideas was to claim the wide-ranging acknowledgment of substantial inequalities in contract law as a way to overcome the theoretical resignation of Wieacker, Sacco, and Kennedy. As an epistemological matrix, the idea of contract as inequality may also explain what is in common among different theories of contract such as those developed by Aditi Bagchi, Hanoch Dagan, and Martijn Hesselink. Indeed, much like will theory and social interdependence did long ago, inequality seems to be the large integrating concept that reconciles contract theory to contemporary, pluralist contract practice.

5. References


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