Contract as inequality

Contrato como desigualdade

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Recebido em: 16.09.2016
Aprovado em: 06.02.2017

Área do Direito: Civil

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.

Keywords: Contract law – Contract theory – Formal equality – Substantial equality – Distributive justice.

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.

Palavras-chave: Direito dos contratos – Teoria do contrato – Igualdade formal – Igualdade substancial – Justiça distributiva.

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.[1] 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.[2] 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.[3] And even those who think of contract as something more than promise or autonomy admit these concepts at the core of contract theory.[4] Consequently, discussions connected to inequality issues are swept off contract law scholarship.[5]

1. * I was benefited from comments and suggestions by Aditi Bagchi, Hanoch Dagan, Martijn Hesselink, and participants at the Contract Law in a Liberal Society Conference (University of Amsterdam School of Law, June 30th-July 1st, 2016). This article was originally designed as a reaction paper to Bagchi, Dagan, and Hesselink's selected works. For a summary of the main discussions held at the meeting, *v.* Silva Filho, Osny da. Qual é o papel do direito dos contratos em uma sociedade liberal? *Conjur*: Direito Civil Atual [online], 05.09.2016, available at [http://www.conjur.com.br/2016-set-05/direito-civil-atual-qual-papel-direito-contratos-sociedade-liberal]. All websites cited in this paper were accessed by 18.01.2017. *e.g.* Kaplow, Louis; Shevell, Steven. Why the legal system is less efficient than the income tax in redistributing income. *Journal of Legal Studies*, v. 23, 1994, p. 667-681; and Shavell, Steven. A Note on Efficiency vs. Distributional Equity in Legal Rulemaking: Should Distributional Equity Matter Given Optimal Income Taxation? *American Economic Review*, v. 71, 1981, p. 414-418. For a critique (that also famously established the "double distortion" label), *v.* Sanchirico, Chris W. Taxes versus legal rules as instruments for equity: a more equitable view. *Journal of Legal Studies*, v. 29, 2000, p. 797-820.
2. *e.g.* Fried, Charles. *Contract as Promise:* A Theory of Contractual Obligation. Cambridge: Harvard University Press, 1981; and Ferri, Luigi. *L'autonomia privata*. Milano: Giuffrè, 1959.
3. There are alternatives. Late scholastics such as Lessius and Molina, as well as the natural lawyers Grotius and Pufendorf, construed their theories of contract from the idea that promises transfer rights from the promisor to the promisee. Contemporary scholars like Peter Benson and Stephen Smith embrace similar ideas. *v.* Benson, Peter. The Unity of Contract Law. In: Benson, Peter (org.). *A Theory of Contract Law:* New Essays. New York: Cambridge University Press, 2007, p. 118-127 (promises transfer rights); Smith, Stephen. *Contract theory*. Oxford: Oxford University Press, p. 72-78 (promises create rights for the promisee).
4. *e.g.* Shiffrin, Seana V. The Divergence of Contract and Promise. *Harvard Law Review*, v. 120, 2007, p. 708 ("In U.S. law, a contract is described as a legally enforceable promise. So to make a contract, one must make a promise."); Betti, Emilio. *Teoria generale del negozio giuridico*. 2. ed. Napoli: Edizioni Scientifiche Italiane, 1950 (1943; 1994), p. 46 ("legal transactions (...) are essentially acts with which individuals regulate their own interests by themselves in reciprocal relations.") For a critique, *v.* Bagchi, Aditi. Distributive Justice and Contract. In: Gregory Klass, George Letsas & Prince Saprai (eds.). *Philosophical Foundations of Contract Law*. Oxford: Oxford University Press, 2015, p. 193-213.

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.[6] 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."[7] 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.

5. Lopes, José Reinaldo de Lima. *As palavras e a lei*. São Paulo: Editora 34, 2004, p. 265-267 (historical assessment of how private law scholarship lost its distributional concerns). Of course, there were important exceptions to the negligence towards inequality issues suggested above. Excellent examples are Ackerman, Bruce. Regulating Slum Housing Markets on Behalf of the Poor: Of Housing Codes, Housing Subsidies and Income Redistribution Policy. *Yale Law Journal*, v. 80, 1971, p. 1093-1197; Kronman, Anthony T. Contract Law and Distributive Justice. *Yale Law Journal*, v. 89, 1980, p. 472-511; and Collins, Hugh. Distributive Justice through Contracts. *Current Legal Problems*, v. 45, 1992, p. 49-67.
6. Kennedy, Duncan. Three Globalizations of Legal Thought: 1850-2000. In: David Trubek & Alvaro Santos (eds.). *The New Law and Economic Development. A Critical Appraisal*. Oxford: Oxford University Press, 2006, p. 62-63.
7. Kennedy, Duncan. Three Globalizations of Legal Thought: 1850-2000, cit., p. 63.

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.[8] 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.[9] 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

8. The idea of inequality may be fruitful to many other disciplines and to academic thinking in general, and the recent emergence of wide-ranging studies on the topic suggests this. *e.g.* Milanovic, Branko. *Global Inequality: A New Approach for the Age of Globalization*. Cambridge: Harvard University Press, 2016 (inequality cycles); Frankfurt, Harry G. *On Inequality*, New Jersey: Princeton University Press, 2015 (reduction of inequality *vs.* elimination of poverty); Piketty, Thomas. *Capital in the Twenty-First Century* (Arthur Goldhammer trans.). Cambridge: Harvard University Press, 2014 (tax and concentration of wealth); Stiglitz, Joseph. *The Price of Inequality: How Today's Divided Society Endangers Our Future*. New York: W. W. Norton, 2013 (political origins of inequality and its effects on politics); and Rajan, Raghuram G. *Fault Lines: How Hidden Fractures Still Threaten the World Economy*. New Jersey: Princeton University Press, 2011 (inequality of opportunities).

9. *v.* Ranouil, Véronique. *L'autonomie de la volonté:* naissance et evolution d'un concept. Paris: Presses Universitaires de France, 1980; Villey, Michel. Essor et décadence du volontarisme juridique. *Archives de Philosophie du Droit*, v. 4, 1957, p. 87-98.

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,[14] and, in Brazil, Orlando Gomes.[15] 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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10. Williston, Samuel. *The Law of Contracts (4 vols.)*. New York: Baker, Voorhis, 1920.
11. Decock, Win. *Theologians and Contract Law. The Moral Transformation of the Ius Commune (ca. 1500-1650)*. Leiden: Martinus Nijhoff, 2013; Gordley, James R. *The Philosophical Origins of Modern Contract Doctrine*. Oxford: Oxford University Press, 1991; and Grossi, Paolo (org.). *La seconda scolastica nella formazione del diritto privato moderno*. Milano: Giuffrè, 1972.
12. *v.* McCloskey, Deirdre N. *Bourgeois Equality: How Ideas, Not Capital or Institutions, Enriched the World*. Chicago: University of Chicago Press, 2016 (hagiography of bourgeois *homo economicus*).
13. French Civil Code (1804), art. 8º: "*Tout Français jouira des droits civils.*" But *v.* Gordley, James R. Myths of the French Civil Code. *American Journal of Comparative Law*, v. 42, 1994 (the French Civil Code did not enact formal equality, but formal equality was read into its provisions by commentators).
14. Kennedy, Duncan. Three Globalizations of Legal Thought: 1850-2000, cit.
15. *v.* Ramos, Luiz Felipe Rosa; Silva Filho, Osny da. *Orlando Gomes*. Rio de Janeiro: Elsevier, 2015, p. 178-182.

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.[16] 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."[17] 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.[18] His ultimate purpose was to bring social change by turning contract law and theory upside down.[19]

16. Cesarino Júnior, Antônio Ferreira. *Direito Social*. São Paulo: LTr, 1980 (1940), p. 60-62 (labor law cannot be subsumed neither to public law nor to private law); Monteiro, Washington de Barros. *Curso de direito civil. Parte Geral*. São Paulo: Saraiva, 1958, p. 14 (labor law is a branch of public law); and Pereira, Caio Mário da Silva. *Instituições de direito civil*. Rio de Janeiro: Forense, 1961, v. 1, p. 8 (labor law is a *sui generis* branch of private law because it is led by public order principles).

17. Ascarelli, Tullio. Ordinamento giuridico e processo economico. In: Tullio Ascarelli. *Problemi giuridici*. Milano: Giuffrè, 1959, v. 1, p. 50.

18. Gomes, Orlando. Influência da legislação do trabalho na evolução do direito. In: GOMES, Orlando. *Direito do trabalho. Estudos*. Salvador: Forum, 1941, p. 8. This short paper was also submitted to the First Congress of Social Law of the Brazilian Social Law Institute, held in São Paulo in 1941. Symptomatically, it was "unanimously criticized" for considering social law "such a reality that is not a new branch of law" (as reported in the annals of the meeting, published two years later). Medeiros, Roberto Saboya de. Relatório geral. In: Vvaa. *Anais do Primeiro Congresso de Direito Social promovido pelo Instituto de Direito Social*. Vol. II. Rio de Janeiro: Serviço de Estatística da Previdência e Trabalho, 1943, p. 10. Nevertheless, Gomes kept making the same point in his following works. *e.g.* Gomes, Orlando. *Contratos*. Rio de Janeiro: Forense, 1959, p. 2 (suggesting that the same rationality would embrace the discipline of "those who work for a salary and those who sell goods and services in exchange of money"). For a broader conceptual discussion, *v.* Klare, Karl E. Public/Private Distinction in Labor Law. *University of Pennsylvania Law Review*, v. 130, 1982, p. 1358-1422 (criticizing the public/private rhetoric in labor law).

19. Ramos, Luiz Felipe Rosa; Silva Filho, Osny da. *Orlando Gomes*, cit., p. 78-80.

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.

20. Alpa, Guido. *Le stagioni del contratto*. Bologna: Il Mulino, 2012, p. 139-183 (on asymmetric, fair, and transparent contracts); Hesselink, Martijn W. *Private Law, Regulation, and Justice*, 2016, working paper available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2744565 (on withdrawal rights, unfair terms control, and remedies for non-conformity).

21. PLS 487/2013, art. 306: "A proteção que este Código libera ao contratante economicamente mais fraco, nas relações contratuais assimétricas, não pode ser estendida para preservá-lo das consequências econômicas, financeiras, patrimoniais ou administrativas de suas decisões na condução da empresa. [...]".

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,[22] 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.[23]

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."[24]

22. *e.g.* Brazil, STJ, REsp 541.867/BA, Segunda Seção, Pádua Ribeiro, 10.11.2004; REsp 476.428/SC, Terceira Turma, Nancy Andrighi, 19.04.2005; REsp 661.145/ES, Quarta Turma, Jorge Scartezzini, 22.02.2005; e REsp 687.239/RJ, Terceira Turma, Nancy Andrighi, 06.04.2006.

23. *e.g.* Marques, Cláudia Lima. Superação das antinomias pelo diálogo das fontes: o modelo brasileiro de coexistência entre o Código de Defesa do Consumidor e o Código Civil de 2002. *Revista de direito do consumidor*, 51, 2004, p. 51 (on current uses of Brazilian Consumer Protection Code). Before, Lopes, José Reinaldo de Lima. *Responsabilidade civil do fabricante e a defesa do consumidor*. São Paulo: Revista dos Tribunais, 1992, p. 79 (pioneer doctrinal claim); and Tomasetti Júnior, Alcides. Abuso de poder econômico e abuso de poder contratual. *Revista dos Tribunais*, v. 84, 1995 (pioneer legal opinion).

24. Bagchi, Aditi. Distributive Justice and Contract, cit., p. 198.

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.[25] 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[26] to recent socio-cultural, neo-pandectist trends,[27] passing through neoclassical law & economics (surprisingly alive outside US, though theoretically decried in its birthplace),[28] not to mention the commutative justice revival.[29] In all these cases, the wide recognition of background inequalities in contract practice is taken as something that should be corrected or even reversed.

25. Kennedy, Duncan. Three Globalizations of Legal Thought: 1850-2000, cit., p. 63.

26. *e.g.* Stolfi, Giuseppe. *Teoria del negozio giuridico*. Padova: Cedam, 1947 (restatement of the classic will theory); Flume, Werner. *Allgemeiner Teil des Bürgerlichen Rechts*. Vol. 2. *Das Rechtsgeschäft*. 4. ed. Berlin: Springer, 2012 (1964) (famous monograph on legal transactions, critically departing from – but still taking for granted – numerous will-ish categories); and lastly, Irti, Natalino. *Un diritto incalcolabile*. Bari: Laterza, 2016 (latest formulation of his nihil-irrationalist version of the will theory).

27. *e.g.* Zimmermann, Reinhard. Roman Law and the Harmonization of Private Law in Europe. In: Arthur Severijn Hartkamp *et alii* (org.). *Towards a European Civil Code*. 4. ed. Alphen: Kluwer, 2010 (1994), p. 27-53; and indirectly, Jansen, Nils. *The Making of Legal Authority. Non-legislative Codifications in Historical and Comparative Perspective*. Oxford: Oxford University Press, 2010.

28. The best reference here is the first Richard Posner, from the celebrated *Economic Analysis of Law*, now in its 9. ed. New York: Aspen, 2014 (1973), to the controversial *The Economics of Justice*. Cambridge: Harvard University Press, 1983. For an overview of Posner's scholarship, *v.* Salama, Bruno Meyerhof. A história do declínio e queda do eficientismo na obra de Richard Posner. In: Maria Lúcia L. M. Pádua Lima (coord.). *Trinta anos de Brasil: diálogos entre direito e economia*. São Paulo: Saraiva, 2012, p. 284-325. Contemporary enthusiasts of the old-style law & economics include Timm, Luciano Benetti. *Direito contratual brasileiro. Críticas e alternativas ao solidarismo jurídico*. 2. ed. São Paulo: Atlas, 2015 (2008, *O novo direito contratual brasileiro*) (moving from an elaboration of Niklas Luhmann's systems theory in the first edition to a wholehearted endorsement of neoclassical law & economics in the second); and, more critically, Eidenmüller, Horst. *Effizienz als Rechtsprinzip: Möglichkeiten und Grenzen der* ökonomischen *Analyse des Rechts*. 4. ed. Tübingen: Mohr Siebeck, 2015 (1995).

29. *e.g.* Weinrib, Ernest J. *The Idea of Private Law*. Cambridge: Harvard University Press, 1995; Canaris, Claus-Wilhelm. *Die Bedeutung der iustitia distributiva im deutschen Vertragsrecht*.

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."[30] 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.[31]

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.[32]

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

München: Bayerischen Akademie der Wissenschaften, 1997; Gordley, James R. *Foundations of Private law: Property, Tort, Contract, Unjust Enrichment*. Oxford: Oxford University Press, 2006.

30. Rodrigues Junior, Otavio Luiz; Rodas, Sergio. Interview with Reinhard Zimmermann and Jan Peter Schmidt. *Revista de direito civil contemporâneo*, 4, 2014, p. 403 (Schmidt, confirmed by Zimmermann).

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.").

32. Dagan, Hanoch; Dorfman, Avihay. Just Relationships. *Columbia Law Review*, v. 116, 2016, p. 1395-1460.

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.[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."[34] In civil law Countries, on the other hand, the most common normative framework for theoretical inquires on contract law is the idea of autonomy, both in its moral (or social) and legal (or institutional) versions.[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.

33. Despite the hegemony of distributive justice at the core of inequality-sensitive contract theories, issues related to equality of opportunities (often read into the old *topos* of freedom of contract, the freedom to choose the contractual partner) and recognition (mainly through antidiscrimination law and theory) are far from absent from contract law scholarship. *e.g.* Dalton, Claire. An Essay in the Deconstruction of Contract Doctrine. *Yale Law Journal*, v. 94, 1985, p. 997-1114 (landmark piece for feminist legal theory); Chase, Anthony R. Race, Culture and Contract Law. *Connecticut Law Review*, v. 28, 1995, p. 1-66; Mulcahy, Linda; Wheeler, Sally (org.). *Feminist Perspectives on Contract*. London: Cavendish, 2005; Silva, Jorge Cesa Ferreira da. A proteção contra discriminação no direito contratual brasileiro. *Revista de direito civil contemporâneo*, v. 1, 2014, p. 41-65 (Brazilian perspective). For an early explanation of these trends, *v.* Minda, Gary. *Postmodern Legal Movements. Law and Jurisprudence at Century's End*. New York: New York University Press, 1995, p. 247 (on the emergence of "diversity movements" by the end of the 20th Century).

34. Bagchi, Aditi. Distributive Justice and Contract, cit., p. 193.

35. *v.* Criscuolo, Fabrizio. *Autonomia negoziale e autonomia contrattuale*. Napoli: Edizioni Scientifiche Italiane, 2008, p. 2-3 (on moral and legal models of autonomy).

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.[36] 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."[37]

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

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*).

37. Bagchi, Aditi. Distributive Justice and Contract, cit., p. 193.

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."[38]

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,[39] 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.

38. Dagan, Hanoch. *The Challenges of Private Law:* Towards A Research Agenda for an Autonomy-Based Private Law, 2015, working paper available at [http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2690014], p. 12.

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

40. Hesselink, Martijn W. Democratic Contract Law. *European Review of Contract Law*. 2015, v. 11, p. 104.

41. Hesselink, Martijn W. Five Political Ideas of European Contract Law. *European Review of Contract Law*, 2011, v. 7, p. 295-313. Before, relying on the left-right wing divide, Kennedy, Duncan. The Political Stakes in "Merely Technical" Issues of Contract Law. *European Review of Private Law*, v. 1, 2001, p. 7-28.

42. Hesselink, Martijn W. Democratic Contract Law, cit., p. 111.

43. Hesselink, Martijn W. Towards a Sharp Distinction between b2b and b2c? On Consumer, Commercial and General Contract Law after the Consumer Rights Directive. *European Review of Contract Law*, v. 18, 2010.

noticed that postwar legal scholarship had lost the "image of society" that 19th and early 20th Century legal scholars had.[44] 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."[45] 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.[46]

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.

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44. Wieacker, Franz. *A History of Private Law in Europe: With Particular Reference to Germany* (Tony Weir trans.). Oxford: Oxford University Press, 1996, p. 463.

45. 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.

46. Kennedy, Duncan. Three Globalizations of Legal Thought: 1850-2000, cit., p. 63.

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