THE ROLE OF DEMOCRACY IN PRIVATE LAW

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1. INTRODUCTION

In liberal democracies, democratic legislation plays a limited role in the development of private law. In common-law jurisdictions, which are the focus of this chapter, part of this limitation is due to an overt institutional division of labour between court and legislature. I say "part" because, as we shall see, not all legislative interventions in the content of private law is meaningfully democratic. In common law and civil law jurisdictions alike, much of private law legislation is professionally controlled, and the content of the law reflects little input from democratic practices of election, representation, deliberation, and voting.

When meaningfully democratic legislation does occur, it remains characteristically limited in at least two related ways. First, democratic intervention is local—at times patchy—rather than comprehensive. It does not take the shape of an overhaul or reexamination of the broad fields of property, contracts, torts, and unjust enrichment. Instead, democratic legislation takes the form of circumscribed interventions in legislating for particular kinds of property or certain types of voluntary and involuntary transactions. These interventions can be broad in their scope (e.g. applying to all employment contracts or affecting liability in all bodily injury caused by accidents). Still, they leave unexamined a core set of general private law principles that rarely, if ever, come under democratic scrutiny. Second, and relatedly, democratic contribution to the content of private law is interpreted and applied by courts, whose reasoning is suffused with these traditional principles

and categories. The limited democratic impact on legislation is then limited again through the reasoning practices of those charged with its application. It turns out that even when it comes to the local scope of democratic legislation, the private law governing particular types of property, transactions, and liability is the product of dual authorship of a democratic legislature and professional courts.

My main goal in this chapter is to argue that this bifurcated way of generating private law is defensible on the principled grounds of an egalitarian political morality. I do so by answering recent calls for the more radical democratisation of private law. The reason for choosing this argumentative structure is that, within contemporary political theory, there is a strong prima facie case for democratically deciding important controversial questions, which balance multiple interests and values. The case is based on both the epistemic advantages of democratic procedures and their correctness-independent credentials, which make their product deserving of their subjects' respect. The grounds for carving out questions from the scope of democratic legislation are narrow and, at least from an egalitarian perspective, do not apply to the delineation of private property rights or contractual obligations. Seen this way, the absence of full democratisation emerges as a puzzle for egalitarian political theory. By addressing this puzzle, I develop an argument about the legitimate but limited role democracy plays in contemporary private law.

After stating the detailed case for the democratisation of private law in Section 2, I answer it in two stages. Section 3 takes a closer look at the normative complexity of private law. It identifies two normative challenges that have made egalitarian liberals think that private law rules deserve special consideration. The challenges, roughly, go to the need to protect other values—relational values and

individual separateness—from the exerting demands of justice and political decision-making. Section 4 reexamines the case for democratisation in light of this normative analysis. It argues, first, that the superior epistemic credentials of democratic legislation make it less likely to recognise the privileged role relational values should play in shaping private law rules. It then argues, more controversially, that reducing the question of individualism in society to a political question, best answered by democratic legislation, is unwarranted. The conclusion is that the bifurcated procedural arrangements we find in liberal democracies provide a better response to the normative complexity of private law when compared to an entirely democratic process. Democracy has a vital role to play as part of these procedural arrangements, but so do professionally-controlled forms of lawmaking. The chapter shows that the legitimacy of both democratic legislation and the professional development of private law depends on the simultaneous existence of both processes.

2. THE CASE FOR DEMOCRATISATION

2.1. The status quo

There is a connection between two developments in modern private law—one epistemic and one practical. Epistemically, there has been a growing awareness of this law's moral, cultural, distributive, and economic stakes.[1] The rise of egalitarian liberalism has been accompanied by a broad rejection

[1] Study Group on Social Justice in European Private Law, 'Social Justice in European Contract Law: A Manifesto' (2004) 10 European Law Journal 653; Martijn W Hesselink, 'Democratic Contract Law' (2015) 11 European Review of Contract Law 81.

of the neutrality and naturalness of private law rules, which are now ordinarily acknowledged as both contingent and intensely political in their consequences.[2] The traditional categories of private property, contract, tort, and unjust enrichment are recognised by many as embodying a particular ideology, serving particular interests, and reflecting particular values and culture. Alongside this awareness, the practice of private law changed as well. New processes for making private law emerged, and the control of legal experts over rulemaking decreased. Legislation, which has always been present in private law, intensified, and democratic legislation—that is, legislative reform not controlled by legal experts—has become more frequent. It yielded a series of contributions to private law that are generally more responsive to its social and political stakes.[3]

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[2] Liam Murphy and Thomas Nagel, *The Myth of Ownership: Taxes and Justice* (Oxford University Press 2004); Samuel Scheffler, 'Distributive Justice, the Basic Structure and the Place of Private Law' (2015) 35 Oxford Journal of Legal Studies 213.

[3] For examples of partisanship in employment protection legislation, see David Rueda, *Social Democracy Inside Out: Partisanship and Labor Market Policy in Advanced Industrialized Democracies* (Oxford University Press 2007) 104–46 (detailing case studies of partisan government in employment protection); Linda Voigt and Reimut Zohlnhöfer, 'Quiet Politics of Employment Protection Legislation? Partisan Politics, Electoral Competition, and the Regulatory Welfare State' (2020) 691 The Annals of the American Academy of Political and Social Science 206; Reimut Zohlnhöfer and Linda Voigt, 'The Partisan Politics of Employment Protection Legislation: Social Democrats, Christian Democrats, and the Conditioning Effect of Unemployment' [undefined/ed] European Political Science Review 1 (forthcoming 2021). On the politics of tenancy legislation, see Susan Bright, *Landlord and Tenant Law: The Nature of Tenancies* (Clarendon Press 1995) 12–13; AH Manchester, *A Modern Legal History of England and Wales 1750-1950* (Butterworths 1980) 320–21; Alfred Thompson Denning, *The Changing Law* (Sweet & Maxwell ; FBRothman 1986) 45–46. On partisanship in consumer protection

There is a causal connection between the two developments, which mutually reinforce each other. The rise of egalitarian liberalism occurred in the shadow of the height of the welfare state.[4] Subsequently, awareness of the distributive and political implications of so-called neutral "rules of just conduct" has motivated rent-seekers, interest groups, and social justice advocates to try to influence the content of private law. Following the rise of the political salience of private law questions, political actors have become increasingly interested in tort reform, the definition of property rights, and the regulation of various types of contracts. Since private law relationships are increasingly seen as intensely political, it is no wonder that their regulation is increasingly controlled by the method generally thought of as most appropriate for resolving political questions: democratic legislation.

And yet, the change has been only gradual and patchy. In common law jurisdictions, it is still the case that courts remain the principal institution responsible for developing general doctrine in all areas of private law. Political science knows to tell us why this is so.[5] Legislative efforts are costly and are ordinarily motivated by interest groups and ideological lobbies. These are more likely to

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legislation and its affect on the law, see Schmuel I Becher, 'Unintended Consequences and the Design of Consumer Protection Legislation' (2018) 93 Tulane Law Review 105.

[4] Katrina Forrester, *In the Shadow of Justice: Postwar Liberalism and the Remaking of Political Philosophy* (Princeton University Press 2019).

[5] For a balanced account, see Daniel A Farber and Philip P Frickey, *Law and Public Choice: A Critical Introduction* (University of Chicago Press 1991) ch 1.

coalesce around a specific type of property or transaction (e.g. family property, employment relations, credit card contracts) and not on a more comprehensive revision of private law, which is costly and whose benefits to specific interests and groups are uncertain. At their highest levels of generality, private law rules deal with A and B, Whiteacre and Blackacre. This makes their distributive impact on particular groups hard to predict.[6] Private law bills that are part of a professional process of legislation, making their way to the legislature through the workings of some professional body, also struggle to find legislative time for similar reasons. But in the case of democratic legislation in private law, this motivational structure affects the very impetus to deal with the subject matter.

The distinction between a professionally controlled legislative process and a democratic legislative process is a distinction between ideal types. By 'democratic legislation,' I mean a type of legislative process in which the content of legislation is shaped by democratic forces, channelled through the mechanisms characteristic of representative democracy: free elections, parliamentary deliberation, and decision by a majority vote. Democratic legislation involves lawmakers representing their parties' ideological views and their constituencies' interests in their deliberations. It is often provoked by lobbying interest groups and ideological pressure groups. Politicians instigate it, its deliberation revolves on ideological, distributive, and politically salient considerations, and it is often voted on along party lines. Members of the legal profession are involved, of course, in any act

[6] Cf. Richard A Epstein, 'The Social Consequences of Common Law Rules' (1982) 95 Harvard law review 1717.

of legislation. Still, legal expertise does not provide the main force behind, or the principal logic of, the legislative effort.

As a form of lawmaking, legislation has been part of European private law since Roman times and is present in both common law and civil jurisdictions.[7] However, not all of this legislation—or even most of it—resembles the ideal type of democratic legislation.[8] Often, private law legislation is a professional affair. Although occurring within a democratically elected legislature, it is closer to a professional type of legislative process. As an ideal type, professional legislation is controlled from start to finish by legal experts. It is provoked by members of the judiciary or a law-reform body such as a law commission, populated by members of the legal profession. It involves drafting by a body of legal experts and, when discussed in the legislature, it sees disproportionate participation by representatives who are professional lawyers, drawing on their legal expertise in their deliberations.

As one UK lord commented, when these legislators come to deal with private law legislation, they make vigorous use of their professional skills. "Lawyers," he said, "are zealous—sometimes even … over-zealous—in trying to improve the drafting of any Bill that comes before us which deals with the law."[9] During the legislative process, the arguments they make, the reasons they invoke, and the considerations they explicitly weigh are often of a casuistic or technical nature. The

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[7] George Mousourakis, *Fundamentals of Roman Private Law* (Springer 2012) 23–24.

[8] Cf. Hanoch Dagan, 'Judges and Property', *Intellectual Property and the Common Law* (Cambridge University Press 2013) 38–39.

[9] (27 May 1999) 601 GBPD HL 1049 (Lord Renton, debating legislation on privity).

deliberation characteristic of this legislation is not substantively different from those we find in professionally controlled "private legislatures," such as the American Law Institute and the National Conference of Commissioners on Uniform State Laws in the US.[10]

This last point requires some refinement. One should not exaggerate the homogeneity of the legal profession, which is nowadays neither demographically homogenous nor limited to a single discourse or worldview.[11] Lawyers are often advocates for social change and social justice and support democratic legislation or administrative regulation that would swerve away from the trajectory of common private law and the distinct modes of reasoning from which it emerged. And yet, it is equally important to acknowledge the affinity between professional legal reasoning and the form of the judicial process. When lawyers reason "as lawyers", and particularly when they are asked

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[10] In their analysis of private legislatures, Schwartz and Scott focus on their susceptibility to interest groups and lobbying. However, they concede that their "analysis applies to those issues that implication value choices and are sufficiently important to attract interest groups. NCCUSL furnishes useful technical expertise to state legislatures in areas where there is a consensus on the underlying values and where the resulting statutes cannot create large winners and losers." Alan Schwartz and Robert E Scott, 'The Political Economy of Private Legislatures' (1995) 143 University of Pennsylvania Law Review 595, 599.

[11] Deborah L Rhode, 'Foreword: Diversity in the Legal Profession: A Comparative Perspective Colloquium: The Challenge of Equity in the Legal Profession: An International and Comparative Perspective' (2014) 83 Fordham Law Review 2241; Jason P Nance and Paul E Madsen, 'An Empirical Analysis of Diversity in the Legal Profession' (2014) 47 Connecticut Law Review 271. On the erosion of the classical characteristics of a homogenous profession in law, see Arie Rosen, 'Office and Profession in the Design of Modern Institutions' (2020) 70 University of Toronto Law Journal 198, 211–13.

to bring their professional expertise to bear on the development of private law, they are prone to conceptualise questions of value, justice, and efficiency in a way similar to how courts would. Edward Rubin, reflecting on his experience heading a subcommittee of lawyers charged with reviewing parts of the Uniform Commercial Code, commented on the perseverance of traditional modes of legal reasoning in these settings:

> A number of leading scholars … have announced the obsolescence of this traditional approach to law. I certainly share this view, but I saw little support for it on the committee. Perhaps this is merely a factor of the committee members' age, although my own experiences with today's law students make me doubt that optimistic theory. Besides, the committee members were not that old, most of them having been in law school during the legal process era. Their attitudes, however, suggested that they had received their training directly from Christopher Columbus Langdell.[12]

2.2. The positive case for democratic legislation

There are good reasons to legislate in private law that have nothing to do with democracy. Sometimes the law requires a codifying restatement. At other times, legislative reform is needed to correct a well-established common law doctrine, which judges consider undeniably authoritative yet problematic in their substance. What is valuable in these instances of legislation is the formal

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[12] Edward L Rubin, 'Thinking Like a Lawyer, Acting Like a Lobbyist: Some Notes on the Process of Revising UCC Articles 3 and 4' (1992) 26 Loyola of Los Angeles Law Review 788, 768.

features of statutes, which differ from those of judicial decision-making. The authoritative univocality of statutes, together with their freedom from the authority of precedent, makes them valuable tools to complement a system of judge-made private law. These values apply equally to professional and democratic modes of legislation.

Democratic legislation has additional virtues. These virtues can be distinguished into two kinds. The first type of virtues is epistemic. Epistemic virtues concern the propensity of democratic processes of election, representation, deliberation, and voting to yield statutes with better content. What "better" means in this context is a matter of some disagreement, even at the abstract level of standard. Early utilitarian defences of democratic legislation applauded its ability to represent the diverse interests in society in a process that yields laws that serve the greatest happiness of the greatest number.[13] Democratic processes are also defended as more likely to yield rational results[14] and have the virtue of aggregating dispersed knowledge from members of society.[15] They can also be

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[13] E.g. James Mill, 'Essay on Government' in Terence Ball (ed), *Political Writings* (Cambridge University Press 1992) 26–35; David Lieberman, 'Bentham's Democracy' (2008) 28 Oxford Journal of Legal Studies 605, 617–19.

[14] E.g. Joshua Cohen, 'An Epistemic Conception of Democracy' (1986) 97 Ethics 26; Joshua Cohen, 'Deliberation and Democratic Legitimacy' in James Bohman and William Rehg (ed), *Deliberative Democracy: Essays on Reason and Politics* (MIT Press 1997); David M Estlund, 'Beyond Fairness and Deliberation: The Epistemic Dimension of Democratic Authority' in James Bohman and William Rehg (ed), *Deliberative Democracy: Essays on Reason and Politics* (MIT Press 1997).

[15] Jeremy Waldron, 'The Wisdom of the Multitude: Some Reflections on Book 3, Chapter 11 of Aristotle's Politics' (1995) 23 Political Theory 563; Josiah Ober, *Democracy and Knowledge: Innovation and Learning in Classical Athens* (Princeton University Press 2008).

seen as useful for discovering the community's shared values and enacting legislation that serves them.[16] Whatever the relevant epistemic standard happens to be—utilitarian, moral-rational, or ethical—there are good arguments that explain how democratic processes help us tap into knowledge and information found with members of the political community and are represented in its legislative assembly.

Alongside whatever epistemic virtues they may have, democratic processes also have correctness-independent virtues. Democratic decision-making is ordinarily seen as a condition for meaningful self-government. Democracy, it is said, is not (only) about reasonable deliberation but (also) about will-formation.[17] In a more liberal streak, it is argued that the democratic process is superior to other decision-making mechanisms because of how it treats participants. It is a process that accords maximal, equal respect to the views of participants in a way that makes the ultimate decision deserving of their respect and allegiance.[18] Seana Shiffrin expresses this connection between citizens and their law in terms of a communicative requirement:

> Even if endorsed by each of us individually, in our hearts and in our editorials, a system of civil and economic rights that satisfied the substantive requirements of justice with respect to each member's just entitlements, claims, or needs, would fail to satisfy this

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[16] Jürgen Habermas, *Between Facts and Norms: Contribution to a Discourse Theory of Law and Democracy* (William Rehg tr, MIT Press 1998) 160.

[17] ibid 180.

[18] Jeremy Waldron, *Law and Disagreement* (Oxford University Press 1999).

> communicative need. The system must, therefore, not only be endorsed by us but also must be our product. Its production must have a communicative component to it, one that could be publicly grasped. So, other things equal, each of us must be involved in the generation and maintenance of this (otherwise) just system for its creation to be our product…[19]

I have argued elsewhere that actual instances of legislation can involve different types of discourses and involve varying modalities of representation, tapping into different sets of virtues associated with democratic lawmaking.[20] The process can be oriented at rational judgments, be dominated by competing interests, or give rise to ethical deliberations. It can also yield a product that is valuable as a mere decision, regardless of its correctness, simply as the product of a democratic process that deserves our respect. However, it is clear that for it to accrue any of these dimensions of value, legislation must be democratic. It must meaningfully involve the mechanisms that channel, negotiate, develop, or aggregate the views or interests of participants. A "professional" legislative process, dominated by the legal profession, does not do that, even when it occurs within a democratically elected legislature. Democratic indifference is not the same as democratic endorsement.

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[19] Seana Shiffrin, 'Speaking Amongst Ourselves: Democracy and Law' [2017] The Tanner Lectures on Human Value 156–57 <https://tannerlectures.utah.edu/Shiffrin%20Manuscript.pdf>.

[20] Arie Rosen, 'Statutory Interpretation and the Many Virtues of Legislation' (2017) 37 Oxford Journal of Legal Studies 134.

Given what we know of the political stakes of private law, the qualities of democratic legislation are relevant to the making of private law rules. If private law is a political matter, it seems wrong to privilege the views of the members of a professional elite when making it. Process, it is claimed, must follow substance more fully. An eminent group of European scholars, collaborating under the Study Group on Social Justice in European Private Law, explains:

> scholarly research quickly exposes beneath the rules [of private law] more fundamental disagreements about how best to reconcile values and interests, and about the proper role of government and the limits of discretion granted to private individuals. Legal scholars, like other citizens, can participate in debates about these political issues, but it should not be supposed that their expertise gives them any privileged insight into how the political questions should ultimately be resolved.[21]

Martijn Hesselink, a staunch advocate for the democratisation of European contract law, expresses a similar sentiment:

> Where moral rights and principles are at stake, values are balanced, and interests are weighed, a process where the voices of all those affected are heard and arguments from different angles, including remote corners of society, are considered and addressed, is to be preferred ...[22]

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[21] Study Group on Social Justice in European Private Law (n 1) 663.

[22] Hesselink (n 1) 113.

Hesselink makes some practical suggestions for how the low political salience and limited motivation from interest groups can be overcome in a way conducive to democratisation.[23] Notwithstanding this technical challenge, the normative question remains. Why not make private law more democratic?

The case for the democratisation of private law is best understood as a case for letting this law benefit from the virtues of democracy. Particularly since the rules of private law have moral and ethical dimensions, and since they affect a range of distributive questions, it seems urgent that they should be the product of a democratic process. A democratised private law can, potentially, reflect the wisdom of the multitude, or at least its interests. It promises to be more reflective of the values of the community and be the sort of law that commands its respect and allegiance. Most importantly, perhaps, as a body of law that directly affects the share each individual gets from an overall scheme of cooperation, it promises to be a law of the people, justifiable to them, at the very least as the expression of a collective judgment on the terms appropriate for their interactions.

2.3. A negative case: The limited view of legal experts

The positive demand for democratisation is complemented by a negative claim, at times implicit, denouncing the exaggerated professional control of lawyers over the content of private law. It is possible to distinguish two related lines of concern on this point. The first regards the unrepresentative nature of the legal profession. Since the stakes of private law are political, it is

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[23] Martijn W Hesselink, 'The Politics of a European Civil Code' (2004) 10 European Law Journal 675.

important to remember that the interests and views of members of the legal profession can diverge from those of other members of their community.[24] As a group, professional judges and lawyers have their distinct guild-like interests in preserving their disproportional control over the content of the law, sustaining a market for their professional knowledge and services. To these, one can add the interests they share with other community members located at the higher deciles of the distribution of wealth and income.[25] Moreover, despite the increasing diversity of the legal profession, lawyers still often come from similar educational, vocational, and socio-economic backgrounds. To the extent that they are still members of a *profession*, they cannot be counted on to represent the values of any diverse community.

The second worry is not about the "who?" but about the "how?". As Lon Fuller shows, there may be an advantage in having courts decide certain disputes between parties, conceptualising them as bilateral disputes and subjecting them to principled reasoning.[26] Given their professional commitment to precedent-based decision-making and principle-based legal reasoning, it makes sense to entrust judges with both deciding cases on the basis of rights (rather than policy) and developing

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[24] See generally, Eliot Freidson, *Professionalism, the Third Logic: On the Practice of Knowledge* (1 edition, University of Chicago Press 2001).

[25] Jeremy Bentham, *A Fragment on Government* (JH Burns and HLA Hart eds, New Authoritative, Cambridge University Press 1988) 116–22; Lieberman (n 13) 614; Gerald J Postema, *Bentham and the Common Law Tradition* (Clarendon Press 1986) 268.

[26] Lon L Fuller, 'The Forms and Limits of Adjudication' (1978) 92 Harvard Law Review 353.

the law in a manner that stabilises expectations and ensures equal treatment.[27] And if courts are "the forum of principle," then lawyers—whose traditional practices are shaped in the shadow of adjudication—often carry the same principled modes of reasoning to their work outside the judiciary when involved in the making of private law.[28]

The challenge from democratisation emphasises the difference between entrusting professionals with the power to apply rights and develop them and between making them the privileged authors of the content of the rules they apply. The determination of private law rules is not only 'polycentric' in the technical sense in which Fuller and Polanyi used the term, affecting a complex system in multiple interrelated ways;[29] it also balances conflicting values and desiderata, which might be hard (or impossible) to compare, and on whose proper weighting there is no agreement within the community. The determination of private law rules affects numerous parties (everyone) along various dimensions (e.g. shaping relationships, distributing benefits and burdens, affecting economic growth), relating to multiple values and social goals (e.g. individual independence, substantive autonomy, distributive fairness, general welfare). This makes their design a matter of politics: a judgment on collective goals, appropriate social structures, and questions of equality, fairness, and social justice.

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[27] Ronald Dworkin, *Taking Rights Seriously: New Impression with a Reply to Critics* (Duckworth 1977); Jeremy Waldron, 'Stare Decisis and the Rule of Law: A Layered Approach' (2012) 111 Michigan Law Review 1.

[28] See text accompanying notes 9-12.

[29] Fuller (n 26) 394; Michael Polanyi, *The Logic of Liberty: Reflections and Rejoinders* (Routledge 1951) 170–71.

Professional control over the content of private law rules is most easily justified when we think of private law as underpinned by a single value. Proponents of corrective justice, for example, can point to the single value of equal independent choice within private relationships as the underlying rationale of traditional private law rules.[30] If that had been the single value at play, there would be a better case for entrusting the development of this law to a profession dedicated to ensuring formal justice within bilateral relationships.[31] Similarly, firm believers in the economic rationality of sophisticated private actors argue that at least the private law governing sophisticated parties can be subjected to the simple principles of laissez-faire economics.[32] Although admittedly part of a polycentric system aimed at maximising the generation of wealth and abstract opportunity, it makes good sense to have private law relationships managed at the level of discrete relationships between profit-maximisers (while allowing for additional mechanisms, external to private law, to control for market failures and distributive injustice).[33]

It is doubtful that either of these two unitary, single-value theories can even explain the traditional categories of modern private law. It seems clear that equal independent choice is often

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[30] Ernest J Weinrib, *The Idea of Private Law* (Revised edition, Oxford University Press 2012) 92–100; Arthur Ripstein, *Force and Freedom: Kant's Legal and Political Philosophy* (Harvard University Press 2009) 40–50.

[31] Cf. Alan Brudner, *The Unity of the Common Law* (2nd edn, Oxford University Press 2013) 5.

[32] Alan Schwartz and Robert E Scott, 'Contract Theory and the Limits of Contract Law' (2003) 113 The Yale Law Journal 541.

[33] ibid 546.

balanced against other values, even within the universe of judge-made private law.[34] It is also doubtful that courts have a comparative advantage in divining legal categories that would provide proper incentives for the optimal behaviour of sophisticated parties.[35] But even if there were a master value which served as the underlying rationale for the entirety of private law (individual autonomy? just relationships?)—what would be the justification for privileging this value, supposedly embodied in the current doctrines of private law, when it conflicts with other values (e.g. social justice or fair distribution)? Once the value choices inherent in private law are acknowledged, two things become clear. First, the normative stakes of private law rules should not be conceptualised in terms of the bilateral relationship alone. Second, there is little sense in making legal experts the ultimate deciders on the content of these rules.

Conceptualising the stakes of private law as limited to the bilateral relationship between plaintiff and defendant is not only indefensibly partial but also, arguably, profoundly misguided. Corrective justice accounts, for example, ask us to consider the bilateral relationship between plaintiff and defendant as if they were equal independent choosers—strangers joined only through their being subjects to a common law. But this is a false starting point for lawmaking. The parties to correlative relations of rights and duties are not strangers; they are already related to each other as equal

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[34] Brudner (n 31). For a critical perspective: Duncan Kennedy, 'Form and Substance in Private Law Adjudication' (1976) 89 Harvard Law Review 1685; Duncan Kennedy, 'The Political Stakes in "Merely Technical" Issues of Contract Law' (2001) 1 European Review of Private Law 7.

[35] Richard Craswell, 'Against Fuller and Perdue' (2000) 67 The University of Chicago Law Review 99.

participants in a scheme of cooperation, which imposes certain demands from justice on their relationship. If what parties to private law relations owe each other is inferred from a reflection on the relationships of abstract free choosers, it is inferred on the wrong basis. The demands of social justice do not come *after* private law rights are formed and are not external to the private law relationship. If anything, they are prior to the determination of private rights and duties.[36]

Underlying the call for democratisation, in this regard, is an old, critical attitude towards legal practice. There is an undeniable gap between the bilateral focus of private law and the political stakes involved. While courts—and lawyers reasoning in the shadow of adjudication—might have special virtues in dealing with bilateral disputes, they are grossly unsuitable for dealing with questions of value and goals that go beyond these relationships. A mode of reasoning which evolved to deal with one set of normative (bilateral) questions emerges as technical, formalistic, and value-insensitive when considered from the perspective of other (social and political) values. If the normative stakes of private law have a social dimension beyond the abstract justice between two parties, then the process of their making should be suited for making decisions of that sort.

2.4. Is adjudication democratic enough?

The core case for democratising private law is layered. It is premised on the contextualisation of private law rules and the identification of their political stakes. Contextualisation reveals multiple competing values and goals impacted by private law rules, sometimes directly and sometimes in

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[36] See discussion at Section 3 and, also, generally Murphy and Nagel (n 2).

intricate ways. The idea that a mode of lawmaking narrowly centred on the bilateral relationship of plaintiff and defendant can be responsive enough to this normative context is highly implausible. Democratic legislation, on the other hand, seems the most suitable process by which the broad normative context of private law questions can be negotiated. It is a decision-making mode responsive to a plurality of values and interests, with better access to data-heavy information and predictive modelling. It can also claim legitimacy and authority in partial independence from its ability to generate "a right answer" on controversial questions of value.

Understanding the heart of the challenge to the professional determination of private law goes a long way to counter at least two possible ways in which it is sometimes defended against calls for democratisation. The first involves an expansive understanding of democracy, emphasising participatory aspects present in adjudication.[37] Defending the generation of law through judge-made common law, Shiffrin explains:

> the process of generating common law has some distinctive democratic virtues. Although any piece of common law jurisprudence is generated by a single judge or a handful of judges at most, through explicit reasoning, practices of precedent, and taking notice of other jurisdictional approaches, common law judges are in conversation with litigants, amici, and other judges over the generations and throughout the states. The issues themselves arise from the grass roots, in a way, as problems occur. Any party who may

[37] E.g. Dagan (n 8) 39.

> allege a prima facie cause of action may present arguments, have them heard, and elicit a reasoned response.[38]

There are several good reasons to reject such expansive notions of democracy, not least since, despite their best intentions, they open the door to illiberal conceptions of democracy (which often emphasise the gap between "real" democracy and parliamentary practices).[39] But even if we were to follow this expansion, it is clear that whatever democratic virtues are involved in common-law adjudication, they cannot meet the challenge posed to judge-made private law. Even if it can be seen as reflecting grass-root values, judicial lawmaking is always limited to the framing of substantive questions in terms of bilateral relationships. This is why theories explaining the rules of private law in terms of bilateral relationships often make good explanatory claims. They seem to *fit* the law that this mode of lawmaking produces. However, it is a different question whether they can justify it or justify the dominance of bilateral values (e.g. independence, fairness, relationship) over non-bilateral considerations (e.g. social justice).

Something similar can be said in response to another argument for judge-made private law, one based on courts' comparative competence.[40] It is sometimes argued that the common law method for generating private law has certain advantages compared to a central, legislative design of a private law regime. Judicial attention to particular cases and the balance they keep between the conservative

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[38] Shiffrin, 'Speaking Amongst Ourselves: Democracy and Law' (n 19) 186.

[39] E.g. Carl Schmitt, *Crisis of Parliamentary Democracy* (Ellen Kennedy tr, MIT Press 1988).

[40] Cf. Dagan (n 8) 33.

pull of precedents and evolutionary responsiveness to changing circumstances can be seen as an advantage both in securing bilateral justice and generating an economically efficient law.[41] However, this, again, misses the point of the core case for democratisation. Why have a system that structurally serves these values and goals and not others? How can such a system be defended as a superior mode for making political decisions on controversial matters that broadly impact multiple values and interests in society? Given the context and significance of private law rules, given their polycentricity, effects on many values, and relevance to numerous conflicting interests, democratic legislation emerges as a superior process for making them.

3. TWO DIMENSIONS OF NORMATIVE COMPLEXITY

The remainder of this chapter answers the core case for the democratisation of private law and rejects it. Rather than defending an either/or position—privileging either democratic or professional control over private law—it defends a bifurcated structure close to the one found in modern liberal democracies. It argues that the procedural division of labour between democratic and professional control fits the structure of the normative schism inherent to private law. One need not deny the political stakes of private law to reject democratisation. It is enough to show that creating a procedural division of labour that is responsive to the complex normativity of private law is better than entrusting its lawmaking to a single process.

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[41] E.g. Rafael La Porta, Florencio Lopez-de-Silanes and Andrei Shleifer, 'The Economic Consequences of Legal Origins' (2008) 46 Journal of economic literature 285.

In this section, I explore two arguments about normative considerations relevant to private law rules. The position I wish to develop is that private law's complex normativity is more structured than the general arguments for democratisation appreciate. I explore two basic tensions inherent to this law. The first is a tension between social justice and relational values; the second between the political and individual dimensions of one's practical identity. In the following section, I will argue that, when it comes to generating private law, the procedural division of labour we find in contemporary liberal democracies can be defended in light of these tensions.

3.1. Value pluralism in associations and relationships

A good place to start considering the structural tensions inherent in private law is with John Rawls' discussion of the subjection of private law rules to the demands of justice. In what follows, I discuss Rawls' work and the work of some of his commentators, but I do so cautiously and for a limited purpose. My purpose is to identify the sort of special considerations that may weigh on how we shape private law rules, aside from considerations of political justice. I want to do so without committing to a Rawlsian framework, at least not in terms of the constitutional structure it may envision. My interest is limited to the particular worries that animate Rawls and two of his commentators to carve a special place for private law within their theories. These worries, I will argue, are shared by a broader group of egalitarian liberals and are relevant to the question of democratisation.

The initial distinction that interests us is the one Rawls draws between the rules of the basic structure, which aim to secure background justice, and "rules that govern the transactions and

agreements between individuals and associations (the law of contract, and so on)".[42] While the first set of rules should be governed by the principles of justice, Rawls is hesitant about subjecting the second set of rules to justice's exerting demands.[43] Rawls explains part of the need to distinguish between the two sets of rules in practical terms. Private law rules need to be simple enough to be broadly understood and accepted by the subjects of private law, who are also not in the best position to evaluate the accumulative impact of their actions on distribution at the social level.[44] Alongside such practical considerations, Rawlsian theory also offers principled grounds for not subjecting private law rules to the demands of distributive justice.

One such principle emanates from value pluralism and the need to accommodate other values aside from political justice. Samuel Scheffler emphasises this concern in terms of Rawls' commitment to the division of moral labour between the principles of justice and other values that apply to individuals and associations.[45] So, for example, in the case of families, Rawls writes:

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[42] John Rawls, *Political Liberalism* (Expanded, Columbia University Press 2005) 268.

[43] Cf. John Rawls, *Justice as Fairness: A Restatement* (Erin I Kelly ed, 2nd edition, Belknap Press: An Imprint of Harvard University Press 2001) 11.

[44] Rawls, *Political Liberalism* (n 42) 268.

[45] Scheffler, 'Distributive Justice, the Basic Structure and the Place of Private Law' (n 2) 227. For a discussion, see Samuel Scheffler, 'The Division of Moral Labour: Egalitarian Liberalism as Moral Pluralism', *Equality and tradition: Questions of value in moral and political theory* (Oxford University Press 2010).

> we distinguish between the point of view of people as citizens and their point of view as members of families and of other associations. As citizens we have reasons to impose the constraints specified by the political principles of justice on associations; while as members of associations we have reasons for limiting those constraints so that they leave room for a free and flourishing internal life appropriate to the association in question. Here again we see the need for the division of labor between different kinds of principles. We wouldn't want political principles of justice to apply directly to the internal life of the family. It is hardly sensible that as parents we be required to treat our children in accordance with political principles. Here those principles are out of place.[46]

As Scheffler explains, political principles are out of place in the family because family relationships are the locus of other values—values that we would not want entirely displaced by our concern for political justice. The same goes for other private relationships subject to private law. These relationships are the loci of additional values, aside from political justice, which we would not want to see wholly overridden, even when they affect distribution and, therefore, the fairness and justice of the overall scheme of cooperation.

Now, it might be tempting to think that there can be a simple solution to this problem. It might seem possible to leave the rules of private law to be governed by one set of principles and ensure just redistribution through taxation in a way that corrects for resulting inequalities. But such a solution will not do. First, and most importantly, even a perfectly just redistribution of income and

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[46] Rawls, *Justice as Fairness* (n 43) 165.

wealth will not remedy all the dimensions of inequality in primary goods brought about by private transactions, not regulated by the principles of justice.[47] Private law rules do not only distribute wealth. They also distribute opportunities, responsibilities, and leisure as well as shape and maintain relations of hierarchy between people. These cannot be remedied by means external to the rules immediately shaping these relationships. Second, empirically, it is not clear that a remedial system of transfer through taxation would even be the most effective way to redistribute wealth and income compared to modifying private law rules.[48] Thirdly, it is false to think that a state-run system of redistribution would be indifferent to the continued existence of a laissez-faire market, fueled by individual motivations insensitive to an ethos of justice.[49] (The twentieth-century experience of the ebbs and flows of social democracy provides a vivid example of this fallacy.)

Instead of a suggestion of a simple solution, Scheffler identifies here a dilemma internal to the Rawlsian framework.[50] On the one hand, it seems wrong to suggest, as some of Rawls' interpreters have suggested, that private law is not part of the basic structure of society. For reasons already mentioned, it seems clear that the design of private law affects the conditions of background justice

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[47] Cf. Kevin A Kordana and David H Tabachnick, 'Rawls and Contract Law' (2004) 73 George Washington Law Review 598, 617–18.

[48] Anthony T Kronman, 'Contract Law and Distributive Justice' (1980) 89 The Yale Law Journal 472.

[49] GA Cohen, 'Where the Action Is: On the Site of Distributive Justice' (1997) 26 Philosophy & public affairs 3, 9–10.

[50] Scheffler, 'Distributive Justice, the Basic Structure and the Place of Private Law' (n 2) 227–28.

against which transactions, relationships, and associates take shape.[51] On the other hand, if private law is part of the basic structure, it should be governed by the principles of justice. To design private law regimes in light of the two principles of justice would mean one of two options. Either protect private law entitlements under the first principles—which would be tantamount to accepting a version of libertarianism—or subordinate the design of private law rules to the second principle, and commit it to the exacting demands of equal opportunity and the difference principle. The first, libertarian horn of this dilemma, is explicitly rejected by Rawls and all egalitarian liberals.[52] The second horn, Scheffler shows, is problematic given Rawls' commitment to the division of moral labour.

Scheffler's own way out of the dilemma involves two stages. The first is to hold, as a matter of interpretation of Rawls' position, that private law is part of the basic structure of society and is therefore subject to the principles of justice. The second is to concede that Rawls' two principles of justice are insufficient for regulating the entirety of the basic structure. Scheffler tentatively suggests that other values, alongside distributive justice, should also bear on the content of private law rules.[53] Examples for such values might be considerations that have to do with the morality of promising

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[51] For a full argument, see Kordana and Tabachnick (n 47). Cf. Kronman (n 48).

[52] John Rawls, *A Theory of Justice* (Revised, Harvard University Press 1999) 54.

[53] Scheffler, 'Distributive Justice, the Basic Structure and the Place of Private Law' (n 2) 234.

(when it comes to contract law) and considerations based on relational values (more broadly in private law).[54]

Later on, I will trace how Scheffler's value-pluralist insight bears on the procedural questions that are the subject matter of this chapter. But before doing that, I want to mention another principled ground against having considerations of justice dominate private law rules, which also begins with Rawls' hesitation. In his reflection on similar passages from Rawls, Arthur Ripstein offers an argument for the relative autonomy of private law, premised on the division of moral responsibility between the individual and society.[55]

Ripstein argues that the Rawlsian methodology for divining the principles of justice is ill-suited for discovering some of the principles that necessarily govern private-law relationships. He explains that even within a just scheme of cooperation, each person must remain responsible for how their life goes and what they do with their fair share from the scheme of cooperation. This responsibility can only be discharged if they are given control—through private law rules—over the resources constituting their fair share:

> The responsibilities of society as a whole, acting through the state, are responsibilities to enable people to make what they will of their own lives, providing them, among other

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[54] ibid 223–24. Cf. Shiffrin, 'Speaking Amongst Ourselves: Democracy and Law' (n 19) 167–68; Seana Valentine Shiffrin, 'The Divergence of Contract and Promise' (2007) 120 Harvard Law Review 708.

[55] Arthur Ripstein, 'The Division of Responsibility and the Law of Tort' (2004) 72 Fordham law review 1811.

> things, with a fair share of resources to use in pursuit of their chosen conception of the good. Citizens are not left with the space within which to decide what matters to them most, or even a space in which to express what matters to them most, but rather, they are provided with both the space and resources, that they can use to decide on and carry out a plan of life.[56]

This is a different argument for why private law must be assigned a distinctive role within an overall scheme of cooperation. Without concepts of property, liability, and contract, it would be impossible to understand "the sense in which we have what is our own".[57] On this basis, Ripstein concludes that there must be a space, within a Rawlsian theory of justice, for private law rules modelled after a Kantian conception of bilateral equality, necessary to ensure that people are indeed the masters of their shares and can equally pursue their goals.[58] This bit of the overall basic structure is then corrected by other redistributive institutions that aim to make the overall system compliant with the second principle of justice.

As Scheffler shows,[59] Ripstein's argument does not establish the necessity of shaping private law without considering questions of distributive justice.[60] One might agree with Ripstein that there

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[56] ibid 1831.

[57] ibid 1833.

[58] ibid 1836–43. Cf. Gerald F Gaus, 'On Justifying the Moral Rights of the Moderns: A Case of Old Wine in New Bottles' (2007) 24 Social Philosophy & Policy 84.

[59] Scheffler, 'Distributive Justice, the Basic Structure and the Place of Private Law' (n 2) 232.

[60] Ripstein (n 55) 1836.

should be equality between actors in their relationships as well as clear notions of mine and thine, liability, and contract. But nothing in Ripstein's argument explains why social justice considerations should not be read into our understanding of property, torts, and contracts. Ripstein articulates a Kantian concern that no one should get to impose their will on another's person or property and that this is necessary if "individuals having shares of the scheme of cooperation" is to mean anything. However, this does not entail that social justice considerations should not inform the definition of private property rights, the circumscription of contractual obligations, or the determination of the grounds for civil liability. One can accept Ripstein's conceptual argument while maintaining that when determining what property, torts, and contracts mean in our community, we should weigh considerations of social justice.

Still, Ripstein's point about the division of responsibility between individuals and society touches upon a more general concern. The point goes beyond Rawls' text, and I would not want to suggest it as part of his theory, so I discuss it in a separate section.

3.2. Individual practical identity

The division of responsibility between individuals and society is related to a deeper problem haunting liberal theory. The problem is the place of individual practical identity within a just social order. This might or might not have been Rawls' principal concern,[61] but Thomas Nagel still identifies it as the great unsolved problem of egalitarian political theory. The challenge, says Nagel, is

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[61] Scheffler, 'The Division of Moral Labour: Egalitarian Liberalism as Moral Pluralism' (n 45) 116.

"[t]o design institutions which serve an ideal of egalitarian impartiality without demanding a too extensive impartiality of the individuals who occupy instrumental roles in those institutions".[62] Nagel worries that if people were to take the demands of political justice seriously in their everyday lives, they would be left with very little space to go about living private lives, pursuing non-political goals, and showing individual agency in their actions.[63]

Private law deals with what individuals can and cannot do in their everyday interactions with others and is therefore particularly vulnerable to this concern. The rules of private law govern the relations—both voluntary and involuntary—between people. They determine how they can use what they have in leading their private lives, the limits of how they can treat and affect the lives of others, and what legal relationships they can constitute with them. The subjection of these rules to the severe demands of political justice might be too restrictive. The worry is not (only) Ripstein's worry about the special requirements of bilateral equality within private law relationships, but a

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[62] Thomas Nagel, *Equality and Partiality* (Oxford University Press 1991) 61.

[63] Cf. Rawls, *Political Liberalism* (n 42) 266. As Scheffler notes, there is an affinity between the subordination of private law to the demands of justice and its subordination to utilitarian goals. If we make the rules of private law too exacting in the provision of distributive justice, we will end up holding individual behaviour up to the standard of justice, normally reserved to the institutions of the basic structure. Scheffler, 'Distributive Justice, the Basic Structure and the Place of Private Law' (n 2) 224. Cf. Thomas W Pogge, 'Three Problems with Contractarian-Consequentialist Ways of Assessing Social Institutions' (1995) 12 Social Philosophy and Policy 241, 257–58.

broader need not to have political goals—legitimate as they may be—dominate the private lives of individuals.

This is a competition of a different sort than the one Scheffler identifies between the principles of justice and other values to be promoted within the basic structure. It is not, for example, a competition between justice and something like "individual liberty". Arguably, considerations of justice do not necessarily diminish individual liberty; they only more equally distribute it. Leaving people to the forces of a laissez-faire market, in which private property and freedom of contract reign supreme, would only serve the liberty of the few. Even when some of the inequalities created by free markets are offset through taxation and transfer, individual liberty remains threatened within a so-called free market. As state limitations on individual use of private property increase, it may be the case that a greater number of people enjoy more liberty in their everyday lives. But the more equally liberty is distributed, the more limited is the liberty associated with having private property, limiting one's liability towards others, and concluding contracts.

Private law theorists sometimes try to cast this as a conflict between the value of formal choice—understood as the mere capacity to choose—and a more robust notion of autonomy—understood as the exercise of a capacity to be part-author or one's own life.[64] But this, again, does not capture the values at stake. Mere choice—being free to choose unimpeded by coercion or

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[64] Brudner (n 31); Hanoch Dagan and Michael Heller, *The Choice Theory of Contracts* (Cambridge University Press 2017). Brudner and Dagan and Heller draw on the Razian analysis of autonomy found in Joseph Raz, *The Morality of Freedom* (Oxford University Press 1986).

manipulation—might be necessary for exercising autonomy. However, it is not clear how valuable mere choice is when it is not in the service of autonomy. "Choosing" to enter an undesirable contract due to the lack of better options is not something of value that ought to balance our concern for autonomy. Moreover, autonomy (as a meaningful exercise of choice) sits on both sides of private law regulation. The limitation, due to egalitarian concerns, of one's capacity to be part-author of one's own life through the use of property and contracts is only distributing autonomy more equally between members, perhaps even expanding the overall autonomy enjoyed in society.[65]

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[65] Alan Brudner's account deserves special attention in this context. Brudner offers a sophisticated argument in which independent choice is seen as both necessary for and in tension with a system that is dedicated to individual autonomy. Brudner (n 31). In his account, seeing individuals as dissociated independent choosers is necessary for an authentic political community to be possible. This takes a particular shape in the context of contract law, where the equitable concern for autonomy is naturally balanced by the need to have an independence-based system of formal right govern contractual relationships. ibid 231. There is a lot to learn from Brudner's notion of a necessary balance in the life of private law, but it seems dubious that the doctrines of formal right are indeed necessary for an authentic community of individuals to exist. One can imagine a radical departure from a private law system whose rules are based on formal choice, in which economic life is more directly controlled by the state, and yet individuals still retain a status as individuals and their autonomy is seen as the ultimate purpose of law and politics. Despite the important and inextinguishable role assigned to independence in Brudner's Hegelian framework, it seems that the question of its value faces the same dilemma mentioned above. Either mere choice has some intrinsic value or its value remains ultimately functional, as an element in a scheme whose real end is individual autonomy. If one is sceptical about Brudner's claims of the necessity of formal right for the generation of individual autonomy, it is not clear what value is attached to a

The normative complexity involved here is not of competing political values but competing aspects of who we are as individuals in society. The passage quoted above from *Justice as Fairness* employs this sort of framing. Rawls speaks about a conflict that is internal to each person in terms of the different kinds of reasons they have. He mentions reasons we have as citizens to impose constraints from political justice and reasons we have as members of families and associations to resist these restrictions. Rawls acknowledges that people's practical identity—their identity as actors responsive to reasons for action—is multifaceted and context-dependent.[66] To the dimensions of our practical identity that Rawls mentions in his example—that of a citizen and a family member—we can add others. We can consider, for example, the reasons we have as universal moral agents (rather than as citizens), reasons we have as parties to a particular social relationship (e.g. friendship, partnership, neighbourship),[67] and reasons stemming from the assertion of one's will and attachment to individual projects, relationships, and communities.[68]

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independence-based, rather than autonomy-based, system of private law and what is lost when we diverge from the former.

[66] Cf. Christine M Korsgaard, *The Sources of Normativity* (Onora O'Neill ed, Cambridge University Press 1996) 22, 100.

[67] See, e.g. Samuel Scheffler, 'Morality and Reasonable Partiality', *Equality and tradition: Questions of value in moral and political theory* (Oxford University Press 2010).

[68] Cf. Seana Valentine Shiffrin, 'Paternalism, Unconscionability Doctrine, and Accommodation' (2000) 29 Philosophy & public affairs 205; Seana Valentine Shiffrin, 'Egalitarianism, Choice-Sensitivity, and Accommodation' in R Jay Wallace and others (eds), *Reason and Value: Themes from the Moral Philosophy of Joseph Raz* (1st edition, Clarendon Press

Thinking about competing aspects of our practical identity better captures the concern about the relations between individuals and society. The idea is that membership in a political community supplies individuals with particular reasons for action emanating from their membership.[69] We can think of these reasons as applying to people by virtue of their political practical identity. However, alongside these reasons, people continue to have legitimate reasons for action that have to do with their *individual* practical identity. These include reasons to pursue their private goals, which result from the individual exercise of their will. They also include the sort of moral reasons that apply to participants in small-scale interactions as individuals, such as the duty to keep one's promise, to treat others as one expects to be treated, and so on.[70] These are reasons for action people have as individuals regardless of their membership in a political community. Moreover—and this is the point—they may be in tension with the demands imposed on individuals by virtue of their political practical identity. Reasons from different sources, as Seana Shiffrin puts it, often "regulate the same phenomena".[71] When they do, this can give rise to tensions and conflicts internal to the practical

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2004); Stephen Darwall, 'Because I Want It' (2001) 18 Social philosophy & policy 129; Stephen Darwall, 'The Value of Autonomy and Autonomy of the Will' (2006) 116 Ethics 263; Matthew Noah Smith, 'The Importance of What They Care About' (2013) 165 Philosophical Studies 297.

[69] I develop a general account of this idea in my 'Political Reasons and Political Authority' (on file with author).

[70] On the distinction beween values appropriate for small-scale interactions and values of political morality, see Scheffler, 'The Division of Moral Labour: Egalitarian Liberalism as Moral Pluralism' (n 45).

[71] Shiffrin, 'The Divergence of Contract and Promise' (n 54) 715.

reasoner. This is so because, even within political existence, we maintain dimensions of individuality, which give us legitimate reasons to resist justice-based limitations.

Private law thus poses a special kind of challenge to egalitarian liberals. On the one hand, one can think of private law as a minimal law, imposing the least intrusive political demands on individual practical reasoning. This would be a law most suitable to groups of dissociated individuals. The problem is that this vision constrains too much the polity's ability to achieve justice and ensure individuals live up to their commitments as members. On the other hand, completely subjecting the rules of private law to political considerations threatens, as Nagel puts it, "to shrink the domain of the private to a tiny compass".[72] It would be too restrictive of our ability to reason as individuals while being members of a political community.

4. FROM NORMATIVE COMPLEXITY TO PROCEDURAL COMPLEXITY

Let us return now to the question of democracy. Much more can and should be said about the two dimensions of normative complexity mentioned above, but it is enough to note two general points for our purposes here. The first is that, alongside considerations of political justice formulated along distributive lines, there are also relational values that are relevant for the making of private law rules. The second is that the demands imposed on individuals through private law capture only part of their normative reality as practical reasoners. They reflect reasons that apply to individuals by virtue of their membership in a political community and might conflict with individual dimensions of their

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[72] Nagel (n 62) 32.

practical identity. If people must continue to reason as individuals even within political communities, then private law rules should not be too exacting in their attempt to achieve justice and other legitimate political goals.

Calls for greater democratisation of private law suggest that the unique qualities of democratic legislation make it most suitable to deal with the normative complexity of this law, which balances multiple interests and competing values. But a closer look at the structure of this normative complexity suggests differently. The claim I defend in this section is that there is value and reason in a bifurcated procedural design, in which private law is developed through two complementary processes. The advantage of this structure is that it is more likely to yield a law that is not dominated by considerations of political justice and social goals. Such a law is more likely, first, to respect the place of relational values and, second, be more moderate in its demands of individuals.

4.1. Epistemic competencies and the dual authorship of private law

Relationships have a dual existence in the normative universe relevant to private law. On the one hand, they are the locus of relational values and reasons special to participants in these relationships. We can talk about relationship-dependent reasons these participants have and ask how lawmaking should take these reasons into account. On the other hand, all relationships occur within a political community. They are not relationships between, strictly speaking, strangers. They are relationships between members of a community who owe duties of justice to each other (and to others outside their relationship). As such, relationships also have a political normative significance beyond the relationship that must be considered.

The main point I take from Scheffler is that it would be wrong to make either of these two normative aspects of relationships subservient to the other. This insight has methodological and procedural implications. It means that we need, first, a process that can produce two normative idealisations of relationships and, then, a process that would bring these two idealisations together. By 'idealisation', I mean an account that is not maximally realistic and that, in this context, knowingly misrepresents the full normative significance of relationships.[73] It is wrong to think of relationships only as the place of relational values and reasons, and it is wrong to think of them only as elements that should be shaped in the service of political goals. As we learn from Scheffler, it is also wrong to skip idealisation altogether and give a unifying account of their normative significance. However, the combination of the two idealisations, unhappy or troubled as it may be, may bring us closer to getting right the normative complexity of private law rules.

It is not impossible for democratic legislation to reveal and articulate relational reasons parties to private relationships have, thereby serving relational values. There can be an epistemic advantage in processes that elicit existing views in society on what relationships should look like—what employment relations should look like, or relationships between family members, or between neighbours—deliberate these views, and ultimately make a majoritarian decision on how these relationships should be shaped. A democratic determination of the rules appropriate for a particular relationship can be informed by moral and ethical considerations particular to it and yield a

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[73] For an account of idealisation in science, see Michael Weisberg, *Simulation and Similarity: Using Models to Understand the World* (Oxford University Press 2013) ch 6.

respectable judgment on what shape this relationship should take. Expressed as a set of private law rules, this determination can help individuals act on their relational reasons.

But although relational values can figure in democratic legislation, they are likely to be made subservient to broader social considerations in practice. This is so because democratic legislation is usually motivated by interest groups coalescing around particular issues or broad ideological motivations. I have mentioned above examples from legislative efforts on employment relations, family property, consumer protection, and tenancy. Legislative efforts in these fields have frequently been dominated by distributive concerns and articulated as elements in broad ideological views.[74] This is so because they speak directly to the competing interests of workers and the owners of the means of production, men and women, Wall Street and Main Street, landowners and those excluded from land ownership. These are all matters that feature within broad distributive ideologies that diminish the relational focus of lawmaking. Moreover, if any of these affected groups become central constituencies of political parties, and if the dynamics of party politics makes parties accountable on these issues to their constituencies, group interest—rather than relational values—will dominate democratic lawmaking.[75] Democratic legislation's treatment of relationships would be, at least in part, instrumental in the pursuit of broader social goals. I do not mean to suggest that this is a vice. However, it does give rise to the value-pluralist concern that Scheffler highlights. If we were to leave the rules governing private relationships to democratic determination, it is hard to see

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[74] See supra, note 3.

[75] Zohlnhöfer and Voigt (n 3).

how relational values would not be overwhelmed by broader considerations of interest or political justice.

The idea that institutional blindness to certain considerations can have its virtues was explored by Dworkin in the context of individual rights.[76] Dworkin claimed that institutional blindness to policy considerations and a practical commitment to treating like cases alike make courts a good forum for making principled decisions on individual rights. I think that something similar can be said about relational values and relational reasons. When framed as questions of justice on *bilateral, private relationships*, private-law questions more readily emerge as a proper subject for judge-made law. The adjudicative process elicits arguments and evidence from actual participants in a particular type of relationship,[77] it measures it against the court's best understanding of the customs of members of this type of relationship, and compares it to other instances in which parties to such a relationship appeared before courts in the past with similar disputes.[78] Judge-made law can, within its limitations, find ways to address problems of vulnerability, abuse, and inequity within bilateral relationships.[79] In doing so, it helps shape relationships in society with particular sensitivity to relational values and allows parties to these relationships to attend to their relational reasons.

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[76] For one formulation, see Ronald Dworkin, *A Matter of Principle* (Clarendon 1986) 69–71.

[77] Note that it is here that the accounts of the benefitial participatory practices of adjudication are most persuasive.

[78] Cass R Sunstein, *Legal Reasoning and Political Conflict* (Second edition., Oxford University Press 2018) ch 3.

[79] See, e.g. Brudner (n 31) 132–43, 219–33.

My suggestion is not that courts never weigh broader considerations of a political or social nature. Nor is it argued that all lawyers involved in what I called here "professional private-law legislation" always prioritise relational values over distributive concerns. But I think it is true that courts' relatively limited epistemic virtues and their inability to weigh societal questions of conflicting values and interests properly make them a better laboratory for elucidating questions that arise at the level of the specific relationship. They are a good forum for one type of idealisation of private relationships, focusing on relational values. If we think that this idealisation captures significant normative concerns, even when it conflicts with the immediate demands of social justice, then that may be a good reason to allow courts and lawyers to continue to play an independent role in developing private law rules.

The point is that at least part of the division of labour between democratic and professional procedures can be defended in terms of their complementary epistemic competencies. The complementarity is particularly useful in explaining the dual authorship of specialised areas of private law, dealing with particular relationships such as tenancy, employment, marriage, and credit. In such instances, democratic legislation plays an important role. It helps shape a law that is more sensitive to the balancing of competing interests, considerations of social policy, and social justice. But it is wrong to resent the role played by non-democratic, professionally controlled processes. These play an equally important role in looking at reasons and values internal to the relationship in relative independence from their broader context.

4.2. Generality and abstraction

Alongside the dual authorship of the private law pertaining to particular relationships, the most striking feature of the democratisation of private law is its limited scope. For reasons that have to do with the costs and benefits of mobilising the heavy machinery of legislation, democratic legislation is never comprehensive and rarely, if ever, touches upon the fundamental principles of private law. The last claim I wish to defend in this chapter is that the non-comprehensiveness of democratic legislation can be explained on principled grounds, responsive to the normativity of private law.

When it operates at the highest levels of generality—dealing with the concepts of property, contract, and torts—private law is an unattractive object for democratic efforts and is mostly left for professional determination. At these levels, it is also most abstract in its idealisation of private relationships.[80] Dealing with property as a general category cannot tap into the various relational sensibilities particular to, say, joint tenancy. And dealing with the general category of contracts does not raise the relational questions peculiar to employment relations. Private law at these high levels of generality deals with relationships between very abstract subjects such as lessor and lessee, promisor and promisee, tortfeasor and injured party. The relational reasons that apply to these abstract subjects are fewer and more general.

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[80] On abstractness as a comparative measure of different idealisations, see Arnon Levy, 'Idealization and Abstraction: Refining the Distinction' [2018] Synthese <https://doi.org/10.1007/s11229-018-1721-z>.

The abstract nature of private law relationships operating at that level of generality affects their content, particularly when further abstracted from their broader social context, as they often are in professionally sourced law. Thinking of private relationships as abstract and decontextualised yields a law that is not sensitive to either broad distributive concerns *or* demanding relational values. It is relatively thin in the demands it makes of its subjects. It approximates the law appropriate to the voluntary and involuntary transactions between independent strangers, dealing with each other under a common law. The deficiencies of such a law are obvious and are quickly pointed out by the critics of "technical" private law and its abstract subjects. This is not a law that can help achieve political justice. Nor is it a law that is attentive to value considerations internal to most real-life relationships. These obvious deficiencies are central to the calls for the socialisation and democratisation of this law.

It would be wrong, however, to evaluate these abstract categories of private law by themselves. They are, after all, part of a tapestry of private law rules operating at varying levels of generality and are produced by different procedures. Within this overall structure, the moderate political demands they make of their subjects make better sense. First, where they apply by themselves, unaided by subsidiary laws reflecting thicker, more contextual normative sensibilities, they regulate transactions in a way that demands very little of their subjects as members of a political community. In other words, they leave a lot of space for the subjects of private law to reason as individuals, relatively unincumbered by the reasons that apply to them by virtue of their political practical identity. More importantly, however, is the role these general, abstract categories play when complemented by democratic legislation and professional lawmaking at a less abstract level. The abstract categories of

private law set the benchmark for the exercise of political authority in private law. They make it the case that, barring an explicit demand made by either court or legislature, the political demands imposed on individuals in their private relationships are very low, perhaps minimal (if people are to coexist peacefully and cooperate at all).

It may be helpful to think of this division of labour between professional and democratic procedures in constitutional terms. Private law is the legitimate province of democratic legislation. People's control over their property and their freedom of contract are not constitutionally protected from ordinary legislation. This is rightly so since protecting them in this way would unduly limit the state's ability to ensure justice and, arguably, other political values and goals. At the same time, however, the lawmaking structure is sensitive to the dangers that overdemanding private law rules pose to individuality. It does so by creating a de facto presumption in favour of a less demanding mode of regulation, from which institutions must actively deviate.

Like other constitutional mechanisms, the procedural division of labour carves out a space for ordinary democratic legislation but envisions a broader normative field, in which democratic decision-making is only one (central) element. What makes this particular constitutional mechanism hard to identify is that it is not only implicit in the political constitution of liberal democracies but also much more nuanced than ordinary constitutional mechanisms. The entrenchment here is imperfectly secured by practice. It relies on the motivational structure characteristic of democratic legislation to ensure that its scope would be local rather than comprehensive. Moreover, what is entrenched is not a substantive protection of rights (e.g. "freedom of contract") but the existence of

a general benchmark of private law rules, relatively isolated from democratic determination, against which democratic legislation occurs.

This is not the kind of structure that aims to mute democratic legislation in private law. On the contrary, its legitimacy and desirability rely on democracy playing an important role in making it. Democratic legislation in private law remains the main valve through which considerations of political justice and other legitimate political goals can be brought to bear on the content of private law. At the same time, the overall structure reflects the need to ensure that these considerations do not dominate this law. This is necessary if the rules we end up with are to be sensitive to the normative complexity of their subject matter.

5. IMPERFECT INSTITUTIONS

I want to conclude by clarifying what exactly I take the analysis offered here to show and, no less importantly, what it does not aim to show. The first conclusion that I think is safe to draw is that radical democratisation of private law is not required by egalitarian principles of political morality and would be a change for the worse from where we are now. Notably, I have not argued here for the superiority of egalitarian political morality over more radical views on politics. There are positions on political morality that would be happy to discount—perhaps eliminate—both relational values and individualism in the name of a more robust idea of membership and collective identity. There are good arguments against such views, but I have not discussed them here. If one has been left unconvinced of the need to protect values other than political justice or dimensions of individual practical identity beyond political membership, they must seek arguments on these points where they are offered.

Second, I tried to unpack the normative logic inherent in the current way private law is made in liberal democracies, particularly in the common law world. My methodology was to try to find reason and value in the world as it is. When looking at the bifurcated process that produces modern private law, we find that there is indeed value in the procedural division of labour between professional and democratic lawmaking. But what exactly the normative implications of this finding are is harder to say. What I have not shown, and did not attempt to show, is that this specific procedural composition is the best way to generate private law or cope with its normative complexity. Perhaps it is possible to have different processes that would serve the normative concerns mentioned here and others. I do not know and have said very little about that (apart from arguing that democratisation is not one such alternative).

Third, if the analysis is persuasive, then it has certain normative implications for how institutional actors should act within the existing structure and how they may support the values and rationality inherent in this structure. Tentatively, it seems right to think that institutional actors should play to their strengths and that judges and legal experts should focus on some considerations when developing the law (e.g. relational values at varying levels of abstraction) and not others. At the very least, it seems right to suggest that when they do play to their strengths in this way, they should not be condemned for doing so. Critical legal theory too often accuses lawyers and judges that they develop the law in a way that is blind to many of its normative stakes. But what if this relative blindness is appropriate as part of a bigger, normatively attractive whole? It is wrong to think that traditional legal reasoning can be the basis for a comprehensive theory of justice or that the values

central to adjudication exhaust our political morality. But this is not the role legal reasoning and adjudication play in modern society, nor has it ever been.

What we ought to remember, and what some contributors find harder to see, is that the same goes for democratic legislation. Democracy has a role to play in the life of private law, and it has been playing versions of this role throughout the twentieth century in most liberal democracies. Democratic legislation is a good way to weigh interests and legitimately decide between competing values. Compared to the alternatives, it provides a superior method for forming a public judgment about what justice requires and coming to a collective decision on social arrangements. In this way, democratic legislation in private law has helped reshape private relationships to the benefit of employees, women, marginalised groups, tenants, borrowers, consumers, and so on. These contributions are neither unprincipled interventions in private law nor a failure to establish democratisation on a larger scale. They add to the tapestry of modern private law, which, as a whole, responds to a normative complexity no single process of lawmaking can address.

This goes, I think, to the most important conclusion of the discussion. Neither democratic legitimacy nor professional legitimacy in the making of private law can be evaluated independently from each other. In a world where private law is left only to judges and lawyers, the practices, interests, and values characteristic to their lawmaking process would be so biased as to render it illegitimate. Similarly, in a world where private law is the province of democratic legislation alone, its structural inattentiveness to certain values and considerations would make it equally problematic. The proper object of evaluation cannot be either of these lawmaking processes by itself but must be their complementary operation.