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Daniela Caruso
Boston University School of Law

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Daniela Caruso
Boston University School of Law

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Daniela Caruso¹

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Abstract – The concern for justice in the context of EU contract law was central to a scholarly initiative that led, in 2004, to the publication of a Social Justice Manifesto. The Manifesto had the explicit goal of steering the Commission’s harmonization agenda away from purely neoliberal goals and towards a socially conscious law of private exchange. Contract law would be designed at the EU level so as to become (or remain, depending on the baseline of each member state) palatable to weaker parties. Today, in the many parts of Europe devastated by rising poverty, dire unemployment rates, and collapsing social safety nets, the Manifesto needs to be revised. When the very access to the market place is foreclosed by indigence and marginalization, the promise of contracts that would be sweet toward the vulnerable has the flavour of Marie Antoinette’s brioche. This essay revisits the situational premises of the Manifesto, acknowledges its accomplishments, identifies its limits, and outlines possibilities for its renewal, both within its original framework and beyond.

Introduction –

The Social Justice Manifesto, published in 2004, was a welcome moment of reflection upon the yet undefined trajectory of EU Contract Law.² The concern underlying the Manifesto was that the Commission would spearhead a technocratic, undemocratic, and yet definitely ideological project of private law harmonization – a project geared towards the neoliberal triumph of private autonomy, and functionally justified only by the goal of driving down the cost of interstate transactions. It is important to locate historically both the Manifesto and the project that the Manifesto aimed to oppose. Beginning with the Communication on European Contract Law of July 2001,³ and continuing with the Action Plan of October 2003,⁴ the Commission seemed poised to launch an ultimately non-sectoral reform of contract law, aimed at bringing ‘coherence’ among different legal systems and harmonizing their guiding rules and principles.⁵ The seeming neutrality of such values as coherence and uniformity could not hide the fact that the project was

¹ Professor of Law, Boston University.
mainly about making life easier for businesses operating across borders. The risk was that harmonization would resuscitate the myth of untrammeled private autonomy, and at the same time erode those private law mechanisms, variously devised through the 20th century by state legislators, courts and agencies, that redressed power imbalances and protected weaker parties. It was therefore important to mobilise the base of private law scholars concerned with questions of distributive justice – or ‘social’ justice as it was more palatably christened by the Manifesto’s authors. The Manifesto highlighted important themes. It noted that private law had an expressive function and needed to reflect the socio-economic complexities of modern societies; that it was a tool for social engineering, and therefore had to be designed with the full consultation of all relevant stakeholders by means of fully democratic processes; and that it had to dovetail with welfare structures that varied a great deal across the different member states.

In hindsight, the project was of the constructive type. It seemed inspired by the belief that the harmonization of contract law, if handled properly and guarded from neoliberal hijacking, could be done well and might achieve laudable goals. L'esprit du temps nurtured this optimistic streak. The EU was then on the verge of a dramatic expansion, with all the promises of enlargement in full display and none of its (un)intended consequences yet in sight. A supranational constitution, harbinger of political convergence and infused with goals of democracy and solidarity, was then in the making. And in matters of contracts a number of legislative measures had already brought a moralizing, social tone to the incipient sales law of the EU. The Manifesto signaled a deeper entrenchment of a particular type of contract law scholarship in the constituent bodies of EU contract law, making sure that its values would not be ignored. And indeed they weren’t. Procedurally, the drafting of new texts involved the work of scholars affiliated with the Social Justice project. Substantively, the voice of the Manifesto would be heard in subsequent enactments, beginning with Directive 2005/29 concerning unfair commercial practices, which outlawed a number of marketing techniques still permissible in the United States. The ‘Recast’ Brussels I Regulation, scheduled to enter into force in 2015, reigns in private autonomy in

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6 According to the Commission’s Action Plan, in the Common Frame of Reference ‘contractual freedom should be the guiding principle; restrictions should only be foreseen where this could be justified with good reasons’.

7 ‘[S]ince the market plays an increasingly important role in securing distributive justice for the citizens of Europe, it is vital that its basic regulatory framework—the private law of contract—should embrace a scheme of social justice that secures a widespread acceptance.’ Manifesto (n 2) 673.


matters of choice of forum when one of the parties is a consumer, an insured, or an individual employee. The explicit justification for this departure from freedom of contract is the assumed vulnerability of such parties. In the same vein, Commission proposals continue to ban pre-dispute arbitration clauses – a practice that some observers deem fanatically pro-consumer and blind to business needs. More generally, as a matter of course the process of producing new contract law instruments involves balancing autonomy with other values, such as the protection of weaker parties.

In many ways, therefore, Social Justice scholars can take pride in a job well done and in their well established presence. There is a sense, however, in which the Manifesto has fallen victim to its own success, as well as to the unfolding of the Euro saga. It is time, therefore, to reassess critically the 2004 Manifesto along two lines – one internal to the project, and one external.

Internal Critique and Suggestions from Within -

Perils of Deliberation - The Manifesto, as noted, placed much faith in the possibilities of deliberative processes. Several commentators belaboured the point that EU private law had to be drafted with the full participation of multiple stakeholders. This emphasis on process had the side effect of substantive ambivalence. The Manifesto aptly noted that views on social justice were radically different within Europe, and that developing one coherent understanding of contract law in the context of multiple welfare models might prove impossible. Thomas Wilhelmsson was particularly aware of ‘internal conflicts within the welfarist perspective’:

What from one point of view may be clearly seen as a welfarist measure, may from some other point of view be regarded as fairly doubtful example. For example, … from the point of view of distributive justice, [precontractual information rules in credit contracts] are problematic, as they

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17 Hesselink (n 8).
18 ‘Although the idea of a European model of the social market has gained some currency, at least in contrast to an American model of capitalism, there remains considerable divergences in views about how the details of this model should be articulated and systematised. Indeed, the existing differences between national systems for providing social welfare and steering market outcomes cast some doubt on the possibility of defining even in abstract terms a convincing interpretation of the European model of the social market. Thus there is a need to build a consensus around the appropriate principles of a social market.’ Manifesto (n 2) 673 (emphasis added).
tend to improve the position of strong consumers, while offering little help to the more vulnerable ones.\textsuperscript{19}

Wilhelmsson then proceeded to assess the contract law \textit{acquis}, as it was in 2004, in light of an articulate taxonomy of welfare models. He found that existing EU instruments – in particular the Unfair Contract Terms Directive – already embraced welfarism, but only in one of its manifestations: the market-rational type, whereby consumer rationality is enhanced by deeper knowledge, wider choice, and ability to repent from occasional lapses of wisdom.\textsuperscript{20} This meant that alternative forms of welfarism – especially those focused on redistribution and extreme vulnerability – had not yet surfaced in EU contract law, and might never see the light of day.

Over the decade following the publication of the Manifesto, social justice has grown \textit{lato sensu} more visible in the discourse of EU contract law. Yet, its most important feature – its emphasis on the distributive potential of contract rules and principles – has not yet gained the visibility one might expect. The Draft Common Frame of Reference (DCFR),\textsuperscript{21} while embracing ‘justice’ as ‘an all pervading principle … not lightly to be displaced,’\textsuperscript{22} pays minimal homage to distributive goals\textsuperscript{23} and candidly reveals the absence of consensus on what such goals might entail:

[D]ifferent readers may have different interpretations of, and views on, the extent to which the DCFR suggests the correction of market failures or contains elements of ‘social justice’ and protection for weaker parties.\textsuperscript{24}

Of course such \textit{petites différences} are truly ‘irreconcilable visions of humanity and society,’\textsuperscript{25} and no reconciliation is, to this day, in sight. In some passages, the DCFR drafters seem to doubt the very possibility of defining justice:

Justice is \textit{hard to define, impossible to measure and subjective at the edges}, but clear cases of injustice are universally recognised and universally abhorred.

‘We know it when we see it’ is not much of a yield after a decade of deliberation. With justice so neutralised, the public/private distinction resurfaces, albeit softened by ‘however’ clauses.\textsuperscript{26}

\begin{itemize}
  \item[\textsuperscript{19}] Wilhelmsson (n 9).
  \item[\textsuperscript{20}] ‘If welfarism is understood as signifying mandatory rules protecting the alleged weaker party to the contract, … then practically the whole contract law \textit{acquis} is of this kind[…. We] cannot avoid questions such as: welfarist in what respect, from what point of view?’ Wilhelmsson (n 9) 714.
  \item[\textsuperscript{22}] Ibid.
  \item[\textsuperscript{23}] ‘The promotion of solidarity and social responsibility is not absent from the private law rules in the DCFR.’ DCFR Outline Edition (n 21).
  \item[\textsuperscript{24}] Duncan Kennedy, ‘Form and Substance in Private Law Adjudication’ (1976) 89 \textit{Harvard Law Review} 1685.
  \item[\textsuperscript{26}] Giuseppe Bellantuono, ‘The Limits of Contract Law in the Regulatory State’ (2010) 6 \textit{European Review of Contract Law} 115 118 (‘The DCFR follows the traditional view that gives prominence to the interests of contractual parties and leaves to different branches of law the task of fulfilling other goals, for example … the distribution of resources to less wealthy classes.’)
\end{itemize}
The promotion of solidarity and social responsibility is generally regarded as primarily the function of public law (using, for example, criminal law, tax law and social welfare law) rather than private law. However, the promotion of solidarity and social responsibility is not absent from the private law rules in the DCFR.\textsuperscript{27}

At an operational level, the DCFR articulates ‘justice’ as a series of absolutely classical ‘qualifications on freedom of contract,’ such as ‘ensuring that like are treated alike.’\textsuperscript{28} With a nod to the Manifesto, the DCFR does raise the issue of social vulnerability.\textsuperscript{29} The category of ‘the vulnerable’, however, soon collapses onto the socio-economically neutral notion of ‘consumer’\textsuperscript{30} – an admittedly dissatisfying proxy for bargaining weakness,\textsuperscript{31} and definitely not a proxy for low income or marginalization. Pre-contractual duties to disclose, or post-contractual rights to repent, are only meant to expand and deepen the range of private autonomy. There is nothing truly redistributive here, and as always, diligentibus jura succurrunt. The truly vulnerable, i.e. those incapable of self-care and due diligence, find little solace in such measures.

In hindsight, the Manifesto’s main flaw seems to lie in its excessive faith in deliberation and in its ambivalent stance in point of distributive justice. It contained no recipe for identifying weaker parties, and embraced no specific redistributive model. Unsurprisingly, given the multitude of interests involved in developing contract law at EU level, the concept of social justice has remained as vague and inconclusive as it was ten years ago.

Going forward, Social Justice scholars could decide simply to sharpen their focus: insist on the distributive impact of contract law rules and on linkages between markets and welfare;\textsuperscript{32} continue to monitor the progress of the Commission towards the adoption of uniform contract law instruments; and make sure that such instruments contain enough protection for ‘vulnerable’ parties. The problem with this course of action is that it might have already delivered all the goods one might ask of it, given its boundaries, its vagueness, and its faith in pluralist deliberation. The question is whether more can be done within the boundaries of contract law harmonization. I will outline some possibilities here, before moving to consider whether the quest for social justice, at this particular historical and political juncture, should rather keep one foot firmly outside the realm of contracts.

\textsuperscript{27} DCFR Outline Edition (n 21).
\textsuperscript{28} Ibid.
\textsuperscript{29} ‘Many of the qualifications on freedom of contract mentioned above can also be explained as rules designed to protect the vulnerable.’ Ibid.
\textsuperscript{30} ‘Within the DCFR the main example of this aspect of justice is the special protection afforded to consumers.’ Ibid.
\textsuperscript{31} ‘Whether the notion of the consumer is necessarily the best way of identifying those in need of special protection is a question which has been raised and will no doubt be raised again.’ Ibid.
\textsuperscript{32} Hugh Collins, Regulating Contracts (Oxford, Oxford University Press, 1999).
**Zooming onto vulnerable consumers** – In February 2013, the European Consumer Consultative Group (ECCG) issued an interesting and detailed ‘Opinion on consumers and vulnerability.’ The Opinion contains a list of recommendations, seemingly an ideal blueprint for a newly reconfigured social justice manifesto. The ECCG aptly departs from the notion of average consumer and attempts to identify specific markers of weakness, such as illness and disability. It conceives of vulnerability as a trap into which anybody can fall at some point during their lifetime, and recommends therefore a flexible approach to each specific circumstance. In contracts jargon, this is a plea for general clauses and case-by-case adjudication. The Opinion also names specific services which should be universally guaranteed (e.g. internet access) and others which should not be handled via autonomous market transactions (e.g. home heating). Most notably, the Opinion recommends conducting empirical studies to verify whether existing mechanisms for the protection of weaker parties (e.g. disclosure mandates or the ability to switch to alternative service providers) are indeed effective. This emphasis on empirical studies echoes analogous suggestions recently made by prominent contract scholars in the United States, and in particular by Oren Bar-Gill and Omri Ben-Shahar in their commentary to the proposed Common European Sales Law (CESL). The point of such suggestions is that the regulation of private autonomy – through mandatory clauses, black lists or disclosure duties – is only warranted where market failures and systemic harms to consumers have been documented via statistically relevant studies. The ECCG opinion is less worried about unduly constraining private autonomy, and rather focuses on identifying new areas of vulnerability, but the bottom line is identical: more data is needed in order to make sure that distributive justice is achieved in consumer transactions.

**Producing better knowledge** – To be sure, the Commission has engaged for a while in empirical studies of the EU market. It did produce an impact assessment before issuing the CESL proposal, and the assessment is rife with data. The sort of data that the Commission chose to gather is, however, peculiar. First, a lot of the information that was assembled is qualitative. Firm managers, for instance, were asked to state whether the fragmentation of contract law in the EU was a hindrance to pursuing inter-state marketing strategies. Replies to this question were then given numerical codes depending on whether the hindrance was reportedly severe, non-existent, or something in between. This is how managers’ impressions, whether or not supported by hard evidence, were converted into hard numbers, and eventually into an accurate-sounding measurement of the loss of business attributable to legal fragmentation.

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36 The Commission’s use of qualitative interviews has attracted sharp critiques. See James Boyle, ‘Two database cheers for the EU’ Financial Times (London, 2 January 2006).
Second, there was no attempt whatsoever at locating the polled firms or consumers in their socio-economic or even simply national context. Interviewees are de-nationalised and anonymous. The assessment collects data on whether firms deal with customers in one, two, or more EU countries, but it does not specify which countries these are, and the vectors of import-export forces within Europe – their directionality or intensity – are nowhere to be seen. Data have no granularity and are systematically aggregate. A nod to firms’ relative market power is found only once, in the statement that legal fragmentation is likely to impose higher costs on firms with lower bargaining power in B2B transactions. This is because leading firms are likely to impose their own choice of law onto their weaker counterparts, placing onto them the burden of acquiring legal knowledge. The implication of this assumption is that the uniformity of sales law would equalise the playing field to the benefit of weaker traders. But with the exception of this casual remark, the entire assessment is controlled by the presumption that strengths and weaknesses are evenly distributed throughout the Union.

In complete contrast to such aggregate data, the pioneering work of Ian Ayres on the impact of race and gender in car-sales dynamics comes to mind as a source of inspiration: identical contract rules can hurt some groups of consumers (or businesses) and benefit others. Interestingly, many other areas of EU policy are supported by highly differentiated, granular and particularised inquiries. REGIO, for instance, is a DG where by definition the analysis of socio-economic dynamics is localised and context-specific. But when it comes to establishing the basis for internal market legislation, the Commission intentionally blends different realities into statistical averages, and takes median values as its legislative basis. This is not the place and time to belabour the resilience of the public-private distinction in EU law, but it is indeed curious that when it comes to drafting the law of the market, an enormous pile of economic data showing socio-economic asymmetries can be brushed aside.

While containing several innovative proposals, the ECCG Opinion is completely aligned with the 2004 Manifesto when it conceives of market transactions as governed by uniform laws for all consumers and all businesses throughout Europe; it aims, once again, at producing Bürgerliches Recht, with emphasis on an EU-wide, undifferentiated citizen in an undifferentiated market context. There is something eternally appealing about a uniform law for a unified market populated by indistinguishable actors. Its philosophical pedigree is both enlightened (insofar as it

37 In contrast, in B2C transactions, even large firms can be constrained by the consumer protection regime to which their customers are entitled.
40 Sellers’ ability to pass along the cost of regulation to consumers varies greatly depending on such factors as brand loyalty, which is lower in emerging economies. See, eg Ali Riza Apil, ‘Foreign Product Perceptions and Country of Origin Analysis across Black Sea; Studies on Azerbaijan, Bulgaria, Georgia, Russia, and Turkey’ (2006) 1 IBSU International Refereed Multi-disciplinary Scientific Journal 22, 31 (‘In [developing countries such as Romania] consumers typically perceive foreign products, particular those made in higher origin countries, as being of higher quality than domestic products.’).
enables individual autonomy) and romantic (insofar as it generates communities tied together by a shared set of norms). It is unsurprising that new member states would want to endorse the project of uniform market rules, thereby signaling their full embrace of the Union’s goals and their true belonging. The idea grows all the more appealing when uniformity makes room for vulnerability – again, a horizontal and ubiquitous category – and softens its rules to embrace it. The cold neoclassical assumption by which the two parties to a transaction are formally equal (B=C) is replaced by the warm acknowledgment of unequal bargaining power in consumer transactions (B>C), and the rules are adjusted accordingly.

In the aftermath of the Euro-crisis, however, one can detect a few signs of dissatisfaction with even the most vulnerability-friendly versions of uniform laws for the EU market. The bond spreads, brought to the attention of the EU public since the start of the sovereign debt crisis and accompanied by dramatic charts in all media forms, have provided a clear and vivid illustration of the socio-economic cleavages plaguing the internal market. One critique, recently phrased by Damjan Kukovec, is that any attempt at uniform regulation of the EU market is necessarily blind to the differences between the Socio-Economic Centres and the socio-economic peripheries of the Union. Kukovec questions the overall edifice of EU law as based on a ‘rhetoric of common interest,’ and therefore not equipped to even acknowledge – let alone redress – the pernicious distributive consequences of European integration. Others have addressed directly the issue of private law harmonization. The uniform regulation of contract law throughout a socio-economically diverse market reproduces, in fact, a fundamental feature of laissez faire – namely, its indifference by design to the socioeconomic diversity of the market. Ironically, member states experienced the progressive socialization and embedding of their private laws in the 20th century, but the EU is now reviving the nineteenth-century habit of insulating the law of private autonomy from the larger question of systemic inequality. Can the Social Justice project internalise such critiques and augment its project accordingly?

Making up for Asymmetries – In the abstract, it would be possible to acknowledge the distributive pitfalls of uniform law and to resist any further Europeanization of contract law. Conscious of the regrettable distributive dynamics of harmonization, some scholars have considered shifting from uniform rules to a much looser system of coordination among different

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43 Rödl (n 42) 151.
Other private law systems within a procedural ‘conflicts’ model. Others have posited that any problems stemming from legal diversity should be handled through spontaneous processes of self-regulation. Social justice scholars, however, would probably be reluctant to leave the law of the EU market to such local devices, either because of their propensity for centralised market regulation or due to their cosmopolitan, anti-nationalist instincts. But if the reflection on the private laws of the EU market must continue, then a generic focus on horizontal vulnerability is not enough, and a closer, more granular understanding of the market – of its many Centres and its many peripheries – can no longer be postponed.

The point is not to stop working on uniform laws for the market. The prevention of fraud to the consumer, a sensible regulation of access to credit, and the outlawing of predatory marketing practices, remain important icons of social justice. The point is to establish an ideological counterpoint to the win-win narrative that has already inspired and justified a number of harmonization projects – including the adoption of a single currency. The uneven costs and benefits of contract law harmonization must be tracked and measured. Losers must be identified, and helped out of the predicament of false autonomy. Compensatory mechanisms specifically designed to redress the uneven costs of compliance with uniform laws may have to be devised outside the boundaries of contract law (more on this point below).

Contracts and Competence Creep - Employment, housing, and access to credit are essential aspects of social justice insofar as they are necessary to secure a set of basic entitlements. These fundamental aspects of the human condition had been heavily regulated for over a century by means of state contract law – a practice that the Treaty of Lisbon, leaving economic and social policy outside the scope of harmonization, promised to leave untouched. It is now clear that the financial crisis and the measures taken in its aftermath – in particular the conditions attached to ‘rescue’ measures meant to save insolvent states from bankruptcy – have deeply eroded both private autonomy and the regulatory capacity of the state in such matters. The nature of employment contracts has been radically altered. Post-employment benefits and pensions have been renegotiated with no regard to pre-existing obligations. The Italian ‘esodati’ have been left

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44 Jörges and Schmidt (n 42) 295 (‘The [Commission’s strategy of full harmonization] is at odds with the socio-economic diversity [now deepening] in Europe. In view of this diversity, the imposition of uniform rules on the balancing of market development and consumer demand do not make economic sense. They also risk the destruction of the social fabric of markets and consumption which remains … characterised by national contexts.’)
46 The charge of ‘statism’, moved against the whole project of contract law harmonization, comes from Richard Epstein, ‘Harmonization, heterogeneity and regulation: CESL, the lost opportunity for constructive harmonization' [2013] CML Rev 207.
49 Labour law reforms in Italy and Spain, more or less directed from Brussels, have been particularly far-reaching.
to wonder about the meaning of sanctity of contracts. Collapsing state and local budgets have caused housing subsidies to shrink, leaving vulnerable tenants to the vagaries of under-regulated landlord-tenant agreements. And in many corners of Europe borrowers have been deprived of financial lifelines. In response to the bursting of the housing bubble, the EU has taken upon itself the role of regulating access to mortgages, again affecting the state’s regulation of the housing market in dramatic and unprecedented ways. In sum, the crisis has led to a de-facto expansion of EU competences in matters of contract law, and the regulatory capacity of states and local government has shrunk accordingly. ‘Social Justice in Contract Law’ must now look at much more than consumer protection. Its agenda must embrace contracts that secure housing, employment and access to credit, and it must stay nimble: on one hand, it needs to work alongside the EU legislator when Brussels seems appropriate – or inevitable – as a locus of intervention; on the other hand, it must protect well-functioning local arrangements from supranational interference. In either case, the plot must thicken. The aforementioned contracts affect, much more directly than on-line shopping, the life of vulnerable subjects and must be placed, at a time of increasing Europeanization, firmly at the centre of the social justice agenda.

The External Critique: beyond contract law –

*Whither contracts?* - At the time of the Bolkenstein proposal, much work was done to keep services of general interest outside of the liberalization agenda of the Commission. Current versions of that political battle are to be found in the attempt to reconcile the ongoing liberalization of the energy market with price control and subsidised utility rates for the poor. The gist of these battles is resisting the privatization of important relationships and modes of supply. Beginning in the late ‘80s, many such battles were lost. Commenting on the White Paper on the Internal Market, Joseph Weiler pointed out that embracing the market was a particular ideological choice that would inform and transform, irreversibly, the ethos of the Community. Marija Bartl’s sophisticated analysis of ‘market rationality’ lucidly portrays the EU’s normative lens as heavily controlled by notions of consumerism and efficiency, and notes that the lens has systemically distortive effects. These critiques resonate loudly within contract law discourse. EU law-making in contract law is premised on the assumption that contracts are the essence of human exchange across national borders, and that a seamless network of private agreements is a

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50 The proposed ‘Directive on Credit Agreements relating to residential Property credit to purchase a home’ contains strong limitations on autonomy: credit simply cannot be given if mandatory assessment (conducted by lender) proves negative (Art. 14(2) of proposal).


52 Commission Communication, ‘Making the internal energy market work’ COM/2012/0663 final. While the Commission sees subsidised electricity cost as a function of states’ social policies, and is opposed to price control, the ECCG recommends ‘social tariffs’ (ECCG opinion (n 33) 12).


necessary and perhaps even sufficient condition of European unity. This is, again, a particular normative lens that risks framing and distorting the discourse on cross-border exchanges. A Social Justice project that is meant to be a critical voice should not reinforce such distortions and should not let ‘contract’ alone dictate the frame of reference in EU law.

Property, Family, and Association – The protection of the vulnerable, in the private law tradition of continental Europe, takes place in multiple sites. Entering contracts for goods and services is one way to fulfill basic needs, and the 2004 Manifesto aptly focused on contracts because in this field, thanks to the capacious reach of the internal market clause, the EU had conquered much legislative territory. But there is much more in private law than contracts. Current proposals for a European Foundation Statute may be paving the way for EU-wide redistribution of private wealth through the channel of charity. Monitoring such initiatives through the lens of social justice and nurturing their development in the form of secondary legislation should be a feature of a new Manifesto.

Family and property law can also be designed so as to assist individuals in times of weakness, and have served this function in some member states more than others. Family and property are areas in which direct harmonization is largely not allowed by primary EU law, for reasons that range from principled stance to rent-seeking entrenchment. The result of this competence divide is a regrettable hollowing out of EU law scholarship. For instance, the ongoing debate about ‘common goods,’ a desirable mode of ownership for such resources as water or cultural sites, runs on a scholarly track that is entirely parallel to EU discourse. It involves domestic property scholars, comparative law experts, and even human rights activists from the Council of Europe, but it has not yet directly engaged EU law circles. When water features in Commission

55 Now TFEU Article 114.
56 http://ec.europa.eu/internal_market/company/eufoundation/index_en.htm (proposal for a European Foundation Statute to make it easier to pursue public interest goals of EU-wide scope).
59 See the timid introduction of legislative competence in matters of family law in 1999 with the Treaty of Amsterdam (1999), now in TFEU Art. 81, or the protection of nationalization projects guaranteed by the Treaty of Rome in what is now TFEU Art. 345.
60 The focus on the logic of the market also tends to obscure the redistributive dynamics of different family law regimes. See Fernanda Nicola, ‘Family Law Exceptionalism in Comparative Law’ (2010) 58 American Journal of Comparative Law 777.
61 See, e.g. Commissione Rodotá - per la modifica delle norme del codice civile in materia di beni pubblici (2007), http://www.giustizia.it/giustizia/it/mg_1_12_1.wp?contentId=SPS47617.
62 See Sjef van Erp, Arthur Salomons & Bram Akkermans (eds), The Future of European Property Law (Sellier European Law Publishers, 2012). This project is still insufficiently concerned with the redistributive dimension of ownership.
63 Fertile synergies could emerge between mainstream EU property scholarship and new ‘common goods’ articulations. See Anna di Robilant, ‘Property and Deliberation’ (2013) (manuscript on file).
documents, for instance, it is funneled into EU conceptual buckets.\textsuperscript{64} It becomes a \textit{product} that must be \textit{safe} across Europe, must be \textit{priced} correctly, and may open up new \textit{market opportunities}.\textsuperscript{65} The strategy of social justice can then only be pursued obliquely, in the form of an exception to market principles in underserved regions. But at the level of EU policy design, social justice cannot partake of the richness of domestic and comparative property debates. It has to deploy contract rhetoric. It has to speak ‘marketese.’ Going forward, a new Manifesto should explore all the possibilities for social justice that the private law tradition may contain – not just those that happen to dovetail with the current competence divide between member states and Brussels.

\textit{Linkages} – At the heart of the 2004 Manifesto was the belief that private law had to be linked with larger questions of wealth distribution and with the politics of social justice. It is important, at this stage of European integration, to recall that linkage begins with discourse, and that discourse is the level –perhaps the only level– at which legal academia can make a difference. It is time, therefore, to branch out of traditional private law inquiries. At the risk of amateurism, scholars must venture into fields that intersect contract and property but go deeper into the distributive effects of European integration. The Commission’s trade deals with third countries, the criteria by which agricultural subsidies are distributed, the cycles of structural funding, the strictures of access to credit and all post-crisis regulatory constraints on markets must be on the radar screen of social justice research. A scholarly project focusing only on the specialty areas of its members would resemble the proverbial drunk searching for his keys under the street light, knowing full well that the keys are somewhere else in the dark.

\textsuperscript{64} Bartl (n 54).