

Economic Inequality, Capitalism and Law

Imperfect Realization of Juridical Equality, the Right to Property and Freedom of Contract

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Abstract

There is a general unease among the public across all jurisdictions about the progressive economic inequality that seems to define the new normal, and this phenomenon has been succinctly documented in numerous prominent studies. This trend of capitalism has been supported by the existing structures of the common law, albeit contrary to the aim and purpose of its original principles. The studies show that the modern capitalist societies display a persistent trend of increasing inequality, and this is summed up by the observation that modern capitalism generates progressive and intense economic inequality.

Capitalism as a socio-economic system is structured and sustained by the law and by socio-economic systems of institutions. Capitalism is not only a social ordering; essentially, it is a legal ordering. At the heart of this legal ordering are private laws, and tort law, but the most important is contract law: freedom of contract. It is common law, similar to the private law in other jurisdictions, that is responsible for the extreme inequality because it allows the institutions of capitalism to function freely and without much control. The open-ended capitalism that allows accumulation of wealth without ceiling causes progressive inequality in society and consequently works against the very freedom and individualism that are supposed to be the ideals of common law and capitalism. Because of the existing institutions of capitalism and the legal construct, freedom, fairness and the intended progress of the individual were not properly realized; the understanding of the ideas and principles of freedom, individualism, juridical equality, the right to property and freedom of contract have been imperfectly realized. With rising inequality, it is this imperfect realization, particularly of juridical equality that is in question.

Keywords: capitalism, inequality, juridical, law, property.

A Introduction

There is a growing disquiet among the general public both on the right and on the left about the economic inequality that seems to define the new normal; the

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recession that followed the 2008 financial crisis and the plutocratic response to the crisis appear to have further confirmed public unease about the progressive inequality.¹ This phenomenon has been succinctly documented in various prominent studies.² Thomas Piketty documents in his celebrated treatise *Capital in the Twenty-First Century* a sudden increase in inequality of income and wealth among people of equal juridical status, based on his study of economic inequality in a number of societies over the last three centuries, but with a particular focus on the post-war twentieth century.³ By examining tax and probate records, Piketty notes an extraordinary increase in inequality of income and wealth over the last few decades in the most developed Western European economies, the United States, Canada, Australia and Japan, with comparable trends in developing states.⁴ Piketty's central thesis is that throughout history, the rate of return on private capital has consistently surpassed the rate of economic growth, which he articulates as $r > g$.⁵ This means that the wealthy class as the predominant possessor of capital will grow their wealth⁶ faster than economies grow, and the non-wealthy will keep falling behind.⁷ As the concentration of wealth is associated with the top 1%, 0.1% and 0.01%,⁸ Piketty's conclusion may be summed up in the following terms: modern capitalism generates progressive and intense economic inequality.

During the mid-2000s Picketty, in collaboration with Emmanuel Saez, published several insightful and well-researched studies on income inequality in the

- 1 D.S. Grewal, 'The Laws of Capitalism', *Harvard Law Review*, Vol. 128, 2014, p. 626; J.Z. Muller, 'Capitalism and Inequality, What the Right and the Left Get Wrong', *Foreign Affairs*, Vol. 92, No. 2, 2013.
- 2 A.B. Atkinson, *Inequality: What Can Be Done?* Cambridge, Harvard University Press, 2014; A.B. & J.E. Stiglitz, 'The Design of Tax Structure: Direct Verses Indirect Taxation', *Journal of Public Economics*, Vol. 6, No. 1-2, 1976, pp. 55-75; S. Kuznets, *Shares of Upper-Income Groups in Income and Savings*, New York, National Bureau of Economic Research, 1953; S. Anand & S.M.R. Kanbur, 'The Kuznets Process and the Inequality-Development Relationship', *Journal of Development Economics*, Vol. 40, No. 1, 1993, p. 25; A.B. Atkinson, 'Bringing Income Distribution in from the Cold', *The Economic Journal*, Vol. 107, No. 441, 1997, p. 297; P. Conceicao & J.K. Galbraith, 'Toward a New Kuznets Hypothesis', in J.K. Galbraith & M. Berner (Eds.), *Inequality and Industrial Change*, New York, Cambridge University Press, 2001, p. 139; Alvaredo *et al.*, 'The Top 1 Percent in International and Historical Perspective', *Journal of Economic Perspectives*, Vol. 27, No. 3, 2013, pp. 3-20; A.B. Atkinson, T. Piketty, & E. Saez, 'Top Incomes in the Long Run of History', *Journal of Economic Literature*, Vol. 49, No. 1, 2011, pp. 3-71; T. Piketty & E. Saez, 'Top Incomes and the Great Recession: Recent Evolution and Policy Implications', *IMF Economic Review*, Vol. 61, No. 3, 2013, pp. 456, 458.
- 3 T. Piketty, *Capital in the Twenty-First Century*, (A. Goldhammer Trans.), Cambridge, Belknap Press of Harvard University Press, 2014.
- 4 *Ibid.*
- 5 *Ibid.*, p. 25.
- 6 Piketty equates wealth with capital, *see ibid.*, pp. 47-50.
- 7 For critics of Piketty's claims *see*, D.N. McCloskey, 'Measured, Unmeasured, Mismeasured and Unjustified Pessimism: A Review Essay of Thomas Piketty's Capital in the Twenty-First Century', *Erasmus Journal for Philosophy and Economics*, Vol. 73, No. 2, 2014; D.R. Henderson, 'An Unintended Case for More Capitalism', *Regulation*, Vol. 37, No. 3, 2014, p. 58.
- 8 Alvaredo *et al.*, 2013; Atkinson *et al.*, 2011; Piketty & Saez, 2013.

United States.⁹ The findings indicated that since the mid-1970s the ‘one per cent’ in the United States had seized an ever-growing share of national income. Picketty also published the analysis of historical trends in income and wealth inequality across most developed states, a project undertaken in collaboration with several celebrated international scholars.¹⁰

Nobel Laureate economist Simon Kuznets had laid out a different view of economic inequality in his study of developments in the first half of the twentieth century.¹¹ He was awarded the Nobel Prize for his research on the United States’ economic growth and national income between 1913 and 1948. His study revealed a trend in capitalism towards originally increasing but later decreasing economic inequality. The reversed U-shaped relationship is now called the Kuznets Curve.¹² Picketty’s research broadens “the spatial and temporal limits of Kuznets’s innovative and pioneering work”, by bring numerous developed societies into the study over a larger time scale of three centuries. Picketty’s work reveals that Kuznets’s research merely maps an historical anomaly,¹³ an inequality that may have decreased in the mid-twentieth century but returned in the 1970s and 1980s.

The Kuznets Curve also promised that further economic growth would self-correct the problems that growth itself brings; however, Kuznets did not explain this self-correcting mechanism. Picketty’s re-examination of Kuznets’s data and his own data spanning over three centuries showed a persistent increase in economic inequality, and this disturbed the belief that the market would self-correct economic inequality. Picketty instead highlights the exceptional nature and anomaly of the post-war period. The twenty-first-century inequality resembles the ninetieth and early twentieth centuries when unequal asset ownership proved decisive of an individual’s life chances. As with the ninetieth and twentieth centuries’ patrimonial capitalism, class stratification and the oligarchic control of the state was an economic, cultural and social reality, and Picketty’s data and his findings reflect the likelihood of the same cultural, social and political consequences being seen in the near future.

Inequality – differences in income and wealth – among people of equal juridical status was taken for granted by the classical political economists. Adam Smith, in *Wealth of Nations*, discusses the rich and poor in Europe against the back-

9 T. Picketty & E. Saez, ‘Income Inequality in the United States, 1913-1998’, *The Quarterly Journal of Economics*, Vol. 118, No. 1, 2013, p. 1; T. Picketty & E. Saez, *The Evolution of Top Incomes: A Historical and International Perspective*, National Bureau of Economic Research, Working Paper No. 11955, 2006.

10 Alvaredo *et al.*, 2013; Atkinson *et al.*, 2011; Picketty & Saez, 2013.

11 Kuznets, 1953; Anand & Kanbur, 1993; Atkinson, 1997; Conceicao & Galbraith, 2001.

12 *Ibid.*; See also, S. Kuznets, ‘Economic Growth and Income Inequality’, *The American Economic Review*, Vol. 45, No. 1, 1955, pp. 1-28; J. Andreoni & A. Levinson, ‘The Simple Analytics of the Environmental Kuznets Curve’, *Journal of Public Economics*, Vol. 80, No. 2, 2001, p. 269; T. Panayotou, ‘Demystifying the Environmental Kuznets Curve: Turning a Black Box into a Policy Tool’, *Environment and Development Economics*, Vol. 2, No. 4, 1997, p. 465.

13 See generally, A.M. Marglin & J.B. Schor (Eds.), *The Golden Age of Capitalism*, Oxford, Oxford University Press, 1990.

ground of inequality in primitive society.¹⁴ It was understood that the free market would generate a new kind of inequality. The advocates of the free market had argued that any inequality generated by the division of labour would compensate for the loss of a largely hypothetical natural equality.¹⁵ Natural equality had always been undermined by social institutions such as slavery and other status-promoting hierarchies. The free market, on the other hand, had generated juridical equality on the basis of freedom of contract and respect for resulting mutual obligations. While the transition to juridical equality and freedom of contract dispelled feudalism, it left the problems of 'modern inequality' undisturbed. However, later political philosophers and economists such as John Stuart Mills and Karl Marx argued that means of production and distribution of wealth must be primarily understood as political issues. Hence, they advocated more equitable social and economic arrangements within societies that had already been transformed by the age of modern commerce.

Although one can argue that Piketty's conclusion regarding increasing inequality is one we already knew by intuition, the most significant factor is that it is backed by spatial and temporal empirical research. It is a coherent historical narrative that is both long-running, over three hundred years, and cross-continental, encompassing North America, Western Europe, Japan and Australia. This empirical confirmation also contradicts a long-held belief in the United States and other developed societies that there is a correlation between capitalism, equality and democracy. A small percentage of people now possess so vast an amount of wealth that they can buy media corporations and private military influence, can sway individual election results and can determine electoral trends.¹⁶

Capitalism as a socio-economic system is structured and sustained by the law and socio-economic systems of institutions. Capitalism is not only a social ordering but also a legal ordering. At the heart of this legal ordering are private laws and tort law, but, most importantly, there is contract law: freedom of contract, or, in other words, bargains. This article will develop a hypothesis that it is common law, similar to the private law in other jurisdictions, that is responsible for the extreme inequality because it allows the institutions of capitalism to function freely without much control. Although earlier social and legal developments that encapsulate the ideas of juridical equality, the right to property, and freedom of contract were meant to check unhindered inequality, the successive stages of capitalism with its tyrannical legal construct always undermined the ideals of free-

14 I. Hont & M. Ignatieff, 'Needs and Justice in the Wealth of Nations', in I. Hont & M. Ignatieff (Eds.), *Wealth and Virtue*, Cambridge, Cambridge University Press, 1983, pp. 13-14.

15 *Ibid.*

16 Donald Trump's election campaign to seek the Republican nomination for the US presidential race epitomizes this view. The legal framework allows this to happen: see *Citizens United v. FEC*, (2010) 130 S. Ct. 876; *Ariz. Free Enter. Club's Freedom Club PAC v. Bennett*, (2011) 131 S. Ct. 2806; *FEC v. WIS. Right to Life, Inc.*, (2007) 551 U.S. 449; *Mc Cutcheon v. FEC*, (2014) 134 S. Ct. 1434; see also, politically motivated redistricting: H. Gerken, 'Getting from Here to There in Redistricting Reform', *Duke Journal of Constitutional Law and Public Policy*, Vol. 5, No.1, 2010, p. 1; H. Gerken, 'Lobbying as the New Campaign Finance', *Georgia State University Law Review*, Vol. 27, 2011, p. 1155; L. Lessig, *Republic Lost*, New York, Twelve Books, 2011.

dom and equality. Because of the existing institutions of capitalism and the legal construct, freedom, fairness and the intended progress of the individual were not properly realized. The concepts of freedom of contract and the right to property should be reconceptualized and restricted for the sake of freedom, fairness, individualism and liberalism, which are supposed to be the main aims of capitalism.

The term 'capitalism' in the modern sense is largely associated with industrial capitalism, and its use became widespread in the late nineteenth century. Society before this was primarily based on commerce. This commercial regime was also based on capitalism. However, the nature of capitalism, capitalist and the institutions of capitalism were different.¹⁷ Commerce was the focus of market exchange and did not have the concept of wages; merchants sold their goods in the markets and fairs and became capitalists.

The main assertion that capitalist societies display a persistent trend of increasing inequality should serve as a stimulus to examine the underlying legal and institutional foundations of capitalist economic relations.¹⁸ So what are these legal and institutional arrangements that govern the capitalist economic and social relations defined as a capitalist economic system? How it came about, how it is being sustained and how the law is responsible for the sustained inequality has been highlighted by Piketty's research,¹⁹ along with what is good about capitalism as a legal order. Section B traces the emergence of commercial society and the origins of juridical equality, the right to property and freedom of contract. It highlights the legal ordering of capitalism and the resulting inequality. Section C deals with capitalism as an institutional ordering and the resulting inequality, and Section D discusses the imperfect realization of juridical equality, the right to property and freedom of contract.

B The Emergence of Capitalist Economic Organization and Its Legal Organization

I Federalism: An Economic Organization and Legal Order

The various epochs of economic history since the beginning of the Middle Ages have displayed distinct economic organizations particular to each. The origin and nature of each economic organization are characterized by that period of history and its legal foundations. In the early stages of the Middle Ages (fifth to eleventh centuries), economic organization was associated with feudalism and rich monasteries, and feudal revenues or church wealth were not directed towards commerce. Capitalism was non-existent, and the feudal society did not allow individu-

17 For different phases of capitalism, see H. Pirenne, 'The Stages in the Social History of Capitalism', *The American Historical Review*, Vol. 19, No. 3, 1914, pp. 494-515.

18 M. Samuel, 'Thomas Piketty and the Future of Legal Scholarship', *Harvard Law Review*, Vol. 128, 2014, p. 49; P.L. Caron, 'Thomas Piketty and Inequality: Legal Causes and Tax Solutions', *Emory Law Journal Online*, Vol. 64, 2015, p. 2073; S.L. Hsu, 'The Rise and Rise of the One Present: Considering Legal Causes of Inequality', *Emory Law Journal Online*, Vol. 64, 2015, p. 2043.

19 Hsu, 2015; see also M.J. Zimmer, 'Intentional Discrimination that Produces Economic Inequality: Taking Piketty and Hsu One Step Further', *Emory Law Journal Online*, Vol. 64, 2015, p. 2085.

alism. There was no juridical equality, positive right to property or freedom of contract.

The feudal legal and institutional relationships were based on status, and the economic organization of feudalism was a hierarchical system of use of land and patronage. Under the system, the kingdom was divided and subdivided into estates controlled by nobles, and they oversaw agricultural production and swore allegiance to the monarch. At its core, there was an 'agreement' between a lord and a vassal whereby a vassal pledged his allegiance, providing political, military and financial service to the lord. In the feudal system, vassals and serfs worked the land bound by law to a lifetime of labour, making their labour compulsory.

Feudalism was essentially a coercive system, fundamentally based on social and consequently economic inequality, and it did not grant individual freedom. However, the idea of freedom and individual rights gained a foothold over a time. For example, in the twelfth century, during the reign of Henry II, the legal rights of an individual facing trial were enhanced. In 1215, King John signed the Magna Carta, which obliged the crown to uphold the rule of law, which was the common law. Edward I extended parliamentary membership to commoners, and after the peasant revolt of 1381, Richard II promised to abolish serfdom, although he failed to do so, and serfdom came to an end over time in the fifteenth century.

Feudalism was also affected in 1337 by the outbreak of the Hundred Years War between England and France, which lasted until 1543 and caused an unprecedented military build-up on both sides, and the army swelled its ranks with feudal labourers. The Black Death further contributed to the challenges faced by feudalism. By the 1350s, war and disease had reduced the population significantly, and as a consequence a new economic organization emerged that enhanced the importance of labour, which became far more valuable and undermined the manorial system. Farm labourers moved to large cities, an act once punishable under the law. The demise of serfdom meant the demise of feudalism itself, and it coincided with the end of the Middle Ages.

II Commercial Society: An Economic Organization and Legal Order

As feudalism slowly began to fade away during the high and late Middle Ages (eleventh to fifteenth centuries), it was replaced by the commercial society, a new capitalist structure and a new model of economic organization of the Renaissance.²⁰ The gradual impact of expanding individual freedom replaced the concept of agricultural servitude, and the epoch of private farming for profit and the growth of urbanization began. The progressive power of commerce began to furnish individuals with new incomes. An uninterrupted migration of peasantry from the country to the centres of commercial activity was fuelled by the hope of gain and a better life. These individuals, who did not have their land to work on, could sell their labour freely as a part of the commercial activity, and in the pro-

20 See W. Sombart, *Der Moderne Capitalism*, Leipzig, Verlag Von Duncker & Humblot, 1902. Sombart is of the view that the economic organization during the Middle Ages was not of a capitalist nature, meaning that the capitalist society or economy during this period had not yet developed to a stage that could be termed as a capitalist economic organization.

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cess built the first fortunes in movable property that were known in the Middle Ages.

Commerce in the Middle Ages was characterized by the freedom of movement, freedom of merchants and hence free capitalist expansion. From the twelfth to the fifteenth centuries, capitalism exercised its influence on the character of economic organization that succeeded, by providing legal foundations based on juridical equality, the right to property, and freedom of contract, allowing capitalism to flourish²¹ as the nature of this capitalism was commercial and its purpose was the constant accumulation of wealth.

However, towards the end of the Middle Ages, capitalism no longer enjoyed the freedom of development that it once did during the eleventh to the thirteenth centuries. By the end of the fifteenth century, capitalism was subject to numerous municipal legislative limitations to curtail its abusive excesses. The municipal statutes regulated wages, conditions of work, prohibited speculation, and limited the freedom of merchants. The church also joined in, and opposed usurious lending and forbade excessive profits.²² Thus, to support the ideals of capitalism, freedom of contract was restricted.

The concern of the early observers and advocates such as Adam Smith and his contemporaries was societal change and individual progress, meaning a continuation of intellectual progress of the Renaissance and the expansion of individualism. Their concern was the normative and positive legal underpinnings of the commercial society. In the new positive legal order, the reform required the reconceptualization of property and contract law²³ to support the ideals of capitalism. This was the most significant and fundamental milestone in the development of laws of capitalism,²⁴ the common law. At the heart of this reconstruction were the markets of grain and labour.²⁵ Reforming them required the elimination of price and supply control on grain, and this meant elimination of the so-called 'moral economy' where the state or local community had accepted responsibility for food provision.²⁶ The reform also meant abolition of guild restrictions on entry into trades and of feudal dues.²⁷ Since these two markets were intertwined, reform in one necessitated reform in the other.²⁸ The idea behind this reconstruction was the societal progress: commercialization of labour relations, more pro-

21 Pirenne, 1914, p. 497.

22 Pirenne, 1914, p. 510.

23 See J. Purdy, *The Meaning of Property*, New Haven, Yale University Press, 2010, pp. 9-43.

24 D. Acemoglu & J.A. Robinson, *The Rise and Fall of General Laws of Capitalism*, National Bureau of Economic Research, Working Paper No. 20766, 2014, <https://afinetheorem.wordpress.com/2014/08/22/the-rise-and-fall-of-general-laws-of-capitalism-d-acemoglu-j-robinson-2014> (last accessed date 11 October 2019); M. Foucault, *The Order of Things*, London, Routledge Classics, 1970, p. 285; R.M. Unger, *What Should Legal Analysis Become?* New York, Verso Books, 1996, p. 3.

25 Grewal, 2014.

26 E.P. Thompson, 'The Moral Economy of the English Crowd in the Eighteenth Century', *Past and Present*, Vol. 50, No. 1, 1971, p. 76; E.P. Thompson, *Customs in Common*, New York, The New Press, 1991, pp. 259-351.

27 J. Markoff, *The Abolition of Feudalism*, Oxford, Oxford University Press, 1996, pp. 554-556.

28 Grewal, 2014.

ductivity in agriculture, a larger tax base for the state, and so on.²⁹ These were the origins of the designing and drafting of the laws of capitalism, and these laws were underpinned by the new notions of juridical equality and the right to private property founded on the new concept of freedom, which legalized itself into the principle of freedom of contract. When at the end of the eighteenth century the industrial revolution brought in new conditions of economic activity, the legal foundations laid down during the phase of commercial capitalism remained; markets and the division of labour became central to the distribution of goods and services in comparison with earlier societies.³⁰

III Juridical Equality

The shift from feudal status-based inequality to equality before the law was achieved. In 1215, Archbishop Stephen Langton assembled the barons of England and forced King John to sign the *Magna Carta* by which future sovereigns and magistrates were required to uphold the rule of law and acknowledge its governance of society. In the early modern period, a reference to juridical equality appeared in a petition to James I of England in 1610.³¹ In 1607, the idea had also found favour with Chief Justice Sir Edward Coke in the *Case of Prohibitions*.³² Samuel Rutherford gave the concept of juridical equality a theoretical foundation in his book, *Lex Rex* (1644), the title literally meaning ‘the law is king’, a subversion of a traditional formulation *rex lex* (‘the king is law’).³³ The principle was supported by John Locke in his *Second Treatise of Government* (1690), and by Montesquieu in *The Spirit of the Law* (1748).

IV Private Property Rights

In the Middle Ages, there was no right to own landed property; it was a status-based feudal society. The notion of a right to private property emerged during the Renaissance as international trade gave rise to mercantilist ideas and merchants were increasingly in possession of movable property. However, the right to private property emerged as a radical demand in seventeenth century revolutionary

29 Hont & Ignatieff, 1983, pp. 13-26.

30 Polanyi *et al.*, ‘The Economy as Instituted Process’, in K. Polanyi (Ed.), *Trade and Market in the Early Empires*, Glencoe, Free Press, 1957, p. 243.

31 See quoted from House of Commons in H. Hallam, *The Constitutional History of England, Volume 1*, 1827, p. 441: “Amongst many other points of happiness and freedom which your majesty’s subjects of this kingdom have enjoyed under your royal progenitors, kings and queens of this realm, there is none which they have accounted more dear and precious than this, to be guided and governed by the certain rule of the law which giveth both to the head and members that which of right belongeth to them, and not by any uncertain or arbitrary form of government....”

32 *Case of Prohibitions* [1607] EWHC J 23 KB: “that the law was the golden met-wand and measure to try the causes of the subjects; and which protected His Majesty in safety and peace: with which the King was greatly offended, and said, that then he should be under the law, which was treason to affirm, as he said; to which I said, that Bracton saith, *quod Rex non debet esse sub homine, sed sub Deo et lege* [That the King ought not to be under any man but under God and the law].”

33 S. Rutherford, *Lex Rex: The law and the Prince*, Edinburgh, Robert Ogle and Oliver & Boyd, 1644. The book published in response to Bishop John Maxwell’s ‘*Sacro-Sancta Regum Majestas*’ and that defends the rule of law.

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Europe.³⁴ Property ownership in freehold land gave a man the right to vote; hence, political freedom at the time was associated with ownership of freehold land and individual independence. However, anyone could own landed property if they could afford to buy it.³⁵ Abbe Sieyes, a French Revolutionary, also argued in favour of property ownership, but for political reasons he also advocated better citizens' rights for the individuals who owned property. The idea behind this was to encourage the rapid expansion of commercial activities, and Sieyes favoured the unrestricted accumulation of property and wealth. However, Maximillian Robespierre was of the view that the unrestricted accumulation of wealth ought to be limited, and that the right to property should not be allowed to violate the rights of others, particularly of 'passive citizens' as defined by Abbe Sieyes. Robespierre's views were eventually excluded from French Constitution of 1793. However, they have some resonance with Piketty's thesis, $r > g$. John Lock further developed the ideas of property. He argued that property ownership derives from the individual's labour and that it is an inalienable natural right and that one is therefore entitled to own landed property bought with the fruits of that labour.³⁶

Juridical equality, protection of property rights and freedom of contract, later affirmed by a constitutional framework, gave birth to the idea of the sovereignty of the people – democracy – which provides legitimacy to a government, while still identifying them as two distinctive features of modern society.³⁷ In this context, the founders of democratic institutions and republics understood the legal institution of property not as a method of allocating resources more efficiently, but rather as a foundation of freedom and democracy. This vital critical imagination is grounded on the balance of history, philosophy and common sense that shows us how society should essentially view the importance and role of property.³⁸ This view of property gives meaning and purpose to Adam Smith's understanding of property as a legal institution that could be a predominant element in a vision of a society that integrates the values of prosperity, freedom and virtuous character.³⁹ All these ideas are based on the concept of freedom from the legal foundations of the social process that establishes the economic system of capitalism.⁴⁰

34 M. Ishay, *The History of Human Rights: From Ancient Times to the Globalised Era*, Berkeley, University of California Press, 2004.

35 D.W. Rossides, *Social Theory: Its Origins, History, and Contemporary Relevance*, Lanham, Rowman & Littlefield Publishers, 1998.

36 J. Locke, *Second Treatise on Civil Government*, New York, Prometheus Books, 1689, p. 27. Locke said that "every man has a property in his person; this nobody has a right to but himself. The labour of his body and the work of his hand, we may say, are properly his".

37 B. Ackerman, *We the People: Foundations*, Vol. 1, Cambridge, Harvard University Press, 1991. This presents a far-reaching reinterpretation of the US's constitutional experience, analysing the past, present and future of popular sovereignty in America.

38 Purdy, 2010.

39 *Ibid.*

40 Grewal, 2014.

V *Freedom of Contract and Individualism*

The theory of freedom of contract is an abstract philosophy of law, and, as a consequence, the philosophical basis of the concept has been variously theorized.⁴¹ Its effect has changed with the changing opinions of law in England.⁴² Its development has been based on empirical inference or social experience. In the background of the abstract and empirical dichotomy, theorizing has always been a contentious ground among legal scholars and judiciary alike. Metaphysical and political philosophers alike moralized the idea of freedom in the latter half of the eighteenth century. Although in some senses the idea of freedom was not new, the development and insistence of it as founded on an immutable basis of moral right and natural law was recent.⁴³

Metaphysicians emphasized that the *ego* and the individual human *will* act as the basic facts of life. This intellectual thinking underlined the significance and substance of individual freedom; in other words, individualism. The economic thinkers of the time espoused individualism in their writings. Adam Smith, Jeremy Bentham and John Stuart Mill all advocated the freedom of bargain as the unquestionable prerequisite of progress. The insistence on utilitarianism and the doctrine of *laissez faire* was emphatic; it encapsulated the idea that by greatest individual freedom the greatest human development will be achieved.⁴⁴ Individualism became synonymous with the progress of the individuals as people. The theorizing of individual freedom in metaphysics, politics and economics and the resulting various manifestations of the doctrine have had a profound effect on the law and, in particular, its application to contract law.

The concept of freedom of contract is at the heart of the notion of a free or capitalist market economy; this gave birth to the idea of political economy in the work of Adam Smith's *Wealth of Nations*.⁴⁵ Mill's essay on 'Liberty' published in 1859, which is based on utilitarian philosophy, is the most influential expression of economic doctrine embedded in the freedom of contract. It makes an eloquent argument for individualism and allows the free development of the individual. It was the philosophy of freedom and individualism that demanded that the law should enforce the obligation of a contract.

VI *Limitation of Freedom of Contract*

The common law never enforced a contract that was deemed to oppose public policy, even when based on the free will of the parties. An obvious example of such a contract is where it contemplates a tort or crime. Perhaps the most striking examples of contracts that were held invalid were those in restraint of trade, and

41 D. Pound, 'Liberty of Contract', *Yale Law Journal*, Vol. 18, No. 7, 1909, p. 454; D. Pound, 'The End of Law as Developed in Juristic Thought', *Harvard Law Review*, Vol. 27, 1914, p. 605; D. Pound, 'The End of Law as Developed in Juristic Thought', *Harvard Law Review*, Vol. 30, 1917, p. 201.

42 A.V. Dicey, *Law and Opinion in England*, London, Macmillan, 1905.

43 S. Williston, 'Freedom of Contract', *The Cornell Law Quarterly*, Vol. 6, No. 4, 1921, p. 365.

44 J.S. Mill, *On Liberty*, London, John W. Parker and Son, 1859.

45 A. Smith, *An Inquiry into the Nature and Causes of the Wealth of Nations*, London, William Strahan, Thomas Cadell, 1776, pp. 524-543; 135-159; 469-471, in which Smith criticizes the apprenticeship system.

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contracts involving a penalty or forfeiture. Such contracts would have been contrary to no law yet were held unenforceable because they were declared unreasonable by the courts. The courts provided relief to mortgagors from provisions in their deeds providing for forfeiture of the mortgaged property and declined to enforce provisions for unreasonable penalties that the parties had agreed. Ironically, the prohibition against 'restraint of trade' contract restricts the freedom of the promisor when the promise inflicts personal injury on them and the consequent oppression and denial of freedom that he will experience by keeping to a restrictive contract.

However, the influence of freedom of contract remained entrenched in favour of capitalism as an applicable feature of public policy, which was best articulated in *Printing and Numerical Registration Co v. Sampson*⁴⁶ by Sir George Jessel MR:

If there is one thing more than any other which public policy requires, it is that men of full age and competent understanding shall have the utmost liberty of contracting and that contracts when entered into freely and voluntarily, shall be held good and shall be enforced by courts of justice⁴⁷

In the twentieth century, the opinion of common law had changed significantly. In *George Mitchell (Chesterhall) Ltd v. Finney Lock Seeds Ltd*,⁴⁸ Lord Denning compared freedom of contract with the oppression of the weak. Given the continued abuse of the principle of freedom of contract by the relentless innovation of capitalism, the judiciary further resorted to the idea of the true construction of the contract. This was used to depart from the natural meaning of the words of the exemption clauses.

Such limitation may also be discerned in a decision of the US Supreme Court in *Muller v. Oregon*,⁴⁹ in affirming a decision of the Supreme Court of Oregon, which made it a misdemeanour to employ women for more than ten hours a day in a factory, laundry or mechanical establishment. In the US, the Law of Carriers, the Interstate Commerce Act and similar state legislation regarding interstate business abolished freedom of contract between shipper or passenger and carrier because the rates a carrier may charge or the facilities it must provide are determined by law and not negotiated between the parties as a matter of free will. There are numerous examples of such legislation in areas such as insurance and fire and safety laws where scope for free bargaining is almost non-existent.⁵⁰ The tendency of the legislature has been to limit freedom of contract where it is contemplated that public policy necessitates it. The extent to which freedom of contract is curtailed is a matter of fact depending on circumstances.

46 *Printing Co. v. Sampson*, (1875) 19 Eq. Cas. L.R. 462.

47 *Ibid.*

48 [1983] 2 AC 803.

49 *Muller v. Oregon*, (1908) 208 U.S. 412.

50 Williston, 1921, pp. 377-378.

The issue of when and to what extent freedom of contract should be restricted is essentially a question that can be answered only in the context of the circumstances. There should be nothing in the concept of freedom of contract that should prevent reasonable experimentation with new interpretations of the concept itself, and the concepts of capitalism and the right to property. The ultimate test of proper limitation on freedom of contract is that provided by experience; a sufficient scope is allowed for a reasonable social experiment for the general welfare of the public, as long as it does not amount to undue interference with freedom of contract.⁵¹ The limitation must be kept as narrow as possible. It is not reasonable to obstruct reality that is based on empirical evidence of freedom of contract. The only important thing is to prove that a limitation on freedom of contract is necessary or desirable. The unlimited freedom of contract, like freedom in other areas of social life, is not necessarily conducive to public or individual welfare.

The important issue to be considered is what the consequences of accepting one or another theory of law are. Professor Dicey, in *Law and Opinion in England*, deliberated on the effect of shifting flows of opinion on the development of the common law and legislation in England. The effect of freedom of contract must change according to time, space and circumstances as it has been changing over a long period. Hence, contracts that lead to 'hoarding capital', including property, although not obnoxious to any law, should be found unreasonable and against public policy.

C Conceptual Framework of Institutions of Capitalism and Inequality

Capitalism is also a social order or governance, and its perception is collective ordering through normalization of social action, either by public action or by private contract.⁵² In this sense, it is a system of institutions. By institution, we mean a well-established and structured pattern of relationship or pattern of behaviour that is accepted as a fundamental part of the culture of capitalism. From an institutionalist perspective, capitalism is not primarily a self-driven mechanism of surplus extraction and accumulation of wealth facilitated by law and by study of the wage, labour or credit system; rather, it is a study of interrelated social institutions.⁵³

The two institutions of capitalism, namely that greed is legitimate, and that the maximization of wealth without an upper limit is permitted, are at the heart of the inequality debate. All other institutions of capitalism support these two institutions, and, as a consequence, the current institutional arrangement not only causes but also perpetuates economic inequality. Capitalism as a social order

51 *Ibid.*, pp. 374-376. See also, US Supreme Court doctrine in *Lochner v. New York*, (1905) 198 U.S. 53, where it was held that specific limitation on freedom of contract in relation to the 'safety, health, morals and general welfare of the public' is acceptable.

52 W. Streeck, 'Taking Capitalism Seriously: Towards an Institutional Approach to the Contemporary Political Economy', *Socio-Economic Review*, Vol. 9, 2011, pp. 137-167.

53 *Ibid.*, pp. 137-140.

may be defined by the absence of an institutional limit on the amount an individual can aspire to,⁵⁴ the core institutions of capitalism, namely the free market and money, do not set a ceiling on the material rewards individuals can legitimately hope for. In this sense, they entail a promise of unlimited wealth. This open-ended capitalism as a social and legal order encourages unlimited rewards and promotes maximization of wealth without limit. This amounts to the rational-egoistic maximization of self-interest. In this, there is a presumed legitimacy of pursuing gain through freedom of contract without being constrained by any norm. Maximization of self-interest – in other words, maximization of wealth – is an institutional expectation because it is rational. Therefore, individuals are expected to behave that way. At an abstract level, capitalism's institutional ethos is reflected in the concept of *homo economicus*.

The free market, a core institution of capitalism, is based on civil rights of individuals to engage in contractual trades between them in the pursuit of material bargains.⁵⁵ Fundamental civil rights are rooted in the basic principle of freedom of contract. In capitalist societies, individuals strive to maximize material gains, with commerce⁵⁶ having replaced the violence of feudalism.⁵⁷ In essence, a capitalist society and state respects freedom of contract and private property and creates an environment that allows the maximization of material gains and, in principle, unlimited material wealth.⁵⁸

The justifying argument for the maximization of wealth is that it is achieved through voluntary agreement rather than by force, and hence that it is legitimate.⁵⁹ Marx characterized this phenomenon as *Plusmacherei*, translated in his formula M-C-M. However, where freedom of contract ends, contracts begin to be concluded under duress; hence their illegality. At this juncture, as a matter of definition and regulation, it is the proper role of the state not only to draw but also to observe the clear line between voluntary exchange and duress.

Actors in the free market are rationally-egoistic. They are oriented to the maximization of self-interest, meaning maximization of economic gain. Institutionally, they are opportunistic and follow the intensive pursuit of self-interest. They bend rules to achieve these ends. They have marginal ethics. These are normalized intentions; they may be nurtured in bad faith, but they are normal. The free market, as the core institution of capitalism, pledges to deliver common good as an unintended by-product of the self-interested pursuit of private goods. Institutionally, common interests are looked after by the uncontrolled pursuit of indi-

54 *Ibid.*, p. 148.

55 T.H. Marshall, 'Citizenship and Social Class', in T.H. Marshall (Ed.), *Class, Citizenship, and Social Development*, 2nd ed., New York, Anchor Books, 1965, pp. 71-134.

56 A.O. Hirschman, *Rival Interpretations of Market Society: Civilising, Destructive, or Feeble?*, *Journal of Economic Literature*, Vol. 20, 1982, pp. 1463-1484.

57 See generally, K. Polanyi, *The Great Transformation: The Political and Economic Origins of Our Time*, Boston, Beacon Press, 1957 [1944].

58 Streeck, 2011, p. 143.

59 H. Spencer, *The Principles of Sociology*, New Brunswick and London, Transaction Publishers, 2003[1882]. In three volumes, with a new introduction by J.H. Turner, quoted by W Streeck (n. 52), p. 143.

vidual interests. Any contrary view would amount to misallocation of resources and hence a distortion of the market. This is by definition regarded as rational and normal and therefore to be expected.⁶⁰ Thus, economically maximizing behaviour or greed exists as an institution in capitalism.

Capitalism, equipped with freedom of contract and the right to property, promoted what could be called a super-norm; namely, that everything that is not explicitly forbidden by law is allowed. The contrary traditionalist view of capitalism would be that everything that is not permitted is prohibited. Thus, the non-traditional, advanced capitalism takes the view that what is not explicitly forbidden amounts to an individual right. This right allows innovation and creative interpretations – or bending – of rules in favour of capitalists' interest, which might be inimical to social order.⁶¹ The evidence of such an innovation may be seen in the securitization of financial assets in the 1980s and 1990s after the repeal of the Glass-Steagall Act in the US. The innovation securitized the various types of assets (loans) into financial products such as Mortgaged Back Assets (MBA), Asset Backed Securities (ABS), Collateralized Debt Obligations (CDO) and Collateralized Mortgage Obligations (CMO), which cumulatively contributed to the onset of the financial crisis of 2007-2008.

One can discern in the above arguments that capitalism as a social order can be viewed as one of two kinds: Durkheimian or Williamsonian. The institutions of Durkheimian capitalism are traditional, based on historical and sociological institutionalism, whereas Williamsonian institutions are based on rational choice institutionalism.⁶² The traditional institutions are normative social structures and are moral in nature; their norms are enforced and legitimized by society as a whole, and they thus regulate the rational-egoistic pursuit of material gains.⁶³ Williamsonian institutions, on the other hand, are based on freedom of contract and voluntarism between the presently contracting parties and are economic in nature. Liberal progressivism views the expansion of markets as a historical process that replaces normative and moral institutions with contractual ones.

I Freedom of Contract: Capitalist Development and Market Expansion

Capitalism has also made significant advances in terms of progressive commercialization and commodification of social relations. The nature of capitalist development may be understood as a gradual or periodic process of expansion of market relations through the system of contracts, where capitalists stand to gain unlimited and unequal rewards.⁶⁴ Market expansion or economic growth by innovation such as reorganizing private lives, including the commercialization of household services, and organization of social and commercial relations upsets social structures and leads to unlimited gains for the capitalists and consequent

60 Streeck, 2011, p. 149.

61 *Ibid.*, p. 147.

62 P.A. Hall & R. Taylor 'Political Science and the Three institutionalisms', *Political Studies*, Vol. 44, 1996, pp. 936-957. The three versions of institutionalisms are, *historical institutionalism, sociological institutionalism and rational choice institutionalism.*

63 Streeck, 2011, p. 153.

64 *Ibid.*, p. 155.

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inequality.⁶⁵ Redistribution through the public sector is replaced by markets for contractual exchange. The market also provides an incentive and opportunity as more and more social relations – social spheres and an increasing range of necessities of life⁶⁶ – are being commercialized and made available in exchange for cash payment, or *barzahlung*, at market price. Freedom of contract allows capitalists to push the boundaries set by social norms in the name of innovation, and such an expansion of the capitalist market is similar to land-grabbing. Assumed flexibility of the concept of freedom of contract and innovation has caused the progress of market relations to outpace that of their social regulation. However, failure to regulate the enormous flexibility of freedom of contract will result in progressive inequality in society. Moreover, it has the tendency to lead to financial crisis, as it did in 2007.

Open-ended capitalism consequently generates inherent agentic rule-bending capacity, resulting in an inegalitarian tendency that affects social cohesion and influences the democratic process. The open-ended maximization of wealth also creates a divide between the elitist interests in the stability or survival of capitalism as an economic system; it is the masses who depend on the survival of traditional capitalism rather than the elite.⁶⁷ The context of rising inequality and the elitists' interests are poignantly reflected in the notion of plutonomy,⁶⁸ the term used by the personal finance department of the Citigroup just before the onset of the 2008-2009 financial crisis.

Protection from open-ended capitalism and the resulting progressive inequality may be found in Polanyi's 'double movement' of capitalist mobilization, when opposite social forces emerge in the form of neo-Durkheimian or post-Williamsonian regulatory institutions.⁶⁹ It is a dialectical response of society to the capitalist creative destruction; in a situation of political conflicts within a capitalist social order, it shows who should be protected in society, how and why. Counter-movements against the marketization of social life are inevitable; otherwise, inequality will keep on rising, with devastating consequences for society.

D Imperfect Realization of Juridical Equality, Right to Property and Freedom of Contract

Open-ended capitalism that allows accumulation of wealth without upper ceiling causes progressive inequality in a society and, consequently, works against freedom and individualism that are supposed to be the ideals of capitalism.⁷⁰ The nature and tendency of such capitalism are inherently inegalitarian, producing anomie and, consequently, posing a serious threat to a democratic society. It disrupts social cohesion; the interests of the economic elite do not align with the sta-

65 *Ibid.*

66 Smith, *A Wealth of Nations*, Book III.

67 Streeck, 2011, p. 151.

68 A group of rich people whose consumption can sustain economic growth.

69 Polanyi *et al.*, 1957.

70 Piketty, 2014.

bility of the economic system as a whole, and they grow irresponsible with respect to the capitalist system's long-term survival; eventually, this loss of values causes social instability.⁷¹ In the absence of a radical political alternative, the masses have no control over the system's fate.⁷² It transpires that the understanding of the ideas and principles of freedom, individualism, juridical equality, the right to property and freedom of contract have been imperfectly realized. It is this imperfect realization, particularly of juridical equality, that is in question.⁷³

The watershed of societal progress regarding individualism was the mid- and late Middle Ages, when society progressed from feudalism to a commercial society by juridical equality, a right to property and freedom of contract. Although the freedom of contract and the right to property introduced the idea of competition as an alternative to the violence of feudalism, given the institutional structure of modern capitalism it still relies on violence to maximize economic gain. A glaring example of this is seen in the revelations of the so-called *Panama Papers*, namely that the economic elite of the world like to pay no tax, whereas the ordinary people pay taxes to sustain social services such as health, law and order and public safety, which the elite then use. This kind of institutional behaviour will reduce the standard of living in a given society. The capital stashed away in the tax havens comes from all over the world, including poor societies, to be deposited there beyond the reach of the law. This is happening supposedly because of freedom of contract, right to property and right to privacy, but at the cost of freedom, individualism and juridical equality itself. The likes of corrupt dictators, unelected leaderships and similar elites across the world, or the banks that reinvest their wealth under the fig leaf of 'the banks are simply doing what they normally do', or even as fraud in the London Interbank Offered Rate (LIBOR) case, are in essence involved in the subversion of the ideals of juridical equality, right to property and freedom of contract and are committing extreme violence, a parallel of which may be found in feudalism.

In the twenty-first century, the economic organization of capitalism has allowed sharp increases in the share of income and wealth accruing to the top 1%, 0.1% and 0.01% of the population.⁷⁴ It is critical to consider whether this is a justifiable phenomenon or whether such a relentless accumulation of wealth by individuals is the legitimate thing to do indeed in a social context, given that human social history shows that the progress of the individual or individualism has been its focus. The answer lies in an analysis of the proper understanding of the three concepts – juridical equality, right to property and freedom of contract – associated with the movement of individualism. Individual progress was at the centre of individualism. One could conclude that there are certain problems with particular institutions of capitalism. One has to determine what is being institutionalized in capitalism as a social order. The evidence of rising inequality shown by

71 See generally, E. Durkheim, *Suicide: A Study in Sociology*, New York, The Free Press, 1966[1897].

72 Streeck, 2011, p. 150.

73 Purdy, 2010.

74 Piketty (n. 3).

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various empirical studies⁷⁵ and the status-based inequality originally seen in feudalism exists to destroy individualism and juridical equality. In this sense, the current practice of the freedom of contract and the right to property has caused a subversion of fairness and justice. Although capitalism was born and flourished because of these two fundamental principles of juridical equality, its institutions of unlimited maximization of wealth – in other words, the maximization of greed – have helped to derail the entire notion of juridical equality. The solution necessitates the reconceptualization of these common law principles.

The issue of inequality is unlikely to be resolved just by limited income redistribution, because there is something broader and more fundamental at work. The origins of economic inequality must be investigated through the prism of law and the institutions of capitalism; and these origins must lie in the subversion of juridical equality, a right to property and freedom of contract. The solution to the problem lies in understanding the nature of the right of freedom of contract and right to property, and the most important thing is to determine the *content of these rights*. It is a matter of ascertaining their purpose in a society, and how they serve the welfare of that society. Given the cycle of disadvantage, a new understanding of the law is required, and it should deliver social justice. The unlimited and open-ended maximization of material wealth was deemed morally inferior in the pre-capitalist times.⁷⁶ The traditional concept of capitalism stood for both society and economy together; they are intertwined and must be analysed together in the context of the institutionalist political economy.⁷⁷ It cannot be said that capitalism is devoid of the norms of decency or that it would not condemn the greediest individuals. However, the problem lies with the capitalist institutions such as the market and money that do not discourage unlimited and open-ended maximization of wealth, an upper ceiling an individual can aspire to. Institutionalized upper limits will institutionalize social order and discourage unnecessary maximization of wealth such as questionable financial innovation. In the twenty-first century, a new institutional framework of capitalism is required. The ideas of progress, fairness, juridical equality, the right to property and freedom of contract need to be reconceptualized.

In this context, the economic organization of capitalism is a political and public issue, and as public policy, it requires a constructive legislative direction. The excesses of capitalism can be checked only by positive law. This would require innovative legislative thinking in most areas of law, including intellectual property protection, public goods, local zoning laws and financial regulation. It is essential to have legislation in place to reduce profits from rent-seeking activities, and public policy's emphasis should be on producing products and services. If society is to become more just and inclusive, a state that represents the perfect realization of juridical equality, the right to property and freedom of contract, it will be vital to legislate to discourage maximization of wealth – in other words, hoarding of wealth without upper limit – and that the new economic organization

75 Piketty, 2014.

76 Streeck, 2011, p. 143.

77 *Ibid.*, p. 138.

supports individual progress, which has always been the core concept of a democratic society.

As wealth hoarding without an upper limit is the key issue, and it is a threat to freedom and juridical equality, as an institution of capitalism it should be discouraged. Wealth hoarding by individuals without upper limit should be deemed contrary to the social interest. In the interest of the survival of capitalism, a financial regulatory regime should ensure the prohibition of wealth hoarding by individuals beyond an acceptable limit. Capitalism is a dynamic and productive force, and its survival within the bounds of reasonability is important for the welfare of society. It is the effect of certain institutions of capitalism that is objectionable, not capitalism *per se*.⁷⁸ Historically, the concept of capitalism does not presuppose the existence of a single, typical economic and legal regime.⁷⁹ In this context, it is the cause and effect analysis of the institutions of capitalism that is important to allow society to envisage the acceptable form of capitalism.

E Conclusion

In the twenty-first century, the economic organization of modern capitalism is allowing the accrual of sharp increases in the share of income and wealth to the top 1%. It is critical to consider whether this is a justifiable phenomenon; in other words, whether such a relentless accumulation of wealth without an upper limit by individuals is a legitimate thing indeed in a social context, given the fact that the human social history shows that the progress of the individual or individualism has always been its focus. Open-ended modern capitalism causes progressive inequality in society, and consequently it works against freedom, individualism and juridical equality, which are supposed to be the ideals of common law and capitalism. The nature and tendency of such capitalism are inherently inegalitarian, causing anomie and, consequently, a serious threat to democratic society. It disrupts social cohesion, the interests of the economic elite do not align with the stability of the economic system as a whole, and they grow irresponsible on the capitalist system's long-term survival, with an eventual loss of values that causes social instability.

The understanding of the ideas and principles of freedom, individualism, juridical equality, a right to property and freedom of contract have been imperfectly realized. It is this imperfect realization, particularly of juridical equality, that is in question. Although the freedom of contract and the right to property introduced the idea of competition as an alternative to the violence of feudalism, given the institutional structure of contemporary capitalism, it still relies on violence to maximize economic gain.

78 P.A. Hall & D. Soskice, 'An Introduction to Varieties of Capitalism', in P.A. Hall & D. Soskice (Eds.), *Varieties of Capitalism*, Oxford, Oxford University Press, 2001, p. 1.

79 R.M. Unger, *What Should Legal Analysis Become?* Oxford, Oxford University Press, 1966, p. 3. Timothy Shenk observed capitalism as a socialist term of abuse that gained the authority of a stable entity or legal and institutional system. See T. Shenk, *What Was Socialism?*, *The Nation*, 2014, p. 27; M. Foucault, *The Order of Things*, London, Routledge Classics, 2002[1970], p. 285.

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The answer lies in an analysis of the proper understanding of these three concepts associated with the movement of individualism. Individual progress was at the centre of individualism and the fundamental understanding and interpretation of concepts of juridical equality, freedom of contract and right to property in practice. In this sense of losing sight of it, one can say that there are certain problems with particular institutions of capitalism. Society must discern what is being institutionalized in capitalism as a social order. The rise of economic inequality seen in various prominent studies is inherently destructive of individualism and juridical equality in the same way it was with feudalism. In this sense, the current practice of the freedom of contract and the right to property has subverted fairness and justice.

The solution lies in understanding the nature of the right of freedom of contract and right to property and the determination of the *content of the rights*, their rationale in society and how they help the welfare of that society. The economic organization of modern capitalism is a political and public issue and a public policy; for that matter it requires a legislative direction. This would require inventive legislative thinking in most areas of law, *e.g.*, intellectual property protection, public goods, local zoning laws and financial regulation. It is necessary to have legislation to reduce profits from rent-seeking activities, and public policy importance should be on producing products and services. As wealth hoarding without an upper limit is the key concern, and poses a threat to freedom and juridical equality, as an institution of modern capitalism it should be opposed.