1. Introduction

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1 HOW THE ARGUMENT GOES

During the 20th century, the Member States of the European Union developed their own models of social justice in private law. Each model is inherently linked to national culture and tradition. However, all models have a common thread, which is the use of the law by the (social welfare) state as a means to protect the weaker party against the stronger party, the employee against the employer, the tenant against the landlord and the consumer against the supplier. Therefore, social justice is bound to the idea of the redistribution of wealth from the richer to the poorer part of the society, individually and collectively. That is where the idea of the social welfare state is located.

The integration of social justice into private law and the rise of the welfare state were made possible by way of the grand transformation process that shook Europe between the 17th and 19th centuries and that freed private law from feudal and corporative (ständische) barriers. This transformation process is very much bound to the specificities of any given particular country, its economic and social conditions and also timing. Social justice itself is a product of the late 19th/early 20th century, a result of the socialist labour movement. Member States responded to this new challenge in various ways, mostly by transforming their private law systems through the ‘protective’ welfare state in the late 19th/early 20th century. The second wave of social justice began after the Second World War with the rise of the consumer society. Again Member States’ private law systems were confronted with the call

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1 I would like to thank R. Sefton-Green, H. Muir Watt, N. Reich, T. Roethe, C. Torp and K. Purnhagen for extremely helpful comments and B. Schüller not only for his support in my research but also for interesting discussions over a couple of months. The responsibility for all errors and misconceptions, however, remains mine.

2 I do not want to claim that social justice can be equated with the social welfare state. In fact, it is necessary to distinguish between the protective welfare state of the late 19th century and the regulatory welfare state which emerged in the second half of the 20th century. I would like to thank C. Torp for this clarification.

for social justice. This time the response came from the ‘regulatory’ welfare state. Social justice in private law cannot be understood in isolation from its origins, first in labour and then in consumer law. Labour law became a subject of its own and emigrated from the private law system into a separate area of law. Its ideological flavour along with its conceptual ideas did not abstain from touching the growing consumer law field. For a complete understanding of the different patterns of social justice in national private law, therefore, we must look at both labour and consumer law.

The European Economic Community as construed in the 1950s was built on a clear separation of responsibilities between the EEC, which was to establish the Common Market, and the Member States, which were to engage in social matters. However, the construction of the EEC changed considerably over time. Since the adoption of the Single European Act (SEA) in 1986, the European Union has assumed a social outlook, which has gradually developed over time, eventually taking shape in the Lisbon Treaty and the Charter of Fundamental Rights. There is even an ongoing discussion on an existing or emerging European social model. What matters in our context are the particulars under which social issues found their way into the European Union.

Member States had developed their national labour laws long before the European Union turned into a political, economic and social actor. Therefore, right from the beginning, European interest in gaining competence in social matters clashed with the settled interests in the Member States, which tended to defend the already achieved status quo. The timid transfer of powers from the Member States to the European Union over the last 25 years is largely due to these tensions. Where the European Union succeeded in gaining competence, not least due to globalisation pressure, the matters were either genuinely European in that they concerned transborder issues or the competence transfer was – often – instrumentalised by the Member States on the basis of ‘modernising’ their national welfare systems, which had become unaffordable.

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The situation in consumer law is different. Consumer law had not yet been settled in the Member States when the European Union assumed a leading role. For this reason, consumer law is of particular interest for analysing the different concepts of justice, that is that followed by the Member States on the one hand and Europe on the other, which clashed already in the process of making and shaping consumer law. However, the European Union at the beginning of the debate introduced a third vein of development. Art. 119 EEC Treaty on equal pay of men and women, already enshrined in the Treaty of Rome, set the tone for the development of a European anti-discrimination law, which reaches far beyond existing national concepts of equal treatment, thereby steadily intruding into ever wider realms of labour and nowadays private law. This third domain has no precedence in the Member States’ laws.

Since the adoption of the SEA, more particularly the White Paper on Completing the Internal Market, the European Union has adopted a set of secondary law means which influence private law matters either directly (consumer, labour, anti-discrimination and business law directives) or indirectly (directives meant to liberalise markets, for example, telecommunication, postal services, energy (electricity and gas), transport, health care). This new regulatory private law is governed by a different philosophy, one which cannot be brought into line with the understanding of social justice as enshrined in labour movement and consumer movement and one which is challenging national models of social justice in private law.

I call the EU model of justice access justice/Zugangsgerechtigkeit (justice through access, not access to justice); that is, that it is for the European Union to grant access justice to those who are excluded from the market or to those who face difficulties in making use of the market freedoms. European private law rules have to make sure that the weaker parties have and maintain access to the market – and to the European society insofar as this exists. Access justice/Zugangsgerechtigkeit is not to be equated with social justice and the meaning it has developed over the 19th and 20th centuries in nation states.

The European model of justice does not exclude a co-existence with differing national models of social justice. Where the European Union claims ultimate responsibility, technically speaking via exclusive competence as realised through the maximum harmonisation doctrine, where market integration prevails over social regulation, social justice re-emerges – as it has always

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been since Roman times in the *ius aequum*\(^8\) – in traditional fields of labour and consumer law via ‘front-stage’ regulation, in the new fields of anti-discrimination law and in the private law that governs the liberalisation policy of regulated markets (energy, telecommunication, postal services, transport) via ‘back-stage’ regulation.

The analysis is split into two parts – an investigation of the different models of social justice in a selected number of Member States in Section 2 followed by an analysis of the emerging European model of access justice in Section 3. Section 2 serves a hermeneutic purpose in order to demonstrate the European way in dealing with matters of social justice. I start from the premise that the different models of social justice in France, Germany and England can only be understood by identifying the respective socio-economic and political backgrounds. These considerations serve as a bridge and a starting point for contrasting my findings with the ongoing development of what is ambitiously called the European social model. I will reconstruct the evolving character of the European legal order which gave way to the rise of ‘the social’. The unbalanced legal order – economics prevail over ‘the social’ – shaped the integration logic, facilitated the transformation of the national social welfare state and also yielded access justice but also led to the reappearance of ‘social justice’ in new forms. Section 4 is devoted to shaping access justice/ Zugangsgerechtigkeit and seeking a balance between the different national concepts of social justice and the European model on access justice/ Zugangsgerechtigkeit.

2 THE SOCIO-ECONOMIC AND POLITICAL BACKGROUND OF SOCIAL JUSTICE (IN PRIVATE LAW) IN FRANCE, GERMANY AND ENGLAND

An investigation into the socio-economic and political background of social justice in private law cannot be conducted without a look into the past. Following Berman,\(^9\) the starting point of such an analysis should be the 11th/12th century, the conflict between the Catholic Church (the spiritual power) and the emperor (the temporal power) which culminated in the conflict between Pope Gregor VII and Emperor Henry IV over the independency of the church from temporal power. Berman argues that the separation of spiritual

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\(^9\) Berman, 1991, p. 144 et seq.
and temporal power did not only initiate early state building, first of the church and then the emperor, but also the scholastic school of law.\textsuperscript{10} The crusades requested by Gregor VII led \textit{inter alia} to a much stronger exchange between the Western world and the Eastern world and paved the way for the reinvigoration of the old Greek and Roman philosophies. One might equally argue that the starting point of my undertaking should be the discovery of America and the growing conflicts between the Spanish and English empires. This would lead us to the 15th/16th century.

My approach however is more modest. In line with the emerging issue of social justice in the 19th century, I will limit my considerations to the last two centuries. My initial idea – perhaps due to the fact that I presented the first version of this chapter at a conference which took place in Paris in January 2007 – was to investigate the interlink between constitution building and codification. Whilst such a starting point offers hopefully interesting perspectives in comparing France and Germany, it falls short in taking the United Kingdom into account. If anything, a parallel may be drawn between the French Revolution of the late 18th century and German state building of the 19th century on the one hand and the Civil War and the conflict between the English Crown and Oliver Cromwell in the 17th century on the other. This is roughly the period I proceed to investigate in attempting to explain where the different patterns of justice derive from.

A look into the past will contribute to a deeper understanding of social justice in private law. I must therefore equally explain how I understand and use history. History as a science has long been dominated by social, cultural and economic history. In my context, such an approach would mean analysing the interplay of constitution building and codification in the common law and the continental legal system. The mainstream approach in history, however, has changed. Today, research focuses on the reconstruction on consciousness and mentality.\textsuperscript{11} More and more, this is done in a comparative perspective, comparative history is therefore gaining ground.\textsuperscript{12} This is also true with regard to legal theory. D. Kennedy\textsuperscript{13} uses such an approach in his path-breaking

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\item Berman, 1991, pp. 146 and 215.
\item Since 1993, there exists a particular review which is devoted to this task: \textit{European Review of History}.
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analysis of the ‘Two (or Three) Globalizations of Law and Legal Thought’ in the last two centuries.

In taking a general approach, we can assume that the French Constitution and the French Civil Code are 200 years old, the German Constitution is that of 1871 and the Civil Code approximately 100 to 150 years old and that the English Bill of Rights and the development of the common law preceded the two.

2.1 The English Model – a Liberal and Pragmatic Design Fit for Commercial Use

On the surface, the challenge is that in English history there is no comparable event to the adoption of the Civil Code in France or in Germany. The Civil War took place in the 17th century and led to major changes in society and in the parliamentarian system. But, it yielded neither a constitution nor a coherent codified body of civil law; rather, it paved the way for the Bill of Rights in 1689. The French and the German legal systems, seen through the eyes of a common law lawyer (I dare to suggest that this is possible for me, a civil law lawyer), share a relatively homogenous view on the role and function of social justice in society. They are united in the idea of universal values that infiltrate legal principles and concepts. This is exactly where common law lawyers run into difficulties.

So the true difference between continental law and common law must be deeper and the reasons must date further back than the French Revolution. We have to identify the break-even point from which the continental legal and the common law system diverged in following different paths. I will tie my considerations to the clash between different philosophies, to the remaining influence of the scholastic in continental Europe and to its growing critique through nominalism in the UK. This was also around the time when the relative cultural unity of Europe broke into pieces.\(^\text{14}\) I think it is empiricism which is responsible for the deep differences between continental and common law legal systems. Empiricism paved the way for utilitarianism – and here we have the key to understanding the English reservations against the realisation of social justice through law.

2.1.1 English pragmatism and two explanatory hypotheses

My view on the English legal system is stamped by empirical research that was undertaken some ten years ago on the management of emergency situations with regard to unsafe consumer goods.\(^\text{15}\)


\(^{15}\) Micklitz, H.-W., T. Roethe and S. Weatherill (eds) (1994), Federalism and
We [the authors of the book] compared the handling of the emergency management of the very same accidents that occurred in France, Germany and the United Kingdom i.e. exploding office chairs in public buildings (due to a breakage-prone gas cylinders) and the so-called glycol wine accident. We analysed the law in the books and the law in action. Our findings can be summed up in the following way: The French engineers and lawyers in the country asked themselves what Paris was doing, the German administrators were seeking the appropriate rules and the English administrators asked where the problem was. As far as Germany is concerned, we found our findings confirmed in a recent empirical study on product safety management in the Baltic Economic Area.16

It is English pragmatism that is characteristic for the handling of the legal system. Two issues arise whenever one attempts to define the differences between the civil law and the common law: first, the use of case law in preference to legal principles; and, second, the use of purposive interpretation.17 Civil law lawyers reason downwards from abstract principles embodied in a code, whereas common law lawyers reason upwards from the facts, moving gradually from case to case. Civil law lawyers search for the Zweck im Recht, the purpose and objective behind the legal ruling, if the wording of the rule to be applied, its position in the broader framework of the code in which the rule is embedded or the history of the rule do not provide guidance. Common law lawyers view purposive interpretation as an alien element.18 Lord Goff sums up these differences as follows:19

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18 See, inter alia, Judge Bingham in Customs and Excise Commissioners v. ApS Samex (1983) 1 All ER 1042, at 1056. However, this is less true in the United States, where lawyers and judges often seek to provide functional public explanations for legal rules.


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Continental lawyers love to proclaim some great principle, and then knock it into shape afterwards. Instead, the boring English want to find out first whether and, if so, how these great ideas are going to work in practice. This is not at all popular with the propagators of the great ideas.

The careful reasoning of English judges is admirable, as is their focus on the wording of the rule in question, their elaboration of the meaning of the rule, and their careful explanation of the application of the rule to the particular facts of the case. It is this peculiarly British pragmatism in looking at where the problem lies and at how to find an answer in the case law and/or in the rules which is so startling to a civil law lawyer who is fixated on rules. The quotation from Lord Goff may find its deeper origin in three strands: (1) common law was and is first and foremost commercial law as the English legal system was never easily accessible for the man in the streets. Ever since the costs to go to court were simply too high; (2) the practising lawyers, the QCs, were selecting the judges. That is why judges benefited from a strong commercial legal background and (3) judges play a much more dominant role in the common law system than in the civil law systems, both institutionally and individually. We can transfer this attitude easily to the issue of social justice. There is deep reservation against the existence of universal principles that enters into the common (commercial) law system from the outside, from politics or deeper from particular socio-philosophical ideas. With regard to potential differences in Europe, pragmatism is an extremely helpful tool in managing differences. Therefore, a particular English view would be to simply accept that there are different concepts in Europe. This, however, does not mean that these differences are integrated into the minds of the lawyers and the citizens (verinnerlicht).

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My hypothesis is that only by understanding English pragmatism can we comprehend English reservations against achieving social justice through law. In light of my argument that the differences between the continental legal system and the common law system can only be explained by the drifting apart of two major philosophical currents, rooted in the socio-economic environments of the respective centuries, I would like to point to two major events. This will not be possible without necessary simplifications:

Firstly, the clash between the scholastic and nominalism. The Crusades linked the Western world to the Arabic world, helped to establish the Italian cities (such as Venice) as world trade centres, and – this is our point – brought Arabic discourse on ancient Greek philosophers (Aristotle and Plato) to Europe. The fall of Constantinople enhanced the influence of the Greek language and Greek philosophers in the Western world. These ideas called into question not only mainstream scholastic thinking (here being understood as the thought of Thomas Aquinas – in particular his concept of universalism) but also the world concept of the church, according to which trade should play a limited role. The critique against the scholastic found its expression in the growing importance of nominalism in the 14th and 15th centuries, in particular in England. Nominalism paved the way for English reservations against grandes idées and big legal principles.

Secondly, the rise of empiricism, which is bound to the birth of the English trading state (Handelsstaat) in the late 16th and early 17th centuries. In continental Europe the feudalistic society changed gradually into societies of cities and merchants. Trade (that is, the economy) turned into a function and a task to be managed by the state – the mercantile system arose. Under Elizabeth I (1558–1603) England succeeded in breaking its dependency on the Hanseatic League with the help of the Merchant Adventurers who got royal support in establishing worldwide operating trade companies. Commercial law was needed to manage English trade internationally. The philosophical counterpart to the social and economic change may be seen in the development from nominalism (Ockham) to empiricism (Bacon) to utilitarianism (Hume, Adam Smith, Bentham).

Both historical strings tied together will justify my assumption that the continental European understanding of social justice in the sense of distributive justice does not really comply with philosophical, historical, economic and legal structures in England or – to put it the other way round – that

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England has paved the way for a legal system which is deeply rooted in nominalistic and utilitarian thinking. In this way, the English way of viewing the role and function of law is much more economic (ökonomischer) in its basic assumptions as opposed to German Idealism (Kant, Fichte, Hegel, Schelling) or French Rationalism (Descartes, Pascal, Voltaire, Rousseau). It is a ‘shorter way’ from ‘utility’ to economic efficiency and economic effectiveness than from duty, understanding, reason, will or spirit (Pflicht, Vernunft, Wille, Verstand, Geist). It can be much more easily adapted to European ‘integration through law’, where judges and the judicial system are given a major role to play.26

2.1.2 The gradual intrusion of social justice into labour and consumer law

There was no big bang in the English society which led to the development of social justice motivated legal regimes. The transformation from a feudalistic and corporative society to an open democracy occurred step by step. The Civil War certainly constituted a break-even point, but the transformation process was very much guided by conflicts between the nobles on the one hand and the merchants on the other who wanted to have their say in the political arena. The rise of the labour movement, in legal theoretical language the rise of ‘The Social’,27 in the UK is bound to its transformation from a trading state to an industrial state at the beginning of the 19th century, a few decades earlier than in continental Europe. The decline of feudalistic structures and the rise of individualistic, social and moral philosophy provided scope within which the labour movement could grow.

Thilo Ramm28 in his analysis of the new ordering of labour law in the 19th and 20th centuries distinguishes two principles, self-help and state-help. Self-help was the basis of trade unions and strikes. This was close to the dominat-
ing liberal understanding of the free play of market forces. The system of self-help replaced the notion of individual laissez-faire with collective laissez-faire. Self-help and collective laissez-faire was a noble circumscription for a period of fight and conflict which led to compromises at both ends, between the trade unions and the trade associations and between the different political forces in Parliament. If Parliament took action it did so in response to concrete problems via isolated statutes and ad hoc political decisions. This is the particular British way of dealing with matters of justice.

The collective laissez-faire system together with unemployment insurance legislation set up a stable system that lasted until the 1960s. If any, the short period under the (old) Labour government in the 1960s could be seen as the unique time in which statutory policy was used as a means to strengthen social institutions and law as a means of distributive justice in labour law. Both elements, self-help through trade unions and regulatory welfare state-help, did not survive Thatcherism.

The story of consumer law is a relatively young one. The debate started in 1960 with the Molon Report, which was requested by the Labour government. It identified numerous deficiencies and injustices that were affecting individuals which were the basis of subsequent changes in the law. However, it was not until 1973 that consumer policy as a political issue was widely accepted across the political parties.\(^{29}\) The UK met the usual prejudices in that it did not formulate a comprehensive consumer policy programme, like France or Germany, but rather reacted in a pragmatic problem-bound political way. In the field of private law, three major reforms took place in about four years: the Amendment of the Supply of Goods Act 1973, the adoption of the Consumer Credit Act in 1974 and the Unfair Contract Terms Act in 1977. All these interventions created mandatory contract law, fully in line with mainstream thinking of using consumer law as a regulatory tool to limit contractual freedom.

However, there are differences between the continental approach on the one hand and the English approach on the other. The Unfair Contract Terms Act in essence prohibits exclusion clauses and does not subject contracts between business and consumers to a general fairness test, as in Germany and some years later in France, which would have given judges the power to individually assess fairness in consumer contracts. The UK approach on consumer credit is determined less by a protective outlook than by guaranteeing a workable and feasible capital market. It combines private law and public law means. In Germany, consumer credit is certainly one of the areas where not so much the legislator but rather the courts play a predominant role in the protec-

tion of the weaker party. The famous intervention of the German Constitutional Court into collateral guarantees between the bank and the debtor’s daughter raised much concern even outside Germany.\(^{30}\) There is no counterpart in the case law of the House of Lords (now the Supreme Court). Most recently the Supreme Court made clear that there is no need and no justification under English law – even if it is implemented EU law – to introduce a protective design into consumer contracts.\(^{31}\)

Neither the Thatcher government in the 1970s and 1980s nor the New Labour government of Blair in the 1990s or in the beginning of this century brought about substantial changes in consumer law, with one exception:\(^{32}\) the liberalisation and privatisation of former state incumbents in the field of telecommunication, energy and transport. Former customers were turned into market citizens rather than taken-care-of consumers who were freed from self-responsibility. The return to the market as the dominating power, self-help instead of statutory regulation, has a long-standing history in the UK. Liberalisation and privatisation of former state monopolies can easily be connected to utilitarian thinking.\(^{33}\) In this way, the UK preceded and strongly influenced developments in the EU.\(^{34}\)

### 2.2 The French Model – a Forward-looking Political Design of a (Just) Society

France has a particular standing in the legal and theoretical discourse on the interrelationship between constitution building, private legal order making and matters of justice. It results from the French Revolution, the results of

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\(^{33}\) Howells, G. and S. Weatherill (2005), *Consumer Protection Law*, Aldershot: Ashgate, p. 78, underline the influence of Hayek in the way in which the UK administered the privatisation process under the Thatcher regime.

which are still today stamping our understanding of ‘a’ constitution and ‘a’
civil code. The key events in France took place in the space of two decades,
contrary to England where no such clear-cut events, at least not with regard
to constitution building and private legal order making, can be fixed. The
Revolution led to a break with feudalistic structures and instituted a bour-
ggeois society governed by individual freedom and equality of rights that
became even more visible in the Code Civil and in the French Constitution.
I start from two premises.

Firstly, the vision of the French Revolution which was proclaimed in the
Declaration of Human Rights, pinned down in a Constitution and later codi-
fied in the Civil Code has deeper social, cultural, economic and intellectual
roots. I will argue that today’s conception of social justice in France can best
be understood as a political forward-looking concept. This goes back to
French Rationalism and Descartes.

Secondly, French society may be characterised by the tension between, on
the one hand, intellectual projects guided by the grandes idées (what is right
is useful) – the French Constitution and the French Code – which strengthen
the power of the executive to the detriment of the power of the judiciary and,
on the other hand, the highly politicised bottom-up resistance against an exces-
sively far-reaching executive power. The fight over ‘the social’ demonstrates
that social justice is a highly politicised matter throughout in society, subject
to conflict, support or rejection.

2.2.1 The political conception – a tentative explanation
Just like in England, the intellectual turning point can be attributed to the
fading influence of scholastic thinking. It liberated the spirit from method-
ological scholastic constraints and paved the way for a particular French ratio-
nal method in philosophy. The founding father was certainly Montaigne
(1533–92). His epistemology went along, with the Zeitgeist of the 16th
century and the then radical scepticism of ‘What do I know?’ . His major
contributions led to the final discredit of the then existing knowledge as a
result of a fully-fledged scepticism and an attempt to find a generally binding
moral and social peace. Montaigne set long-lasting incentives for critical
reflection on all existing knowledge and values, which has been later named
‘the Enlightenment’.

Looking back, the 16th century may be regarded as a transitional period in
which the old scholastic forms of thought were overcome but where a new
method to investigate the ‘truth’ and the concept of the truth was not yet

36 Wieacker, F. (1967), Privatrechtsgeschichte der Neuzeit, 2nd edn, Göttingen:
Vandenhoeck, p. 343.
developed. This was left to the 17th century. Descartes began with his *Discours de la Méthode*. He claimed that a particular method to acquire the truth is needed, which then allows us to solve all philosophical questions. For Descartes ‘what is true is useful’ and not ‘what is useful is true’ as in utilitarianism. This is the key to understanding the particular French political conception. Descartes’ philosophy results in the priority of theory over practice, which is the basic thesis of French intellectualism. *Cartesianism* heavily influenced political life and the emergence of the absolute monarchy of Louis XIV. The fall of the absolute monarchy goes hand in hand with the rising criticism of Descartes’ philosophy – through Voltaire and Rousseau. What matters in our context is the critique of Lock and Hume against Descartes’ notion that man has natural ideas. Condillac and Helvetius instead argued on the basis of psychological *empiricism* that men are equal from time of birth. This concept constituted the scientific basis for the French revolutionary ideas.

The innovative and creative potential of French philosophy in the 17th century becomes clear when we look to the setting of new incentives in social philosophy and in the perception of the moral. They overcome the Cartesian metaphysic – revelation of natural laws through God, responsibility before God, reception of power of the sovereign from God – which might be largely due to moral decline. Moral standards should be defined by themselves. The different strains – Rousseau on the one hand and a more *utilitarian* vision inspired by English philosophers on the other – are united in the attempt to found a morality removed from theological and metaphysical requirements. This is the core of French laicity.

### 2.2.2 Politicising private law as social law

As in England, the development of labour law is bound to the growing role of the labour movement, the establishment of trade unions and the rise of the *protective* welfare state. This does not mean that self-help and state-help took similar forms. The trade unions in France are much closer to the different political parties. Although somewhat exaggerating, one may assume that each party may be associated with a particular trade union and vice versa. That is why social conflicts between workers and employers have a political dimension that cuts across different parties, on each side of the poles. The French state on the other hand is much more the protective welfare state in the German sense, which understands, or which has learned to understand under the constant and highly politicised pressure of the labour movement, that it has to take workers’ interests systematically into account.

From a French perspective the notion of labour law does not make much sense. It is much more correct to speak of *droit social* which enshrines employment law and social security. As in Germany *droit social* developed
outside the civil law system and roughly at the same time.\footnote{Haupt, H.-G. (1995), ‘Sozialpolitik und ihre gesellschaftlichen Grenzen in Frankreich vor 1914’, \textit{Jahrbuch für Wirtschaftsgeschichte}, p. 171.} The governments of the \textit{belle époque} adopted three major laws: insurance against accidents at work in 1898, the ban on Sunday trading in 1906 and the social insurance system (pension and invalidity) in 1910. The French social laws and the French lawyers contributed substantially to the rise of \textit{droit social} in Europe and beyond, in particular after the First World War. The intellectual spirit of ‘the social’ in the late 19th and early 20th centuries is grounded in the path-breaking philosophical work undertaken during the decline of the French absolute monarchy, with its focus on ‘moral’ philosophy.\footnote{Kennedy, D. (2003), ‘Two Globalizations of Law & Legal Thought: 1850–1968’, \textit{Suffolk University Law Review}, 36 (3), 649.}

Consumer law is a product of the consumer society, that is, of the \textit{market} society. Two particularities deserve to be mentioned. In the UK and in Germany consumer policy arose as a statutory policy, but in France the politicisation of consumer law is closely intertwined with the role and function of trade unions and other societal players in the public domain. When consumer policy reached the political agenda, the different trade unions entered the field and integrated the voice of consumers into their overall policy at least to some extent. The second particularity may be demonstrated by returning to the roots of French consumer law and in demonstrating the resemblance between the two constitutive elements of labour and consumer law which point to the French Revolution.

The system of statutory price control, which was forgone in the late 1970s under pressure from the EU, had created strong and stable ties between the public and private spheres, which found their expression in the way in which price fixing was used to introduce consumer protection issues. Opening up the market for consumer products, that is, allowing the market to fix the price, meant that France had to set up a consumer policy which should accompany market liberalisation. Therefore, consumer policy in France has always been and still is highly politicised. It is exposed to strong political variations according to the political party which holds the power and is closely related to social trends, as promoted by trade unions.

In Europe France took a leading role in the field of consumer information and consumer contract law. It fits well then that the French Government, more particularly the Minister of Economics, undertook a major effort in the early 1980s to set a benchmark for the future of consumer law in Europe. The Commission de la Refonte, established by the Government and headed by Jean Calais-Auloy, intended to develop a coherent body of rules that would stand

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side by side with the Code Civil. This ambitious project, which would have given France a leading role in consumer law, failed for various reasons, not least because of the growing importance of European consumer law. However, the project was originally designed as a forward-looking project reaching beyond the elaboration of technical rules and stressing a rather political message, that of the role and function of consumers as citizens in a market society. The drafters even intended to transpose the model of declaring collective agreements generally applicable to standard contract conditions.

The decline of French consumer law as a forward-looking design for the future is obvious. The EU project on a European Code on Civil Law endangers, from a French understanding, the unique role the Code Civil enjoys in the civil law countries. This might explain the sometimes nationalistic reactions against the European project and the project ‘Catalan’ which is meant to bring intellectual leadership back to France. Even the European Commission had to consider the ‘particular’ position of France and the French Civil Code in the European codification project. The ‘terminology group’, composed partly of the French academic group constituted by the Société de Législation Comparée and the Association Henri Capitant des Amis de la Culture Juridique Française, had to somewhat compensate for the German–Dutch–English–Polish dominated Study and Acquis Group.

2.3 The German Model – an Authoritarian Paternalistic-Ideological though Market Orientated Design

The German Civil Code, the Bürgerliches Gesetzbuch (BGB), entered into force on 1 January 1900. So the German Civil Code is a hundred years younger than the French Civil Code. In the aftermath of the Congress of Vienna, the scattered German regions (kingdoms, counties (earldoms), regions) failed to unite in a German state, unified by its own constitution. It was not until 1871 that Germany managed, under the regime of the Prussian

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king/emperor and his chancellor Bismarck, to adopt a constitution. I will build my arguments around two major guiding assumptions.

Firstly, there is a direct line from Kant to Savigny to the formal rationality of the private law system (Weber) which serves the execution of capitalist society. The Kantian philosophy inspired Savigny in the foundation of the so-called Historical School (*Historische Schule*), which gained dominating influence during the 19th century and is still influential today. It has created a particular way of thinking which favours the expulsion of all social policy issues into the ‘pure’ private law system. Social issues are outsourced to special private law legislation outside the BGB.

Secondly, there is the link between Hegel, Thibaut, German idealism, and legal naturalism, as expressed in Jhering, Ehrlich, Weber, Kantorowicz, where the national ideals were tied to the social ideals of a society and a nation. Such a vision can hardly be connected to an authoritarian state that accepts the responsibility for guaranteeing protection in order to exclude political participation. The German version of legal naturalism favours an instrumental use of the legal system for matters of justice.

### 2.3.1 Ideological paternalism and market pragmatism

The late adoption of the constitution is mirrored in the equally late adoption of the German Civil Code. It is still worth studying the intellectual quarrel of the two German law professors, Thibaut and Savigny over the value of a codified German Civil Code, Thibaut fighting in Heidelberg enthusiastically – inspired by German Idealism and *les grandes idées* of the French Revolution – for a genuine German Code, Savigny fighting brilliantly (but not enthusiastically) for the maintenance of the old Roman law.43

Savigny is the founding father of the German Historical School (*Historische Schule*), which argues that law shall not and cannot be derived from the ‘nature’ or ‘reason’ of the human being (*Natur und Vernunft*). Quite to the contrary, law should and must be understood as a historical product of the spirit of the people (*Völksgeist*). The task of the lawyer is not to constitute a meaningful legal order for human beings, but to collect and systemise the legal material produced by the spirit of the people. That is why it is called in a somewhat misleading way Historical School (*Historische Schule*). History appears rather static. Law in this sense is Kantesian formal (*kantisch-formal*), not inspired by ‘nature’ and ‘reason’ (*Natur und Vernunft*) as Hegel claimed. Savigny wanted to become the ‘Kant’ of the legal system (*der Kant der Rechtswissenschaft*). The ideals of Thibaut were reflected in the philosophy of

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Hegel, who paved the way for studying history, its development and the dynamics of its development. The rising legal naturalism (Jhering) contributed to a better understanding of the historical and present reality of legal orders. Most of the legal auxiliary sciences (rechtliche Hilfswissenschaften) such as criminology, research on legal facts (Rechtstatsachenforschung) and legal sociology (Rechtssoziologie – Eugen Ehrlich and Max Weber) have their origin in legal naturalism as well as the Freirechtsschule. The dark side of legal naturalism, which is the standard formula, results from its strong belief in deducing from historical and present reality repercussions on the perfect model of justice, which has to be achieved by a politically guided law that is supposed to achieve a particular social purpose. The tension between pragmatic market based legislation in the formal sense and the strong striving for social ideas is characteristic of the German political and legal system.

Law making in the Germany of the early 19th century was understood as an academic exercise, quite contrary to the democratic discussion that surrounded the adoption and distribution of the French Civil Code. The Thibaut/Savigny conflict, the conflict between two leading professors, led to the instauration of the two law commissions, again composed of professors, which finally paved the way for the adoption of the German Civil Code, some fifty years later. The leading role of academics in Germany is certainly associated with the political – democratic – vacuum that resulted from the failed attempt in 1848 to establish a German nation.

2.3.2 Authoritarian liberalism and the rise of labour law and consumer law

Social justice issues did not make their way into the German Civil Code. The political – statutory – response to the distortions of the industrial revolution, the expropriation of the labour force and its disastrous effects on health and safety resulted in the establishment of a dense social security system, adopted in the last decades of the 19th century. Between 1881 and 1889, the German Reichstag adopted laws on health insurance (1881), accident insurance (1883) and invalidity insurance (1889). In 1891 the introduction of pension funds followed. These protective welfare activities had equally to compensate for the exclusion of the fourth class (the workers) from political power by the Sozialistengesetze. The explicit objective was to undermine the rise of the labour movement. The only way for workers to organise themselves was to unite in education circles, the so-called Arbeiterbildungsvereine. They consti-

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tuted the nucleus for the organisation of the labour force after the collapse of the second German empire with the end of the First World War. The Weimar Republic not only brought a new democratic constitution but also gave way to major legislative acts which enforced representation of the labour movement, from 1922, on work councils (Betriebsräte) which granted workers rights to participate in the decision-making of companies. Already in 1915 Hugo Sinzheimer had forcefully advocated for the introduction of legislative means to declare collectively negotiated tariffs generally applicable. The project, however, was only realised in 1949. This time lag is characteristic for the delayed transposition of intellectual concepts into legal means. The Weimar Republic provided a fertile ground for ideas and concepts to give the economy a more democratic outlook (Napthatli). However, these ideas and concepts were only realised in the 1970s when Germany obtained the first government in which the social democrats won the majority in the elections and adopted, in 1976, the law on codetermination (Mitbestimmungsgesetz).46

The rise of consumer law brought the discussion between the two academic camps back to the fore (Professorenmodell47), a discussion which could only take place in Germany, as only German academics still hold a strong tradition of what constitutes in essence a political debate that becomes a legal debate. The question behind the question was whether the regulatory spirit of the old German Civil Code should be amended so as to integrate into the German Civil Code the missing social(ist) oil, not labour law but consumer law – which had grown into a separate field of law outside the German Civil Code. The legal-political response to the consumer society which grew and grew in the aftermath of the Second World War remained timid and half-hearted. In an amazing historical continuity, consumer law grew outside the Civil Code in the form of special laws and regulations (Sonderregelungen = Sonderprivatrecht), commented on and documented by the critical academia.

Since 2002, consumer law provisions have formed part of the German Civil Code. This time, however – some voices set aside48 – there was no outcry from

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academia, although the integration of the consumer contract law rules challenges the system and the coherence of the German Civil Code. In the shadow of the so-called modernisation of German contract law (Schuldrchts-Modernisierungsgesetz), the executive, that is the Ministry of Justice, smuggled the bulk of consumer contract law rules into the German Civil Code. The much more political dimension, the merging of technical, formalistic civil law (Savigny) and value loaded consumer law (von Gierke), however, attracted neither public nor much academic awareness. The integration of consumer law into the German Civil Code has been performed as a technical bureaucratic exercise. To date, academia has largely ignored the possible long-term effects of the materialisation of private law through mandatory contract law rules and its Europeanisation through the integration of harmonised consumer contract law rules into the traditional body of consumer law. The old camps in civil law are still alive but their use of aggressive language and rhetoric has become subdued.

3 THE EUROPEAN INTEGRATION PROCESS AND THE EUROPEAN MODEL OF JUSTICE

My hypothesis is that, in the European Court of Justice (ECJ) jargon, the ‘European legal order’ and the ‘European constitutional charter’ have yielded, over the last fifty years, a genuine model of justice, which I term access justice (Zugangsgerechtigkeit), which differs from national concepts of social justice. This also means that the EU model is not coalescing with the Member States’ models of justice.

3.1 The Evolving Character of the European Legal Order and the Rise of ‘the Social’

Since the late 1990s there have been two issues that have dominated European legal discourse, the development of a European Constitution and the making
of a European Civil Code. If both the Constitution and the Civil Code were to be realised they would bring the European Union much nearer to the concept of a nation state as developed in the 17th century.

At a first albeit superficial glance, the historical similarities between state building and code making in France at the end of the 18th and beginning of the 19th centuries and the current debate on Europe’s future are striking. These similarities have, however, neither been seen nor been subject to debate at either political or legal theoretical level. In fact, both grand projects are strongly interconnected via questions of their feasibility, of the degree to which they take into account ‘the social’, via the shaky legitimacy of the founding fathers (the European Convention and the Acquis/Study Group) via the unclear mandates/competencies of the drafters, via the particular character of a European Constitution and a European Civil Code in contrast to national constitutions and civil codes, via the ambitious though somewhat misleading use of the word ‘constitution’ and ‘Civil Code’ and in sum via ideological preconceptions.52

In the meanwhile both projects, the grand constitutional project and the grand civil law project, have ‘failed’. Maybe one reason can be found in the blatant neglect of the inner links between the two projects, in particular the link between a social model that could and should guide the debate over a European constitution and the development of a new European private legal order that has a social outlook. Such an undertaking would have entailed the need to discuss, in the respective democratic fora, matters of justice at the European level. Both grand projects have been guided by a similar philosophy, that is, that European integration is regarded very much like a technical process concerned with the development of correct rules that contribute to the furtherance of market integration rather than a controversy over social-political aims and perspectives.53 The technocratic nature of the debate has served an important purpose by depoliticising the discussion in domestic political circles. This does not mean that the grand projects do not deal with

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‘justice’ or do not enshrine a particular model of justice, but such a model remains hidden either behind or amidst technicalities or ‘grand words’ without any specification of meaning.\(^{54}\)

The material substance of the European Constitution was ‘saved’ in the Lisbon Treaty. The European Civil Code project led to intensive academic debates and the production of the Acquis Principles (ACQP) and the Draft Common Frame of Reference (DCFR).\(^{55}\) The latter comes near to a fully-fledged European Civil Code in its form as an ‘academic exercise’,\(^{56}\) without, however, political support from the European Council and the European Parliament.\(^{57}\) Whether the DCFR will be ‘saved’ as a political project remains to be seen. However, the newly appointed European Commission has now taken a political initiative in order to translate the ‘academic Draft Common Frame of Reference’ into a political draft. The collaboration between the European Commission and European academia resembles, in an ominous way, the German Professorenmodell where academia cooperates with an authoritarian executive, overriding a weak parliament.\(^{58}\)

What remain out of the similarities between 19th-century France and 21st-century Europe, however, are insights on the differences between national and European constitution building and national and European civil law code making. The lesson to be learned is that the European legal order should be understood as a legal system and a polity under constant and ongoing construction. The evolutionary nature is characteristic of the European legal order. ‘The social’ has been gradually established over the last 50 years. As at the Member States’ level, ‘the social’ means first of all labour law and social security. It is an open secret that this domain still remains rather underdeveloped. Consumer law, quite to the contrary, is a field in which the European Union has been setting incentives for the last 25 years. Anti-discrimination law might serve as a bridge between the two. It connects labour law and consumer law as it cuts across the various parts of the economy and the society. Anti-discrimination law is about to become the identity mark of the European

\(^{54}\) See Art. 2 of the Lisbon Treaty where ‘justice’ is listed as one of the EU values.


\(^{56}\) I do not regard the production of the DCFR as a mere academic exercise as the drafters were actually working as legislators with a political mandate in mind.


Union. This conglomerate of rules is going to yield a genuine European model of justice. Such a model of European justice, and I start from the premise that there is one, has to be dug out of the wedge of EU rules which are enshrined in these three areas and brought into the limelight not only of the academic debate.

3.2 The Impact of the European Integration Process on Labour and Anti-discrimination Law

3.2.1 Labour law and anti-discrimination law
The development of the substantive EU labour law may be broken down to three major trends. The Rome Treaty introduced, under pressure from France, Art. 119 (Art. 141, Art. 157 TFEU) dealing with equal payment for men and women. A most active court and a responsive EU legislator backed by a number of Treaty amendments, in particular via the Treaty of Amsterdam, took an active stand. Art. 13 (Art. 19 TFEU) and Art. 141 (3) (Art. 157 TFEU) transformed the rules on the equal payment principle into a general principle of anti-discrimination via Treaty amendments and secondary Community law. Its role, function and reach in private law are subject to a controversial debate. The second relatively stable and coherent field where the EU holds competence since the introduction of Art. 118(a) (Art. 137, Art. 153 TFEU) into the Single European Act is health and safety at work. Here, too, the EU has demonstrated considerable law-making activeness. The third area is rather broad and covers a whole range of legal issues, demonstrating that, despite all the impressive activities of the EU, labour law remains rather pointillistic to date. The open method of coordination (OMC) may be regarded as a separate trend or branch of EU labour law. It has, however, not really changed the sketchy picture of EU labour law despite all the activities which have been undertaken under the new regime.

All three strains of development are united in one perspective; they demonstrate how much the EU is focused on opening up markets for workers, on fighting against discrimination in access requirements, in short, granting access justice/Zugangsgerechtigkeit, thereby leaving the social welfare ‘after

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59 In this direction see, Münch, R. (2008), Die Konstruktion der europäischen Gesellschaft: zur Dialektik von transnationaler Integration und nationaler Desintegration, Frankfurt am Main: Campus-Verl.

care’ to the responsible Member States. Three phases can be identified: co-ordination of national laws and policies, European legislative activism and European hegemony, which allow for structuring the potential impact of the rise of ‘the social’ at the EU level concerning matters of social justice.

Co-ordination  Art. 119 (Art. 141, now Art. 157 TFEU) did not provide for legislative competences in its initial form. This article constituted the battlefield of litigation between workers and employers, an area which the ECJ infiltrated via the preliminary reference procedure.\(^{61}\) On the basis of Art. 100 (Art. 94, now Art. 103 TFEU), the EEC (as it then was) unanimously adopted six directives which can be grouped into three topics: (1) Directive 75/117 on equal pay and Directive 76/207 (now Directive 2002/73) on access to employment, both strongly connected to the principle of equal pay under Art. 119; (2) Directive 75/129 on collective redundancies (amended via Directives 92/56 and 98/59) and Directive 80/987 on insolvency protection (amended by Directive 2008/94) and Directive 80/987 on insolvency protection (amended by Directive 2008/94) and Directive 80/987 on insolvency protection (amended by Directive 2008/94) and Directive 77/187 on transfer of rights and Directive 91/533\(^{62}\) on information on worker rights. The two Directives 75/117 and 76/207 deserve particular attention here since the ECJ developed ground rules for the judicial protection of individually enforceable rights\(^{63}\) that were transferred from the field of equal pay and access to employment into all other fields of European law where the enforceability of subjective rights was at stake.\(^{64}\) Without enforceable individual rights, access justice would have remained law in the books.

Legislative activism  Despite limited competences, the European Commission pushed for the adoption of a series of directives, thereby taking control of at least one of the central issues of labour policy via minimum standards: the framework Directive 89/391 on the health and safety of workers, Directive 92/85 on the protection of pregnant women at work, Directive 93/104 on working time (amended by Directive 2003/88) and Directive 94/33 on the protection of young people at work. The addressees of the EU legisla-

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\(^{62}\) Directive 91/533 is still based on Art. 100 and what is even more important, it is guided by the same spirit as the previous five directives adopted between 1975 and 1980.


tion are the particularly vulnerable workers, those exposed to dangerous working conditions, pregnant women and young people. Again, an abundant series of ECJ judgments could be reported where an active court extended the scope of application of harmonised EU rules and strengthened individual rights to fighting for access. Maastricht brought the European Monetary Union (EMU) but also new competences in the field of social policy with binding effects only for the remaining 11 Member States. This constitutional deficit was remedied in Amsterdam, which paved the way for the UK to take up the set of four directives adopted between 1994 and 1997. Art. 2(2) of the Protocol led to the adoption of Directive 94/45 on the working council (as amended by Directive 2009/38) and Directive 97/80 on burden of proof (which was repealed by Directive 2006/54). Art. 4(2) of the Protocol allowed for the introduction of Directive 96/34 on parental leave and 97/81 on part-time workers. The latter two are meant to strike down particular modes of discrimination. In *Laval* the ECJ interpreted the posting of workers Directive 96/71 as *de facto* and *de jure* laying down fully harmonised standards for the benefits of workers from the new Member States, thereby breaking down the barriers to the labour markets in the old Member States.65

The EU managed to introduce a new spirit into the new set of directives, which can be noted in two directives, 94/45 on works councils and 96/17 on the posting of workers. Both contain a strong cross-border element and both rely on the image (*Leitbild*) of a worker which resembles the circumspect and responsible consumer. The new ideal type of European worker has to enforce his or her rights themselves. Protecting pregnant women, securing the rights of young people and granting parental leave, all these regulatory means are given an ever stronger economic element based on the premise that the EU labour market should remain open for everybody, not only for the male full-time worker. An endless chain of ECJ judgments shaped the European labour law *acquis* (the set of existing EU labour law rules) and contributed to the development of a new *Leitbild* of the worker which is perhaps most prominently delineated in the *Bosman*66 judgment.

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The third phase may be characterised by three modes of regulation: a hidden mode, a new mode and an old mode in a new guise. The hidden mode refers to cold harmonisation which results from the introduction of a single currency. Whilst the EU holds the power, if any, to adopt minimum standards in all fields of labour law and policy where it has received competences, the practical effects of the EMU, which became clear only after 1 January 2002, lead to a situation where Member States are deprived of using the national currency as a means to fight against unemployment. The welfare state is modernised by the back door – and through the EU. The new mode results from the introduction of the OMC in 2000 and its growing importance even outside core fields of labour policy such as social inclusion (OMC SPIC) and the European Employment Strategy (EES). The OMC proceduralises social policy making and social policy enforcement by new modes of governance. Proceduralisation within new governance does not allow for setting clear-cut standards on material justice. In this way, the OMC is much nearer to the model of ‘access justice’.

There is, however, one area of labour law and policy where the European Union has been setting the tone more or less since the insertion of Art. 119 into the Treaty of Rome and independent from the ups and downs of the European integration process via numerous directives in the field of occupation and employment and via a proactive ECJ – the fight against old and new forms of discrimination not only between men and women. The Treaty of Amsterdam extended Community powers in Art. 141(3) (now Art. 157 TFEU) and introduced Art. 13 (now Art. 19 TFEU), thereby paving the way for a series of directives which, overarching the boundaries of EU labour law and policy, set down minimum standards in the fight against discrimination. Art. 141(3) (Art. 157 TFEU) was used by the EU to amend Directive 76/207 by Directive 2002/73 and to recast Directive 76/207 via Directive 2006/54. In so far the EU changed competence, from Art. 100 (Art. 94) to the more specific rule in Art. 141(3) (Art. 157 TFEU). Art. 13 (now Art. 19 TFEU) initiated three directives: 2002/43 on equal treatment between persons irrespective of race and ethnic origin, 2000/78 establishing a general framework for equal treatment in employment and occupation and last but not least Directive 2004/113 for equal treatment between men and women in the access to and supply of goods and services.


The anti-discrimination principle has found its way into the draft of the European Constitution. It is anchored in Art. 2 of the Union Treaty and Art. 21 of the Charter of Fundamental Rights.\textsuperscript{69} It plays a prominent, though highly contested, role\textsuperscript{70} in the ACQP and the DCFR.\textsuperscript{71} The Mangold judgment\textsuperscript{72} has raised a highly controversial debate on whether EU law knows a self-standing binding general principle of anti-discrimination, and whether such a principle is applicable not only vertically in citizen–state relations but also horizontally in citizen-to-citizen relationships. In its broadest reading, the Mangold doctrine lies at the heart of the (or a) European principle of access justice/Zugangsgerechtigkeit as it would allow guaranteeing access of EU workers to the labour market, access of EU consumers to the consumer market and access of EU citizens to all sorts of services, so long as they come under the scope of the EU law. Kücükdevici seems to grant horizontal direct effect to the Charter of Fundamental Rights.\textsuperscript{73} If such a principle is enshrined in EU law, Mangold and Kücükdevici could serve as a tool for overriding the reservations of the UK, Poland and the Czech Republic about the integration of the Charter of Fundamental Rights into Union law. A new, though related, battlefield has come up in Test Achats.\textsuperscript{74} The more general question concerns to what extent secondary community law can be submitted to a compliance test with the Charter of Fundamental Rights governed by access justice/Zugangsgerechtigkeit as the overall horizontal yardstick.


\textsuperscript{71} Art. 3:101–3 ACQP; II.-2:101 DCFR.

\textsuperscript{72} ECJ C-144/04 ECR 2005 I-9981; ECJ C-411/05 Palacios de la Villa, ECR 2007 I-8531.

\textsuperscript{73} (21) ‘In that context, the Court has acknowledged the existence of a principle of non-discrimination on grounds of age which must be regarded as a general principle of European Union law (see, to that effect, Mangold, paragraph 75). Directive 2000/78 gives specific expression to that principle (see, by analogy, Case 43/75 Defrenne [1976] ECR 455, paragraph 54).’ (22) ‘It should also [emphasis added] be noted that Article 6(1) TEU provides that the Charter of Fundamental Rights of the European Union is to have the same legal value as the Treaties. Under Article 21(1) of the Charter, “[a]ny discrimination based on … age … shall be prohibited.”’

\textsuperscript{74} Opinion of AG Kokott – Case C-236/09, as confirmed by the ECJ on 1 March 2011.
In *Bosman*,75 *Angonese*,76 *Viking*,77 *Laval*, and *Olympique Marseille*78 the ECJ recognised the direct applicability of Art. 39 (Art. 45 TFEU) concerning the freedom of movement for workers, freedom of establishment in *Viking* Art. 43 (Art. 49 TFEU) and freedom of services in *Laval*, Art. 49 (Art. 56 TFEU). The ECJ has transgressed the public/private law divide and even turned vertical direct effect into a limited horizontal direct effect.79 The worker is confronted with collective agreements that have a quasi-statutory character and restrict his or her legal position. The right of free movement of workers is used so as to strike down collective private agreements that are established either by private organisations with a quasi-statutory character (*Bosman, Olympique Marseille*) or by the states themselves (*Angonese*). *Viking* and *Laval* fit into that picture although the perspective is different. The parties fight for access against discriminatory collective private agreements and the ECJ grants access against the fierce opposition of trade associations and trade unions.

### 3.2.2 Consumer law

The development of consumer law was initiated outside the scope of the clear competence rules under the Rome Treaty in the early 1980s. The adoption of the Single European Act led to the new Art. 100(a) (now Art. 104 TFEU), which granted the EU the power to take legislative action to complete the Internal Market, using a ‘high level of consumer protection’ as the basis. To understand the link between the White Paper on Completing the Internal Market, the Single European Act and the rise of consumer law, it is still worth reading the very influential Sutherland report.80 That is the source from which the well-known rhetoric of ‘an integrated market needs confident consumers’ derives.81 The Maastricht Treaty brought a genuine competence which was complemented in the Treaty of Amsterdam and enshrined in the Lisbon Treaty. Art. 169 TFEU has, however, never gained importance. All relevant measures were based on Art. 104 TFEU. In hindsight, the Europeanisation of consumer

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75 ECJ Case C-415/93, ECR I-4921.
76 ECJ Case C-281/98, ECR I-4139.
77 ECJ Case C-438/05, ECR I-10779.
78 Case C-325/08, OJ C 247, 27 September 2008.
legal policy occurred in three phases. The first is still dominated by the varying patterns of national social justice; the second points already to the development of a deviating European model of justice, which is then subject to further specification and hardening in the third phase.

**Coordination** The first phase was determined by a policy of coordination of different national models of justice which purported to root the social connotation into European private law. This is characteristic of all initiatives taken between 1975 and 1985, that is, before the rise of the Internal Market. From the three directives adopted during this timespan, two, Directive 85/577/EEC on contracts concluded away from business premises and Directive 87/102/EEC on consumer credit, bore a strong national protective bias. It is the weak consumer who is the addressee of regulatory action. Depending on the various patterns, the regulatory action is more or less linked to considerations of social justice.

**Legislative activism** After 1986, with the White Paper on Completing of the Internal Market and the adoption of the Single European Act, the European Commission was in a much stronger position. It needed ‘only’ the support of the majority of the Member States and it benefited from the new competence rule. Within a couple of years the EU managed to get quite a number of directives through the legislative machinery, some of which had been pending for years, for example, Directive 90/314/EEC on package tours, Directive 93/13 on unfair terms in consumer contracts, Directive 94/47/EC on time sharing, 97/7/EC on distance selling, Directive 98/27 on injunctions and Directive 99/44/EC on the sale of consumer goods. The link between the completion of the Internal Market and consumer protection, however, gradually changed the outlook of consumer law, its contents, its direction and its concept. The protective device of consumer policy lost priority to the benefit or the detriment – depending on the viewpoint – of the now emerging image of the responsible consumer who was to play a central role within the European integration process. That is where the genuine model of justice in the EU has its roots.

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84 Critical as regards the alleged change of the paradigm, see Rösler, H. (2004), Europäisches Konsumentenvertragsrecht: Grundkonzeption, Prinzipien und Fortentwicklung, Munich: Beck, p. 74.
EU consumer law is market behaviour law. European consumer law is more and more turning into a consumer law without a social protective outlook—or, to put it in more cautious terms, with a less determined one. The European ideal is the European consumer who shops across borders in a relaxed though attentive and self-responsible manner.

*Striving for hegemony*  The third phase is linked to the policy shift that was initiated by the Lisbon Council and hammered down in the 2002 consumer strategy. Maximum harmonisation ranks high on the European Commission’s political agenda. So far, it seems as if the European Commission has succeeded in transforming minimum standards into maximum rules in particular economic sectors. However, it has not managed to establish full harmonisation in legal fields which cut across various markets and sectors of the economy. Directive 2002/65/EC on distance selling of financial services constituted the breakthrough in the realisation of the new paradigm. In a methodically interesting approach of combining elements of Directive 2001/95/EC on general product safety and Directive 2005/29/EC on unfair commercial practices, it purports to harmonise unfair commercial practices with respect to business-to-consumer (B2C) relationships. Last but not least, the adoption of Directive 2008/48/EC on consumer credit followed suit, after a hard and protracted fight on the full harmonisation approach. Directive 2008/122/EC replaces Directive 94/47/EC on time sharing with an even more detailed set of fully harmonised rules. A revised proposal to fully harmonise package tours is underway. The European Commission presented a similar approach in its 2008 proposal on a directive on consumer rights which is meant to substitute Directives 85/577/EEC on doorstep selling, 97/7/EC on distance selling, 93/13/EC on unfair terms and 99/44/EC on consumer sales. However, it seems as if the European Commission has run into a deadlock situation.


89 The version, adopted in June 2011, provides only for full harmonisation of.
What does full harmonisation mean with regard to the separation of powers between the Member States and the EU in consumer law? In what way does full harmonisation affect the dividing line between national protective concepts of justice and the EU model which puts emphasis on market behaviour and on a consumer who is circumspect and responsible? Full harmonisation takes away powers from the Member States. The hidden consensus between the European Commission and the Member States, which boosted the adoption of minimum protection standards in the aftermath of the Internal Market programme, has collapsed, not silently, but publicly (though widely unnoticed) in the Consumer Strategy 2002. The overall target formulated in the Lisbon Council to make the EU the most competitive market world-wide might bring about a major change in consumer policy and law, one which documents the end of the philosophy behind the Internal Market and the idea of the circumspect and responsible consumer. The new consumer Leitbild is the economically efficient consumer who has to operate no longer merely in a European but in an international environment.

**The current situation** I started from the premise that access justice/Zugangsgerechtigkeit might become the new paradigm of EU private law. Full harmonisation, however, brings a new dimension into EU consumer policy in that the question arises of who should deal with the protection of those consumers who do not meet the efficiency doctrine. The Member States are barred from taking action in fully harmonised fields of EU private law. In a legalistic perspective, they are free to take action only in partially harmonised areas. It might then be for the EU to develop a social model in private law matters outside the dominating patterns of the efficient consumer/worker who may expect no more than ‘rough justice’ – a model in which the consumer/worker claims ‘social justice’. Can the EU rules on services of general economic interest (SGEI) serve as a fall-back position? Or will the Member
States have to take the responsibility back for the protection of the weaker parties? Much will depend on the future of the full harmonisation principle.

4 THE EUROPEAN MODEL ON ACCESS JUSTICE

The EU model cannot be reduced to a formal libertarian concept of justice where the state is denied the right to forcibly redistribute wealth from one individual or group to another. I have shown in my analysis of the economic, social and political determinants that European labour, anti-discrimination and consumer law escapes the polarisation between social distributive justice and allocative (libertarian) justice. What I want to show now is what this new pattern of European justice looks like. I will first try to locate the European concept of justice. It lies somewhere between social distributive and libertarian allocative justice. I will then look into the constitutive elements of access justice/Zugangsgerechtigkeit: ‘access rights’ and ‘anti-discrimination’. I will limit myself to laying down the ground for discussion. The concrete legal implications of such a principle remain to be elaborated.

4.1 Social Distributive Justice, Access Justice and Allocative Libertarian Justice

Firstly, access justice differs from national protective concepts in that it does not aim at social protection in a redistributive perspective. The addressees of the EU labour, anti-discrimination and consumer law are not so much or not primarily the ‘poor who pay more’ – or, to allude to the famous study of Caplovitz, the black people or white women who have to pay more for a new car than white men – but rather the dynamic, open-minded, flexible, well-informed, self-standing and self-conscious mobile workers or consumers who are seeking the best job opportunities and the best prices on the market of consumer goods and services so as ‘to reap up the benefits of the internal market’. The normative Leitbild, which is dominating EU labour and consumer law making, requires these omnipotent market citizens for the completion of the Internal Market and for making the EU ‘the most competitive and most dynamic knowledge-based economy’ in the world.

EU labour, anti-discrimination and consumer law contains normative concepts such as the vulnerable consumer in Directive 2005/29 on unfair

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commercial practices or in the field of services of general economic interest which seem to run counter to such a Leitbild and to indicate a more social justice orientated approach. The ECJ is hovering between more factual protective and more normative fictitious conceptions of the consumer/worker. Despite these social justice elements, which undoubtedly exist, I would, however, stress that the dominating Leitbild, the dominating normative construct in EU labour, anti-discrimination and consumer law, is very much the normatively instrumentalised caricature of the real-life world. It is the result of a market driven European ‘integration through (regulatory) law’. This understanding is far away from the starting point of social policies in the 1960s and 1970s, perhaps not so much from the changing patterns in the legal systems as from political programmes of social welfare orientated Member States and even from early initiatives of the European Commission in the 1970s.

The new modes of governance, so amply favoured by the European Commission in non-harmonised areas of EU labour law so as to foster social inclusion of those workers who are incapable of keeping pace with the changing labour market, have no counterpart in consumer law. They do not even exist in areas such as services of general economic interest where the link to the OMC could easily be built to handle the situation of those customers who are excluded from basic services. The OMC could serve, in theory, to approximate the different policies of the Member States and to define best practices concerning the protection of the vulnerable.\footnote{Bartl, M. (2010), ‘The Affordability of Energy: How Much Protection for the Vulnerable Consumer?’; \textit{Journal of Consumer Policy}, 33 (2), 225–45; Neergaard, U. (2008), ‘Services of General (Economic) Interest and the Services Directive – What Is Left Out, Why and Where to Go?’, in Neergaard, U., R. Nielsen and L.M. Roseberry (eds), \textit{The Services Directive: Consequences for the Welfare State in the European Social Model}, Copenhagen: DJOF Publishing, p. 65.}

It has to be recalled that the regulatory mechanism established by the European Commission to design the ACQP and the DCFR resembles much more the New Approach on Technical Standards than the OMC, which was promoted in the academic environment as an appropriate tool for the codification project.\footnote{van Gerven, W. (2006), ‘Needed: A Method of Convergence for Private Law’, in A. Furrer (ed.), \textit{Europäisches Privatrecht}, p. 437; on the parallel between the new approach and the making of the DCFR see Micklitz, H.-W. (2007), ‘(Selbst)-Reflektionen über die wissenschaftlichen Ansätze zur Vorbereitung einer europäischen Vertragsrechtskodifikation’, \textit{GPR Zeitschrift für Gemeinschaftsprivatrecht}, p. 2.} That is why EU labour, anti-discrimination and consumer law is definitely and purposively different from national welfare state inspired protective concepts of the weaker parts of society.
Secondly, the EU concept of justice differs from allocative libertarian concepts of justice, as EU labour, anti-discrimination and consumer law is in substance regulatory law which restricts not only the exercise of the market freedoms but also the private autonomy of parties to a labour or consumer contract. None of the Treaty amendments and none of the secondary rules are inspired and guided by the idea that it is a prominent task of the European Union to establish and to ensure a European principle of freedom of contract and private autonomy. The ECJ has read such a principle into the four market freedoms. The legal paradigm of EU law making via the Treaty and via secondary law, however, is regulatory law, which means regulated autonomy. The EU is transforming private law rules ‘from autonomy to functionalism in competition and regulation’. I have set down my understanding of the role and function of European private law elsewhere.

EU regulatory labour and consumer law uses mandatory contract law rules as a device to achieve particular policy purposes which might be sector related or, as is the case in labour, anti-discrimination and consumer law, subject and sector related. All these mandatory EU rules on labour, anti-discrimination and consumer law are guided by one and the same philosophy: they are meant to bring the consumer and the worker into a legal position where she or he is equipped with the necessary set of rights so as to participate in and reap the benefits of the Internal Market and the most competitive economy. EU regulatory law starts from the premise that a European Economic Constitution based on the four market freedoms and competition law does not produce the necessary results by itself. Additional tools are needed to guarantee access to the market. This is exactly what the Lisbon Council, and since then various documents of the European Commission, mean when they constantly reiterate the formula of ‘reaping the benefits of the internal market’. Participation in and access to the internal market legitimises the adoption of mandatory EU labour, anti-discrimination and consumer law rules.

Thirdly, the EU model of justice cannot and will not be equated with social justice, emanating from the workers’ movement that developed in the 20th century. Nor will it be seen as a libertarian concept of justice where there is no statutory responsibility for the distribution of wealth between members of the society. So what is it then positively speaking? In German it would be Zugangsgerechtigkeit, which literally means access justice. I found the term first in a document of the German Catholic Church which was prepared by

eminent German academics as a response to the plea for transforming the German welfare state. Access justice alludes to the concept of equity in the Common law system, not so much in its origins as in its content. Equity was meant to compensate for the deficiencies which resulted from the narrow and formalised rules on writs which restricted access to common law, whereas the regulatory law counterbalances the market freedoms. They share, however, the conviction that a legal system cannot be based on libertarian allocative concepts and that an element of Billigkeit – equity – is needed that counterbalances such model.

The EU legal system was originally designed as an international treaty before the ECJ transformed the Rome Treaty into a genuine legal order based on enforceable rights. EU regulatory labour and consumer law, right from its beginning and with constant support from the ECJ, could be understood not only as integrating a social dimension into the market based project of European integration, but also to make sure that those who should benefit from the mandatory rules are also given access to the legal system. In this sense, access justice contains two elements: first, breaking down the barriers which limit participation and access, and second, strengthening the position of consumers and workers with a view to enforcing their rights. With regard to the first category, access justice would require that all market participants, including consumers, must have a fair and realistic chance to enter the market, consume its products and use its services, as well as reaping the benefits of the market. Access justice in the second sense relates to the degree of justice the individual might gain after he or she has been granted access. Rights are useless if they cannot be enforced. The ECJ is strongly advocating for judicial protection as now enshrined in Art. 47 of the Charter of Fundamental Rights. The EU is promoting, not only in the field of labour, anti-discrimination and consumer law, conflict resolution via mediation and dispute settlement outside courts.\(^\text{100}\)

In sum: access justice means more than a formal guarantee to workers and consumers that they may have a theoretical chance of participating in the market and reaping the benefits of the market. This would be justice in the meaning of the libertarian concept. Access justice in the meaning of Max Weber, quite to the contrary, materialises the equity doctrine. The legal system is responsible for establishing tools which transform the theoretical chance into a realistic opportunity, thereby eliminating all sorts of barriers which hinder the assertion of the claim to access. This requires further deepening.

4.2 The Two Constitutive Elements: Access Rights and Anti-Discrimination Rights

There are two major identifiable constitutive elements of the European model of justice: ‘access rights’ and ‘non-discrimination rights’. Both elements cut across labour and consumer law. They appear in labour and consumer law in different legal forms and different connotations, as Leitnormen in the Lisbon Treaty, as part of the Charter of Fundamental Rights, in EU directives, recitals and recommendations. In their most outspoken form, they may grant individually enforceable rights, vertically in consumer/worker–state relationships, horizontally in consumer/worker–private supplier/employer relationships, at least as long as the other party to the contract is tying the consumer-worker to collective private agreements which bear a quasi-statutory character. In a less developed form, the so-called rights may formulate policy guidelines or mere policy objectives which could and should nevertheless be taken into account by the courts in the interpretation of the respective provisions that lie at the heart of the conflict. The perspective I take is a private law perspective, meaning that I investigate the horizontal dimension of the two constitutive principles, in order to describe the possible impact on private law relations.

4.2.1 Specific access rights in labour, anti-discrimination and consumer law

In private law relations, the subjective rights inbuilt into the market freedoms as interpreted by the ECJ are paving the way for access being granted against discriminatory collective private agreements. There are limits to this case law since the ECJ does not submit collective private agreements to the scope of application of the four market freedoms. Otherwise, the logic of judicial control in unfair terms would have to be reconsidered. Herein there is a prominent field of collective private agreements that could easily be brought into the perspective of Bosman, Angonese, Olympique Marseille, Viking and Laval. But such an understanding would submit private law as such under the market freedoms, a decision the ECJ refused to take in Alsthom Atlantique and CMC Motorradcenter.

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101 I will not discuss the horizontal effect of these rights, as this would reach beyond the purpose of the chapter.


103 ECJ C-339/89 ECR I-107.

104 ECJ C-93/92 ECR I-5009.
The Charter of Fundamental Rights does not contain an overall rule which grants access. However, there are bits and pieces in the Charter that can be broken down into the categories of labour and consumer law. Methodologically speaking, the Leitnormen of the Charter, the individually or collectively enforceable rights enshrined in the Charter, the policy objectives laid down in the Charter and the rights and objectives concretised in secondary Community law must be read and interpreted together. More recent EU regulations and directives refer, in their recitals, to the Charter of Fundamental Rights so as to ensure compliance of secondary Community law with the Charter. This is a most visible expression of the ongoing constitutionalisation process of private law relations.¹⁰⁵

**Labour** The Lisbon Treaty introduces a new Art. 2 which lays down a set of values common to the Member States:

The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.

These values are not fully concretised in the established legal order. Therefore Art. 2 must be read as a Leitnorm, of no direct legal consequences. However, Art. 2, read together with the various articles of the EU Charter, might allow for the grounding of a European concept of justice on weighing social rights; for example, those of workers and consumers balanced against the supplier’s right to market his or her products and services freely in and throughout the Internal Market. Chapter II formulates in Art. 14 the right to education and in Art. 15 the freedom to choose an occupation and the right to engage in work. Chapter IV defines, under the heading of solidarity, a whole set of rights, in particular in Art. 27 (information and consultation), Art. 28 (collective bargaining), Art. 29 (access to placement services), Art. 30 (unjustified dismissal), Art. 31 (fair and just working conditions) and Art. 34 (social security).

Access in labour law takes different forms, although there is at first sight a parallel to the services of general economic interest taking a broad understanding, that is under inclusion of financial and digital services. Since 1975, the EU has established a long-standing policy to establish regulatory means which are aimed at keeping those workers in business who are in a more vulnerable position due to their particular personal circumstances, such as pregnant women, parents, young people and part-time workers. However, in particular those measures taken under the Social Policy Agreement adopted under the Maastricht Protocol are reaching far beyond particular groups of workers and rather formulate access conditions for worker representation as well as for posting workers outside the home country.

Consumers  Art. 38 of the Charter of Fundamental Rights requires that Union policy ensures a high level of protection. Individually enforceable rights cannot be deduced from Art. 38 of the Charter. The set of rights granted to consumers lag behind those granted to workers. Art. 35 (health care) and Art. 36 (access to services of general economic interest) provide for more specific protection in selected areas of consumer policy. The Treaty contains, in Art. 169 TFEU, elements of a ‘right to information’ and a ‘right to establish consumer organisations’, although these rights have to be given shape via secondary Community law in order to be understood as individual, maybe even enforceable, consumer rights.

The most prominent feature in the Charter related to access is to be found in Art. 36, which links access rights to the rather opaque concept of services of general economic interest:

The Union recognises and respects access to services of general economic interest as provided for in national laws and practices, in accordance with the Treaty establishing the European Union, in order to promote the social and territorial cohesion of the Union.

Art. 36 of the Charter is not meant to grant individual rights, at least not according to the majority of academic opinion. Art. 36 of the Charter should, however, be read together with secondary legislation in the field of telecommunication, postal services, electricity, gas and transport, just to name those services which clearly come under the category of services of general economic interest:

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107 Regarding the interpretation of this provision and its doctrinal qualification see the contribution of Baquero Cruz in de Búrca, Gráinne (ed.) (2005), EU Law and the Welfare State: In Search of Solidarity, Oxford: Oxford University Press, pp. 169 and 178.
economic interest. Legal doctrine argues that the respective directives are all united in the idea that the new consumer should and must have access to the new competitive market and that access must be understood as an individually enforceable right. In *Sabatauskas* the ECJ did not decide on the right of access of consumers to the energy market. Reading both the Charter and the respective directives together justifies the existence of an enforceable right of access to services of general economic interest. The addressee of such an individually enforceable right, however, would not be the supplier of the services of general economic interest but rather the respective Member State which is under an obligation to implement the directives in light of the Charter in such a way that the customer is granted subjective enforceable rights. The missing horizontal direct effect has been subject to concern in academic circles for quite some time. The problematic effects of the existence of EU rights which cannot be enforced against the correct addressee has been termed by Reich ‘rights without duties’. The Charter sheds new light on an old debate as is so amply demonstrated by the ECJ in *Mangold* and *Küçükdeveci*.

There is another, equally difficult, question pending. Can the right to access under Art. 36 be extended beyond the notion of services of general economic interest to the fields of financial and digital services to all those services which the consumer-worker-citizen depends on today, economically and socially? From a doctrinal point of view, there is a huge gap in policy statements, like that in the 2000 Lisbon Council conclusions which build concrete

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109 See on the right to access under Art. 20 of Directive 2003/54 in particular with regard to the right of access to universal services, ECJ C-239/07 Julius Sabatauskas, at 47, AG Kokott at 35, 38, not yet reported; see Pirstner-Ebner (2009), Europäische Zeitschrift für Wirtschaftsrecht at 15, 16.


links beyond the SGEI, stating that citizens may not be excluded from the benefits of the information society and that financial illiteracy should be combated. These announcements are reflected neither in the set of EU directives and regulations which govern the field of financial and digital services nor in the Charter. The most concrete step the European Commission has taken is in the field of financial services, where the consumer shall be given a right to a bank account. However, the document has no binding legal effects. Again the Charter might allow for hardening soft law means.

These types of services serve as perfect examples to demonstrate the difference between formal libertarian and materialised access under EU law. The simple chance to have access exists for particular groups of persons often only in theory. Materialised access requires more; it requests regulatory mechanisms which transform the *theoretical normative* opportunity into a *realistic concrete* perspective. The result of materialised access is not to be confused with social justice. Social justice is result orientated. The outcome is what counts in order to be able to assess whether the result is just or not. Materialised access is less result orientated. It only establishes fair and non-discriminatory access conditions.

4.2.2 The horizontal dimension of anti-discrimination

The second element – anti-discrimination – is even wider-spread and more deeply anchored in the Treaty, in the Charter and in secondary consumer and labour law rules. Contrary to access, which bears a positive message, anti-discrimination bears a negative one. EU law prohibits various forms of discrimination, unequal payment in the Treaty for example and, since 2000, a wide variety of discriminatory practices related to the labour market but also practices which are not related to the labour market. The EU Charter deals extensively with non-discrimination in Art. 21, in even more detail than in the four directives.

The set of four directives adopted in the aftermath of the Treaty of Amsterdam on the basis of Art. 13 (Art. 19 TFEU) and Art. 141(3) (Art. 157 TFEU) extend the EU anti-discrimination rules beyond equal pay and equal access to employment to race and ethnic origin, and – what is even more important in the context of the emerging EU model on justice – they establish anti-discrimination rules which are applicable outside the labour market in private law relations in the access to and the supply of goods and services. The academic debate so far turns, to a large extent, around the question of what kind of model of justice the anti-discrimination rules stand for. The debate gained pace through the insertion of the anti-discrimination principle into the ACQR and the DCFR.114

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114 Art. 3:101 to 3:103 ACQR and II.-2:01 to II.-2:103 DCFR.
I will borrow from Basedow\textsuperscript{115} the distinction between integration motivated anti-discrimination verdicts and societal policy motivated anti-discrimination verdicts. This fits into the distinction between allocative libertarian justice and access justice/Zugangsgerechtigkeiten. Integration motivated anti-discrimination rules can be found in the above-mentioned rules on regulated markets. The addressees of the anti-discrimination rules are Member States, regulatory authorities and the different economic actors. From a consumer/customer perspective the rules may be broken down into (a) those indirectly affecting consumers and (b) those directly affecting them. Under the first category, we can note rules to ensure non-discriminatory access to the internet, non-discriminatory tariffs for access to the network and rules to prohibit any form of discrimination between the different economic operators. Under the second category, particular rules on non-discriminatory treatment within the framework of universal service obligations can be noted.

The societal policy motivated verdicts are of direct concern to workers and consumers. The basic philosophy of the non-discrimination rules has been developed by the ECJ within the framework of the Rome Treaty as accomplished by the two directives on equal pay and equal access to work. After a series of judgments where the ECJ was ready to give a broad reading to the notion of ‘pay’, in \textit{Smith v. Advel Systems}\textsuperscript{116} the ECJ rejected any attempt to use the Treaty provisions for levelling up pay. All that the Treaty requires is equal treatment of men and women, not equal treatment at an equally high level. In the case at issue, EU law did not prevent the employer from raising the retirement age of women to that of men. This message can be transferred to all sorts of discrimination between men and women.\textsuperscript{117} The EU rules on anti-discrimination allow for the establishment of equal access conditions, but the very same rules cannot be used to establish equal standards for men and women at the most favourable level. Those reading into the EU rules regarding standards of substantive justice a redistributive meaning advocate for an EU model of justice which reaches beyond access justice. It might very well be that the proponents of such an interpretation will suffer from a renewed setback when the ECJ has to decide on the choice between social distributive and access justice. Such an understanding would not comply with \textit{Smith v. Advel and others}, but it would be coherent with the philosophy of EU regulatory law. As the four directives establish, only minimum standards would therefore remain for the Member States to decide whether they want to go beyond access justice within the national rules implementing the directives.

\textsuperscript{116} ECJ Case-408/92 ECR I-4435.
5 SUMMARY OF PARTS II–V OF THE BOOK

This book deals with an old subject: social justice in private law. What is hope-fully new is the idea that social justice must be read and understood in the relevant socio-economic and cultural context. EU Member States have different concepts of social justice embedded in particular institutional frameworks. The European integration process, with its strong emphasis on market building, cuts across the different national patterns of justice and yields its own model which does not fit into any of the national categories. The rest of the contributions to this book are grouped under four major headings: the deeper legal and philosophical foundations of social justice, in contrast to corrective, commutative, procedural and legal justice; the relationship between constitutional values and private law; the socio-economic development of Europe and the impact on patterns of social justice; and patterns of social justice in labour relations, consumer law and competition law.

Part II is devoted to communication between Wojciech Sadurski and Christine Chwaszczza on the relationship between corrective, commutative, procedural and social justice. The focal point of the debate is the role and function of commutative justice in contrast to social justice.

The main aim of Sadurski’s Chapter 2 is to challenge the validity of the distinction between legal justice and social justice. He argues that what we usually call ‘legal justice’ is either an application of the more fundamental notion of ‘social justice’ to legal rules and decisions or is not a matter of justice at all. In other words, the only correct uses of the notion of legal justice are derived from the notion of social justice and, hence, the alleged conflicts between criteria of social and legal justice result from the confusion surrounding the proper relationship between these two concepts. Two views about the ‘social justice/legal justice’ dichotomy are said to be of particular importance and will provide the focus for the argument: this dichotomy is sometimes identified with a classical distinction between ‘distributive’ and ‘commutative’ justice and sometimes with the distinction between ‘substantive’ and ‘procedural’ justice.

Chwaszczza argues in Chapter 3 that the concept of commutative justice is indispensable, because it responds to a genuine branch of problems of justice that are today even more relevant than in antiquity or early modern times. Commenting on Professor Sadurski, she follows two of his interpretations of commutative justice: in terms of the obligation to keep promises and contracts and in terms of the contrast between substantive and procedural justice. She argues that either account of commutative justice concerns a sphere of justice that cannot be reduced to any other form or branch of justice. In the remainder of the chapter, she underlines that pure procedural justice plays an indispensable role in legal and socio-political practice, because it provides a
method of settling conflicts of interests and values. The point is that if commutative justice is understood as pure procedural justice, the concept can be neither eliminated nor dropped.

Sadurski admits in Chapter 4 that Chwaszcza’s argument is complex and subtle, and that there are many points with which he agrees or, at least, with which he would not disagree. He then focuses on the two main points of her critique, which are central to her argumentative strategy. If these arguments succeed, they are largely devastating to Sadurski’s initial position. These two points concern, first, the role of voluntariness in exchanges (which, he believes, responds to his argument concerning commutative justice, though Professor Chwaszcza uses it in the context of procedural justice) and, secondly, moral diversity (which responds to his argument regarding procedural justice). Sadurski begins by underlining the context in which he developed his original position. His main objective was to scrutinise critically – and eventually undermine – a popular distinction between ‘social justice’ and ‘legal justice’: an intuitive view according to which these are two, independent from each other, forms of ‘justice’. He had identified two critically important paths leading to such a distinction, between ‘commutative’ and ‘distributive’ justice on the one hand and justice in procedures and justice of outcomes on the other hand, whereby allegedly ‘commutative’ and ‘procedural’ justice are sub-species of ‘legal justice’, and ‘distributive justice’ and ‘justice of outcome’ are sub-species of social justice. He had discarded this characterisation by pointing out that (a) commutative justice is either highly dependent on distributive justice or else it boils down to principles which are not about justice at all (such as the duty to fulfil freely given promises), and (b) procedural justice is bound to its ‘justness’, on the justness of outcomes, or else it is not a matter of justice at all but relates rather to purely formal principles such as the duty to observe publically established rules.

This summary aims not only at setting down the general background of the discussion but also, and more importantly, at dispelling a sure misunderstanding that a reader may form on the basis of Chwaszcza’s rendition of Sadurski’s argument. The misunderstanding may consist of a perception that these two arguments – namely that concerning the commutative/distributive distinction and that surrounding the procedural/outcome-related distinction – are in some important ways parallel and connected to each other. Indeed, Professor Chwaszcza claims that Sadurski’s argument ‘assumes a parallel between the contrast of substantive and procedural criteria of justice on the one side and the contrast of distributive and commutative justice on the other side’. No such ‘parallelism’ was intended by him. He takes the opportunity to make the point clearly: ‘there is no substantive connection between my two arguments, and the only parallelism is in the general structure of the argumentative strategy’. In both cases, the alleged distinction between two independent forms of justice
– ‘social’ justice and ‘legal’ justice – is dismissed by suggesting that (what is taken to be) a variant of legal justice should in fact derive from social justice, or else it is not a matter of justice at all. But here the parallel ends.

In her rejoinder in Chapter 5, Chwaszcza first emphasises that she, as a philosopher, is stunned by the frequency with which the concept of social justice is mentioned in articles and documents and by the absence of the concept of commutative justice in the debate. If there is something that the philosopher can and may contribute to debates on European private law, she says, it is an attempt to reveal the distinctive role of (modern) accounts of commutative justice. Her aim, thus, is not to find out ‘what justice is’, as Sadurski seems to assume in his reply, but to clarify the different systematic problems to which notions of the concept of justice respond.

Part III of the book brings together scholars who discuss the relationship between the constitutional order, the values enshrined in the constitutional order and the impact of constitutional values on private law relations.

Ernst-Ulrich Petersmann argues in Chapter 6 that concepts of social justice in European and international private law must remain consistent with the principles of justice underlying European and international public law. The chapter begins with a brief explanation of the diversity of conceptions of constitutional justice and of their legal impact on ever more fields of European public and private law. After clarification of the constitutional terminology used in this chapter, Rawlsian principles of justice for national and international law are distinguished from multi-level human rights as principles of justice, multi-level judicial protection of constitutional rights and the rule of law by ‘courts of justice’, and the diverse forms of democratic and private participatory justice for transforming legal and social relationships. The constitutional dimensions of the 2007 Lisbon Treaty confirm that the ‘many concepts of social justice in European private law’ must be construed and developed with due regard to the diverse dimensions of ‘constitutional justice’ in European and international public law.

Chapter 7 by Hugh Collins commences with an elucidation of the concept of the ‘constitutionalisation of private law’ by reference to a distinction drawn between theories concerning the structural relation between public law and private law in national legal systems. Although the idea of the constitutionalisation of private law can be understood in different ways, the more radical version, which can be fairly attributed to the ‘Manifesto of Social Justice’, requires Collins to view private law as a detailed articulation of underlying constitutional rights and principles. The chapter subsequently examines the

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distinction between the direct and indirect effect of constitutional rights on private law. It is argued that, even in accordance with the more radical interpretation of the constitutionalisation of private law, it is justifiable and coherent to prefer the interpretive method of indirect horizontal effect. Further steps towards understanding the practice of indirect horizontal effect in the multi-level private law system in Europe can be achieved, according to Collins, by taking into account the recent constitutional reforms of the EU. With this precise, though complex, picture of the method of alignment in mind, he considers it feasible to assess the claim that the constitutionalisation of private law is likely to promote social justice.

In Chapter 8, Ugo Mattei explores the role of European private law (EPL) in this reactionary transformation and suggests paths for change. He argues that EPL, rather than resisting the current decline in civilisation, is co-responsible for the incremental transformation of the European citizen and political actor into a passive and pacified consumer. He argues that, twenty years after the fall of the Soviet Union, Europe should prepare for the imminent fall of US hegemony by developing a political economy of law finally progressive both in form and in substance. In order to do so, he is of the opinion that we need a long-term vision capable of expanding the best aspects of European constitutionalism and of asserting an advanced political platform based on a new covenant between humans and nature. The new vision, in strong opposition to the one developed in the preceding twenty years of neo-liberal folly, must be based, according to Mattei, on a relentless critique of private property based on the full development of the doctrines of the social function of rights contained in many national constitutions, so as to regenerate a legal civilisation that rejects profit and pursues the justice motive. Mattei says that the new vision challenges the ideology of competition (which has usurped a constitutional status in Europe and has been accepted by EPL within an uncritical reception of modes of thought developed within a mainstream economics paradigm), the unfortunate pernicious product of an obsolete version of scientific positivism serving the interests of global capital. He argues that economists’ technocratic vision of the law should be rejected by EPL, which should instead equip itself with tools capable of contributing to the development of a radically alternative vision. Full social inclusiveness and equality is the sole logic serving the interest of preserving the global commons within an ecological approach to the law based on cooperation and networking rather than on individualistic competition. The whole relationship between public law and private law should be revamped and the ‘profit motive’, sanctified in the last twenty years, should be now marginalised and eventually substituted with a newly empowered ‘justice motive’ based on the realisation of substantive and not merely formal equality, as indicated by some of the most important European post-Second World War constitutions.
Part IV discusses the impact of socio-economic developments within the EU and within selected Member States on the proprietary order of the EU, on the role and function of the emerging welfare state and the judiciary, and on nation states’ specific patterns of social justice.

In Chapter 9, Alessandro Somma discusses the relationship between the European proprietary order and patterns of social justice. He focuses on the historical roots and precedents of current reform of the proprietary order, underlining that their common element is the encouragement of cooperation between capital and labour or capital and consumption. He tries to show that only a higher level of conflict makes it possible to enhance individual emancipation. Finally, he evaluates the model of social justice that was elaborated in the 1970s. He then critically addresses the centrality of the conflict between capital and labour, its link to the issue of unlimited economic growth, and its incapacity to redistribute wealth in a world on its way to the end of labour.

Cornelius Torp’s thoughts in Chapter 10 on the development of the British and West German welfare states since 1945 fall broadly within the field of the history of institutions. He attempts to reconstruct the concepts of social justice which underlie and underpin the architecture of the social security systems in both countries and describe how – or whether – they have changed. He is interested not so much in the intentions of the most important social-political actors as in those structural principles which were, and are, reinforced institutionally in the arrangements of the social state – in part even behind the backs of those involved – and which therefore can best be distilled from a bird’s-eye view, looking back. Special attention should be paid in this context to the following question: have the principles of justice inscribed into the institutions of the welfare state in both countries changed fundamentally since the Second World War or have their respective ‘genetic codes’ remained pretty much the same?

The heuristic starting point of Torp’s study is the distinction, widely accepted in the research on the nature of justice, between the three basic principles of distributive justice: justice in terms of need, justice in terms of merit or equivalence (meaning that there is an equivalence between contributions and benefits in the social insurance system) and justice in terms of equality. In employing the typology of Gösta Esping-Andersen, Torp assigns the liberal welfare state regime of Great Britain to the group which sees justice in terms of need, whereas the corporatist or conservative welfare state of Germany is seen as belonging to the second category: justice in terms of merit or equivalence. These categories and these assignments are then examined. He looks first at the health care system, then at the systems of making provisions for old age, and, finally, at the systems which insure against the risks of unemployment, before turning to the results and reflecting on these in light of the newest developments.

In Chapter 11, Ruth Sefton-Green examines the hypothesis that French
private law’s conception, or even vision, of social justice is characterised by paternalism and solidarity. She says that solidarity, at least intuitively, constitutes the bedrock of social justice. For her, solidarity is the phenomenon of collective identification; the reason why we identify with one another in a given society. It explains the social bonds of society, that is, why we help those who are close to us, why we give or contribute to others altruistically without expecting anything in return. It is because we recognise objectively a social bond, and subjectively a resemblance, that solidarity functions as it does and aspires to social justice. According to Sefton-Green it follows, at least intuitively, that solidarity is underpinned by distributive aims. The link between solidarity and distributive justice, as a facet of social justice, requires examination. The French doctrine of contractual solidarity (solidarisme contractuel) has attempted to apply the idea of solidarity to contract law. The chapter evaluates this effort while suggesting that solidarity may still have unexplored potential in private law.

In Chapter 12, Pia Letto-Vanomo discusses questions related to the relationship between law and justice. Her starting point lies mainly in legal history, but she also covers topics relevant for current legal argumentation. The focus is on what is called Nordic Law. She argues that there is something we can call justice and that positive law can – or should – be measured by it. She suggests that there are different ‘techniques’ for bringing the idea(s) of justice within modern legal systems. These techniques are historically determined and there are local variations in their use even within the ‘Nordic legal family’. She also says that there are differences between legal orders based on their openness to corrections for justice. Thus, when the meaning and future possibilities of the social justice concept in various legal systems are compared, the ‘technical’ dimension – that of functions and means of various legal actors, especially their role and style in legal argumentation – cannot be neglected. Subsequently, she analyses techniques of legal scholarship.

The aim of Arthur Dyevre in Chapter 13 is not to map existing points of friction between EU and national law regarding the definition of social justice. Rather, he aims to reflect and to speculate on what role judicial actors could and are likely to play in bringing about and in resolving tensions. He focuses on two related questions. First: what role are domestic judges likely to play in the battle over social justice? Second, in keeping with the comparative approach of the book: are judges likely to react differently in different countries to the Europeanisation of social justice? The answers he puts forward are largely tentative, if not speculative. For the most part, they lack systematic empirical grounding. But, for the purpose of the chapter, his goal is simply to provide food for thought by discussing what look like plausible hypotheses.

The chapter has two sections. The first looks at accounts of judicial behaviour that still have wide currency in legal scholarship. There, he tries to show...
that what the conventional wisdom says about the determinants of judicial decision-making and cross-national variations in judicial behaviour is untenable. He argues that judges should indeed be expected to react differently in different places to the intrusion of European law but that differences will not come from something like the Common Law/Civil Law divide or the way judges are socialised *qua* judges. Having refuted the conventional wisdom, in the second section he moves on to develop a more positive argument, looking at what actually drives judges. The factors that really matter when it comes to explaining and predicting the judiciary’s reaction, he argues, are essentially institutional and attitudinal. In short, his point is that a plausible account of how domestic courts react to the incursion of EU law should start out from the preferences of the judges sitting on those courts and the constraints of their institutional environment.

The final section, Part V, tests the hypothesis that patterns of social justice are context related and differ between labour, consumer and competition law.

In Chapter 14, Marie-Ange Moreau looks into concepts of justice in labour law relations. Appealing to the notion of social justice in the European Union poses for her a significant challenge, including the difficulty of mapping its contours, something which is, at the very least, paradoxical and disturbing for such a fundamental concept in the context of labour law. For social justice is an objective which, in the context of labour relations, is inspired both by the notion of commutative justice, to the extent that it applies to the definition of the obligations of the parties to an employment contract, and by the notion of distributive justice, as it is concerned with correcting the structural inequalities linked to employer power by the introduction of specific rights, in particular collective rights. It therefore has to have both structural and procedural aspects. Its importance should not be underestimated; it is not an overstatement to suggest that the objective of social justice is what inspires the development of social norms, in particular labour law, whether passed at the national or regional level or the international level. Moreau devotes particular attention to the interplay between patterns of justice in international labour law and in EU labour law.

In Chapter 15, Hannes Rösler raises the following questions within the general setting of the role of social justice in private law relations. What signifies the *social* justice that developed during the 20th century and which is the subject of this book? What distinguishes, in the context of consumer transactions, the ideal of social justice from traditional justice? In order to highlight the different meanings of social justice concerning consumption, he focuses on the actual development of consumption and its influence on private law. Therefore, he sketches the evolution of the notion of consumption from mercantilist times to the present, before he explores how the socio-economic diversification into labour and consumption spheres resulted in a shift from
traditional liberal economic ideas towards more flexible contract law and interventionalist approaches in the European legal systems. With reference to cases, the chapter demonstrates how new market offerings and consumption patterns gave momentum to the transformation of traditional justice towards social justice.

The chapter is said to prove two things: that consumption and corresponding protective laws are unifying elements in Europe and that consumer law in a historic and functional sense is not restricted to the EU stance, but rather extends to diverse issues of general contract law. Rösler underlines the different logics of justice in the growing post-national and multi-level system of Europe. On the one hand, there are the EU’s patches of justice that are internal market centred. On the other hand, there are 27 Member States with much more diverse, more refined and broader ‘social models’ of contract law. Therefore, he also comments on the current debate concerning the shift from minimum to full harmonisation as proposed by the Commission.

In Chapter 16, Chris Willett considers the pattern of social justice in key parts of UK consumer law. Ultimately, he seeks to highlight how general principles and preventive enforcement (in significant part brought about by Europeanisation) have laid better foundations for the promotion of social justice values in UK consumer law. He also points to the institutional tension that may have arisen in the UK as a result of strife between values of commutative justice that are favoured at the highest judicial level and values more oriented to social justice that are promoted by the key regulatory body, the Office of Fair Trading (OFT). He sketches the issues that arise in business–consumer relationships (that is, in relation to freedom of choice and substantive outcomes) and the broadly different attitudes to these issues that might be taken from perspectives prioritising self-interest and self-reliance and (on the other hand) perspectives prioritising fairness and protection. Then he places these issues in the context of ideas of commutative and social justice. Essentially, the key points for him are the specifically protective normative reference point of social justice, in contrast to the lack of a particular normative reference point in the case of commutative justice, and the distinction between the focus of social justice on the collective dimension and the focus of commutative justice on the individual dimension.

Willett then highlights a shift (driven by Europeanisation) from the traditional UK model of piecemeal rules and private enforcement to a greater use of general principles and preventive enforcement. This, it is suggested, strengthens the foundations for achieving at least some social justice goals. However, he contends that these are fragile foundations because so much depends on how these general principles are concretised. In the UK, in particular, there is said to be evidence of tension in the approach to interpretation between the social justice instincts of the OFT and the commutative justice
instincts of the Supreme Court. Nevertheless, he argues that the more social justice oriented approach of the OFT might be advanced by greater legislative specification on certain key points and increasingly rigorous, research based argumentation by the OFT.

According to Bastian Schüller in Chapter 17, consumer laws in Scandinavia are ‘famous’ for their level of protection. Some see them as a manifestation of social justice in contract law. For him it is a matter of perspective, depending on the understanding of social justice. If one connects ‘social justice’ with meanings like ‘distribution of welfare’, ‘correcting inequalities’ and ‘paternalistic behaviour of the state’, most legal scholars and citizens of the Scandinavian states are said to have a hard time to confirm it. Nevertheless they might admit that some of these meanings are incorporated into consumer law, at least paternalistically, but they will fight to clarify that social justice is not adequate to characterise their consumer laws. On the other hand, if one connects something like ‘a level playing field’, ‘fair results’, and ‘social peace’ to ‘social justice’, most Scandinavians might nod in agreement.

According to Schüller, there is no great difference between those two characterisations of Scandinavian consumer law; the first understanding of ‘social justice’ focuses more on the means, the second more on the ends. Distribution of welfare is meant to level the social battleground. Correcting inequalities is only a way to achieve fair results and a paternalistic behaviour of the state is aimed at securing social peace in society. The best way to characterise Scandinavian consumer law is to describe it as a pragmatic civil right. This description symbolises the main features that are woven into consumer law. The pragmatic style focuses on the real-life world consequences rather than discussing methodological integrity. Consumer rights as civil rights are deeply anchored in Scandinavian societies and are understood as serious protection rights with reasonable expectations of enforcement.

The chapter consists of three main parts: the relationship between pragmatism and Scandinavian Legal Realism and its effects on recent legal thinking in the Scandinavian countries; the development of consumer laws, that is, the socio-economic background and legal measures in Scandinavian countries; the understanding of consumer law as a pragmatic civil right demonstrating the measures and enforcement via an illustration of recent consumer law.

K.J. Cseres argues in Chapter 18 that social justice and competition law are not two antagonistic ideals. However, competition law is said to have inherent limits to accommodate values associated with social justice. Even though the freedom of consumer choice is seen as an inherent part of competition law and policy, distributional concerns are not necessarily perceived in the same manner. For Cseres, competition law is based on the rationalities of economic efficiency and welfare maximisation for the whole society instead of making
value judgments on how such economic welfare should be distributed between different social groups. She argues that there are other public policies that are better suited to address the distribution of income on the basis of fairness and relative deservingness such as taxation or consumer protection. In most cases competition law is said to serve social interests in an indirect way by maintaining and protecting the competitive process and allowing society to reap the fruits thereof in the form of high quality goods and services at low prices, now and in the future.

Cseres departs from the argument that social justice should be considered in a broader context including economic justice. By economic justice she means equal access, equal participation and equal opportunities for all market players to enjoy the economic benefits of a well-functioning market. Viewing social justice in this broader perspective requires a legal framework composed of complementary sets of rules and institutions that are consistently and efficiently aligned with each other, all working towards the common goal of achieving and preserving a well-functioning market. In this legal framework, competition law is said to be an essential but not sufficient device to achieve what Micklitz calls ‘access justice’. Cseres develops this argument by discussing three aspects of competition law: its policy objectives, its substantive rules limited to Articles 101 and 102 TFEU, and its procedural rules of enforcement. She uses EC competition law as the theoretical setting of this chapter. According to her, an area where these social justice concerns have been made more explicit and strengthened is the participation of consumers in the procedural framework of Articles 101 and 102 TEU.

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