Index

abuse of superior bargaining power 429–32

see also competition law
access justice/Zugangsgerechtigkeit see European model of access justice
Acquis Principles 24, 29, 35, 42
Akman, P. 412–13
Alexy, Robert 151
Alsthom Atlantique (ECJ) 38
American Legal Realism 170
Amsterdam Treaty 27, 30
Analytic School 268–9
Andean Common Market 127
Angonese (ECJ) 30, 38
anti-discrimination see discrimination and anti-discrimination law
Aristotle 215, 241, 260
Australia 68–9
Autopec II (ECJ) 433

Bacon, Francis 11, 170
Barry, B. 123
Basedow, J. 43, 341
BAT and Reynolds (ECJ) 431
Baudrillard, Jean 333
Beale, H. 428
Becker, G. 444
BEMIN 432
Bentham, Jeremy 11
Bercusson, Brian 308
Berman, H.J. 6–7
Björne, Lars 266, 267–8
Blackstone, William 169
Blair, Tony 14, 222
Bosman (ECJ) 27, 30, 38
Bourgeois, Leon 243–5
bourgeois society from feudal status to social class 194–5
from order to organism 196–7
publicization of private law 197–8
civil code as a Charter of Fundamental Rights of Individuals 196
and economic freedoms 189
individualism and emancipation 191–3
nature of 189, 190
model of social justice 190
pre-capitalist 189
as a private law society 193
social justice in the bourgeois society 191–4
BP v. Huard 247
Bulgaria 441
Burdeau, Georges 67
Bürschhaft, German constitutional court 148, 151
business-specific complaints boards 396–7, 399–400
Campbell Soup 70
Canada 158, 159
Capitalism belief in 179
from bourgeois society to capitalist society 194–8
bourgeois society pre-capitalist 189, 190
from feudal status to social class 194–5
from order to organism 196–7
publicization of private law 197–8
capitalist law, development of 206–7
controlling Brussels 182

Hans-W. Micklitz - 9780857935892
Downloaded from Elgar Online at 12/31/2018 05:28:26PM via free access
The many concepts of social justice in European private law

corporate capitalism ecologically unsustainable 179, 180
democratic capitalism in Norway 391–2
de-socialized economy 205
democratic capitalism in Norway 391–2
de-socialized economy 205
foundations 190
global 173, 179
Industrial Revolution producing 189
organized capitalism 198–9
privatizing common resources 180
proprietary order 188–90
social capitalism transformed into predatory system 177
social justice in the capitalist society: cooperation with solidarity 198–203
division of labour and proprietary functionalism 199–200
economic constitution and individual emancipation 201–3
ordoliberal biopolitics 200–201
state and people in organized capitalism 198–9
and solidarity 205
Soviet Union and capitalism 172
and state sovereignty 182–3
Sweden, welfare capitalism in 389–90
and welfare states 170, 174, 389–90
Western capitalism 171
Caplovitz, D. 34
cartels 441–6
see also competition law
Cartesianism 16
CECED 419–20, 422
Charter of Fundamental Rights of the European Union 310–11, 349
access rights 38–42
anti-discrimination principle 29, 42
Art. 6 312
Art. 21 42
Art. 28 155
Art. 35 40
Art. 36 40–42
Art. 38 40
Art. 47 37
binding effect 123, 154, 155, 312
opt-outs 312, 313
constitutional law and justice 117, 119–23, 129–30
consumers 40
human dignity 115
reservations 29
rights and directive principles 152
social rights 140, 157, 311–13, 317–18
see also human rights
Charter of Fundamental Rights of Individuals 194
Chevassus-Marche 247–8
Chwaszcza, Professor Christine 44–6, 92–3, 95–100, 102–4
Civil Code 8, 15, 18–24, 133, 148–9, 160–61, 176, 194, 239–41, 248–9, 254, 335, 338
civil law compared to civil law 8–10, 280–81, 283–4
appointment of judges and degrees of judicial activism 284–5
civil rights see social peace via pragmatic civil rights
CMC Motorradcenter 38
Coleman, Professor Jules 105
collective rights 159, 313, 317–19
Collins, Hugh 46–7
common law compared to civil law 8–10, 280–81, 283–4
appointment of judges and degrees of judicial activism 284–5
commutative justice 80–89, 105–11
beyond commutative justice 87–9
can we make sense of commutative justice? 80–89
commutative, distributive and procedural justice 90–104
concept of commutative justice 64–5, 80–81
conceptual approximations 81–5, 105
and economic exchange 107
as irreducible principle of justice 107
justice and keeping one’s promises 67–8, 81–2, 105
as pure procedural justice 108
substantive and procedural criteria of justice 82–5
and contractual solidarity 250
and distributive justice 64–73, 93, 94–7, 105–6
commutative justice standards as derivative 65–7
distinctions between commutative and distributive justice 64–6, 70–73, 94–6
doubts about commutative/distributive distinction 70–73
primacy of distributive considerations 65–6
rules/promises and commutative justice 66–7, 80–81, 85–7, 95–7, 105, 109
unfairness and inequality of bargaining power 67–70, 83
economic constitution and individual emancipation 202
legal justice 106
promises see promises
‘pure procedural justice’ 74–6, 87–9
and moral pluralism 100–104
whether notion of ‘pure procedural justice’ can be eliminated 88–9
and social justice 105–6, 303, 363–6, 367, 373
expression of requirements 106–7
social versus commutative justice in UK 374–9
substantive and procedural criteria of justice 82–5
systematic perspective 85–7, 105–6, 109–11
voluntariness see voluntariness
see also distributive justice; social justice and legal justice
competition law 445–6
enforcement see under enforcement
French 429
German 429
Italian 430
objectives of competition law 406–16
competition goals in consolidated version of TEU 415–16
general objectives of competition law 406–9
goals of European competition law 409–15
procedural rules 432–46
access to justice through criminal law enforcement 441–6
access to justice through participation in competition law procedure 430–37
access to justice through private enforcement of competition law 437–41
social justice and competition law 405–6
substantive rules 416–32
abuse of superior bargaining power 429–32
distributive justice in Art. 101 TFEU 416–22
distributive justice in Art. 102 TFEU 424–9
fairness 424–9
interim conclusion 429
limitations on distributive justice in Art. 101(3) 422–4
US 427
see also towards a European model of economic justice
Condillac, Étienne Bonnot de 16
conflict see social justice, solidarity and conflict
constitutional justice and ‘participatory justice’ 46, 115–32
‘constitutional justice’ conceptions to justify national/international law 115–17
meaning of ‘constitutional justice’ 116
defining ‘constitutions’/
‘constitutionalism’/
‘constitutionalization’ 117–18
meaning of constitution 117–18
meaning of constitutionalisation 118
meaning of constitutionalism 118
future of European constitutional law and social justice 128–31
how to interpret EU law
commitments to justice and
Rawlsian justice 119–21
justice as multilevel constitutional
guarantees of human rights
121–3
citizens’ basic socio-economic
needs to be met 122
justice through multilevel judicial
protection of rights/rule of law
123–6
international treaties and
individual rights 125–6
reformative interpretations of
legal rules 124
progressive constitutionalization of
legal/social relationships
127–8

constitutional law

constitutional justice see
constitutional justice and
‘participatory justice’

European constitutional law 128–31
codifying constitutional rules
128–9
disputes over social justice and
principles of justice 130–31
EU Charter of Fundamental
Rights 117, 119–23,
129–30
future of European constitutional
law and social justice
128–31
Lisbon Treaty 115, 119–23
Germany 115, 177, 187, 263, 265,
327–8
courts’ role 290–91
private law and constitutional
rights 117, 148

human rights 117

multilevel judicial protection of
constitutional rights/rule of law
123–6
international treaties and
individual rights 125–6
reformative interpretations of
legal rules 124
theories of relation between private
law and constitutional rights
136–41

see also constitutionalisation of
European private law
Constitutional Treaty 128
constitutionalisation of European private
law 46–7, 133–66
conclusion 163–4
constitutionalisation of private law
135–41
differences between single source
and mutual support
structures 137–40
meaning of constitutionalisation
of private law 135–6
mutual support structure 136–7
single source structure 137
theories of relation between
private law and
constitutional rights
136–41
indirect horizontal effect in EU multi-
level private law system
156–7
alignment in practice 157
Manifesto on Social Justice in
European Private Law 46,
133–5, 140, 159, 164
social justice and constitutionalisation
158–63
contractual freedom and personal
autonomy 159–63
inclusion of social/economic
rights and redistributive
measures 159
social justice and private law
158–60
varieties of indirect horizontal effect
146–56
court structures 147–50
fundamental principles and
ordinary legislation 153–6
rights and directives principles
150–52
virtues of indirect horizontal effect
141–6
arguments against direct
horizontal effect for
constitutional values
142–6
concept of direct effect 141, 142
concept of indirect effect 142
‘constitutionalizing’ law
constitutional justice see constitutional justice and
‘participatory justice’
European private law see constitutionalisation of European private law
consumer law 4, 6, 35–7, 334
contracts see contact law; transformation of contractual justice
Denmark
business-specific complaints boards 396–7, 399–400
Contract Act s. 36 394–6
public consumer complaints boards and commissions 396, 399–400
Directives 41, 157
consumer credit 31–2, 346
consumer rights 379–80
consumer sales and guarantees 31–2, 346, 348
contracts away from business premises 31
distance selling 31–2, 346
door to door selling 32, 346
draft Directive on consumer rights 345–7
product safety 32
time-sharing 31–2
unfair commercial practices 34–5, 346, 370–73, 374
unfair terms 31–2, 341, 346, 348, 369–70, 376, 380–81, 400
vulnerable consumer 34–5
enforcement 396–8
move to general principles/preventive enforcement 366–74
regulating contract terms 367–70
regulating practices 370–73
reliance on private enforcement 366–7
strengthened foundations for social justice 373–4
EU
assuming leading role 5, 24
European integration process and EU policies 30–34, 288
Finnish 445
French 17–18, 341–2
fairness test 13
German 17, 340–42, 345
authoritarian liberalism and rise of consumer law 20–22
consumer credit 13–14
fairness test 13
harmonization 22, 32, 339, 341, 345–7, 350, 400–401
history 343–4
impact of EU law in context 345–9
inequality of bargaining power and unfair terms 67–70, 83, 151–2, 329
standard terms 340–41, 367–70
Directives 369–73
Italian 209
as market behaviour law 32
Member States 5, 33
Norwegian
business-specific complaints boards 396–7, 399–400
Contract Act s. 36 394–6
protection 393
public consumer complaints boards and commissions 396, 399–400
Scandinavian see social peace via pragmatic civil rights
services of general interest 34–5
365, 368–80
specific access rights 38–9, 40–42
Swedish
Contract Act s. 36 394–6
disputes 441
public consumer complaints boards and commissions 396, 399–400
UK 17, 340–42, 345
no protective design in consumer contracts 14
pre-contractual liability 340
social justice intruding into 12–14
standard terms 340–41, 367–70
unfairness and inequality of bargaining power 67–9, 151–2, 342
and welfare state 334
see also social justice in the Office of Fair Trading

consumers 329–30
awareness 385, 393, 398, 400
barriers to access to justice 443–4
business-specific complaints boards 396–7, 399–400
commutative and social justice 363–6, 367

competition law and policy
consumer welfare standard in competition law
enforcement 408–9, 413–15

consumers in competition law 422–4
enforcement 436–41

participation rights 435–8
consumer law see consumer law

Consumer Ombudsman 394, 397, 399–400

consumer-trader issues 360–63
choice constraint 361–3
information problems 360–61
contracts see contact law;
transformation of contractual justice

EU Charter of Fundamental Rights 40

public consumer complaints boards and commissions 396, 399–400
rise of 3, 5, 331–3

social justice and consumer transactions 3, 328–30
unfairness and inequality of bargaining power see under consumer law

contract law
concept of contract 246

Danish 393–6
EU 140, 160–63

French combining paternalism and solidarity 251–2
commutative justice 250, 253
contractual solidarity 237, 245–6, 249
corrective justice 247–50, 253
justice in contracts 70, 173

manifestations of solidarity in contract law 245–6
paternalism 239–43
personal autonomy 161–2
practical consequences of judicial decisions and contractual solidarity 246–9
standard terms 341
theoretical criticisms of the solidarity doctrine 249–50
unfairness and inequality of bargaining power 70
see also social justice in French private law

German 335–6

personal autonomy 160–61, 162, 173–4
pre-contractual duties to protect 338–9
standard terms 340
harmonization 133, 339, 341, 345
Member States 133
Norwegian 394–6

and personal autonomy 159–63, 173–4
proportionality test 161–2

and social justice 303

solidarity in contract law 245–6
combining paternalism and solidarity 251–2

good faith at pre-contractual stages 247
practical consequences of judicial decisions 246–9

solidarity underpinning contract law by affecting parties’ behaviour 247
theoretical criticisms of the doctrine 249–50

Swedish 394–6

unfairness and inequality of bargaining power 67–70, 83, 151–2, 329
standard terms 340–41, 367–70

voluntary and reciprocal consent in contractual relations 107

see also transformation of contractual justice

Council of Europe 318–19

Hans-W. Micklitz - 9780857935892
Downloaded from Elgar Online at 12/31/2018 05:28:26PM
via free access
criminal law enforcement of competition law see under enforcement
Critical Legal Positivism (Tuori) 266
Cross, Rupert 78
Cseres, K.J. 52–3
customary law 260, 261
see also law and legal principles
Dalhuisen, Jan Fredrik 344
Danilenkov v Russia 318
democracy
democratic capitalism 391–2
democratic constitutionalism 119, 121
democratic peace 121
European private law and democratic legitimacy 177
reasonable pluralism and democratic power 129–30
social justice in the 1970s
democracy of citizens and alternative use of law 206–7
democracy of producers and its risks 207–8
democracy of workers 207–8
Demogue, R. 245
Denmark 265, 266, 272–3, 288
consumers
business-specific complaints boards 396–7, 399–400
Contract Act s. 36 394–6
public consumer complaints boards and commissions 396, 399–400
coop-erative liberalism 390–91
Descartes, René 12, 15, 16, 170
direct effect see under constitutionalisation of European private law
directive principles and rights 150–52
Directives
consumer law 41, 157
consumer credit 31–2, 346
consumer rights 379–80
consumer sales and guarantees 31–2, 346, 348
contracts away from business premises 31
distance selling 31–2, 346
doctor to door selling 32, 346
draft Directive on consumer rights 345–7
product safety 32
time-sharing 31–2
unfair commercial practices 34–5, 346, 370–73, 374
unfair terms 31–2, 341, 346, 348, 369–70, 376, 380–81, 400
vulnerable consumer 34–5
discrimination 26, 28, 43
discrimination in wills 145
equal pay of men and women 5, 25–6, 28, 43
european integration process, impact on 25–30
horizontal dimension of anti-discrimination 42–3
and labour relations 306, 309–10
solidarity and substantive equality 205–6
specific access rights 38–42
distributive justice
in Art. 101 TFEU 416–22
limitations on distributive justice in Art. 101(3) 422–4
in Art. 102 TFEU 424–9
commutative, distributive and procedural justice 90–104
and commutative justice 64–73, 93, 94–7, 105–6
commutative justice standards as derivative 65–7
distinctions between commutative and distributive justice 64–6, 70–73, 94–6
The many concepts of social justice in European private law

doubts about commutative/distributive distinction 70–73
primacy of distributive considerations 65–6
rules/promises and commutative justice 66–7, 80–81, 85–7, 95–7, 105, 109
unfairness and inequality of bargaining power 67–70, 83
economic constitution and individual emancipation 202
nature of 64–5, 80, 82–3
principles of 216
and the public interest 180–81
and social justice 303
and solidarity see social justice in French private law
and tort law 252–3
Domat, Jean 169
Donoghue v. Stevenson 336–8
Draft Common Frame of Reference 24, 29, 35, 42
and consumer law 345–6
principles/values for model rules for European private law 137–8
role of human rights on model rules 138–9
Duguit, Léon 244
Dworkin, Ronald 91, 124
Dyevre, Arthur 49–50
Eckoff, T. E. 386
economic justice see towards a European model of economic justice
Ehrlich, Eugene 19, 20
Elster, Jon 281
empiricism 8, 387–8
English 8, 11–12, 387
psychological 16
Enerji Yapi-Yol Sen v Turkey 318
enforcement
of Articles 101 and 102 430–37
Community interest 433–4, 436
European Commission’s proceedings 431
private enforcement 435–7, 437–41
third party participation 431–7
competition law
access to justice through criminal law enforcement 441–6
access to justice through private enforcement of competition law 437–41
private enforcement 435–7, 437–41
unfair prices 427
consumer law 396–8
move to general principles/preventive enforcement 366–74
regulating contract terms 367–70
regulating practices 370–73
reliance on private enforcement 366–7
strengthened foundations for social justice 373–4
costs 444
criminal law enforcement 441–6
deterrence 443–4
retribution 444–5
sanctions on individual directors 442–3
judicial protection of individually enforceable rights 26–7, 37
England see under United Kingdom (UK)
Epsing-Andersen, Gøsta 48, 216
equal pay see under discrimination and anti-discrimination law
Eriksson, Lars D. 269
European Code on Civil Law 18, 23–4, 133
Acquis Principles 24, 29, 35, 42
Draft Common Frame of Reference see Draft Common Frame of Reference
European Commission 18, 26
competition policy 413–15, 424, 426–7
distributive justice 416–22
enforcement of Articles 101 and 102 430–37
Guidelines 420–21
sanctions on individual directors 442–3
White Papers 420, 437–41
consumer law 31–3, 42, 375
Draft Common Frame of Reference 24
financial services 42
harmonization 32, 51, 133, 329, 350, 400–401
labour law 35
social welfare 35
application in private contexts and positive duties 147
Art. 6 258
Art. 8 149, 161
criminal law sanctions for competition law infringements 450
privacy 149
and states’ rights 150, 318
European Council 24
European Court of Human Rights 126, 129, 257
claims against states and fundamental rights 147
discrimination in wills 145
industrial citizenship 320
labour unions and collective bargaining 159
social rights 317–19
voting behaviour of judges 285
European Court of Justice 22, 125–6
and Charter of Fundamental Rights 154–5, 159, 312, 317–19
collective rights 317–19
competition law 413–14, 418–22
abuse of a dominant position 424–5
compensatory principle 439–40
enforcement proceedings 431
private damages claims, availability of 436–7
consumer law 35, 41, 347, 374–5, 400
Directives 153–6, 157
fundamental principles and ordinary legislation 153–6, 157
judicial power and principles of justice 130–31
judicial protection of individually enforceable rights 26–7, 37
labour law 27, 35
market freedoms 30, 36, 38, 154–5
national private law 156–7, 159
non-discrimination 43, 130
preliminary reference procedure/preliminary rulings 26, 293–4, 348
social and labour policies 277–8, 312–19
see also Court of First Instance
European Economic Community 4, 121, 126, 127
European Employment Strategy 28
European Free Trade Area 126, 129
European model of access justice 5, 34–43
co-existence with national models of social justice 5–6
differing from national concepts of social justice 22
and European integration process 22–34
social distributive justice, access justice and allocative libertarian justice 34–7
two constitutive elements: access rights and anti-discrimination rights 38–43
horizontal dimension of anti-discrimination 42–3
specific access rights in labour, anti-discrimination and consumer law 38–42
European Monetary union 27, 28
European Parliament 24, 121, 435
codification of European private law 173
European private law see constitutionalisation of European private law
European Social Charter 317
European Union (EU)
competition law see competition law
constitutional justice see constitutional justice and ‘participatory justice’
consumer law see under consumer law
discrimination see discrimination and anti-discrimination law
European Code on Civil Law 18, 23–4, 133
Acquis Principles 24, 29, 35, 42
DCRF see Draft Common Frame of Reference
European Constitution 22–4, 29, 121
European integration process and model of justice 22–34
coordination of national laws and policies 26, 31
European hegemony, striving for 28, 32–3
evolving character of European legal order and rise of ‘the social’ 22–5
harmonisation and Member States see under Member States
impact on anti-discrimination and labour law 25–30
impact on consumer law 30–34
legislative activism 26–7, 31–2
principles of political justice 119
European law 257
constitutional law 128–31
constitutionalization see constitutionalization of European private law
contract law 140, 160–63
EU law principles 121, 122
future of European constitutional law and social justice 128–31
impact of EU law and consumer law 345–9
indirect horizontal effect in multi-level private law system 156–7
labour law see under labour law
Nile Perch in private law see Nile Perch in European private law
and ILO 305
labour relations and social justice see labour relations and concept of social justice
Member States see Member States model of justice see European model of access justice
as a proprietary order 187–9
restless reform of the proprietary order 188–9
social market economy as an Irenic order 187–8
social citizenship 319–21
Europeanization of social justice and the judiciary 49–50, 277–97
ECJ interpretation of social and labour policies 277–8
preference formation and institutional constraints 286–94
external institutional constraints 292–4
institutional constraints 290–94
internal constraints: judicial agenda-setting/decision-making 290–91
judicial preferences and judicial preference formation 286–90
questioning the conventional wisdom 280–86
appointment of judges and degrees of activism 284–5
impact of training and socialization on judicial behaviour 285–6
reasons against justifications for judicial action 281–3
variations in judicial rhetoric/determinants of judicial behaviour 283–4
wrong explanation: essentialism and legalism 279–86
conventional wisdom 279–80
questioning the conventional wisdom 280–86
fascism
constraints of the individual sphere 205
economic freedoms, building fall of 207
Germany 187–8, 202–3
great transformation 199–200
Italy 201, 202–3
and Ordo-liberalism 187–8, 200, 202–3
preventing 204

Hans-W. Micklitz - 9780857935892
Downloaded from Elgar Online at 12/31/2018 05:28:26PM
via free access
Index

Index

Finland 263, 264–5
conceptual jurisprudence in 265–9
legal history/science 267–8, 269–70
reforms 268
consumer disputes 445
judges 289
welfare state 269
Forsthoft, Ernst 139
France
bourgeois society
to capitalist society see under
social justice, solidarity and
conflict
civil code as a Charter of
Fundamental Rights of
individuals 196
and economic freedoms 189
individualism and emancipation
191–3
nature of 189, 190
model of social justice 190
pre-capitalist 189
as a private law society 193
social justice in the bourgeois
society 191–4
Catalan project 18
Civil Code/French Constitution 8,
15, 18, 20, 23, 24, 194, 254,
265, 327, 330
ad hoc intuitive paternalism
240–43, 253
courts’ role 290–91, 293
ordre public paternalism 239–40
competition law/abuse of superior
bargaining power 429
Constitutional Treaty 128
consumer law 17–18, 341–2
fairness test 13
contract law
combining paternalism and
solidarity 251–2
and commutative justice 250,
253
contractual solidarity 237,
245–6, 249
and corrective justice 247–50,
253
justice in contracts 70, 173
manifestations of solidarity in
contract law 245–6
and paternalism 239–43
and personal autonomy 161–2
practical consequences of judicial
decisions and contractual
solidarity 246–9
standard terms 341
theoretical criticisms of the
solidarity doctrine 249–50
unfairness and inequality of
bargaining power 70
discrimination 309
and EU 288–9
French Rationalism 12, 15
French Revolution 7, 8, 14–15, 17,
19, 327
and bourgeois society 188–9,
193
indirect effect and private law,
practice of 149–50
judges 239, 240–42, 251, 280, 285,
288–9
labour law 16–17, 310
paternalism in private law 238,
239–43
ad hoc intuitive paternalism
240–43
combining paternalism and
solidarity 251–2
ordre public paternalism 239–40
rationalism 12, 15, 387
socio-economic/political background
of social justice in private law
6
forward-looking political design
of (just) society model
14–18
political conception – a
tentative explanation
15–16
politiciising private law as social
law 16–18
social justice in French private law
see social justice in French
private law
tort law 252–3
welfare state 16
Frostifresh 70
functionalism 199–200
fundamental rights see human rights and
fundamental rights

Hans-W. Micklitz - 9780857935892
Downloaded from Elgar Online at 12/31/2018 05:28:26PM
via free access
General Court 421–2, 432–3
George, Henry 392
Gerber, D.J. 428
Germany
access justice 36–7
Berlin Wall, fall of 172–3
competition law/abuse of superior bargaining power 429
constitution 139–40, 171
constitutional law 115, 177, 187, 263, 265, 327–8
courts’ role 290–91
private law and constitutional rights 117, 148
consumer law 17, 340–42, 345
authoritarian liberalism and rise of consumer law 20–22
consumer credit 13–14
fairness test 13
contract law 335–6
and personal autonomy 160–61, 162, 173–4
pre-contractual duties to protect 338–9
standard terms 340
and EU 288, 312
fascism 187–8, 202–3
German Idealism 12, 19
health care system 217–19
indirect effect and private law, practice of 147–9
judges 280, 285, 288
labour law 16–17, 334
authoritarian liberalism and rise of labour law 20–22
legal science 267, 270
Lisbon Treaty 278
Ordoliberalism 187–8, 200–201
product of fascism 187–8, 202
social market economy 187–8, 200
pensions system 220, 223–6
poverty among the elderly 226
principles of justice 223–5
private pensions 225
pre-modern law 260
private law and constitutional rights 117, 148
socio-economic/political background of social justice in private law 6
Civil Code/German Constitution 8, 18–22
authoritarian liberalism and rise of consumer and labour law 20–22
authoritarian/paternalistic/ideological/market orientated design model 18–22
German state-building 7
ideological paternalism and market pragmatism 19–20
welfare state 16, 216, 228–31
health care system 217–19
pensions system 220, 223–6
unemployment compensation system 227–8, 230
Gerstenburg, Oliver 142
Ghestin, Jacques 250
Goff, Lord 9–10
gouvernment des juges, Le (Lambert) 289
Graver, Hans Petter 271–2, 274, 389
Grossman-Doerth, Hans 340
Grotius, Hugo 169
Hägerström, Axel, 268, 385
harmonisation 5, 27, 33–4, 137, 157
cold harmonisation 28
consumer law 22, 32, 339, 341, 345–7, 350, 400–401
contract law 133, 339, 341, 345
European Commission 32, 51, 133, 329, 350, 400–401
labour law 27, 311, 315
negative and positive harmonisation 308, 315
principle of subsidiarity 308
private law 116–17, 130–31, 134
Hart, H.L.A. 84, 91, 95
Hegel, Georg 12, 19–20
Heinemann, A. 437
Helvétius, Claude 16
Herzog, Roman 278
Hirschl, Rán 158–9
Historical School 19, 261, 262
Hobbes, Thomas 70–71, 107, 192
Hönnige, Christoph 285
horizontal effect see under constitutionalisation of European private law
human rights and fundamental rights 263–4
and constitutional law 117
contract law and fundamental rights 190
DCFR, role in 138–9
justice as multilevel constitutional guarantees of human rights 121–3
citizens’ basic socio-economic needs to be met 122
labour relations see under labour relations and concept of social justice
multilevel judicial protection of constitutional rights/rule of law 123–6
international treaties and individual rights 125–6
reformative interpretations of legal rules 124
respect for human dignity as source of rights 115
social justice and EU social model and fundamental rights 307–13
between strengths and weaknesses 311–13
originality of social fundamental rights 309–11
see also Charter of Fundamental Rights of the European Union
Hume, David 11, 16
Hungary 430
damages for cartels 445
Hunter-Henin, Myriam 161–2
Iceland 266
indirect effect see under constitutionalisation of European private law
Industrial Revolution 188, 331, 349
producing a capitalist society 189
standard terms 340
workers’ conditions 195
International Competition Network 429
International Covenant on Civil and Political Rights, UN 122
International Covenant on Economic, Social and Cultural Rights 122
International Labour Organization 126, 171, 303–5, 307, 317
collective rights 319
Declaration on Fundamental Principles and Rights at Work 304, 320
and EU 305
Philadelphia Declaration 303
International Monetary Fund 174
International Social Justice Project 216
Ireland 285
Italian School 269
Italy 171
Civil Code 176
class and role in redistribution of wealth 208–9
competition law/abuse of superior bargaining power 430
constitution 205–6
consumer protection 209
de-codification debate 173
fascism 201, 202–3
solidarity and substantive equality 205–6
James, William 387
Jhering, Rudolf von 19, 20, 338
Joerges, C. 415
judiciary
appointments and degrees of activism 284–5
common/civil law traditions see common law compared to civil law
conventional wisdom of application of rules/principles 279–81
questioning conventional wisdom 280–86
diverse traditions 130, 159
Finland 289
France 239, 240–42, 251, 280, 285, 288–9
Germany 280, 285, 288
impact of training and socialization on judicial behaviour 285–6
institutional constraints 290–94
external institutional constraints 292–4
internal constraints: judicial agenda-setting/decision-making 290–91
international treaties and individuals
125–6
interrelationship with law and justice 124
Ireland 285
judicial dialogue 348
multilevel judicial protection of
constitutional rights/rule of law 123–6
international treaties and
individual rights 125–6
reformative interpretations of
legal rules 124
Norway 289
preferences and judicial preference
formation 286–90
reasons against justifications for
judicial action 281–3
role 12, 49, 206, 242–3, 251, 266,
268, 272–3
fairness in consumer contracts 13
interpreting rules in battles over
conceptions of justice 379
legal reforms 267
and social justice see
Europeanization of social
justice and the judiciary
Spain 288
Sweden 289
UK 10, 280, 285, 288
US 283–4, 289
variations in judicial rhetoric and
determinants of judicial
behaviour 283–4
see also European Court of Human
Rights; European Court of
Justice
Juridisk overtalelseseskunt (Skills of legal
persuasion) (Graver) 271–2
justice
comitative justice see commutative
justice
concept of justice 63–4, 90–91, 215,
257
battles between executive and
judiciary 375–82
empirical research into 215–16, 230
opposing arbitrariness of concept
91–2
constitutional justice see
constitutional justice and
‘participatory justice’
contractual justice see contract law;
transformation of contractual
justice
distributive justice see distributive
justice
economic justice see towards a
European model of economic
justice
interpreting law in conformity with
principles of justice 124
justice through legal dogmatics
269–71
and law 257–62, 273–4
legal principles as correcting
means 262–4
legal rhetoric and caring about
justice 271–3
multilevel constitutional guarantees
of human rights 121–3
multilevel judicial protection of
constitutional rights/rule of law
123–6
international treaties and
individual rights 125–6
reformative interpretations of
legal rules 124
objective justice 260–61, 262, 263
‘participatory justice’ see
constitutional justice and
‘participatory justice’
procedural justice see procedural
justice
social justice see social justice
subjective justice 260
substantive justice see under social
justice and legal justice
Kant, Immanuel 12, 19, 108
moral theory of human rights
115–16
theory of justice 121–2
perpetual peace 125
Kennedy, Duncan 7–8, 170, 237–8
Kennedy, John F. 329–30, 344
Kessler, Friedrich 340
Keynes, John Maynard 171, 179
Koetz, Professor Hein 172–3
Krushev, President Nikita 171
Küçükdevici (2010) 29, 41, 153, 312, 317
Kumm, Mattias 139–40

labour law 4, 5, 6, 35–7
  Directives 26–7, 29, 311, 315–17
  European integration process, impact on 25–30
  French 16–17, 310
  German 16–17, 334
  authoritarian liberalism and rise of labour law 20–22
  harmonization 27, 311, 315
  labour relations and social justice see labour relations and concept of social justice
  as ‘the social’ 24
  specific access rights 38–40
UK 16, 334
  Directives 27
  social justice intruding into 12–14
see also workers
labour relations and concept of social justice 50, 303–24
objective of social justice and European social model under threat 313–19
recovery capabilities of European social model 317–19
threat to European social construction 314–17
social justice and development of labour law 303–7
social justice and European social citizenship 319–21
social justice search in reinforcing EU social model by fundamental rights 307–13
between strengths and weaknesses 311–13
originality of social fundamental rights 309–11
Lambert, Edouard 289

law and legal principles
  competition law see towards a European model of economic justice
  constitutional law see constitutional law
  consumer law see consumer law
  contract law see contract law; transformation of contractual justice
  criminal law enforcement of
    competition law see under enforcement
  customary law 260, 261
discrimination see discrimination see discrimination and anti-discrimination law
European law see under European Union (EU)
and justice 257–62, 273–4
  legal justice and social justice see social justice and legal justice
labour law see labour law
legal principles as correcting means 262–4
legal rhetoric and caring about justice 271–3
natural-divine law 260–61, 262
positive law 260–61, 262, 269, 273
  controlling its own justice 262
  unjust positive law 262, 263
private law see private law, European public law see constitutional justice and ‘participatory justice’
Roman law 6, 19, 70, 260, 265, 335, 344, 387–8, 398
social differentiation, diversification of law and juridification of social spheres 333–4
soft law 42, 261
see also under individual countries
legal naturalism 19–20
legal realism 268, 273, 385–6, 398–9
legal socialism 197
Leisering, Lutz 231
Lenin, Vladimir 170–71
Lequette, Ives 251
Letto-Vanomo, Pia 49
liberalism 206
  authoritarian liberalism 20–22
  classic/traditional 197, 201, 335
  and Ordoliberalism 203–4
  co-operative liberalism 390–91
The many concepts of social justice in European private law

English 390
normative core 111
Ordoliberalism 187–8
and classic liberalism 203–4
and competition law 409–12
economic constitution and
individual emancipation
201–3
model of social justice 202–3
Ordoliberal biopolitics 200–201
product of fascism 187–8, 202–3
redefined as social market
economy 187–8, 200
and Scandinavian economy 389
Lisbon Treaty 4, 24, 30, 38, 46, 312,
349, 415
and Charter of Fundamental Rights
154, 317–18
common values 39
constitutional law and justice
115, 119–23
codifying constitutional rules
128–9
Lochner 170
Locke, John 16
Lundstedt, Vilhelm 268
Lüth 117, 148
Luxembourg 277, 313
Maastricht Treaty 27, 30, 179
Magalhes, Pedro 285
Mak, Chantal 160
Makkonen, Kaarle 270
Mangold 29, 41, 278, 312
Manifesto on Social Justice in European
Private Law 133–5
see also constitutionalisation of
European private law
Marx, Karl 200, 269
Matra 421–2
Mattei, Ugo 47
meaning(s) of social justice in Nordic
countries 49, 257–76
conceptual jurisprudence in Finland
265–9
justice through legal dogmatics
269–71
law neglecting justice? 258–62
debate between Prodi and
Schröder 259–6
legal rhetoric and caring about justice
271–3
legal principles as correcting means
262–4
Nordic legal family 264–5
Member States
competition law 442–5
national competition authorities
436–8, 442–3
sanctions on individual directors
446–7
consumer law 5, 33
consumer’ participation rights
437–8
democratic constitutionalism 119,
121
democratic peace 121
and Directives 153–6, 157
harmonisation 5, 27, 33–4, 137, 157
consumer law 22, 32, 339, 341,
345–7, 350, 400–401
contract law 133, 339, 341, 345
labour law 27, 311, 315
negative and positive
harmonisation 308, 315
private law 116–17, 130–31, 134
and ILO 305, 307
indirect effect and private law,
practice of 147–50
directive principles 150–52
fundamental principles and
ordinary legislation 153–6
national competition authorities
433–5, 439–40
private law, determining 156–7
and Charter of Fundamental
Rights 157, 312
social justice models
compared to EU model of justice
5, 22
contract law 347
developing models of social
justice in private law 3–4
and EU regulatory private law 5
interests clashing with EU interest
in gaining competence 4
social justice and social rights 24,
278, 311–18
see also Europeanization of social
justice and the judiciary
sovereignty see sovereignty
MERCOSUR   127
Métropole Télévision 418
Metro–Saba I 421
Micklitz, Hans-W. 53, 341, 406, 447
Mignot, Marc 249–50
Möllers, T.M.J. 434
Moloney Report (UK) 13
Montaigne 15
Montesquieu, 121
Montgomery, Robert 267
moral pluralism and pure procedural justice 100–104
see also social justice and legal justice
Moreau, Marie-Ange 50
Müller-Armack, Alfred 188, 412, 446
national competition authorities 433–5
natural law 260–61, 262
see also law and legal principles
Netherlands 128, 160, 162
New Approach on Technical Standards 35
Nice Treaty 128
Nile Perch in European private law 47, 167–84
expansion of European private law 167–8
fall of the Berlin Wall and rise of European private law 172–7
Americanization of Europe 173–7, 178
‘market friendly’ law facilitating profit and competitive model 174, 180
resistance to market ideology 175
intellectual context 169–70
new legal consciousness 177–81
corporate capitalism and state sovereignty 182–3
European private law and democratic legitimacy 177
political and cultural weakening of nation states 179
public interest and distributive justice 180–81
political context 170–72
the right to the future 181–3
allowing regeneration of justice motive 182
role of European private law 168–9
nominalism 8, 11–12
Nordic countries
Scandinavian consumer law see social peace via pragmatic civil rights
social justice see meaning(s) of social justice in Nordic countries
Norway 266
consumers
business-specific complaints boards 396–7, 399–400
Contract Act s. 36 394–6
protection 393
public consumer complaints boards and commissions 396, 399–400
democratic capitalism 391–2
judges 289
separation from Denmark 391

Ockham, William of 11
O’Donoghue, R. 428
Office of Fair Trading see social justice in the Office of Fair Trading
Olivecrona, Carl 268, 385
Olympique Marseille 30, 38
Ombudsman, Consumer 394, 397, 399–400
open method of coordination (OMC) 25, 35
new modes of governance and ‘access justice’ 28
social inclusion (OMC SPIC) 28
Ordoliberalism 187–8
and classic liberalism 203–4
and competition law 409–12
economic constitution and individual emancipation 201–3
Ordoliberal model of social justice 202–3
Ordoliberal biopolitics 200–201
product of fascism 187–8, 202–3
redefined as social market economy 187–8, 200
see also liberalism
organicism 196–7, 198
Österreichische Postsparkasse 432
justice and keeping one’s
considerations concerning outcomes
limiting scope of moral duty to obey
practice of promising as ‘pure
promises binding for normative
reasons
reasons to accept promising to settle
justice of exchange questions
unjust promises
and doubt that promise/consent
was voluntary

see also voluntariness

proportionality test
clashes between rights
contract law and personal autonomy
double proportionality test
market freedoms, interference with
in private law contexts
in social regulation
public consumer complaints boards and
commissions
public interest
Community interest
services of general interest
‘pure procedural justice’
commutative justice as
inequalities in distribution of
limits of
and moral pluralism
principles of
and public decisions
and voluntariness
whether notion of ‘pure procedural
justice’ can be eliminated

see also social and legal justice

Raiser, Ludwig 340
Ramm, Thilo 12–13
rationalism
ethical 191
French 12, 15, 387
Rawls, John 46, 96
citizens’ basic socio-economic needs to be met 122
general theory of justification 108
justice
as constitutional fairness 119–21, 123
as first virtue of social institutions 116, 214
imperfect procedural justice 88, 100, 110
principles of justice for national and international law 115, 121, 127
procedural justice 74–6, 83, 87–8, 100–101, 110
public reason as reason of supreme courts 126
reasonable pluralism and democratic power 129–30
social justice 106
social contract 107
unjust promises 95–7
Raz, Joseph 162
Realism 268, 273, 385–6, 398–9
regulatory private law 5
Reich, Norbert 270
Reifner, Udo 270
Rettfärd (Justice) 272
rights
Bill of Rights 8
civil rights see social peace via pragmatic civil rights
collective rights 159, 313, 317–19
constititutional review and protection of rights 151–2
consumers’ participation rights 437–8
contract law and fundamental rights 190
and directive principles 150–52
economic/social rights 122
EU Charter see Charter of Fundamental Rights of the European Union
human rights see human rights and fundamental rights
International Covenant on Civil and Political Rights, UN 122
International Covenant on Economic, Social and Cultural Rights 122
judicial protection of rights/rule of law 123–6
international treaties and individual rights 125–6
reformative interpretations of legal rules 124
social justice and EU social model and fundamental rights 307–13
between strengths and weaknesses 311–13
originality of social fundamental rights 309–11
workers’ rights 21, 37, 39, 43, 155, 310–11
collective rights 159, 313, 317–19
in Soviet Union 170
Rödl, F. 415
Roman law 6, 19, 70, 260, 265, 335, 344, 387–8, 398
see also law and legal principles
Rome Treaty 5, 37, 412–13
discrimination and equal pay 25–6, 28, 43
Rösler, Hannes 50–51
Ross, Alf 268, 385–6
Rousseau, Jean-Jacques 12, 16, 88, 243
Rüffert 277, 313–14
Rush Portuguesa 316–17
Russia 287
see also Soviet Union
Sabatauskas 41
Sadurski, Professor Wojciech 44, 45, 81–3, 87–9, 105–6, 108–9, 111
Savigny, Friedrich Carl von 19–20, 170, 262
Scandinavia
consumer law see social peace via pragmatic civil rights
economy 389–92
Denmark: co-operative liberalism 390–91
Norway: democratic capitalism 391–2
Sweden: welfare capitalism

social justice see meaning(s) of social justice in Nordic countries

Scanlon, T. 123
Schaub, Alexander 409
scholastic thinking 8, 11, 15
Schröder, Jan 259–61, 273
Schüller, Bastian 52
Sefton-Green, Ruth 48–9
Segal, Jeffrey A. 283–4

Senmodern ansvarsrätt (Late modern law of responsibility)
(Wilhelmsson) 266, 270–71

services of general interest 34–5, 365, 368–80
Sidgwick, Henry 64
Single European Act (1986) 4, 5
consumer law 30–31
health and safety at work 25
Sinzheimer, Hugo 21
Slawson, W. David 340
Smith, Adam 11, 121, 180, 192, 331–3, 390

Smith v. Advel Systems 43

‘social, the’ 6, 12, 15, 17
globalization of 175
meaning of 24
rise of 22–5, 26

Social civilrätt (Social civil law)
(Wilhelmsson) 266, 270, 274

social justice
and access justice see social justice
and access justice in private law
in the bourgeois society see under social justice, solidarity and conflict
in the capitalist society see under social justice, solidarity and conflict
and commutative justice see under commutative justice
and competition law see towards a European model of economic justice
concept of 105–6, 384
and constitutionalisation see constitutionalisation of European private law

consumer transactions and society 3, 328–30
see also transformation of contractual justice
dimensions of social justice 329–30
and EU social citizenship 319–21
and EU social model and fundamental rights 307–13
between strengths and weaknesses 311–13
originality of social fundamental rights 309–11

in French private law see social justice in French private law
and future of European constitutional law 128–31
disputes over social justice and principles of justice 130–31
integration into private law 3
and the judiciary see Europeanization of social justice and the judiciary
and labour and consumption 209–10
and labour relations see labour relations and concept of social justice
and legal justice see social justice and legal justice
models in the proprietary order 189–91
in the 1970s see under social justice, solidarity and conflict
in Nordic countries see meaning(s) of social justice in Nordic countries
objective of social justice and European social model under threat 313–19
recovery capabilities of European social model 317–19
threat to European social construction 314–17
in the Office of Fair Trading see social justice in the Office of Fair Trading
origins 3–4
and private law see social justice and access justice in private law
and public law see constitutional
Index

justice and 'participatory justice' 3
and redistribution of wealth see social justice, solidarity and conflict 3
and solidarity and conflict see social justice, solidarity and conflict use of law to protect as common thread 3
in the welfare state see social justice in the welfare state

social justice and access justice in private law 3–57
European integration process and model of justice see under European Union (EU)
socio-economic/political background of social justice in private law 6–22
England see England
France see France
history 6–7
Germany see Germany

social justice in French private law 48–9, 237–56
content and nature of social justice in French law revisited 253–4
paternalism in French private law 238, 239–43
ad hoc intuitive paternalism 240–43
meaning of 237–8
means of achieving paternalism 238, 239
ordre public paternalism 239–40
solidarity in private law 243–53
combining paternalism and solidarity 251–2
illustrations of solidarity in tort law: unexplored potential 252–3
manifestations of solidarity in contract law 245–6
practical consequences of judicial decisions and contractual solidarity 246–9
theoretical criticisms of the solidarity doctrine 249–50
theory of solidarity as potential source of inspiration 243–5
social justice and legal justice 44–6, 61–79, 90–104, 106

concept of justice 63–4, 90–91
opposing arbitrariness of concept 91–2
commtuitive and distributive justice 64–73, 93, 94–7, 105–6
commtuitive justice standards as derivative 65–7
distinctions between commutative and distributive justice 64–6, 70–73, 94–6
doubts about commutative/distributive distinction 70–73
primacy of distributive considerations 65–6
rules/promises and commutative justice 66–7, 80–81, 85–7, 95–7, 105, 109
unfairness and inequality of bargaining power 67–70, 83

commtuitive, distributive and procedural justice 90–104
procedural and substantive justice 73–9, 82–5, 85–7, 93–4, 106
nature and meaning of procedural justice 73–5
nature and meaning of substantive justice 73
principles of humanitarianism 77–9
principles of procedural justice 74–5, 101–2
procedural justice derivative from substantive justice 74, 75–9
procedural prohibitions dictated by principle of justice of outcome 77–9
‘pure procedural justice’ 74–6, 87–9
voluntariness see voluntariness
promises see promises
‘pure procedural justice’ 74–6, 87–9, 109–11
commtuitive justice as inequalities in distribution of socioeconomic goods 108
limits of 108

Hans-W. Micklitz - 9780857935892
Downloaded from Elgar Online at 12/31/2018 05:28:26PM via free access
and moral pluralism 100–104
principles of 74–5, 101–2
and public decisions 110–11
and voluntariness 75, 101–2, 108
whether notion of ‘pure
procedural justice’ can be
eliminated 88–9
social and legal justice 92–4, 105–6
legal justice 106
social justice/legal justice
dichotomy 61–4
social justice as a matter of
distribution 62–3
requirements, expression of
106–7
see also commutative justice,
derivative justice
social justice in the Office of Fair
Trading 51–2, 359–83
commutative and social justice
363–6, 367
consumer-trader issues 360–63
choice constraint 361–3
information problems 360–61
salvaging social justice 379–81
social versus commutative justice in
UK 374–9
approach of ECJ 374–5
OFT versus Supreme Court
375–9
towards social justice: move to
general principles/preventive
enforcement 366–74
regulating contract terms 367–70
regulating practices 370–73
reliance on private enforcement
366–7
strengthened foundations for
social justice 373–4
social justice, solidarity and conflict
48, 187–210
bourgeois society
bourgeois law, development of
206–7
civil code as a Charter of
Fundamental Rights of
individuals 196
and economic freedoms 189
individualism and emancipation
191–3
model of social justice 190
nature of 189, 190, 200
pre-capitalist 189
as a private law society 193
social justice in the bourgeois
society 191–4
from bourgeois society to capitalist
society 194–8
from feudal status to social class
194–5
from order to organism 196–7
publicization of private law
197–8
different models of social justice in
the proprietary order 189–91
contract law and fundamental
rights 190
solidarity 190
European Union as a proprietary
order 187–9
restless reform of the proprietary
order 188–9
social market economy as an
Irenic order 187–8
Industrial Revolution 188
producing a capitalist society
189
workers’ conditions 195
social justice in the capitalist society:
cooperation with solidarity
198–203
division of labour and proprietary
functionalism 199–200
economic constitution and
individual emancipation
201–3
Ordoliberal biopolitics 200–201
state and people in organized
capitalism 198–9
social justice, labour and
consumption 209–10
social justice in the 1970s: conflict
with solidarity 203–9
class and role in redistribution of
wealth 208–9
democracy of citizens and
alternative use of law
206–7
democracy of producers and its
risks 207–8

Hans-W. Micklitz - 9780857935892
Downloaded from Elgar Online at 12/31/2018 05:28:26PM
via free access
new idea of conflict 203–4
solidarity and substantive equality 205–6
social justice in the welfare state 48, 214–36
health care systems
Germany 217–19
UK 217–19
justice and welfare state 214–17, 230–31
ability to pay as dominant principle 228
new institutionalism 230
no one single principle underlying welfare state 228, 229
principle of equivalence 229–30
principle of neediness for welfare states 229
redistributive effects of welfare systems 228–9
pensions systems
Germany 220, 223–6
UK 220–23
unemployment compensation systems
Germany 227–8, 230
UK 226–7
social peace via pragmatic civil rights 52, 384–402
consumer law 392–8
business-specific complaints boards 396–7, 399–400
Consumer Ombudsman 394, 397, 399–400
consumer law enforcement 396–8
Contract Act s. 36 394–6
development of consumer protection 393–4
public consumer complaints boards and commissions 396, 399–400
Scandinavian consumer law as pragmatic civil right 384–5, 398–401
State as middleman between business and consumers 397–8
philosophies of Scandinavian law 385–9
pragmatism 387–9
Scandinavian legal realism 385–6
Scandinavian economy 389–92
Denmark: co-operative liberalism 390–91
Norway: democratic capitalism 391–2
Sweden: welfare capitalism 389–90
social welfare state see welfare state
socialist labour movement 3
soft law 42, 261
see also law and legal principles
solidarity 190, 237, 289
in private law 243–53
affecting parties’ behaviour 247
combining paternalism and solidarity 251–2
and commutative justice 250, 253
and contractual solidarity 249
corrective justice 247–9, 253
illustrations of solidarity in tort law: unexplored potential 252–3
manifestations of solidarity in contract law 245–6
practical consequences of judicial decisions and contractual solidarity 246–9
strong version of solidarity 247, 248–9
theoretical criticisms of the solidarity doctrine 249–50
theory of solidarity as potential source of inspiration 243–5
weak version of solidarity 246–8
and social justice see under social justice, solidarity and conflict
and substantive equality 205–6
Sommà, Alessandro 48
sovereignty
economic sovereignty and Eurozone 178
parliamentary sovereignty 289
state sovereignty 178–9, 182–3, 291
territorial 178
transferring to TNCs 179
access to justice through participation in competition law procedure 430–37
access to justice through private enforcement of competition law 437–41
social justice and competition law 405–6
substantive rules 416–32
distributive justice in Art. 101 TFEU 416–22
distributive justice in Art. 102 TFEU 424–9
interim conclusion 429
limitations on distributive justice in Art. 101(3) 422–4
transformation of contractual justice 50–51, 327–58
dimensions of social justice 329–30
evolutionary perspective: rise of concept of consumption in Europe 331–3
impact of EU law in context 345–9
justice and legal systems 327–8
major shifts in legal systems from a bird’s eye view 335–45
extending duties of care for harm by products 336–8
extending pre-contractual duties to act fairly and to inform 339–40
extending pre-contractual duties to protect 338–9
interim findings: overarching unifying developments/diverging results 342–5
legislators as actors 341–2
judicial review of terms (based on judge-made or statutory law) 340–42
patterns of contractual justice before 20th century mass consumption 335–7
social differentiation, diversification of law and juridification of social spheres 333–4
see also contract law
transnational corporations 178, 179, 182
Index

Treaty on European Union 129, 412
Art. 2 119, 122, 129–30
Art. 3 119, 130, 187, 349, 415, 421
Art. 5 130
Art. 6 123
Art. 101 406
Art. 102 406
legal status of Charter of Fundamental Rights 154
Treaty on the Functioning of the European Union (TFEU) 119
Art. 7 421
Art. 19 25, 28
Art. 45 30
Art. 49 30
Art. 56 30
Art. 67 119
Art. 101 53, 406, 416, 434–5
distributive justice in Art 101 TFEU 416–22
enforcement 430–37
limitations on distributive justice in Art. 101(3) 422–4
Art. 102 53, 406, 414, 416, 434–5
distributive justice in Art. 102 TFEU 424–9
enforcement 430–37
Art. 103 26
Art. 104 30, 30
Art. 114 347
Art. 151 306
Art. 153 25
Art. 157 25–6, 28
Art. 169 30, 40, 348
Art. 251 119
Art. 267 348
Truman, President Harry S. 171
Tuori, Kaarlo 263–4, 266
Two Concepts of Rules (Rawls) 96, 109
‘Two (or Three) Globalizations of Law and Legal Thought’ (Kennedy) 8

Una Storia della Giustizia (Prodi) 259
United Kingdom (UK) and Charter of Fundamental Rights of the EU 152
opt-out 312, 313
Commission on Social Justice 231
competition law/abuse of superior bargaining power 430
constitutional review and protection of rights 151–2
consumers
Moloney Report on Consumer Protection 341–2
social justice see social justice in the Office of Fair Trading
consumer law 17, 340–42, 345
no protective design in consumer contracts 14
pre-contractual liability 340
social justice intruding into
standard terms 340–41, 367–70
unfairness and inequality of bargaining power 67–9, 151–2, 342
empiricism 8, 11–12, 387
health care system 217–19
indirect effect and private law, practice of 149
individualism as a political practice 193
judges 10, 280, 285, 288
labour law 16, 334
Directives 27
social justice intruding into
negligence 336–8
pensions system 220–23
Beveridge Report 220, 226
poverty among the elderly 222–3
private pensions 221, 222
pre-contractual liability 340
product liability 336–8
socio-economic/political background of social justice in English private law 6, 8–14
Bill of Rights 8
Civil War 7, 8, 12
English pragmatism and two explanatory hypotheses 8–12
gradual intrusion of social justice into labour and consumer law 12–14
liberal, pragmatic design fit for commercial use model 8–14
social versus commutative justice 374–9

Hans-W. Micklitz - 9780857935892
Downloaded from Elgar Online at 12/31/2018 05:28:26PM via free access
social justice in the OFT see social justice in the Office of Fair Trading
unfairness and inequality of bargaining power 67–9, 151–2, 342
standard terms 340–41, 367–70
welfare state 216, 228–31
health care system 217–19
pensions system 220–23
unemployment compensation system 226–7
unfair prices 427
United Nations (UN) Charter 126
United States
American Legal Realism 170
competition law
unfair prices 427
courts’ approach 292
document of unconscientiability 69–70
influence on European private law and economic policies 173–7, 178
judges 283–4, 289
perceptions of 171–2
prioritizing civil/political liberties over economic/social rights 122
slavery 176
social versus commutative justice: OFT and Supreme Court 375–9
social justice and private law 158
social regulation 170
Uppsala school 268
U.S. v. Bethlehem Steel Corporation 73
utilitarianism 8, 11, 14, 16, 96
individual as an element within the unit 192–3
promotion of economic welfare 121
Uusi varallisuusliike (New law of obligations) (Pöyhönen) 266
Verband der Sachversicherer 418
Verein für Konsumenteninformation v Commission 435–6
‘Verzichtet unserer Rechtssystem auf Gerechtigkeit?’ (Schröder) 259–61
Vienna Convention of the Law of Treaties 126
Viking 30, 38, 117, 130–31, 155, 277, 312–14, 317
Voeten, Eric 285
Voltaire, 12, 16
voluntariness, 75, 83–5, 89
and commutative justice 75, 92–3, 107
concept of voluntariness 83–4, 98
and interpretive judgments 83–4, 108–9
as principle of justice 108–9
and procedural justice 98–100
and pure procedural justice 75, 101–2, 108
and outcome considerations 84–5, 98–100
voluntary agreements generating harmful external effects 86–7
principle of volenti replacing concept of commutative justice 107
voluntary and reciprocal consent in contractual relations 107
Watt, James 349
Weber, Max 19–20, 37
welfare state
becoming unaffordable 4
birth of welfare state 198
and capitalism 170, 174, 389–90
and consumer law 334
development and inclusiveness 173
and capitalism 182
enhancing social peace 202
Finnish 269
French 16
German 16, 216, 228–31
health care system 217–19
pensions system 220, 223–6
unemployment compensation system 227–8, 230
Nordic 386
Norwegian 392
‘protective’ welfare state 3, 16
Prussian 198
‘regulatory’ welfare state 4
rise of 3
social justice in see social justice in the welfare state
UK 216, 228–31
  health care system 217–19
  pensions system 220–23
  unemployment compensation system 226–7
  unfair prices 427
  welfare capitalism 389–90
Wells, H.G. 338
Whelan, P.A. 445–6
White Papers
  on competition policy 420
  on damages claims 437–41
  on completing the Internal Market 5, 30–31
Wieacker, Franz 335
Wilhelmsson, Thomas 266, 270–71, 272, 274
Willett, Chris 51–2
Wolff, Christian 169
workers
  conflict with employers 16, 26
democracy of workers 207–8
Directives 26–7, 28
dismissal 161
education circles 20–21
exclusion from political power 20
freedom of movement 30, 34
Industrial Revolution 195
labour relations and social justice see labour relations and concept of social justice
markets for 25, 29, 35, 37
part-time 27, 40
posted 27, 40, 131, 313, 315–16
and production system 203
right to strike 313–14
vulnerable/weaker 27, 40, 123, 158
welfare and protection 195, 198, 305–6, 315–17
exploitation 177–8, 194
health and safety 26–7, 40, 159, 310
risk to 159
workers’ movement 36
workers’ rights 21, 37, 39, 43, 155, 310–11
  collective rights 159, 313, 317–19
  in Soviet Union 170
see also labour law
World Intellectual Property Organization 126
World Trade Organization 126, 174
  accession to 178
  China’s accession 179
Wrede, Rabbe Axel 267
Zahle, Henrik 272–3, 274
Zitting, Simo 269
Zweigert, Konrad 173