

SOCIAL JUSTICE AND ACCESS JUSTICE IN PRIVATE LAW*.

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1. How the argument goes.

During the 20th, 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.¹

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 -19th century and that freed private law from feudal and corporative (ständische) barriers.² This transformation process

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¹ 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.

² See F. WIEACKER, *Privatrechtsgeschichte der Neuzeit*, Göttingen, 1967.



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 for social justice. This time the response came from the 'regulatory' welfare state. Social justice in private law cannot be understood without its origins, first in labour, 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 that was to establish the Common Market and the Member States that were to engage in social matters. However, the construction of the EEC changed considerably over time. Since the adoption of the Single European Act 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.³ What matters in our context are the particularities under which social issues found its way in 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 that 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'⁴ their national welfare systems which had become unaffordable.

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.⁵ For this reason, consumer law is of particular interest for analysing the different concepts of justice, i.e. that followed by the Member States on 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 the Completion of the Internal Market,⁶ the European Union adopted a huge set of secondary law means which influence either directly (consumer, labour, anti-discrimination and business law directives) or indirectly (directives meant to liberalise markets, e.g. telecommunication, postal services, energy – electricity and gas, transport, health care) private law matters. 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 or later the 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), i.e. that it is for the European

³ See F. RODL *Europäische Arbeitsverfassung* to be published in A. Bogdandy (ed.), *Europäisches Verfassungsrecht*, 2009, will also be published in English by the same editors in the course of the year; F. W. SCHARPF, *Crisis and Choice in European Social Democracy*, Ithaca, New York, 1991; N. COUNTOURIS, *European Social Law as an Autonomous Legal Discipline*, in P. Eeckhout and T. Tridimas (eds), *Yearbook of European Law*, 28, Oxford, 2009; B. HAAR and P. COPELAND, *What are the Future Prospects for the European Social Model?*, *European Law Journal*, 16 (3), 2010, p. 273-291.

⁴ B. EICHENGREEN, *The European Economy since 1945: Co-ordinated Capitalism and Beyond*, Princeton, 2007, NJF, pp. 335-341; S. WEATHERILL, *Competence and Legitimacy*, in C. Barnard and O. Odusu, *The Outer Limits of European Union Law*, Oxford, 2009, p. 17, who stresses the potential of EU law to overcome nationalism and protectionism in Member States.

⁵ H.-W. MICKLITZ, *The Visible Hand of European Private Law*, in P. Eeckhout and T. Tridimas (eds), *Yearbook of European Law*, 29, 2010, p. 3-60.

⁶ *Completing the Internal Market. White Paper from the Commission to the European Council* (Milan, 28-29 June 1985), COM (85) 310 final, 14.6.1985.



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 century 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 been since Roman times in the *ius aequum*⁷ – 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 part II followed by an analysis of the emerging European model of access justice in part III. Part II 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 background. 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 evolutive 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. The final part 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*.

⁷ In the same direction, see G.-W. CALLIES and M. RENNER, *Between Law and Social Norms: The Evolution of Global Governance*, *Ratio Juris*, 22 (2), 2009, p. 260-280.

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*,⁸ 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 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.⁹ The crusades requested by Gregor VII led 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 philosophy. 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 the English empire. 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 this is due to the fact that I presented the first version of this paper 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 with 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 shall 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 codifi-

⁸ H. J. BERMAN, *Recht und Revolution. Die Bildung der westlichen Rechtstradition*, Frankfurt, 1991, p. 144 et seq.

⁹ H. J. BERMAN, *Recht und Revolution. Die Bildung der westlichen Rechtstradition*, Frankfurt, 1991, p. 146 and p. 215.



cation 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.¹⁰ More and more, this is done in a comparative perspective, comparative history is therefore gaining ground.¹¹ This is also true with regard to legal theory. D. Kennedy¹² uses such an approach in his path-breaking analysis of the ‘Two (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 Declaration of Civil 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 parliamentary system. But, it neither yielded a constitution nor a coherent codified body of civil law, rather, it made way for the Declaration of the Bill of Rights in 1689. The French and the German legal systems, seen through the eyes of a common law lawyer (daring 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 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.¹³ 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.¹⁴

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.¹⁵

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.¹⁶

¹⁰ See U. RAULFF (ed.) , *Mentalitätengeschichte. Zur historischen Rekonstruktion geistiger Prozesse*, Berlin, 1987; H. SCHULZE, *Mentalitätsgeschichte – Chancen und Risiken eines Paradigmas der französischen Geschichtswissenschaft*, in *Geschichte in Wissenschaft und Unterricht*, 36, 1985, p. 247-270.

¹¹ Since 1993, there exists a particular review which is devoted to this task: *European Review of History*.

¹² D. KENNEDY, *Two Globalizations of Law & Legal Thought: 1850-1968*, *Suffolk University Law Review*, 36 (3), 2003, p. 631-679; ID., *Three Globalizations of Law and Legal Thought: 1850-2000*, in ID., *The New Law and Economic Development*, Cambridge, 2006, p. 19.

¹³ H.J. BERMAN, *Recht und Revolution. Die Bildung der westlichen Rechtstradition*, Frankfurt, 1991, p.265.

¹⁴ H.-W. MICKLITZ, T. ROETHE and S. WEATHERILL (eds) *Federalism and Responsibility - A study on Product Safety Law and Practice in the European Community*, London, 1994.

¹⁵ H.-W. MICKLITZ and T. ROETHE, *ProdEnglandsicherheit und Marktüberwachung im Ostseeraum – Rechtsrahmen und Vollzugspraxis*, *VIEW Schriftenreihe*, 26, 2008.

¹⁶ Lord R. GOFF, *The Future of the Common Law*, *International and Comparative Law Quarterly*, 46 (4), 1997, p. 745; B.S. MARKESINIS (1994), *Learning from Europe and Learning in Europe*, in ID. (ed.), *The Gradual Convergence: Foreign Ideas, Foreign Influences and English Law on the Eve of the 21st Century*, 1994, p. 1; T. KOOPMANS, *The Birth of European Law*



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.¹⁷ Lord Goff sums up these differences as follows:¹⁸

“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, the elaboration of the meaning of the rule, and their careful explanation of the application of the rule to the particular facts of the case.¹⁹ 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.²⁰ The quotation from Lord Goff may find its deeper origin in three strands, (1) common law was and is first and foremost commercial law²¹ 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.²² 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 spiritualised (*verinnerlicht*).

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 environment 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 (Venice) as world trade centres, and – this is our point – brought Arabic discourse on ancient Greek philosophers (*Aristotle* and *Platon*) 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 main stream scholastic thinking (here being understood in the meaning of *Thomas von Aquin* – 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 C14th and C15th, 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

at the Cross Roads of Legal Traditions, *The American Journal of Comparative Law*, 39 (3), 1991, p. 493.

¹⁷ See, *inter alia*, Judge Bingham in *Customs and Excise Commissioners v. ApS Samex* (1983) 1 All ER 1042, at 1056.

¹⁸ Lord R. GOFF, *The Future of the Common Law, International and Comparative Law Quarterly*, 46 (4), 1997, p. 745; see also R. GOODE, *Insularity or Leadership? The Role of the United Kingdom in the Harmonisation of Commercial Law, International and Comparative Law Quarterly*, 50 (4), 2001, p. 751, quoting Lord Wilberforce ‘The elegance, style and analytical powers of the British legal community have survived the decline of the British Empire intact.’

¹⁹ B.S. MARKESINIS (1994), *Learning from Europe and Learning in Europe*, in Id. (ed.), *The Gradual Convergence: Foreign Ideas, Foreign Influences and English Law on the Eve of the 21st Century*, 1994, p. 1.

²⁰ H.-W. MICKLITZ, T. ROETHE and S. WEATHERILL (eds) *Federalism and Responsibility - A study on Product Safety Law and Practice in the European Community*, London, 1994.

²¹ H. COLLINS, *Lord Hoffmann and the Common Law of Contract, European Review of Contract Law*, 5 (4), 2009, p. 474-484, demonstrates the influence of one single judge, Lord Hoffman, to hammer down and to defend the traditional concept of contract law in today’s time.

²² M. WEBER, *Wirtschaft und Gesellschaft. Grundriß der verstehenden Soziologie*, Tübingen, 1980, p. 511; H. COLLINS, *Lord Hoffmann and the Common Law of Contract, European Review of Contract Law*, 5 (4), 2009, p. 474-484 and in particular the forceful critic of J. BENTHAM, *An introduction to the principles of morals and legislation*, Oxford, 1907, see under Part II, 1.1.3.



(Handelsstaat in the late C16th and early C17th).²³ In continental Europe the feudalistic society changed gradually into societies of cities and merchants. Trade (i.e. the economy) turned into a function and a task to be managed by the state – the mercantile system arose. Under Elisabeth I (1558-1603) England succeeded in breaking its dependency from the Hanseatic League with the help of the Merchant Adventurers who got royal support in establishing world wide operating trade companies.²⁴ 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, A. Smith, Bentham).

Both historical strings tied together shall justify my assumption that the continental European understanding of social justice in the meaning 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 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.²⁵

²³ E. SCHULIN, *Handelsstaat England. Das politische Interesse der Nation im Außenhandel vom 16. bis ins frühe 18. Jahrhundert*, 1969, reprinted in *The American Historical Review* (1975), 80 (1), p.107.

²⁴ See L. JAMES, *The Rise and the Fall of the British Empire*, London, 1994.

²⁵ No research has been undertaken as to whether there is a link between the adherence of the UK to the EU and the deepening of European integration via case-law. Whilst the building blocks van *Gend en Loos* as well as *Costa Enel* had been decided before the UK joined the EU, the ground breaking judgment *Dassonville* and *Cassis de Dijon* which paved the way for the development of the Internal Market were taken with participation of UK judges. Today’s pattern of integration might have changed. C. Joerges, even speaks of ‘integration without law’ referring to the dominance of politics and the influential role of ‘governance’.

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’²⁶, 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 Ramm*²⁷ in his analysis of the new ordering of labour law in the C19th and C20th distinguishes two principles, self-help and state-help. Self-help was the basis of trade unions and strikes. This was close to the dominating 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 and 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*.

²⁶ D. KENNEDY, *Two Globalizations of Law & Legal Thought: 1850-1968*, *Suffolk University Law Review*, 36 (3), 2003, p. 631-679; ID., *Three Globalizations of Law and Legal Thought: 1850-2000*, in, ID. *The New Law and Economic Development*, Cambridge, 2006, p. 19.

²⁷ Th. RAMM, ‘Epilogue: The New Ordering of Labour Law’, in B. Hepple (ed.) *The Making of Labour Law in Europe. A comparative Study of Nine Countries up to 1945*, London, 1986, p. 277.



The story of consumer law is a relatively young one. The debate started in 1960 with the *Molony 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 took until 1973 before consumer policy as a political issue was widely accepted across the political parties.²⁸ The UK met the usual prejudices in that it did not formulate a comprehensive consumer policy program, 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 interventions created mandatory contract law, fully in line with main stream 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, just as Germany and some years later France, which would have given judges the power to individually assess fairness in consumer contracts. The UK approach on consumer credit is less determined 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 protection 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.²⁹ There is no counterpart in the case law of the House of Lords (now 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.³⁰

²⁸ See M. WHINCUP., *Consumer Legislation in the United Kingdom and the Republic of Ireland*, New York, 1980, p.6.

²⁹ M.R. MARELLA, *The Old and the New Limits to Freedom of Contract in Europe*, *European Review of Contract Law*, 2 (2), 2006, p. 264, in particular under reference to G. TEUBNER, *Ein Fall von struktureller Korruption? Die Familienbürgerschaft in der Kollision unverträglicher Handlungslogiken*, in *Kritische Vierteljahresschrift für Gesetzgebung und Rechtswissenschaft*, 1999-2000, pp. 83 and 388.

³⁰ Judgment, 25.11.2009, *Office of Fair Trading (Respondents) v. Abbey National plc & Others (Appellants)*, Michaelmas Term (2009) UKSC 6 on appeal from (2009) EWCA Civ 116.

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:³¹ 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 take-care consumers who 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.³² In this way, the UK preceded and strongly influenced development in the EU.³³

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 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 break³⁴ with feudalistic structures and instituted a bourgeois society governed by individual freedom and equality of rights that became even more visible in the Code Civil and in the French Constitution.³⁵ 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 codified in the Civil Code has deeper social, cul-

³¹ G. HOWELLS and S. WEATHERILL, *Consumer Protection Law*, England, 2005, p. 78.

³² G. HOWELLS and S. WEATHERILL, *Consumer Protection Law*, England, 2005, p. 78, underline the influence of v. Hayek in the way in which the England administered the privatisation process under the Thatcher regime.

³³ J. KEBLLER and H.-W. MICKLITZ, *Kundenschutz auf den liberalisierten Märkten – Vergleich der Konzepte, Maßnahmen und Wirkungen in Europa – Personenverkehr/Eisenbahn*, in *VIEW Schriftenreihe*, Band 24, 2008; J. KEBLLER and H.-W. MICKLITZ, *Kundenschutz auf den liberalisierten Märkten – Vergleich der Konzepte, Maßnahmen und Wirkungen in Europa – Telekommunikation*, *VIEW Schriftenreihe*, Band 25, 2008.

³⁴ H. ARENDT, *On Revolution*, London, 1963.

³⁵ F. WIEACKER, *Privatrechtsgeschichte der Neuzeit*, Göttingen, 1967, p. 343.



tural, 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*.

| 80 *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 excessively 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 turning intellectual point can be attributed to the fading influence of scholastic thinking. It deliberated the spirit from methodological scholastic constraints and paved the way for a particular French rational method in philosophy. The founding father was certainly *Montaigne* (1533-1592). His epistemology went along with the *Zeitgeist* of the 16th century and the then radical scepticism '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 of all existing knowledge and values, what has been later named '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 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 to solve all philosophical questions. For *Descartes* 'what is true is useful' and not 'what is useful is true' like 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. The *Cartesianism* heavily influenced political life and the emergence of the absolute monarchy of Louis XIV. The fall of the abso-

lute 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 *Locke* and *Hume* against *Descartes*' notion that man has natural ideas. *Condillac* and *Helvetius* instead argued based on 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 moral removed from theological and metaphysical requirements. This is the core of French laicity.

2.2.2. Politicising Private Law as Social Law

Just like 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 exaggerated, 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 bear 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. Like in Germany 'droit social' developed outside the civil law system and roughly at the same time.³⁶ The gov-

³⁶ H.-G. HAUPT, *Sozialpolitik und ihre gesellschaftlichen Grenzen in Frankreich vor 1914, Jahrbuch für Wirtschaftsgeschichte*, 1995, p. 171.



ernments of the '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 'droit social' in Europe and beyond, in particular after the First World War. The intellectual spirit of 'The Social' in the late C19th and early C20th is grounded in the path breaking philosophical work undertaken during the decline of the French absolute monarchy, with its focus on 'moral' philosophy.³⁷

Consumer law is a product of the consumer society, i.e. of the *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 is demonstrated by the close links between labour and consumption 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 seventies of the 20th century under pressure from the EU, had created strong and stable ties between the public and the private sphere, 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, i.e. 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 eighties 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 side-by-side with the Code Civil.³⁸ 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 stressing a rather political message, the one 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.³⁹

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'⁴⁰ 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 Française⁴¹, had to somewhat compensate for the German-Dutch-English-Polish dominated Study and Acquis Group.

3.3. The German Model – An Authoritarian Paternalistic-Ideological though Market Orientated Design

The German Civil Code entered into force on the 1st January 1900. So the German Civil Code is a hundred years younger than the French Civil Code. In the aftermath of the Vienna Congress, the scattered German regions (kingdoms, counties (earl-

³⁸ *Proposition pour un nouveau droit de la consommation*, rapport de la commission de la refonte du droit de la consommation au secrétaire d'État auprès du ministre de l'Économie, des Finances et du Budget chargé du Budget et de la Consommation, 1985.

³⁹ J. CALAIS-AULOY, *Collectively Negotiated Agreements: Proposed Reforms in France*, in *Journal of Consumer Policy*, 7 (2), 1984, p. 115-123.

⁴⁰ J. CARTWRIGHT and S. VOGENAUER (eds), *Reforming the French Law of Obligations*, Oxford, 2009.

⁴¹ B. FAUVARQUE-COSSON and D. MAZEAUD (eds.) *European Contract Law: Materials for a Common Frame of Reference: Terminology, Guiding Principles, Model Rules*, Munich, 2008.

³⁷ D. KENNEDY, *Two Globalizations of Law & Legal Thought: 1850-1968*, in *Suffolk University Law Review*, 36 (3), 2003, 649.



doms), regions) failed to unite in a German state, united by its own constitution. It took until 1871 before Germany managed, under the regime of the Prussian 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 ‘Historische Schule,’ which gained dominating influence during the 19th century and which is still influential today. It has created a particular way of thinking which favoured the rejection of all social policy issues into the ‘pure’ private law system. Social issues were 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 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.

3.3.1. 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.⁴²

Savigny is the founding father of the German Historische Schule, which argues that law shall 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 (Volksgeist). The task of the lawyer is *not* to constitute a meaningful legal order for human beings, but to col-

lect and systemise the legal material produced by the spirit of the people. That is why it is called in a somewhat misleading way ‘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 *Hegel*’s philosophy who paved the way for studying history, its development and its dynamics of the development.⁴³ The raising 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, Rechtstatsachenforschung (research on legal facts) as well as legal sociology (Rechtssoziologie – *Eugen Ehrlich* and *Max Weber*) have their origin in legal naturalism as well as the Freirechtsschule.⁴⁴ The dark side of legal naturalism, which is the standard formula, results from its strong believe 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 strive for social ideas is characteristic for 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.

3.3.2. Authoritarian Liberalism and the Rise of Labour Law and Consumer Law

Social justice issues did not made their way into the German Civil Code. The political – statutory – response to distortions of the industrial revolution, the expropriation of the labour force and its disastrous effects to health and safety resulted in the es-

⁴² A.F.J. THIBAUT and F.C. v. SAVIGNY, *Ihre programmatischen Schriften, mit einer Einführung von Hans Hattenhauer*, München, 2002.

⁴³ H-P. SCHWINTOWSKI, *Recht und Gerechtigkeit. Eine Einführung in Grundfragen des Rechts*, I, Berlin, 1996, p. 35.

⁴⁴ F. WIEACKER, *Privatrechtsgeschichte der Neuzeit*, Göttingen, 1967, p. 570.

tablishment of a dense social security system, adopted in the last decade of the 19th century. Between 1881 and 1889, the German Reichstag adopted the law on health insurance (1881), accident insurance (1883) and invalidity insurance (1889). In 1891 the introduction of the 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 constituted 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 Republic of Weimar did not only bring a new democratic constitution, it also gave way to major legislative acts which enforced 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 (*Naphtali*). However, these ideas and concepts were only realised in the 1970s when Germany elected the first government in which the social democrats won the majority in the elections and adopted, in 1976, the law on code-termination (Mitbestimmungsgesetz).⁴⁵

The rise of consumer law brought the discussion between the two academic camps back to the fore (Professoren-Modell⁴⁶), a discussion which could only take place in Germany, as only German academics still hold a strong tradition in 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 the missing social(ist) oil, not labour law but consumer

law, into the German Civil Code – which had grown to 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 and documented by the critical academia.

Since 2002, consumer law provisions form part of the German Civil Code. This time, however, – some voices set aside⁴⁷ – there was no outcry in the academia, although the integration of the consumer contract law rules challenge the system and the coherence of the German Civil Code. In the shadow of the so-called modernisation of German contract law (Schuldrechts-Modernisierungsgesetz), the executive, i.e. 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 (*v. Gierke*), however, did neither attract public nor much academic awareness. The integration of consumer law into the German Civil Code has been performed as a technical bureaucratic exercise. Till today, academia largely ignores 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 on 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.

4. The European Integration Process and the European Model of Justice

My hypothesis is that in the ECJ jargon, the ‘European legal order’ and the ‘European constitutional charter’⁴⁸ has 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

⁴⁵ G. BRÜGGEMEIER, *Entwicklung des Rechts im organisierten Kapitalismus*, Band 1: *Von der Gründerzeit zur Weimarer Republik*, Frankfurt, 1977; ID., Band 2: *Vom Faschismus bis zur Gegenwart*, Frankfurt, 1979.

⁴⁶ R. ZIMMERMANN, *Consumer Contract Law and General Contract Law: The German Experience*, in *Legal Current Problems*, 58, 2005, p. 415-489; H. SCHEPEL, *The European Brotherhood of Lawyers: The Reinvention of Legal Science in the Making of European Private Law*, in *Law and Social Inquiry*, 32 (1), 2007, 183-199; R.M. KIESOW, *Rechtswissenschaft – was ist das?*, in *JuristenZeitung*, 2010, 586.

⁴⁷ K. ADOMEIT and H. MARCUSE, *der Verbraucherschutz und das BGB*, in *Neue Juristische Wochenschrift*, 579, 2004, p. 827-838; K. ADOMEIT, *Die gestörte Vertragsparität – ein Trugbild*, in *Neue Juristische Wochenschrift*, 1994, p. 2467; W. FLUME, *Vom Beruf unserer Zeit für die Gesetzgebung*, *Zeitschrift für Wirtschaftsrecht*, 1994, p. 1727.

⁴⁸ N. WALKER, *Big ‘C’ or Small ‘c’?*, in *European Law Journal*, 12 (1), 2006, p. 12-14.

means that the EU is not coalescing with the Member States' models of justice.⁴⁹

4.1. The Evolutionary Character of the European Legal Order and the Rise of 'The Social'

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Since the late nineties there are two issues that have dominated the European legal discourse,⁵⁰ 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 beginning of the 19th century 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.⁵¹

In the meanwhile both projects, the grand constitutional project and the grand civil law project, '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

⁴⁹ It might be particularly interesting to discuss whether and to what extent it was possible for the EU – and not for the Member States – to realise the principle of equal treatment in family law and later in private law per se, see D. KENNEDY, *Two Globalizations of Law & Legal Thought: 1850-1968*, *Suffolk University Law Review*, 36 (3), 2003, 631-679, where he points out that the continental European countries as well as common law countries were unable to realise equal treatment in family matters during the peak time of 'The Social'.

⁵⁰ For an account of the theoretical strains in the debate, N. WALKER, *Legal Theory and the European Union: A 25th Anniversary Essay*, in *Oxford Journal of Legal Studies*, 25 (4), 2006, p. 581-601.

⁵¹ H.-W. MICKLITZ and F. CAFAGGI (eds), *The European Private Law after the Common Frame of References*, Cheltenham, 2010.

European private legal order that bears 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, i.e. 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.⁵² This does not mean that the grand projects do not deal with '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 or meaning.⁵³

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 Principles⁵⁴ and the Draft Common Frame of Reference.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 References' into a political draft. The collaboration between the European Commission and the European Academia resembles, in an ominous way, the German Professorenmodell where the academia co-operate with an au-

⁵² See for an early critique of the technical a-political character of the codification project of the European Commission in Social Justice Study Group, *Social Justice in European Contract Law: A Manifesto*, in *European Law Journal*, 10 (6), 2004, p. 653-674 and on the outcome of the project see M.W. HESSELINK, *CFR & social justice: a short study for the European Parliament on the values underlying the draft common frame of reference for European private law: what roles for fairness and social justice?*, in *Centre for the Study of European Contract Law Working Paper Series No. 2008/04*, who gives a relatively positive account of the degree to which social justice has been taken into account.

⁵³ See Art. 2 of the Lisbon Treaty where 'justice' as one of the EU values is listed.

⁵⁴ 2007.

⁵⁵ Outline edition, 2009.

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.

⁵⁷ See in so far, M.W. HESSELINK, *CFR & social justice: a short study for the European Parliament on the values underlying the draft common frame of reference for European private law: what roles for fairness and social justice?*, in *Centre for the Study of European Contract Law Working Paper Series No. 2008/04*.



thoritarian executive, overstepping a weak parliament.⁵⁸

What remains 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* character is characteristic for the European legal order. ‘The Social’ has been gradually established over the last 50 years. Just like 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 Union.⁵⁹ 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 to the limelight not only of the academic debate.

4.2. The Impact of the European Integration Process on Labour and Anti-Discrimination Law

4.2.1. 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) on equal payment of 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.⁶⁰ 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 activity. 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 till today. The 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 taken under the new regime.

All three strains of development are united in one perspective, they demonstrate how much the EU is focussed 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 care’ to the responsible Member States. Three phases can be identified: coordination 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, today 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, today 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 (today 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 (3) Directive 77/187 on transfer of rights and Directive 91/533⁶²

⁶⁰ Critical F.J. SÄCKER, *Vertragsfreiheit und Schutz vor Diskriminierung*, ZEuP, Iff. and Basedow, J. (2008), ‘Grundsatz der Nichtdiskriminierung’, in ZEuP, 2006, 230-251; supportive, A.S. VANDENBERGHE, *The Economics of the Non-Discrimination Principle in General Contract Law*, *European Review of Contract Law*, 3 (4), 2007, p. 420.

⁶¹ H.-W. MICKLITZ, *The Politics of Judicial Co-operation in the EU – the Case of Sunday trading, Equal Treatment and Good Faith*, New York, 2005, p. 166.

⁶² Directive 91/533, though adopted years after Directive 90/987 is still based on Art. 100 and what is even more im-

⁵⁸ H. SCHEPEL, *The European Brotherhood of Lawyers: The Reinvention of Legal Science in the Making of European Private Law*, in *Law and Social Inquiry*, 32 (1), 2007, 183-199.

⁵⁹ In this direction see, R. MÜNCH, *Die Konstruktion der europäischen Gesellschaft: zur Dialektik von transnationaler Integration und nationaler Desintegration*, Frankfurt/Main, 2008.



on information of 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 rights⁶³ 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 were 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 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 addressee of the EU legislation is the particularly vulnerable worker, 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 stretched the boundaries of the scope of application of harmonised EU rules and strengthened individual rights to fighting for access. Maastricht brought the 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 and paved the way for the UK to take over 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 (the latter 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 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

portant, it is guided by the same spirit as the previous five directives adopted between 1975 and 1980.

⁶³ MICKLITZ, H.-W. (2005), *The Politics of Judicial Cooperation in the EU – the Case of Sunday trading, Equal Treatment and Good Faith*, New York: Cambridge University Press, pp. 202 and seq.

⁶⁴ See N. REICH, *Bürgerrechte*, 1999, §§ 8, 9, 14 at 228.

⁶⁵ Judgment, 18.12.2007, Case 341-05, *Laval un Partneri* ECR 2007, I-11767 at 51-111; there is an interesting and controversial debate on how to read Directive 96/71, in particular on

The EU managed to introduce a new spirit into the new set of Directives, which can be noted in two Directives, 94/45 on working council and 96/17 on the posting of workers. Both contain a strong cross border element and both rely on the leitbild of a worker which resembles the circumspect and responsible consumer. The new ideal type of the European worker has to enforce her rights herself. Protecting pregnant women, securing the rights of the youth 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 and contributed to the development of a new leitbild of the worker which is perhaps most prominently designed in the *Bosman*⁶⁶ judgment.

Strive for hegemony: The third phase maybe characterised by three modes of regulation, a hidden mode, a new mode and an old mode in a new disguise. The hidden mode refers to cold harmonisation which results from the introduction of a single currency. Whilst the EU holds 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 leads to a situation where Member States are deprived from 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).⁶⁷ 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’.

whether the minimax debate fits to the directive at all, see S. DEAKIN, *Regulatory Competition after Laval*, in *Cambridge Yearbook of European Legal Studies*, 10 (10), 2008, 581-610 and M. DOUGAN, *Minimum Harmonisation after Tobacco Advertising and Laval Un Partneri*, in M. Bulterman and L. Hancher and A. McDonnell and H. Sevenster (eds.), *Views of European Law from the Mountain: Liber Amicorum Piet Jan Slot*, Alphen aan den Rijn 2009, p. 12-13.

⁶⁶ Judgment of 15.12.1995, C-415/93, *Union royale belge des sociétés de football association and others/ Bosman and others* ECR 1995 I-4921.

⁶⁷ Website of the European Commission, Social Affairs and Equal Opportunities, available at: http://ec.europa.eu/employment_social/spsi/joint_reports_en.htm (accessed at 14 November 2010).



There is, however, one area of labour law and policy, where the European Union has and is 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 on the access to the supply of goods and services.⁶⁸

The current situation: 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 Rights⁶⁹. It plays a prominent, though highly contested role⁷⁰, in the ACQP and the DCFR.⁷¹ The *Mangold* judgment⁷² 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 not only applicable 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 (a) European principle of *access justice/Zugangsgerechtigkeit* as it would

⁶⁸ See for a summary of the EC law on anti-discrimination, U. RUST and J. FALKE (eds), *AGG Allgemeines Gleichbehandlungsgesetz mit weiterführenden Vorschriften; Kommentar*, Berlin, 2007, p.198.

⁶⁹ For a deeper analysis see U. RUST and J. FALKE (eds), *AGG Allgemeines Gleichbehandlungsgesetz mit weiterführenden Vorschriften; Kommentar*, Berlin, 2007, pp. 291 *et seq* and J. BASEDOW *Grundsatz der Nichtdiskriminierung*, 2008, *ZEuP*, p. 230-248.

⁷⁰ F.J. SÄCKER, *Vertragsfreiheit und Schutz vor Diskriminierung*, *ZEuP*, 1ff. and Basedow, J. (2008), 'Grundsatz der Nichtdiskriminierung', in *ZEuP*, 2006, 230-251.

⁷¹ Art. 3:101 till 3:103 ACQP; II.-2:101 DCFR.

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

allow to guarantee 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. *Küçükdevici* seems to grant horizontal direct effect to the Charter of Fundamental Rights.⁷³ If such a principle is enshrined in EU law, *Mangold* and *Küçükdevici* could serve as a tool for overriding the reservations of the UK, Poland and the Czech Republic against the integration of the Charter of Fundamental Rights into Union law. A new, though related battlefield has come up in *Test Achats*.⁷⁴ The more general question concerns 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.

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 boundaries between 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 bear a quasi statutory character and that restrict her legal position. The right of free movement of workers is used so as to strike down collective private agreements that are either established by private organisations bearing 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 discriminating collective private agreements and the ECJ is granting access against the fierce opposition of trade associations and trade unions.

⁷³ (21) In that context, the Court has acknowledged the existence of a principle of non-discrimination on the 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 H.-W. M.) 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'

⁷⁴ Opinion of AG Kokott - Case C-236/09 available at

<http://www.lex.unict.it/eurolabor/en/documentation/altridoc/clusion/c236-09.pdf>. (accessed 14 November 2010).

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, 27.9.2008.

⁷⁹ N. REICH, *Rights without Duties*, to be published in the *Yearbook of European Law*, 2010, p. 60.



4.2.2. Consumer Law

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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 Article 100 a), today Art. 104 TFEU, which granted the EU the power to take legislative action to complete the Internal Market taking a ‘high level of consumer protection’ as the basis. To understand the link between the White Paper on the Completion of the Internal Market, the Single European Act and the rise of consumer law it is still worth reading the most influential Sutherland report.⁸⁰ That is where the well-known rhetoric of ‘an integrated market needs confident consumers’ derives from.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 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.

Co-ordination: 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.⁸² This is characteristic for all initiatives taken between 1975 and 1985, i.e. before the rise of the Internal Market. From the three directives adopted during this time span, two, Directive 85/577/EEC on contracts concluded away from business premises and Directive 87/102/EEC, 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, the White paper on the Completion of the Internal Market and the adoption of the Single European Act, the Euro-

pean 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.⁸³ Within a couple of years the EU managed to get quite a number of directives through the legislative machinery, some that 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.⁸⁴ That is where the genuine model of justice in EU has its roots. EU consumer law is *market behaviour law*.⁸⁵ European consumer law is more and more turning into a consumer law without – or to put it in more cautious terms – with a less determined social protective outlook. The European ideal is the European consumer who shops across border in a relaxed though attentive and self-responsible manner.⁸⁶

Strive for hegemony: The third phase is linked to the policy shift initiated by the Lisbon Council that was 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 distant selling of financial services constituted the break through in the realisation of

⁸⁰ The *Internal Market After 1992 Meeting the Challenge*, European Parliament Doc (SEC 92-final) 2277 (1992).

⁸¹ See on the confident consumer S. WEATHERILL, *The Evolution of European Consumer Law and Policy: From well Informed Consumer to Confident Consumer*, in H.-W. Micklitz (ed.), *Rechtseinheit oder Rechtsvielfalt in Europa?*, Baden-Baden, 1996 p. 423.

⁸² Critical as regards the objectives of consumer law, G.-P. CALLIES, *Nach der Schuldrechtsreform: Perspektiven des deutschen, europäischen und internationalen Verbrauchervertragsrechts*, 203, *Archiv für die civilistische Praxis* (AcP), 1996, p. 575.

⁸³ H.-W. MICKLITZ and S. WEATHERILL, *Consumer Policy in the European Union: Before and after Maastricht*, in *Journal of Consumer Policy Special Issue*, 16 (3-4), 1993, p. 285-321.

⁸⁴ Critical as regards the alleged change of the paradigm, see H. RÖSLER, *Europäisches Konsumentenvertragsrecht: Grundkonzeption, Prinzipien und Fortentwicklung*, Thesis Marburg, 2004 p. 74.

⁸⁵ N. REICH, ‘Protection of Consumers’ Economic Interests by EC Contract Law – Some Follow-up Remarks’, *Sydney Law Review*, 28 (1), 2006, 37-62, quite critical on such attempts, T. WILHELMSSON, *The Contract Law Acquis: Towards More Coherence Through Generalisation?*, *Europäischer Juristentag*, 4 (1), 2008, p. 111-145.

⁸⁶ B. HEIDERHOFF, *Grundstrukturen des nationalen und europäischen Verbrauchervertragsrechts, insbesondere zur Reichweite europäischer Auslegung*, *Habilitation- München*, 2004, pp. 289, 423.



the new paradigm. In a methodically interesting approach, of combining elements of Directive 2001/95/EC on general product safety, Directive 2005/29/EC on unfair commercial practices, it purports to harmonise unfair commercial practices with respect to B2C relationships.⁸⁷ Last but not least, the adoption of Directive 2008/48/EC on consumer credit followed suit, after a hard and long lasting fight on the full harmonisation approach.⁸⁸ 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/EEC on unfair terms and 99/44/EC on consumer sales.⁸⁹ However, it seems as if the European Commission has run into a deadlock situation.

What does full harmonisation mean with regard to the separation of powers between the Member States and the EU in consumer law?⁹⁰ 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 In-

ternal Market and the idea of the circumspect and responsible consumer.⁹¹ The new consumer leitbild is the economically efficient consumer which has to operate no longer merely in 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’, but a consumer/worker who even claims ‘social justice’. Can the EU rules on services of general economic interest serve as a fall back position?⁹² 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.

5. 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 escape 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.

⁸⁷ G. HOWELLS, H.-W. MICKLITZ T. WILHELMSSON, *European Fair Trading Law – The Unfair Commercial Practices Directive*, Aldershot, 2006.

⁸⁸ See H.-W. MICKLITZ and P. ROTT and L. TICHY (2007), *Impact assessment of the revised proposal on consumer credit on the Member States legislation in Czech Republic, Germany and the United Kingdom*, MS January 2007.

⁸⁹ Commission of the European Communities. Proposals for Directive of the European Parliament and of the Council on Consumer Rights, COM (2008) 614 final; H.-W. MICKLITZ and N. REICH, *Crónica de una muerte anunciada: The Commission Proposal for a ‘Directive on Consumer Rights, Common Market Law Review*, 46 (2), 2009, 471-519.

⁹⁰ S. WEATHERILL, *Minimum Harmonisation as Oxymoron? The Case of Consumer Law*, in H.-W. Micklitz (ed.), *Verbraucherrecht in Deutschland – Stand und Perspektiven*, VIEW Schriftenreihe, Band 20, 2005, p. 15 and T. WILHELMSSON, *European Consumer Law: Theses on the Task of the Member States*, p. 37.

⁹¹ H.-W. MICKLITZ, *Jack is out-of the Box - The efficient Consumer-Shopper*, in T. Wilhelmsson and J. Bärlund, *Festschrift*, JFT 3–4, 2009, p. 417–436.

⁹² H.-W. MICKLITZ, *The Targeted Full Harmonisation Approach: Looking behind The Curtain*, in G. Howells and R. Schulze (eds), *Modernising and Harmonising Consumer Contract Law*, Munich, 2009, p. 47.



5.1. Social Distribute, 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*⁹³, the black or women who have to pay more for a new car than white men⁹⁴ – but rather the dynamic, open-minded, flexible, well-informed, self-standing and self-conscious mobile worker or consumer who is 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’.⁹⁵ The normative leitbild, which is dominating EU labour and consumer law making, requires this omnipotent market citizen needed 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 contain normative concepts such as the vulnerable consumer in Directive 2005/29 on unfair commercial practices or in the field of services of general economic interests 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 sixties and seventies, perhaps not so much from the changing patterns in the legal systems, but 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 incapable of keeping pace with the changing labour market, have

no counterpart in consumer law. It does not even exist in areas such as services of general economic interests where the link to the OMC could easily be built to handle the situation of those customers who are excluded from basic services. 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.⁹⁶ It has to be recalled that the regulatory mechanism established by the European Commission to design the ACQP and the DCFR resemble 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.⁹⁷ That is why EU labour, anti-discrimination and consumer law are 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 and a 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 for 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.⁹⁸ The legal paradigm of EU law making via the Treaty and via secondary law, however, is regulatory law, this means *regulated autonomy*. The EU is transforming private law rules ‘from autonomy to functionalism in competition and regulation’. I have laid down my understanding of the role and function of European private law elsewhere.⁹⁹

⁹⁶ M. BARTL, *The Affordability of Energy. How much protection for the vulnerable consumer?* *Journal of Consumer Policy*, 33 (2), 2010, p. 225-245; U. NEERGARD, *Services of General (Economic) Interest and the Services Directive -What Is Left Out, Why and Where to Go?*, in Neergard, U. and R. Nielsen and R.M. Roseberg (eds), *The Services Directive, Consequences for the Welfare State in the European Social Model*, Copenhagen, 2008, p.65.

⁹⁷ W. VAN GERVEN, *Needed: A Method of Convergence for Private Law*, in A. Furrer (ed.), *Europäisches Privatrecht*, 2006, p. 437, on the parallel between the new approach and the making of the DCFR see H.-W. MICKLITZ 2007, *(Selbst-)Reflektionen über die wissenschaftlichen Ansätze zur Vorbereitung einer europäischen Vertragsrechtskodifikation*, in *GPR Zeitschrift für Gemeinschaftsprivatrecht*, p. 2.

⁹⁸ See most recently, J. BASEDOW, *Party Autonomy in the Private International Law of Contracts*, *European Review of Private Law*, 15, 2007, p. 891.

⁹⁹ I have developed this concept in H.-W. MICKLITZ, *The Visible Hand of European Private Law*, in P. Eeckhout and T. Tridimas (eds.), *Yearbook of European Law*, 28, 2010, p. 3-60.

⁹³ D. CAPLOVITZ, *The Poor Pay More*, New York, 1967.

⁹⁴ AS, L. AYRES, *Fair driving: Gender and Race Discrimination in Retail Car Negotiations*, *Harvard Law Review*, 104 (4), 1991, p. 817-871.

⁹⁵ COM (2008) 614 final, p. 2.



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 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 shall not be equated with social justice, emanating from the workers’ movement, that has developed in the 20th century. Nor shall 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 but 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.¹⁰⁰

In sum: *access justice* means more than a formal guarantee to workers and consumers that they may have a theoretical chance in 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.

5.2. The Two Constitutive Elements: Access Rights and Anti-Discrimination Rights

There are two major identifiable constitutive elements in which the European model of justice becomes visible: 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 its most outspoken form, they may grant individually

¹⁰⁰ See ECJ, 18.3.2010, Joined Cases C-317/08, C-318/08, C-319/08 and C-320/08 *Alassini*, ECR (2010) I- nyr. From a consumer point of view see N. REICH, in H.-W. MICKLITZ and P. ROTT and N. REICH, *Understanding EU Consumer Law*, 2009, § 8, p. 341.



enforceable rights,¹⁰¹ 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.¹⁰² The perspective I take is a private law perspective, meaning that I investigate the horizontal dimension of the two constitute principles, in order to design the possible impact on private law relations.

5.2.1. Specific Access Rights in Labour, Anti-Discrimination and Consumer Law

In private law relations, the subjective rights in-built into the market freedoms as interpreted by the ECJ are paving the way for being granted access against discriminating 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 freedom, a decision the ECJ refused to take in *Alsthom Atlantique*¹⁰³ and *CMC Motorradcenter*¹⁰⁴.

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

(1) 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, e.g. 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 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 interests taking a broad understanding, i.e. 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 woman, parents, young people and part-time workers. However, in particular those measures taken

¹⁰⁵ There is an abundant literature on this issue, see G. BRÜGGEMEIER and A. CIACCHI and G. COMANDÉ (eds.), *Fundamental Rights and Private Law in Europe*, 1 - 2, Cambridge, 2010; O. CHEREDNYCHENKO, *Fundamental Rights, Contract Law and the Protection of the Weaker Party: A Comparative Analysis of the Constitutionalisation of the Contract Law with Emphasis on Risky Financial Transactions*, doctoral dissertation – Utrecht, 2008; Ch. MAK, *Fundamental Rights in European Contract Law. A Comparison of the Impact of Fundamental Rights on Contractual Relationships in Germany, the Netherlands, Italy and England*, Alphen aan den Rijn, 2008.

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

¹⁰² See V. KOSTA, (forthcoming 2010), *Internal Market Legislation and the Private Law of the Member States. The Impact of Fundamental Rights*, to be published in *European Review of Contract Law*.

¹⁰³ ECJ C-339/89 ECR I-107.

¹⁰⁴ ECJ C-93/92 ECR I-5009.



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.

(2) 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 interests) provide for more specific protection in selected areas of consumer policy. The Treaty contains, in Art. 169 TFEU, elements of a 'right to information'¹⁰⁶ 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 interests:

The Union recognises and respects *access to services* of general economic interests 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.¹⁰⁷ 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. 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.¹⁰⁸ In *Sabatauskas*¹⁰⁹, the ECJ did

not decide on the right of access of consumers to the Energy market.¹¹⁰ 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 interests but rather the respective Member State who is under an obligation to implement the directives in light of the Charter in 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 can not be enforced against the correct addressee has been termed by *N. Reich* 'Rights without Duties'¹¹¹. 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 field of financial¹¹² and digital services¹¹³, to all those services on 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 builds concrete 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 neither reflected 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 comes from 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

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, nyr, see PIRSTNER-EBNER, *EuZW*, 2009, 15, 16 UNDER 4.

¹¹⁰ See, P. ROTT, *A new Social Contract Law for Public Services? – Consequences from Regulation of Services of General Economic Interests in the EC*, in *European Review of Contract Law*, 1 (3), 2005, 342.

¹¹¹ N. REICH, *The public/private divide in European law*, in H.-M. Micklitz, and F. Cafaggi (eds.), *European Private Law after the Common Frame of Reference*, Cheltenham, 2010 p. 56.

¹¹² T. WILHELMSSON, *Services of general interests and European Private law*, in C. E. Rickett and T.G.W. Telfer (eds.), *International Perspectives on Consumers' Access to Justice*, Cambridge, 2003, p. 149.

¹¹³ H.-W. MICKLITZ and A. OEHLER (2007), *Consumer Policy in the Digital World, Scientific Advisory Board for Consumer, Food, and Nutrition Policies to the Federal Ministry of Consumer Protection, Food, and Agriculture*, Germany, Berlin.

¹⁰⁶ M. RADEIDEH, *Fair Trading in EU Law – Information and Consumer Choice in the Internal Market*, Groningen, 2005.

¹⁰⁷ Regarding the interpretation of this provision and its doctrinal qualification see the contribution of BAQUERO CRUZ in G. De Búrca (ed.), *EU Law and the Welfare State: In Search of Solidarity*, Oxford, 2005, pp. 169 and 178.

¹⁰⁸ P. ROTT, *A new Social Contract Law for Public Services? – Consequences from Regulation of Services of General Economic Interests in the EC*, in *European Review of Contract Law*, 1 (3), 2005, 323-345; C. WILLET, *General Clauses on Fairness and the Promotion of Values Important in Services of General Interest*, in C. Twigg-Flesner and D. Parry and G. Howells and A. Nordhausen (eds.), *Yearbook of Consumer Law*, 2008, p. 67.



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 confounded 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.

5.2.2. The Horizontal Dimension of Anti-Discrimination

The second constitute 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, anti-discrimination bears a negative message. 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, even in 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 so far academic debate turns, to a large extent, around the question on 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

I will borrow from *Basedow*¹¹⁵ the distinction between integration motivated anti-discrimination verdicts and societal policy motivated anti-discrimination verdicts. This fits into the distinction between allocative libertarian 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 they may be broken down in a) those indirectly affecting consumers and b) directly affecting them. Under the first category, we can note rules to ensure non-discriminatory access to the net, non-discriminatory tariffs for access to the network and rules meant to prohibit any form of non-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 *Smith v. Advel Systems*¹¹⁶ the ECJ rejected any attempt to use the Treaty provisions for levelling up equal pay. All that the Treaty requires is equal treatment of men and women, but 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.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 in 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 once the ECJ has to decide on the choice between social distributive and access justice. Such

¹¹⁵ J. BASEDOW, *Grundsatz der Nichtdiskriminierung*, ZEuP, 2008, p. 237.

¹¹⁶ ECJ Case-408/92 ECR I-4435.

¹¹⁷ See H.-W. MICKLITZ, *The Politics of Judicial Co-operation in the EU – the Case of Sunday trading, Equal Treatment and Good Faith*, New York, 2005, pp. 182 and 188 with reference to the ECJ case law.

¹¹⁴ Art. 3:101 to 3:103 ACQR and II.-2:01 to II.-2:103 DCFR.



an understanding would not comply with *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.