THE POLITICS OF JUSTICE IN EUROPEAN PRIVATE LAW, AN INTRODUCTION*.

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ABSTRACT. The 'Politics of Justice in Private Law' intends to highlight the differences between the Member States' concepts of social justice, which have developed historically, and the distinct European concept of access justice. Contrary to the emerging critique of Europe's justice deficit in the aftermath of the Euro crisis, I argue that beneath the larger picture of the Monetary Union, a more positive and more promising European concept of justice is developing. European access justice is thinner than national social justice, but access justice represents a distinct conception of justice nevertheless. It is both descriptive and normative.[1] I will neither defend national cultures and traditions[1] nor proclaim European access justice as a substitute for national social justice. Member States/nation states remain free to complement European access justice and bring to bear their own pattern of social justice. However, the ongoing economic and societal transformations force us in light of "intuitively felt cracks"[1] to rethink national patterns of social justice and their compatibility with the European concept of justice. The book defends the European experiment as good and useful. The European legal order and European society yield genuine social values. Nostalgia for the national welfare state of the 1970s or the sovereign nation state is not likely to be an adequate answer to the societal and economic transformations at the beginning of the 21st century.

The argument.

The clarion call for justice in private law, which first emerged in the late 19th century, places the nation state in a prominent position. Today, the nation state is subject to deep going transformation processes that affect its ability to deliver its preferred option of justice.[1] The European experiment – the building of a transnational quasi-statutory entity through law with all its turbulence – allows us to study the effects of these transformation processes on private law, on the nation state and on patterns of justice. Peering through a looking-glass, EU private law mirrors the limits of the national welfare state, but also allows us to study the potential for building a concept of justice beyond the nation state in a regulated economy through private law – access justice. Long standing national legal traditions and legal cultures clash with the transformative power of the EU that challenges entitlements held dear, but offers opportunities for rethinking justice through private law. Here is a tentative definition:

Access justice materializes the *theoretical chance* of EU citizens to participate in the market so as to make it a *realistic opportunity*. Access justice lays down *procedural* requirements for proper law enforcement of EU private law. Access justice provides for an *institutional* design that allows for the participation of EU citizens in civil society. Access justice distributes and redistributes opportunities. Therefore, access justice should be understood as a thin version of social distributive justice. However, in its participatory form it turns into societal justice.

The following introduction highlights the transformation of private law, of the nation state and of social justice. It provides guidance to the theoretical localisation of access justice and the methodology used. The overall argument of the book is then unfolded in three consecutive steps. The first part analyses the transformation process of social justice in the private legal orders of France, Germany and the UK. Despite all the alterations the three legal orders demonstrate intellectual path dependency which, however, is severely shattered only after the Second World War through the European integration process. How the EU is interfering into the foundations of private law and the patterns of justice is the theme of the second part. It goes to show that the EU is developing a genuine model of justice access justice that sits uncomfortably with national patterns of justice and provokes strong political and ideological reactions.[2] The third part is devoted to identifying the shape of the new private law beyond the nation state which is already in the making. All three parts devolve to a single conclusion: Access justice is claimed to be the paradigm for the emergent private law order beyond the nation state.

Introduction: Justice, State/the EU and Private law

The history of the transformations of the private law, the nation state and social justice needs to be structured. *D. Kennedy's*[3] distinction between the three waves of Globalisation of Legal Thought, from Classical Legal Thought to the Social and from there to Neo-Formalism helps explain the three transformations. The three waves are used as labels that capture a set of common features in each of the three epochs, but they leave space for contingency in the evolution of scenarios. At the *apogée* of Classical Legal Thought, the 'state' is governed through formal law expressing norms of corrective justice. During the second wave of globalisation of legal thought, 'The Social' arises as a general pattern in social welfare states that comes to dominate private law. The third wave of globalisation is characterised by Kennedy's concept of neoformalism.[4] Private law thinking intrudes into the formerly public sector, the different policies and institutions, shattering established patterns of social justice. The nation states have new challenges to master, in which social and distributive justice appear in a new light, no longer as a matter of the nation state alone, but as one that affects the overall position of each nation state *vis-à-vis* the global economy.[5]

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* Si tratta dell'introduzione al volume di H.W. Micklitz, *The Politics of Justice in European Private Law. Social Justice, Access Justice, Societal Justice,* Cambridge, 2018, pubblicata con il consenso dell'autore e sottoposta ad autonoma valutazione.

[1] H.-W. Micklitz and D. Patterson, *From the Nation State to the Market: The Evolution of EU Private Law as Regulation of the Economy beyond the Boundaries of the Union?*, in B. van Vooren, St. Blockmans and J. Wouters (eds.), *The EU's Role in Global Governance. The Legal Dimension*, Oxford University Press, Oxford, 2013, p. 59-78.

[2] In a similar direction though not discussing private law, F. de Witte, *Justice in the EU. The Emergence of Transnational Solidarity*, Oxford University Press, Oxford, 2015, who distinguishes between market, communitarian and aspirational solidarity.

[3] D. Kennedy, 'Three Globalizations of Law and Legal Thought: 1850–2000', in D. M. Trubek and A. Santos (eds.), *The New Law and Economic Development. A Critical Appraisal*, Cambridge University Press, Cambridge - New York, 2006, p. 19-73.

[4] D. Kennedy uses neoformalism, in particular through his claim of 'managing difference'. In so far the critique that he forgets about the role and function of the 'market' seems to be overstated, J. Desautels-Stein and D. Kennedy, Foreword: Theorizing Contemporary Legal Thought, in *Law and Contemporary Problems* 78: i-x., 2015.

[5] D. Patterson, A. Afilalo, *The new global trading order. The evolving state and the future of trade*, Cambridge Universi-

The next step is to delineate access justice from pure market justice[6] and to clarify the relationship between the European model of access justice and national patterns of social justice. The substantive part of the introduction concludes with a clarification on the chosen three-layered methodology which underpins the overall argument. First and foremost, there is ideological criticism on the over-instrumentalisation of the law as a means to build a social market and a more just society. The European experiment contributes to dismantle blind spots[7] in the national welfare state *and* to provide a forum for the suggested post-classical move that lays bare the architecture of the post-national private law. Legal consciousness and intellectual history constitute the third layer and serve as the tool through which the transformation process of the last 200 years can be re-constructed, explained and made comprehensible. In what comes I will first analyse the transformations, then locate access justice before I turn to the pre-conceptions and the methodology.

1. The Transformation of Private Law, the Nation State and Social Justice.

The Member States of the European Union developed over the 20th century their own model of social justice in private law. For the purposes of the book private law is understood as economic law. It covers contract and tort as well as labour law, non-discrimination law and consumer law.[8] Each model of social justice is inherently linked to the specificities of the particular country, its economic and social conditions and the national culture and tradition. However, all models have in common that sooner or later it is for the (nation) state[9] to use the law as a means to protect the weaker party against the stronger party, the employee against the employer, the tenant against the landlord,[10] and the consumer against the supplier. Therefore, social justice is bound to the idea of redistribution of wealth and loss shifting 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 and that is where the rhetoric of social distributive justice via the (nation) state is rooted.

The integration of social justice into private law and the rise of the welfare state in the 20th century were made possible through the economic, social, political and technological developments that shook Europe between the 17th -19th century and that freed private law from feudal and corporative (*ständische*) barriers.[11] Social justice itself is a product of the late 19th/early 20th century, a result of the socialist labour movement. States responded to the rise of the labour movement 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 started after World War II with the rise of the consumer society.[12] Again States' private law systems were confronted with the call for social justice. This time the response came from the '*regulatory'* welfare state. Labour law became a subject of its own and emigrated from the private law system becoming a separate area of law. A similar development can be observed in consumer law which is about to segregate from private law independent of its form, whether it is part of a national civil code or not.[13]

ty Press, Cambridge - New York, 2008; P. BOBBITT, *The shield of Achilles. War, peace, and the course of history*, Anchor Books, New York, 2003.

[6] J. N. ADAMS AND R. BROWNSWORD, *The Ideologies of Contract*, in *Legal Studies*, 7, 1987, p. 205-223.

[7] CH. JOERGES, *On the Legitimacy of Europeanising Private Law: Considerations on a Law of Justi(ce)-fication (justum facere) for the EU Multi-Level System*, in A. HARTKAMP, M. W. HESSELINK, E. HONDIUS, C. JOUSTRA, E. DU PERRON AND M. VELDMAN (eds.), *Towards a European Civil Code*, 3rd ed., Kluwer Law International - Ars Aequi Libri, Alphen aan den Rijn - Nijmegen, 2004, p. 159-190.

[8] H. D. ASSMANN, G. BRÜGGEMEIER, D. HART AND CH. JOERGES (eds.), *Wirtschaftsrecht als Kritik des Privatrechts* (Königstein/Ts.: Athenäum,1980).

[9] B. HEPPLE, *Welfare Legislation and Wage-Labour*, in B. HEPPLE (ed.), *The Making of Labour Law in Europe. A comparative Study of Nine Countries up to 1945*, Mansell Publishing, London, 1986, p. 114-153, p. 122 'very uneven development'.

[10] *TENLAW: Tenancy Law and Housing Policy in Multi-level Europe* directed by Christoph Schmid, Centre of European Law and Politics at the University of Bremen, http://www.tenlaw.uni-bremen.de/.

[11] J.-W. HEDEMANN, *Die Fortschritte des Zivilrechts im XIX. Jahrhundert. Ein Überblick über die Entfaltung des Privatrechts in Deutschland, Österreich, Frankreich und der Schweiz. Erster Teil. Die Neuordnung des Verkehrslebens*, Vol. I, Heymann, Berlin, 1910. Hedemann was later involved in the Nazi regime and in the development of the so-called Volksgesetzbuch (the attempt of Third Reich jurists in the Akademie für Deutsches Recht to replace the Bürgerliche Gesetzbuch by a civil law code aligned with the principles of National Socialism).

[12] On the much longer history of consumption, F. TRENTMANN, *Empire of Things. How we became a world of consumers, from the fifteenth century to the twenty-first*, Penguin Books, London, 2016, on the rise of the consumer society after World War II, pp. 272.

[13] H.-W. MICKLITZ, *Do Consumers and Businesses need a New Architecture for Consumer Law? A Thought Provoking Impulse*, *Yearbook of European Law*, 32, 2013, p. 266-367, against a separate codification, M. W. HESSELINK, *Post-private Law?* and E. HONDIUS, *Against a New Architecture of Consumer Law - A Traditional View*, in K. PURNHAGEN AND P. ROTT (eds.), *Varieties of European Economic Law and Regulation. Liber Amicorum for Hans Micklitz*, Springer International Publishing, New York, 2014, p. 31-42 and p. 599-610 respectively.

The European Economic Community as originally envisaged in the 1950s, in contrast, was to be built on a clear separation of responsibilities, between the EEC - to establish the Common Market - and the Member States that remained responsible for social policy.[14] The constitutional construction of the EEC changed considerably over time. Since the adoption of the Single European Act in 1986, the European Union bears a 'social outlook', which gradually developed over time and has now taken shape in the Lisbon Treaty and the Charter of Fundamental Rights. There was even an ongoing discussion on an existing or emerging European Social Model,[15] which is currently being superseded by debates about the injustice resulting from the Euro crisis and the way it is managed through the EU, Member States and the IMF.[16] The democratic and social deficit critiques are not new. They accompany the EU from its beginning and gained pace after the Single European Act in 1986, which granted the EU powers in social regulation. However, the Euro crisis has added a new layer to the debate about the justice deficit and its proclaimed neo-liberal outlook,[17] that has placed the blame for undermining national democracies firmly at the door of the EU. This debate somewhat overshadows that the EU is not the cause of the transformation process and that its role and function needs a much more sophisticated understanding here enshrined in the model of shared responsibilities.[18]

1.1. The transformation to the law of the labour and consumer market society

Member States developed their national labour laws long before the European Union turned into a political, economic and social actor. Where the European Union succeeded in gaining competence through the various Treaty amendments, the matters were either genuinely European in that they concerned cross-border issues within the EU or the competence transfer was to serve, in tacit agreement with the majority of the Member States, the 'modernising'[19] of national economies so as to make them fit for competing in ever more globalised markets. The 'erosion' of the welfare state and the 'decline' of the 'Social' lie at the heart of social justice critiques of the EU.[20]

'Modernisation' does not take on the same contours in the three Member States under scrutiny. One might wonder, therefore, who is modernising whom – is the EU modernising the Member States, or the Member States modernising the EU. It will be shown that UK labour law precedes labour law developments via the EU. Therefore, UK labour law might be the driver behind the EU approach on labour law, with some modifications through the promotion of social rights. In consumer law, Member States left the field to the EU, which is about to develop a second generation of consumer law that reaches beyond national welfarist thinking.[21] In reaction to the Euro crisis, the EU legislator is gradually developing a genuine approach with regard to investor protection and debtor protection, though it seems as if the ECJ, rather than the EU legislator, is the driving force.[22]

The functional transfer of regulatory powers from Member States to the European Union since the adoption of the White Paper on the Completion of the Single European Market in 1985,[23] has triggered a fierce debate; first, on Europe' *social deficit* in the aftermath of *Viking* and *Laval*[24] and, second, on Europe's *justice deficit*. Scholars ask why Member States were not ready to grant the EU more

[14] Intergovernmental Committee on European Integration, *The Brussels Report on the General Common Market* (hereafter referred to as 'Spaak Report'), June 1956, available at: http://aei.pitt.edu/995/1/Spaak_report.pdf.

[15] F. RÖDL, *Labour Constitution*, in A. v. BOGDANDY, J. BAST (eds.), *Principles of European Constitutional Law*, 2nd ed., Hart Publishing, Oxford, 2009, p. 623-658; N. COUNTOURIS, *European Social Law as an Autonomous Legal Discipline*, in *Yearbook of European Law*, 28, 2009, p. 95-122; B. P. T. HAAR AND P. COPELAND, *What are the future prospects for the European social model? An analysis of EU equal opportunities and employment policy*, *European Law Journal*, 16 2010, p. 273-291.

[16] F. W. SCHARPF, *Monetary union, fiscal crisis and the preemption of democracy*, in 9 *Zeitschrift für Staats- und Europawissenschaften / Journal for Comparative Government and European Policy*, 2011, p. 163-198.

[17] W. STREECK, *How Will Capitalism End?* (London: Verso, 2016).

[18] Y. SVETIEV, *The EU's Private Law in the Regulated Sectors: Competitive Market Handmaiden or Institutional Platform?*, in *European Law Journal*, 22, 2016, p. 659-680, at p. 679-680, in more detail Part II. 4.2.

[19] B. EICHENGREEN, *The European Economy since 1945. Coordinated Capitalism and Beyond*, Princeton University Press, Princeton 2008, p. 335-341; ST. WEATHERILL, *Competence and Legitimacy*, in C. BARNARD, O. ODUDU (eds.), *The Outer Limits of European Union Law*, Hart Publishing, Oxford, 2009, p. 17-34, who stresses the potential of EU law to overcome nationalism and protectionism in Member States.

[20] C. CROUCH, *The strange non-death of neo-liberalism*, Polity Press, Cambridge, 2011; A. SOMEK, *The Cosmopolitan Constitution*, Oxford University Press, Oxford, 2014.

[21] Report of the Advisory Council for Consumer Affairs at the Federal Ministry of Justice and Consumer Protection, *Consumer Rights 2.0. Consumers in the Digital World*, available at: www.svr-verbraucherfragen.de/en/wp-content/uploads/sites/2/Report-1.pdf.

[22] G. COMPARATO, *The Financialisation of the Citizen*, Hart Publishing, Oxford, 2018.

[23] COM (85) 310 final, 14.6.1985

[24] Case C-438/05, *The International Transport Workers' Federation und The Finnish Seamen's Union* [2007] ECR I-10779; Case C-341/05, *Laval un Partneri* [2007] ECR I-11767.

comprehensive powers to shape and elaborate the 'Social'? A rather simple explanation is the unwillingness of the Member States to build the 'United States of Europe' after 1989 with a common social, economic and fiscal policy. This suggests that the 'Social' could have been preserved in a fully federalised European Union. The subtler explanation is that the Member States needed the EU to prepare their citizens for the much more competitive economic, political and social environment. Therefore, the 'debate on deficits' – social deficit, democratic deficit, justice deficit - could be explained as a tension between models of the national welfare state and the fact that there may be limits to the 'Social' in a globalised economy.

The EU's limited competences did not allow for deeper intervention into labour law, at least if one understands labour law as reaching beyond personal employment law. A holistic view demonstrates the EU's limited impact on industrial relations, social security, collective bargaining, minimum wages and unemployment policy,[25] and commercial and company law.[26] The two most visible developments notwithstanding the EU's restricted competence relate to the much debated approach taken to the role and function of trade unions in the making and enforcement of self-standing rules (*Viking* and *Laval*) and, secondly, the individualisation of the employees through subjective enforceable 'rights'.

National consumer law, in contrast, was not at rest yet in Member States when the European Union took on a leading policy role.[27] The European Union 'saved' consumer law from its decline in the Member States, transforming it into an instrument of Internal Market-building and, later, for the management of the Euro crisis.[28] That is why consumer law *with* or *without* protection[29] is of particular interest for the concept of justice. In national law, *van der Heijden* characterises regulatory intervention as 'inequality compensation':[30] 'the legislator has considered it useful and necessary to compensate the economic imbalance between employer and employee through law'. At an EU level, however, new language is required that combines EU market and European society building. It might be more appropriate to speak of the European 'law of the labour market society' and the European 'law of the consumer market society'. Only such a label combines the two perspectives the market and the society.[31]

The EU has introduced a third dimension into the debate on the 'Social', a dimension which is crucial for understanding the European social morals and for conceptualising the European model of justice. Art. 119 ECC Treaty of Rome, introduced 'Equal pay of Men and Women' (now Art. 141 TFEU). The various treaty amendments broadened the scope of equal pay in Art. 141 TFEU and expanded the recognised forms of discrimination. The EU legislature extended the reach of the anti-discrimination principle to transgender, race, age, disability and religion. Today EU anti-discrimination law has expanded into ever wider fields of the economy and society. Member States with a colonial past had adopted race discrimination laws long before. The change in language from anti- to non-discrimination changes the focus. Non-discrimination is positive, namely an obligation to find discrimination, whereas anti-discrimination is negative, it limits discrimination where it is found and brought to the public (judicial) attention.[32] The ethics of non-discrimination as an overarching principle is directly connected to what *D. Kennedy* termed the third wave of globalisation of legal thought.[33]

Since the White Paper on the Completion of the Internal Market[34] the EU has adopted a large amount of secondary legislation. The regulations and directives influence private law matters either directly (consumer, labour, non-discrimination, commercial and company law directives) or indirectly (directives meant to liberalise markets, e.g. telecommunication, postal services, energy – elec-

[25] B. Hepple and B. Veneziani, *Introduction*, in B. Hepple and B. Veneziani (eds.), *The Transformation of Labour Law in Europe. A Comparative Study of 15 Countries 1945-2004*, Hart Publishing, Oxford, 2009, p. 1-29, at p. 3.

[26] S. Deakin and F. Wilkinson, *The Law of the Labour Market. Industrialization, Employment and Legal Evolution*, Hart Publishing, Oxford,, 2005, p. 2, covers social security, active market policy, even elements of commercial, competition and company law.

[27] H.-W. Micklitz, *The Visible Hand of European Regulatory Private Law. The Transformation of European Private Law from Autonomy to Functionalism in Competition and Regulation*, in *Yearbook of European Law*, 28, 2009, p. 3-59.

[28] F. Della Negra, *Private Law and Private Enforcement in the post-crisis EU retail financial regulation*, PhD thesis, European University Institute (2017).

[29] H.-W. Micklitz, *The Expulsion of the Concept of Protection from the Consumer Law and the Return of Social Elements in the Civil Law. A Bittersweet Polemic*, in *Journal of Consumer Policy* , 35, 2012, p. 283-296.

[30] P. van der Heijden, *Post-industrial Labour Law and Industrial Relations in The Netherlands*, in Lord Wedderburn, M. Rood, G. Lyon-Caen, W. Däubler and P. van der Heijden (eds.), *Labour Law in the Post-industrial Era. Essays in honour of Hugo Sinzheimer*, Aldershot, Dartmouth, 1994), p. 133-148, p. 135-136; R. Dukes, *The Labour Constitution. The Enduring Idea of Labour Law*, Oxford University Press, Oxford, 2014.

[31] R. Münch, *Constructing a European Society by Jurisdiction*, in *European Law Journal*, 14, 2008, p. 519-541 who analyses the role of the ECJ in the making of transnational society.

[32] Part II. 2.2.

[33] D. Kennedy, *Three Globalizations of Law and Legal Thought*.

[34] COM (85) 310 final, 14.6.1985.

tricity, gas, transport, health care and financial services). The *first* set of rules mimic the design of *protective* legislation in line with national social welfare thinking. The *second* set of rules move away from protective regulation to social market regulation, from social distributive justice to European access justice. The European rules on labour, non-discrimination and consumer law are governed by a different philosophy, which cannot be brought into line with the social welfare understanding of justice. These three areas of European regulatory private law form the core of the analysis in the Member States (Part I), the EU (Part II) and in the tripartite private legal order beyond the nation state (Part III).

1.2. The transformation of the nation state and the European experiment

European integration, the building of a genuine European legal order in the words of the ECJ, and what others refer to as the European 'constitutional charter' cannot be compared with the 20th century social welfare state. The European legal order represents a unique constitutional construct, which is neither a nation state in the European sense, nor a federation of states in the American understanding. There is strong support for the uniqueness of the European legal order and for the opportunities it offers in the post nation state era;[35] however, there is equally strong and growing critique. [36] Insisting on the particularities of the European legal order is claimed to be 'unhelpful' and 'dogmatic' when it comes to discussing 'justice'.[37] The political basis of the self-legitimating European integration process seems to be exhausted. Defending the EU is demanding. Much ink has been spilt on the open constitutional design of the EU. In 2017, the EU appears more than ever as an experiment with an open outcome. The common heritage that guided European nation states to overcome the legacy of two world wars did not help to manage the political challenges after the fall of the Berlin wall and the economic challenges of increased globalisation.[38]

There is no doubt that European integration is challenging national social welfare state models and with it the 'Social'. This lies behind the understanding of the EU as a market state and of the EU as the driver of the transformation process.[39] However, the Euro crisis and its impact on the European periphery[40] have made leftist dreams of a 'social Europe' implausible. The European version of the 1970s welfare state could not compensate for the decline of the national social welfare state in the 1980s. Redistribution requires rich states to support poor states. Europe is about to move into the opposite direction by introducing a kind of fair return principle where Member States assume that contributions to the EU budget should result in roughly equivalent returns from the EU.[41] The zero interest policy of the ECB, to the contrary, might regressively redistribute wealth, and not only to the detriment of the citizens in the crisis states.[42] The focus of this book is not on macro level ECB policy, but on the micro level of private law. The 'justice deficit' of the EU when measured against national welfare state standards should not overshadow the social

[35] L. AZOULAI, *The Court of Justice and the Social Market Economy: The Emergence of an Ideal and the Conditions for its Realisation*, in *Common Market Law Review* , 45, 2008, p. 1335-1355; Y. SVETIEV, *The EU's Private Law in the Regulated Sectors*; CH. F. SABEL AND J. ZEITLIN, *Learning from Difference. The New Architecture of Experimentalist Governance in the EU*, in *European Law Journal*, 14, 2008, p. 271-327; CH. F. SABEL, O. GERSTENBERG, *Constitutionalising an Overlapping Consensus: The ECJ and the Emergence of a Coordinate Constitutional Order*, in *European Law Journal*, 16, 2010, pp. 511-550.

[36] The different contributions in D. KOCHENOV, G. DE BÚRCA AND A. WILLIAMS (eds.), *Europe's Justice Deficit?*, Hart Publishing, Oxford, 2015 can be grouped around two camps, those who focus on the downside and those who see potential. Here is a rough overview on the argument: Nagel under reference to Rawls: no background justice beyond the state (p.4), Forst: a just political order is a democratic order (p. 10), Somek: human rights and fundamental rights no substitute Somek (p. 13) Williams: justice and rights are different (p. 33); Menendez: no justice without democratic politics (p.145-146); Menéndez: the EU legal order is taking politics away from democracy (p. 139), Wilkinson: European integration has eroded the Keynesian Westphalian compromise (p. 123), Davies: politicization no panacea (p. 11). At the other end are those who rely on the potential, Gerstenberg and Viehoff/Nicolaïdis: fertile testing ground for hybrid theories of justice (p. 12) Wilkinson: no reason why the EU cannot be treated as offering a form of community or society (p. 117/118).

[37] D. KOCHENOV, *The Ought of Justice*, in D. KOCHENOV, G. DE BÚRCA, A. WILLIAMS (eds.), *Europe's Justice Deficit?*, Hart Publishing, Oxford, 2015, p. 21-33.

[38] C. GLINKI, CH. JOERGES, *European Unity in Diversity?! A conflicts-Law Reconstruction of Controversial Current Developments*, in K. PURNHAGEN, P. ROTT (eds.), *Varieties of European Economic Law and Regulation. Liber Amicorum for Hans Micklitz*, p. 285-314; p. 289 frame the question in terms of the 'exhaustion of the legal integration theory'.

[39] MICKLITZ AND PATTERSON, *From the Nation State to the Market*.

[40] D. KUKOVEC, *Law and the Periphery*, in *European Law Journal*, 21, 2015, p. 406-428.

[41] A. J. MENÉNDEZ, *Whose Justice? Which Europe?*, in D. KOCHENOV, G. DE BÚRCA, A. WILLIAMS (eds.), *Europe's Justice Deficit?*, Hart Publishing, Oxford, 2015, p. 137-152; p. 149 with a deeper analysis of those parts of the society within the Member States who benefit from the return.

[42] P. TRIANA, *Debt That Costs Less Than Nothing: Greece's Unique Opportunity*, 2017, available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2941023.

and societal dimension of the EU and the EU private law order. Against *Rawls* statement that there cannot be justice 'beyond the state'[43], the EU succeeds in doing justice in a supranational legal order, and for a transnational European society. In a complex division of competences, the quasi-statutory character of the EU leaves room for Member States to maintain their level of social justice, according to their available resources and the willingness of Member States' citizens to pay through higher taxes.[44] Access justice is not meant to substitute national patterns of justice.

1.3. The transformation of national social justice and European access justice.

From *Aristotle* to *Rawls*, justice has been regarded as the elemental part of social morals, whose recognition human beings owe each other.[45] Social justice bears a *collective* element, the protection not of individuals alone, but of individuals who form particular groups within society. Social justice is not at the core of classical (philosophical) theories of justice. Social justice emerges in Marxist and socialist theories.[46] Two lines of arguments have to be kept distinct in the discourse: first, the idea of social justice as distributive justice where it remains for the state to redistribute wealth between citizens so as to achieve a fairer balance between the rich and the poor; second as a principal of political action to create a better and more just society. In the words of *A. Sen*[47]: '*a theory of justice that can serve as the basis of practical reason must include ways of judging how to reduce injustice and advance justice rather than aiming only at the characterisation of perfectly just societies*.'

The analysis focuses on the ways in which matters of justice found their way in the protective welfare state and later into the EU, its historical origins, its rise in the three nation states, later its transformation through the EU. In Germany, Christian social ethics, namely catholic social theory, played a crucial role in the transformation of a socialist movement which grew outside the political order into a democratic movement inside the political order.[48] In the UK, a similar story can be told regarding the trade union movement/formation of the Labour party and, in their case, Methodists.[49] Pope *Leo VIII*'s encyclical, Rerum Novarum (New Things; 1891), gave rise to a "new vision" of a state, which had to compensate for the missing social structures (rural families, guilds) of the Industrial Age. It even paved the way for internationally recognising that 'labour is not a commodity', but encompasses a 'societal dimension'. The Social was introduced in the Treaty of Versailles 1919, then reiterated in the Declaration of Philadelphia adopted by the International Labour Organisation in 1944:[50] '*All human beings irrespective of race, creed or sex, have the right to pursue both their material well-being and their spiritual development in conditions of freedom, dignity, of economic security and equal opportunity*.' The distributive dimension of the social justice paradigm – something that will have to be demonstrated – opened the door for economic consideration. Today social distributive justice is under pressure through economic efficiency.[51]

It is clear that social changes led to the rise of labour law in the late 19th century, later consumer law[52] in the 20th century, at least in industrialised

[43] J. Rawls, *The Law of Peoples*, Harvard University Press, Cambridge Mass.,1999.

[44] S. Steinmo, *The Evolution of Modern States. Sweden, Japan, and the United States*, Cambridge University Press, New York, 2010.

[45] O. Höffe, *Gerechtigkeit. Eine philosophische Einführung*, C.H. Beck, München, 2001 and O. Höffe, *Soziale Gerechtigkeit. Über die Bedingungen realer Freiheit*, short version, in *Neue Zürcher Zeitung*, 67, 2005.

[46] K. Marx, *On the Jewish Question*, in J. O'Malley, R. A. Davies (eds.), *Marx. Early Political Writings*, Cambridge University Press, Cambridge, 1994, p. 28-56; E. Paschukanis, *Allgemeine Rechtslehre und Marxismus,* 3rd ed., Verlag Neue Kritik, Frankfurt a.M., 1970, p. 33 one of the leading Marxist legal theorist developed the idea from the withering of the law in a socialist society (Absterben des Rechts). Already Lenin underlined the role of law as a means to realise Marxism-Leninism, E. Bloch, *Naturrecht und menschliche Würde*, Suhrkamp, Frankfurt a.M., 1961, p. 252.

[47] A. Sen, *The idea of justice*, Harvard University Press, Cambridge Mass., 2009 as quoted by S. Douglas-Scott, *Justice, Injustice and the Rule of Law in the EU*, in D. Kochenov, G. de Búrca and A. Williams (eds.), *Europe's Justice Deficit?*, Hart Publishing, Oxford, 2015, p. 51-66, at p. 63.

[48] F. Wieacker, *A History of Private Law in Europe*, translated by T. Weir, Clarendon Press, Oxford, 1995, p. 470; F. Wieacker, *Privatrechtsgeschichte der Neuzeit unter besonderer Berücksichtigung der deutschen Entwicklung,* 2nd rev. ed., Vandenhoeck & Ruprecht, Göttingen, 1967, p. 600.

[49] 'The English Labour Movement was not in itself explicitly religious but it was nevertheless permeated by religion both in its origin and in its subsequent development. Its roots lay in three areas in particular: the French revolutionary spirit of 'liberty, fraternity and equality', early Owenite socialism and John Wesley's Methodist religion of the poor', N. Scotland, *Methodism and the English Labour Movement 1800-1906*, in *Anvil*, 14, 1997, p. 36-48, available for free via google.

[50] B. Hepple and B. Veneziani, *Introduction*, p. 5; Th. Ramm, *Epilogue: The New Ordering of Labour Law 1918-45*, in B. Hepple (ed.), *The Making of Labour Law in Europe. A comparative study of nine countries up to 1945*, Mansell, London-New York, 1986, p. 277-300, at p. 298 claiming that the ILO declaration was inspired through Roosevelt's essential freedoms.

[51] Under Part I. 2.4.

[52] The early origins of consumer protection have long been neglected, but now K. Soper and F. Trentmann (eds.), *Citizen-*

western democracies. The process of societal differentiation (Ausdifferenzierung der Gesellschaft)[53] has yielded different fields of law – notwithstanding their common origin – private law relations, have ended up in segmentation. Labour law – and land law (tenancy law) – became a matter for specialists which are only loosely tied to the bigger world of private law. 'Yielding' is certainly a debatable circumscription of what in societal reality was the result of a century long fight and fierce conflict.[54] The highly conflictual dimension behind justice in labour law is highlighted in *Jhering's* famous book 'Kampf ums Recht' (The Struggle for Law) which alludes to *Darwin's* 'Struggle for Life'.[55]

Historically, there is a strong connection between labour law and non-discrimination law, both with regard to gender and to race. Women were not only excluded from the political process until the early 20th century, they were also barred from participating in the labour market. Where they were granted access to the labour market, they suffered from many forms of discrimination. In that sense, equal treatment of men and women bears a strong moral connotation. The position of women within the family – the famous three Ks, Kinder, Küche und Kirche (children, kitchen and church)[56] remained untouched for a long time despite their integration into the labour market. The second strand of development comes from race discrimination.[57] The former colonial countries were supposed to integrate citizens of the colonies into their national labour market. It took international institutions and later the European Union to turn non-discrimination into a genuine European legal principle,[58] covering all forms of discrimination and reaching far beyond the labour market deeply into society. Today non-discrimination law is about to separate from labour law and become a self-standing discipline.[59] This is the new political and juridical battlefield that divides national societies, legal systems and courts.

What remains is consumer law. Consumer law is certainly not the result of a 'fight' between two conflicting parties, perhaps with the exception of France.[60] Even in the hey-day of national consumer policy in the 1960s and 1970s such a material language would not correctly capture the character of the conflict which was much more located in the political fora than in civil society. Health and safety issues (the thalidomide catastrophe and later Bhopal)[61] and the eviction of over-indebted house owners were rare occasions that raised political and societal awareness.[62] In consumer law the linkages to traditional private law are still close, although consumer law drives the ongoing materialisation of private law.[63] This finding holds true whether consumer law forms an integral part of civil codes or whether it is separated from the civil code and compiled in a separate body of law. The deeper reason for the separation of labour and consumer law might be their greater permeability to social concerns. Societally the conflicts to be solved quite often cut across the two fields of law.[64]

The EU's takeover of the 'Social' results from a political decision by the Member States to enshrine social elements in the Single European Act. It accelerated the transformation of the Social, and the EU, which manifested itself in the changing face of social law and of the conception of justice that lies

ship and consumption, Palgrave Macmillan, Basingstoke England - New York, 2008; H.-G. Haupt and C. Torp (eds.), *Die Konsumgesellschaft in Deutschland 1890-1990. Ein Handbuch*, Campus Verlag, Frankfurt - New York, 2009.

[53] N. Luhmann, *Soziale Systeme. Grundriss einer allgemeinen Theorie*, Suhrkamp, Frankfurt a.M., 1984.

[54] The description of the strikes in the British Mining Industry 1921/1926, Ramm, 'Epilogue', pp. 277; B. Hepple and B. Veneziani, *Introduction*, p. 1-3, 25-26.

[55] F. Wieacker, *A Histoty of Private Law*, p. 447.

[56] S. Paletschek, *Kinder, Küche, Kirche*, in É. François, H. Schulze (eds.), *Deutsche Erinnerungsorte*, Vol. 2, C.H. Beck, München, 2001), p. 419-433; R. Bridenthal, *Beyond Kinder, Küche, Kirche. Weimar Women at Work*, *Central European History*, 6, 1973, p. 148-166.

[57] B. Hepple, *Equality at Work*, in B. Hepple, B. Veneziani (eds.), *The Transformation of Labour Law in Europe. A Comparative Study of 15 Countries 1945-2004*, Hart Publishing, Oxford, 2009, p. 129-164, at p. 133-134.

[58] The literature is abundant, with regard to private law, N. Reich, *General Principles of EU Civil Law*, Intersentia, Cambridge, 2014, Chapter 3, p. 59-88.

[59] D. Schiek, *Zwischenruf: Den Pudding an die Wand nageln? Überlegungen zu einer progressiven Agenda für das EU-Anti-Diskriminierungsrecht*, *Kritische Justiz*, 47, 2014, p. 396-402; D. Schiek, L. Waddington and M. Bell (eds.), *Cases, Materials and Text on National, Supranational and International Non-Discrimination Law*, Hart Publishing, Oxford, 2007); M. Bell, *Anti-Discrimination Law and the European Union*; Oxford University Press, Oxford - New York, 2002.

[60] It is a pity that Trentmann's fascinating history of consumption (*Empire of Things*) does not engage with countries where the rise of consumer law bears a very strong political dimension, such as Spain or Brazil.

[61] E.g. the thalidomide catastrophe, P. Derleder, G. Winter, *Die Entschädigung für Contergan* (1976) *Demokratie und Recht*, 1976, 260-304.

[62] H.-W. Micklitz, I. Domurath (eds.), *Consumer Debt and Social Exclusion in Europe*, Ashgate, Farnham - Burlington, 2015.

[63] C.-W. Canaris, *Wandlungen des Schuldvertragsrechts - Tendenzen zu seiner "Materialisierung"*, in *Archiv für die civilistische Praxis*, 200, 2000, p. 273-364, at least as long 'materialisation' is equated with contractual justice as it is done here, pp. 282-276-292, where he distinguishes between three forms of materialization (materialisation of private autonomy, materialisation of contractual justice and of the politics behind materialization) and p. 320-364, where he analyses consumer law.

[64] H. Collins, *Regulating Contracts*, Oxford University Press, Oxford - New York, 1999, p. 70-74 discussing *Liverpool v Irwin* [1977] A.C. 239.

behind it. In the place of social distributive, a genuinely European concept of access justice is emerging. European access justice responds to the transformation of the state through globalisation, the decline of the social and changes in society. Social justice presupposes the existence of a 'well-ordered society' (*Rawls*) whose citizens are able and willing to take the necessary redistributive steps. Access justice transcends nation state thinking and takes matters of justice beyond the nation state. Access justice involves not only the multi-level dimension in the EU, the shared competences between the EU and the Member States, access justice provides the deeper foundations as to why private actors have to accept political and social responsibilities. Access justice gains a thicker relational dimension in that not only the state but also companies and private individuals bear a legal responsibility towards and beyond the contracting parties. This is not to claim that the European legal order has already recognised the deep going change in the private legal order. Such a consequence is in the offing ever since *Viking* and *Laval*[65] and the 'reverse' rationalisation logic which follows from the *Cassis de Dijon* doctrine.[66] The result is a shared responsibility for access, shared between the political branches of the EU and Member States, as well as private parties.

Invoking access to the Internal Market and barring access to European society cannot be dismissed as an instance of instrumentalization for the market alone. It is, rather, a genuine and emerging concept of post national justice that enshrines a substantive and an institutional procedural dimension, it guarantees materialised access and it involves trade unions and civil society organisations.

The substantive dimension is most outspoken in the non-discrimination principle. The latter mutated from gender discrimination to a kind of catch-all rule for discrimination through nationality, sexual orientation, race/ethnicity, age, disability, religion, migrating ever more broadly and deeply from the economic into the societal environment. Whilst this strand of development focuses on social discrimination through unequal treatment, there is a second strand of development that emphasises the consequences of economic discrimination through price discrimination and/or through unaffordable prices in universal services.[67] Another way to capture the overall importance of the non-discrimination principle is to stress the move from social to financial inclusion. One might go as far as to argue that the non-discrimination principle in its two strands constitutes the European contribution to a distinct moral system in private law and maybe even in European society. European access justice guarantees the people of Europe the right to discrimination-free access to the market, as a worker and as a consumer, but also access to society where participation depends on access to basic services.

Access justice reaches beyond individually enforceable rights. Access justice invokes an institutional procedural dimension. Historically trade unions claimed the right to negotiate and to monitor the relationship between workers and employers. It will have to be shown that in line with the rise of the welfare state thinking, nation states were getting ever more deeply involved in the shaping of industrial relations. Art. 118 b) SEA (now Art. 155 TFEU) introduced 'Social Dialogue' as a means to promote collective labour agreements at the EU level. The expectations set into the mechanism never realised, though.[68] In light of *Viking* and *Laval*, justice through collective agreements has turned into a particularly sensitive political issue, where the EU is all too often seen as the mere cause of social decline. A fairer account seems to be that the EU and the ECJ are accelerating a process that has its origin in the transformation of the economy and the society. Collective agreements outside the labour market never reached a similar level of legal and political awareness at EU level, although the transformation of labour and consumer law to the law of the labour and consumer market *society* leaves ample space for the participation of non-governmental organisations in the making and enforcement of collective agreements. With regard to labour law, *Hugh Collins* has characterised what is at stake. His findings can be read in conjunction with consumer law:[69]

'Workers and employers (*consumers and suppliers HM*) are not merely private actors in the labour market (*the consumer market HM*), but also participants in the process of governance that reconcile the needs of social cohesion and a broad notion on citizenship with the pressing requirements constantly to improve the competitiveness of the relations of production (*consumption HM*)'.

[65] L. AZOULAI, *The Court of Justice and the Social Market Economy*.

[66] Case 120/78, *Rewe-Zentral AG v Bundesmonopolverwaltung für Branntwein* [1979] ECR I-649, Part II. 4.1.

[67] However, the different classes of consumers allow for 'discrimination', Part III. 2.1.; 3.1.; 4.1.

[68] As to possible parallels with Weimar-era corporatism and its blatant failure, Ch. Thornhill, 'The Constitutionalization of Labour Law and the Crisis of National Democracy', in P. F. KJAER, N. OLSEN (eds.), *Critical Theories of Crisis in Europe. From Weimar to the Euro*, Rowman & Littlefield, London, 2016, p. 89-105.

[69] H. COLLINS, *Employment Law*, 2nd ed., Oxford University Press, Oxford, 2010, p. 259.

Emphasis should be placed on the move from private actors in the market to participants in transnational European society, from mere economic to political actors, from workers, consumers in private bilateral relations, to worker citizens and consumer citizens in a political order that surpasses the national i.e. nation state boundaries. Access justice through collective agreements breaks down the individualisation and enables a collective justice management through the involvement of societal organisations and associations in the making and the monitoring of contractual relations far beyond individual discrimination and individual exclusion. The potential will have to be demonstrated throughout the analysis of the tripartite legal order beyond the nation state.[70]

2. The theoretical localization of access justice.

What remains to be done is to locate access justice within the justice discourse. European private law, this is my argument, escapes the economic, social and political polarisation between *social distributive justice* and *allocative (libertarian) justice*. This results from the particularities of the European experiment. The EU remains a quasi-statutory entity that regulates the economy and society beyond the nation state. It is here where *access justice* crystallizes. But what then is access justice, positively speaking, where can it be located?[71] Is access justice *more* than *allocative libertarian justice* but *less* than *social distributive justice,* standing in the middle between the two or must it be regarded as a new category of justice?[72] I will first delineate access justice from social justice and allocative libertarian justice, before I engage the critique that access justice is no more than market justice and that it challenges more far reaching normative standards of justice. The localisation exercise requires clarification of Treaty competences and societal responsibilities of the Member States and the EU. European access justice, this is my claim, is normative and descriptive. It reaches beyond the market. It does not replace national patterns of justice but stands side-by-side national patterns of social justice, legally and societally.

2.1. Social distributive, allocative libertarian and access justice

The theoretical localization is developed in three steps: first, access justice is distinguished from social redistributive justice; secondly, it is distinguished from allocative libertarian justice before, thirdly, the concept of access justice is positively elaborated.

First, access justice differs from national protective concepts in that it does not primarily aim at social protection in a redistributive perspective. The addressees of EU labour law and first generation consumer law are not the 'poor who pay more' – to allude to *Caplovitz*'s[73] famous study. These are the dynamic, open-minded, flexible, well-informed, self-standing and self-conscious mobile workers, who travel around Europe and would accept a job anywhere. It is the consumer who seeks the best value on the market of consumer goods and services to reap the benefits of the internal market.[74] The normative leitbild, which dominates EU labour and consumer law making, requires this omnipresent market citizen necessary for the completion of the Internal Market and for aligning the EU with the Lisbon 2000 agenda,[75] that is, to make Europe 'the most competitive economy' in the world. This category of worker and consumer is much coveted by employers and suppliers. The problem then is not so much access per se, but access to the market under 'fair conditions'. This is exactly what EU secondary law adopted in the heyday of the 'Social' focused on: private law as a tool to institute *fair access* to the market, through compensating for information asymmetries, through clearing the market from unfair conditions, terms and procedures that block access. Fairness is not so much a form of substantive; but of procedural justice.

[70] Part III. 2.5; 3.5.; 4.5.

[71] S. Robin-Olivier, in *Revue Trimestrielle de Droit European*, 48(4), 2012, on file with the author and N. Reich, in *Common Market Law Review* , 50, 2013, p. 1523-1525 in their review of H.-W. Micklitz (ed.), *The Many Concepts of Social Justice in European Private Law*, Edward Elgar, Cheltenham, 2011.

[72] H. Dagan, *Between Regulatory and Autonomy-Based Private Law*, in *European Law Journal*, 22, 2016, p. 644-658 and M. W. Hesselink, *Private Law, Regulation and Justice*, in *European Law Journal*, 22, 2016, p. 681-695; L. Niglia, *Law or Economics – Some Thoughts on Transnational Private Law*, in K. Purnhagen/P. Rott (eds.), *Varieties of European Economic Law and Regulation. Liber Amicorum for Hans Micklitz*, pp. 93-104; H. Dagan and M. Heller, *The Choice Theory of Contracts*, Cambridge University Press, Cambridge - New York, 2017).

[73] D. Caplovitz, *The Poor Pay More. Consumer practices of low income families* (New York: The Free Press, 1967); I. Ayres, *Fair driving: Gender and Race Discrimination in Retail Car Negotiations*, in *Harvard Law Review* , 104, 1991, p. 817-872.

[74] Commission of the European Communities, Proposal for a directive of the European Parliament and of the Council on consumer rights, COM (2008) 614 final, 8.10.2008, p. 2.

[75] The Lisbon Strategy of 2000 (Lisbon European Council 23-24 March 2000, Presidency conclusions), available at: http://www.europarl.europa.eu/summits/lis1_en.htm.

Whilst the EU has to some extent absorbed and transformed the protective outlook of early national welfare state legislations, the EU non-discrimination directives and the EU directives and regulations on regulated markets have set a new tone in the debate. The regulation of vulnerability – resulting from social discrimination (subject/group related) and economic discrimination (object related) - gained ground. Access read in conjunction with vulnerability sets different priorities. The addressees are not those customers business is looking after. The vulnerable usually have no access to the market. No access means exclusion from the labour market and exclusion from the consumer market. By emphasising access justice, a new horizon opens. There is no choice between access to unfair conditions or no access; the vulnerable consumer is socially and financially excluded. As early as 1995 in *Magill*, the ECJ used Art. 86 EC (today Art. 102 TFEU) to open up the market for new competitors against incumbents, who were defending their monopoly by reference to intellectual property rights.[76] Far beyond the specific context of the case, there is a much broader animating idea. Directives and regulations on regulated markets are not only instrumentalized to grant access to new competitors, but to ensure access to those who are at risk of exclusion from 'essential facilities'. These workers and consumers are constitutive not only for participation in the market, but also for participating in civil society.[77]

The rise of the social exclusion/inclusion rhetoric coincides with the refusal of the Member States to grant the EU comprehensive competences in labour and social policies. The so-called Open Method of Coordination was developed in the 1990s as an integral part of the employment policy. Since 2003 OMC is anchored in the Treaty, now Art 153 TFEU. It empowers the European Commission in non-harmonised areas of EU labour law, to foster social inclusion of those workers who are not able to keep up with the pace of the changing labour market. The OMC is regarded as the epitome of the 'new modes of governance' favoured by the European Commission since the adoption of the White Paper on European Governance in 2001.[78] Governance crosses the borders between public and private, between administrative action and contract, between law making and rule enforcement within or outside the competence boundaries.[79] 'New modes of governance' in different shades and forms have reached or are about to reach non-discrimination, consumer policy and universal services. The Fundamental Rights Agency manages social discrimination via the Charter; the European Commission uses new modes of governance outside its Treaty competences to enforce unfair commercial practices law. Hand in hand with the economic and the Euro crisis, 'financial inclusion' turned into policy objective. Again new modes of governance are regarded as an appropriate tool of implementation. The OMC in particular seems appropriate so as to monitor and manage the Member States' differences in implementing universal services obligations.[80] The OMC could, in theory, approximate the different policies of Member States and define best practices for the protection of the vulnerable. In order to avoid economization of vulnerability as a form of market rationality, the vulnerable should have certain entitlements. The 'language' of vulnerability is social. Extending the language is a political question.[81]

Secondly, the EU concept of justice differs from *allocative libertarian concepts of justice*, as EU labour, non-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. While the ECJ has read such a principle into the four market freedoms,[82] it has also broadened

[76] Joined cases C-241/91 P and C-242/91 P, *RTE and ITP v. Commission* [1995] ECR I-743.
[77] This will be developed in Part III. 4.
[78] COM (2001) 428 final, 25.7.2001.
[79] For a clarification on governance Introduction 3.2.

[80] There is a world of discussion on services of general economic interests, services of general interest and services of non-economic interests. W. SAUTER, *Public Services in EU Law*, Cambridge University Press, Cambridge, 2015 and with regard to consumer law, A. JOHNSTON, *Seeking the EU 'Consumer' in Services of General Economic Interest*, in D. LECZYKIEWICZ AND S. WEATHERILL (eds.), *The Images of the Consumer in EU Law. Legislation, Free Movement and Competition Law*, Hart Publishing, Oxford, 2016, pp. 93-138.
[81] For a critical assessment M. BARTL, *The Affordability of Energy. How much protection the vulnerable consumer?*, in *Journal of Consumer Policy*, 33, 2010, p. 225-245; for a nuanced account the contributions in U. NEERGAARD, E. SZYSZCZAK, J. W. VAN DE GRONDEN AND M. KRAJEWSKI (eds.), *Social Services of General Interest in the EU*, T.M.C. Asser Press, The Hague, 2013, particular the joint conclusions written by the editors, pp. 595, also E. SZYSZCZAK, J. DAVIES, M. ANDENAS AND T. BEKKEDAL (eds.), *Developments in Services of General Interest*, T.M.C. Asser Press, The Hague, 2011).
[82] CH. MÜLLER-GRAFF, *Privatrecht und Europäisches Gemeinschaftsrecht. Gemeinschaftsprivatrecht*, Nomos, Baden-Baden, 1989; G. RÜHL, *Extending Ingmar to Jurisdiction and Arbitration Clauses: The End of Party Autonomy in Contracts with Commercial Agents?*, in *European Review of Private Law*, 15, 2007, p. 891-903; G. RÜHL, *Party Autonomy in the Private International Law of Contracts: Transatlantic Convergence and Economic Efficiency*, in E. GOTTSCHALK, R. MICHAELS, G.

the concept so as to integrate third party interests.[83] The concept of regulatory law forms the legal paradigm of EU law making via the Treaty and via secondary law. Broadening the freedom of contract and setting boundaries to the enlarged freedoms goes hand in hand. Private autonomy is *regulated autonomy*. The EU is transforming private law rules 'from autonomy to functionalism in competition and regulation'. Private autonomy turns into '*regulated autonomy*'.[84]

EU regulatory private law uses mandatory contract law rules as a device to achieve particular policy purposes which might be sector related or as it is the case in labour, non-discrimination and consumer law, subject and sector related. The mandatory EU rules on labour, non-discrimination and consumer law are guided by 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 to participate in the Internal Market. EU regulatory law starts from the premise that the European legal order, based on the four market freedoms and competition law does not produce these results by itself. Additional tools are needed to guarantee *access* to the market, whether for the well-informed or for the vulnerable consumer. This is exactly what the Lisbon Council, and the various documents of the European Commission mean, when they constantly reiterate the formula of '*reaping the benefits of the internal market'*. Everybody must be on board to get the system going, even the vulnerable so that the EU is legitimated. Whilst this catches the spirit of the Agenda, it should not be overlooked that the Lisbon Declaration directs attention to the 'underdogs' or the 'losers' of globalization.

Thirdly, provided the EU model of justice cannot be equated with social justice or with a libertarian concept of justice. What does access justice mean positively speaking? In German the concept would be *Zugangsgerechtigkeit* which literally means *access justice*. The term is used in a document of the German Catholic Church which was prepared at the beginning of the new millennium by eminent German academics as a response to the plea to reform the German welfare state.[85] Access justice contains three elements; *first*, that the barriers which limit participation and access must be broken down; *secondly*, it aims to strengthen the position of consumer and workers to enforce their rights in a multi-governance legal order and, *thirdly*, to develop an institutional design that is necessary to cope with the move from protection laws to the laws on the labour and consumer market society. With regard to the *first* category, access justice requires that all market participants, including consumers, must have a fair and realistic chance to enter the market, avail themselves of its products and services, as well as to partake in 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. But against whom? Member States, the EU or even the parties directly? The ECJ strongly advocates for judicial protection as now enshrined in Art. 47 of the Charter of Fundamental Rights. Mediation and dispute settlement outside courts is gaining ground. *Last but not least* an institutional design is needed that involves trade unions, consumer associations and more broadly civil society in the making of the rules that underpin modern private law relations and their enforcement. This is the private law of networks where the 2nd generation of consumer law may benefit from the experience of the labour movement in collective bargaining. Access justice then reaches beyond the market and gains a particular societal relational dimension. It connects the people, the workers, the consumers, the employers and the suppliers in a society beyond the nation state. Private law relations here gain a

RÜHL AND J. VON HEIN (eds.), *Conflict of Laws in a Globalized World*, Cambridge University Press, Cambridge, 2007, p. 153-183.

[83] F. CAFAGGI, H. MUIR-WATT (eds.), *Making European Private Law. Governance Design* (Cheltenham: Edward Elgar, 2008); H.-W. MICKLITZ AND C. SIEBURGH (eds.), *Primary EU law and Private Law Concepts*, Intersentia, Cambridge - Antwerp, 2017.

[84] Special section 'European Regulatory Private Law' in the *European Law Journal* with contributions from G. Comparato, H. Dagan, M. W. Hesselink, Y. Svetiev and H.-W. Micklitz, 22(5) (2016), p. 621-695; G. COMPARATO AND H.-W. MICKLITZ, *Regulated Autonomy between Market Freedoms and Fundamental Rights in the Case Law of the CJEU*, in U. BERNITZ, X. GROUSSOT AND F. SCHULYOK (eds.), *General Principles of EU Law and European Private Law*, Ashgate, Aldershot, 2013, p. 121-154.

[85] Die deutschen Bischöfe, Kommission für gesellschaftliche und soziale Fragen, 'Das Soziale neu denken. Für eine langfristig angelegte Reformpolitik', Nr. 28, 12. Dezember 2003, available at: https://www.dbk.de/fileadmin/redaktion/veroeffentlichungen/kommissionen/Ko_28.pdf, at p. 16: '*Heute erscheint nicht mehr vorrangig die Verteilungsgerechtigkeit als das Hauptproblem. Vielmehr müssen auch Wege eröffnet werden, um die Beteiligungsgerechtigkeit für alle zu stärken*'. (Today distributional justice no longer appears as the main problem. Rather, ways must also be opened to strengthen participation equity for all). One may wonder whether there something 'catholic' about access justice v. 'protestant' in allocative or libertarian justice; Roscoe Pound on the link between the common law (meaning liberal common law), 19th century and Puritanism, *The Spirit of the Common Law*, College of Law, Faculty Publications (Francestown, New Hampshire: Marshall Jones Company, 1921), p. 32.

new outlook, one which is to be associated with a new societal private law order.[86]

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. Access justice *materializes* (*Max Weber*) the *theoretical* chance into a *realistic* opportunity, lays down *procedural* requirements for proper law enforcement and provides for an *institutional* design that allows for participation of civil society. Therefore, access justice should be understood as a thin version of social distributive justice. However, in its participatory form it turns into societal justice.

2.2. Critique: equal opportunity and market justice

When I presented my outline of access justice in 2005 at the French Cour de Cassation in Paris, I saw myself confronted with critique that runs through the last decade as a red thread: (1) is access justice a *descriptive* or a *normative* model; (2) does access justice boil down to *market justice* setting aside the political societal dimension of justice, complying nicely with the rise of the *market state* via the EU with *social inclusion* instead of social justice; (3) does access justice in its insistence on substantive equality *sacrifice individual autonomy* to the promotion of public goods? (4) from where does the EU obtain its *legitimacy* to initiate such a far-reaching transformation?

Access justice is *descriptive* and *normative*. The factual background to access justice is taken from life-long empirical research investigating how and why the EU took over major fields of social regulation. Whilst labour law, consumer law and to some extent non-discrimination law, has been extensively debated mostly in a normative perspective, the descriptive side has attracted less attention. *N. Jansen* identifies the strength of European regulatory private law in its explanatory power.[87] What Europe 'achieved' is to reinvigorate the deep relationship between the economic and the social in a market society. *The 'Social' cannot be disconnected from the market*. Political and theoretical claims for the institutional independence of the Social and of social private law from economics and economic law that dominated the legal discourse in the second half of the 20th century did not provide enough intellectual attention to 'who pays' for the social achievements and who provides the state with the necessary resources.[88]

Justice in whichever form necessarily implies a *normative* dimension. The policy objectives enshrined in labour law, non-discrimination law and consumer law cannot be pursued without having at least implicitly a vision of the degree and type of justice that could and should be achieved. By taking over social regulation, the EU accepts a moral and a legal responsibility to ensure justice in the internal market.[89] The EU market state is criticized for reducing justice to market justice, to the realization of equal opportunities. It will have to be shown throughout the analysis of the European social law that access justice not only materializes 'equal opportunity' but that access justice reaches beyond the market into society. The EU market state paradigm is complemented by the claim for social inclusion.[90] It enshrines the moral responsibility of all relevant actors, the European Union, Member States, businesses and their economic counterparts, EU citizens. The rationality test rooted in *Cassis de Dijon* is to be interpreted as tool to submit not only Member States social regulation but also EU social regulation and even the activities of private parties to a rationality test.[91]

In a private law context, the potential impact of this responsibility is not limited to the EU and the Member States as regulators, but affects the autonomy and responsibility of private parties. Individual autonomy of the private parties is societally embedded. This does not mean that the collective purpose behind social regulation automatically prevails over individual autonomy. Seen through the eyes of the

[86] This societal private law is developed in Part III. 4.

[87] Paper presented at the European University Press post ERC-ERPL conference 'Forms of Interaction between European and National Private Law', organized by G. Comparato, H.-W. Micklitz and Y. Svetiev, 2-3 March 2017, paper on file with the author.

[88] Contributions in A. Bogg, C. Costello, A. C. L. Davies, and J. Prassl (eds.), *The Autonomy of Labour Law*, Hart Publishing, Oxford, 2015; more particularly M. Freedland, *Otto Kahn-Freund, the Contract of Employment and the Autonomy of Labour Law*, in that book on p. 29-44, at p. 43, where he concludes that Kahn-Freund 'always preferred to suggest positive paths for the doctrinal development of labour law from within the general law than to demand a declaration of independence from it.' Much more in the other direction M. Bell, *The Principle of Equal Treatment: Widening and Deepening*, in G. de Búrca and P. Craig (eds.), *The Evolution of EU law*, 2nd ed., Oxford University Press, Oxford, 2011, p. 611-639, M. W. Hesselink, *Unjust Conduct in the Internal Market: On the Role of European Private Law in the Division of Moral Responsibility between the EU, its Member States and their Citizens*, in *Yearbook of European Law*, 35, 2016, p. 410-452.

[89] M. Hesselink, *Unjust Conduct in the Internal Market*.

[90] EU financial regulation offers strange indications of how training and education should steer the correct behaviour, when non-compliance with voluntary training programmes for financial inclusion are indirectly sanctioned, Comparato, *The Financialisation of the Citizen*.

[91] Part II. 4.1.

individual, social inclusion is an option not an obligation. The individual must have the choice to opt out and to decide that being excluded is better than being commandeered to pursue an over-individualised public purpose. The increased space for autonomy beyond the state implies increased responsibilities of private parties, workers/consumers and companies. Not only is business about to become the direct addressee of social rights if not of the holders of the public good, also workers, consumers and civil society associations might have to bear a greater responsibility for the public good. The subsequent tension between the autonomy based foundation of access justice and the collective dimension of access justice is obvious[92] and will be discussed in the procedural and institutional design of European access justice.[93]

It is not the purpose of this book to deepen the relationship between the regulatory power of the EU and its legitimacy. The increasing powers of the EU through various Treaty amendments in the 1980s and 1990 triggered a debate on whether alternative models of legitimacy can compensate the apparent democratic deficit. *Fritz W. Scharpf*[94] draws the catchy distinction between input and output legitimacy, *N. Walker*[95] insisted on the need of polity legitimation to increase Europe's constitutional momentum. The EU is criticised for its bureaucratic Eurocrisis management that is claimed to undermine national democracies through undemocratic decision making in the hands of Eurocrats.[96] Justice, this seems to be the consequence, can only be achieved within a national democracy. There is an undeniable deeper link between standards of justice and the legitimacy of the authority which stands behind distributive policies. Not enough attention, however, has been given to the hidden role that Member States are playing in using the EU to modernise, the critics would say to dismantle, the social welfare state, social standards and a vision of a just society. Neither has the increasing responsibility of private parties within the EU legal order attracted the degree of attention it deserves.[97]

2.3. Access justice and social justice in tandem

There are two arguments why European access justice cannot replace national patterns of social justice: the first results from the non-existence of a European polity; the second from the limited competences of the EU. Whilst the first had already been touched upon,[98] the limits of the Order of Competence in regulating justice have to be clarified.[99]

The basic structure of the European Order of Competence remained largely the same since 1957, with two exceptions: Art. 114 TFEU in the SEA and Art. 81 TFEU on international private law issues. The functional market-driven logic enabled the EU to adopt labour law, non-discrimination law and consumer law, mostly through minimum harmonization, but increasingly through maximum standards.[100] In the harmonised field of European regulatory private law, the ECJ tends to broaden the scope and reach of EU law: reading full harmonisation *contra legem* into directives which remain silent on the degree of harmonisation,[101] giving a broad reading to directives which provide for full harmonisation[102] or submitting national legislation that reaches beyond the European minimum to a proportional-

[92] This is the key critique of Dagan, 'Between Regulatory and Autonomy-Based Private Law'.
[93] Part III. 2.5., 3.5., 4.5.
[94] F. W. Scharpf, *Governing in Europe: Effective and Democratic?*, Oxford University Press, Oxford - New York, 1999).
[95] N. Walker, *Europe's constitutional momentum and the search for polity legitimacy*, in *International Journal of Constitutional law*, 3, 2005, p. 211-238.
[96] D. Chalmers, M. Jachtenfuchs, Ch. Joerges (eds.), *The End of the Eurocrats' Dream. Adjusting to European Diversity*, Cambridge University Press, Cambridge, 2016, in particular the introductory chapter 'The Retransformation of Europe', written the editors, 1-28.
[97] Contrary to the strong focus on the responsibilities of in particular multinationals in transnational private law, special issue *Les Grandes Théories du Droit Transnational*, with contributions of K. Tuori, B. Kingsbury/N. Krisch/R. B. Stewart, H. Muir-Watt, Ch. Joerges/F. Rödl, F. Cafaggi, R. Zimmermann, G.-P. Calliess/M. Renner, A. Fischer-Lescano/G. Teubner, P. Schiff Berman, in *Revue Internationale de Droit Economique*, 2013, p. 1-256.
[98] D. Chalmers, S. Trotter, *Fundamental rights and legal wrongs: The two sides of the same EU coin*, in *European Law Journal*, 22, 2016, p. 9-39; D. Chalmers, L. Barroso, *What Van Gend en Loos stands for*, in *International Journal of Constitutional Law*, 12, 2014, p. 105-134.
[99] Updated version of my contribution, *The EU as a Federal Order of Competences and the Private Law*, in L. Azoulai (ed.), *The Question of Competence in the European Union*, Oxford University Press, Oxford, 2014, p. 125-152; on the need for clarification J. Smits, *Who Does What? On The Distribution of Competences Among the European Union and the Member States*, in K. Purnhagen, P. Rott (eds.), *Varieties of European Economic Law and Regulation. Liber Amicorum for Hans Micklitz*, p. 343-357.
[100] For an early analysis on the consequences, E. Steindorff, *EG-Vertrag und Privatrecht*, Nomos, Baden-Baden, 1996).
[101] Case C-183/00, *González Sánchez* [2002] ECR I-3901, Part II. 4.2.
[102] J. Stuyck, *The Court of Justice and the Unfair Commercial Practices Directive*, in *Common Market Law Review*, 52, 2015, 721-752. On the differences between the product liability directive and the Directive on Unfair Commercial Practices, V. Mak, *Full Harmonization in European Private Law: A Two-Track Concept*, in *European Review of Private Law*, 20, 2012, p. 213-235.

ity test.[103] The much-debated *Tobacco* judgment[104] and its aftermath seems to have slowed but not halted the expansion of the EU legislator's competence in key areas of traditional private law.[105] In its judgment on the annulment of Regulation (EC) No 1435/2003 (European Cooperative Society (SCE)),[106] the ECJ held that Art. 352 TFEU is the correct legal basis which requires unanimity.[107] That is why one might argue that if any, a European Civil Code or European Sales Law could only be adopted provided Member States unanimously agree on the harmonization of civil law and on the level of justice 'social' or 'access' justice. Art. 169 TFEU on the other hand, allows for the adoption of a European Regulation on consumer law but only in the form of minimum standards.[108]

The Lisbon Treaty is said to have changed the functional logic of market-driven EU private law. Art. 3 (1) TEU is making the values laid down in Art. 2 TEU (inter alia Justice) one of the three aims of the EU (the other two being the peace and well-being of people). Art. 3 (3) TEU establishes '*a highly competitive social market economy*'. The vague reference to 'justice' can hardly pave the way for a fully harmonised private law.[109] This is all the more evident because, as the ECJ confirmed in *Glaxo Smith*[110] that the Lisbon Treaty did not change the character of the EU market economy. Many advocates of the 'Social' understand fundamental and human rights as a tool for a better society and for a more social private law, against which private law rules are to be measured.[111] However, it seems excessive to understand the Charter as a value system that legitimates the full harmonisation of standards of justice in private law matters.

The strongest argument for shared responsibilities that leaves room for European access justice and national social justice can be taken from the subsidiarity principle (Art 5 (1) TEU). The first time the subsidiarity principle played a crucial rule in private law-making, occurred in the discussion on the legal basis for CESL (not on the values enshrined in the CESL), where four Member States, Austria, Belgium, Germany and the UK,[112] raised the newly-introduced subsidiarity claim, but did not achieve the quorum set out in Art. 7 of Protocol 2. Art 4 (2), which requires respect for the national identities and for essential state functions. The ECJ has referred to Art. 4 (2) on three occasions. In *Sayn-Wittgenstein*,[113] the ECJ accepted that the republican form of government may form part of the national identities of Member States. In *Runevič-Vardyn* and *Anton Las*, the Court held that the protection of official language(s) is a facet of national identity.[114] The GCC regards social security as part of German identity.[115] The reference to 'essential

[103] Case C-205/07, *Gysbrechts and Santurel Inter* [2008] ECR I-9947.

[104] Case C-376/98, *Germany v. Parliament and Council* [2000] ECR I-8419

[105] K. GUTMAN, *The Commission's 2010 Green Paper on European Contract Law: Reflections on Union Competence in Light of the Proposed Options*, in *European Review of Contract Law*, 7, 2011, p. 151-172, at 155; ST. WEATHERILL, *The Consumer Rights Directive: How and why a quest for 'coherence' has (largely) failed*, in *Common Market Law Review* , 49, 2012, p. 1279-1317, at 1317, under 6; now more fully from the same author, ST. WEATHERILL, *Contract Law of the Internal Market*, Intersentia, Cambridge, 2016). The bottom line of a rather lenient approach of the ECJ is Case C-58/08, *Vodafone and Others* [2010] ECR I-4999.

[106] Council Regulation (EC) No 1435/2003 of 22 July 2003 on the Statute for a European Cooperative Society (SCE), OJ No. L 207, 18.8.2003, pp. 1.

[107] C-436/03, *Parliament v. Council* [2006] ECR I-3733.

[108] N. REICH, *A European Contract Law, or an EU Contract Law Regulation for Consumers?*, in *Journal of Consumer Policy*, 28, 2005, p. 383-407.

[109] On the misleading parallel between (German) social market economy (sozialer Marktwirtschaft) and the Treaty revision, CH. JOERGES, *A Renaissance of the European Economic Constitution*, in U. NEERGAARD, R. NIELSEN, L. M. ROSEBERRY (eds.), *Integrating Welfare Functions into EU Law. From Rome to Lisbon*, Djøf Publishing, Copenhagen, 2009, p. 42-52.

[110] Case C-501/06 P, *GlaxoSmithKline Services and Others v Commission and Others* [2009] ECR I-9291, para. 63; J. DREXL, *La Constitution économique européenne - L'actualité du modèle ordolibéral*, in *Revue internationale de droit économique*, 2011, p. 419-454.

[111] In favour D. CARUSO, *Fairness at a Time of Perplexity: The Civil Law Principle of Fairness in the Court of Justice of the European Union*, in S. VOGENAUER, ST. WEATHERILL (eds.), *General Principles of Law. European and Comparative Perspectives*, Hart Publishing, Oxford, 2017, p. 329-354; critical Lord Hoffmann, *The Universality of Human Rights*, Judicial Studies Board Annual Lecture, 19 March 2009, available at: https://www.judiciary.gov.uk/announcements/speech-by-lord-hoffmann-the-universality-of-human-rights/; nuanced with regard to the position of the ECJ, ST. WEATHERILL, *The Empowerment is not the only fruit*, in D. LECZYKIEWICZ, ST. WEATHERILL (eds.), *The Images of the Consumer in EU Law. Legislation, Free Movement and Competition Law*, Hart Publishing, Oxford, 2016, p. 203-222; H. COLLINS, *The constitutionalization of European private law as a path to social justice*, in H.-W. MICKLITZ (ed.), *The Many Concepts of Social Justice in European Private Law*, Edward Elgar, Cheltenham, 2011, p. 133-166.

[112] On file with the author, not all are publicly available, for the UK Council Doc. 18547/11 of 14 December 2011, for Germany BT-Drucksache 17/800, for Austria 8609 Beilagen zu den stenographischen Protokollen des Bundesrates. Another three Member States have provided critical statements.

[113] Case C-208/09, *Sayn-Wittgenstein* [2010] ECR I-13693, paras. 88, 92.

[114] Case C-391/09, *Runevič-Vardyn und Wardyn* [2011] ECR I-3787 and Case C-202/11, *Las* [2013] ECR I-000.

[115] German Constitutional Court, 2 BvE 2/08, 30.6.2009, the judgment is available in English at: https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2009/06/es20090630_2bve000208en.html, at para 258: 'pursuant to Article 23.1 first sentence of the Basic Law, Germany's participation in the process of integration depends,

state function' and 'national identity' strikes down *full harmonization* of private law as a constitutional means of completing the Internal Market. Shared competence in respect of the subsidiarity principle is calling for a common European platform for which both the EU and the Member States accept responsibility.[116] *D. Chalmers* proposal to grant Art. 4 (2) horizontal direct effect would allow for making the different responsibilities for the common platform and for national standards beyond the platform much more transparent.[117] Therefore the rules of the Treaty do not enable the EU to replace the variety of national patterns of social justice through European access justice. The EU and the Member States are tied together, each of them promoting its own pattern of justice.

3. Pre-conceptions and methodology

The reconstruction of the achievements of the 'Social' in the Member States and how and why the EU complements it, requires clarification on two basic pre-conceptions and on the concrete methodology used. The first pre-conception is the critical undertone that guides the use of law in the political design of justice in private law through nation states and the EU. The focal point is an *ideological criticism* of the instrumentalisation[118] of law for societal and political purposes. The second pre-conception is the understanding of the European integration process as an *experiment*. Herein lies the connection to debates on the constitutionalisation process of the EU, on the EU experiment as a discovery process, on the EU as the epitome of governmental experimentalism or as a political and societal laboratory. The label that holds all these debates together is the postclassical move at the times of the third globalization. The methodology used to describe and analyse the transformation processes is a combination of intellectual history and 'legal consciousness'.[119] The latter is understood as the set of deeper assumptions laypersons share about their own legal systems based on the expectations they have in the functioning of legislatures, courts, the executive and of society. Historical path dependencies develop in accordance with a logic that is displayed in various parts of the regulated economy.

3.1. Ideological criticism

The concept of social justice to be realised by the nation state is based on deep rooted assumptions. The market cannot produce appropriate results, in particular it cannot produce social justice (market failure). Neither the individual nor self-organisation via trade unions, consumer and tenant associations, are in a position to compensate for these market failures (corporatist failure). Therefore, the state enjoys a twofold task, via its (democratic) powers the state becomes and then is responsible for the protection of the weaker party and for the *re-distribution of wealth*. This is the *economic* dimension of social justice. The *political* dimension of social justice points to the society the citizens live in and therewith the different societal role the citizens have to play in a democratic society.[120]

The rise of the 'Social' implies that the nation state is in a position to meet such self-imposed tasks. The state has to *define the weaker parties*, which over time resulted in ever more sophisticated status related rules.[121] The state has to *define the interests of the weaker parties*, which contradicts individual and collective autonomy.[122] The welfare state and the regulatory state differ from the authoritarian state (*John Stuart Mill*), against which the individual seeks protection. The welfare state interferes into society and regulates autonomy. *C. Sunstein* and *E. Thaler* do not understand libertarian paternalism as an oxymoron. The state is claimed to be able to combine liberal and paternalist/welfarist

inter alia, on the European Union's commitment to social principles. Accordingly the Basic Law … aims at committing the European public authority to social responsibility in the spectrum of tasks transferred to it (Heinig, Der Sozialstaat im Dienst der Freiheit, 2008, pp. 531 et seq.). But the social state necessarily requires political and legal concretisation in order for it to have an effect.'; F. de Witte, *Justice in the EU*, pp. 55, 59; H.-W. Micklitz, *German Constitutional Court (Bundesverfassungsgericht BVerfG)*, 2 BvE 2/08, 30.6.2009 - Organstreit proceedings between members of the German Parliament and the Federal Government' (2011) 7 *European Review of Contract Law* 528-546.

[116] Invoking subsidiarity implies responsibility, H.-W. Micklitz, *The Maastricht Treaty, the Principle of Subsidiarity and the Theory of Integration*, in *LAKIMIES Special Issue on European Integration* (periodical of the Association of Finnish lawyers), 4, 1993, p. 508-539.

[117] D. Chalmers, L. Barroso, *What Van Gend en Loos stands for*, and Part III. 2.5., 3.5., 4.5 on the need to allocate responsibilities to the different levels of justice.

[118] Instrumentalism and functionalism are used as interchangeable terms throughout the text.

[119] For a fuller analysis, H.-W. Micklitz, *On the Intellectual History of Freedom of Contract and Regulation*, in *Penn State Journal of Law & International Affairs*, 4, 2015, p. 1-32.

[120] For the deeper tensions between democracy and a Keynesian market capitalism, W. Streeck, *How Will Capitalism End?*

[121] K. I. Schmidt, *Henry Maine's "Modern Law": From Status to Contract and Back Again?*, in *The American Journal of Comparative Law*, 65, 2017, p. 145-186.

[122] This is particularly true for the UK, where collective bargaining served as a substitute for statutory regulation, Part I.1.2.4.

instruments.[123] The state has *to define (and know) the yardstick* of what shall be distributed to whom and under what conditions. Insights on the economic consequences of the intended redistribution have to be merged with political considerations on societal acceptability. The state has to *clarify the political role of private parties, business, workers and consumers in a democratic society* beyond the formal election procedures through modes of participation in law-making and law-enforcement. This overall move towards a more just society creates expectations. The political promises become subject to a validity test.

The decision of the Member States to grant the European Union ever more powers, with or without Treaty amendments in the relevant fields of social interests, is equally based on a whole series of courageous assumptions which draw their inspiration from the Member States. The EU started to regulate labour, consumer and non-discrimination law at a time when the 'Social' began to lose impetus in the Member States. This coincidence explains why social expectations, which were nourished and generated over decades in the Member States, were transposed more or less directly to the European Union. Consequently, and somewhat overstatedly, the European Union is then expected to develop distributive standards of justice for an Internal Market and societal standards for a just European society. The European Union is implicitly seen to be able, and competent, to define these social standards at the minimum or even at the maximum level for a heterogeneous Union of 27 (28) Member States. The mismatch between social justice in a nation state context and social justice in a transnational quasi statutory entity remained long unobserved.

The transfer of national patterns of justice to the EU blinded us (I include myself) to the potential differences between the Member State arena vis-à-vis the EU.[124] The European Union brings reality back in – the 'who pays' and the 'how to compete', the complicated link between the rise of the welfare state and the rise of sovereign debt, the 'how to compete' to the conditions under which national economies with high labour costs and social costs may survive in a more competitive global market. In light of these claims and expectations the true reach of the European integration process can be properly assessed. The 'nation state' is objectified through a quasi-statutory entity *viz* the EU, which has a genuine 'legal (constitutional) order' and institutions that yield their own standard of justice. Therefore, the EU has to be measured against normative standards that comply with its constitutional and institutional status.[125]

Both the Member States and the EU use, more or less, the same tools for achieving justice through public regulation: first, materialisation of private law[126] through mandatory standards; secondly, by inserting general concepts on good faith, reasonableness and fairness,[127] thirdly, through constitutionalisation via fundamental and human rights. Whatever the technique is, legislatures, courts and agencies have to transform the new European social moral into normative standards. Law is instrumentalised for social purposes beyond formal rationality. Whether materialisation through private law is possible at all is subject to a fierce debate that started already in the early 1980s, when it became clear that statutory interventions in the name of the 'Social' yielded all sorts of failures. That is why the analysis of the politics of justice has to openly address regulatory failure, governmental failure, the failure of enforcement, all of which endanger the success of social regulation in the late 20th century.[128] EU law inherited this legacy from the Member States. In transforming social labour law and social consumer law into the law of the labour and consumer market society, the EU opened up a new perspective that favours a more holistic perspective on the interplay between formal and material rationality, bringing the market and the society closer to each other. *Cassis de Dijon* serves as the benchmark for the rationality test. Non-discrimination law - the 'Darling Dogma of Bourgeois Europeanists'[129] – has transformed the prohibition of gender discrimination into a general principle, thereby stretching law to its limits. The EU has managed to yield a new overarching European social moral. This does not mean, however, that it is necessarily for the law to transpose this social moral into societal reality. The ever harder litigation over the reach of the non-discrimination principle provides ample evidence.[130]

[123] C. R. Sunstein and R. H. Thaler, *Libertarian Paternalism Is Not an Oxymoron*, in *The University of Chicago Law Review*, 70, 2003, p. 1159-1202.

[124] R. Sefton-Green, *Social Justice and European Identity in European Contract Law*, in *European Review of Contract Law*, 2, 2006, p. 275-286.

[125] D. Kochenov, 'The Ought of Justice', p. 26.

[126] In the sense of M. Weber, *Wirtschaft und Gesellschaft*, 5th rev. reprint (Tübingen: J. C. B. Mohr Siebeck, 1972), p. 387, in particular p. 503; D. Assmann, G. Brüggemeier, D. Hart, C. Joerges, *Wirtschaftsrecht als Kritik des Privatrechts*.

[127] Lord Sweyn, *The Role of Good Faith and Fair Dealing in Contract Law: A Hair-Shirt Philosophy?*, in *The Denning Law Journal* , 6, 1991, p. 131-141.

[128] With regard to the three nation states under scrutiny, Part I. 2, with regard to the EU, Part II. 3.

[129] A. Somek, *The Darling Dogma of Bourgeois Europeanists*, in 20 *European Law Journal*, 20, 2014, p. 688-712.

[130] R. Xenidis, *Shaking the normative foundations of EU equality law: Evolution and hierarchy between market integration*

There is need for politics, although politics might not necessarily be the cure to the claimed justice deficit. Politics and economics must go together. *Niklas Luhmann*'s story of the 12th camel provocatively claims that fair distribution is a mere fiction.[131] The way out of the claimed failure of the materialisation of law is said to be proceduralisation.[132]

From the 1980s onward proceduralisation gained ground, in the EU most visibly through the turn to governance.[133] The conclusion would be that the state, be it the Member State or the EU, should lay down procedures under which the material standards of justice are elaborated. These procedures let the parties back in and allow for relational transactions within an EU set quasi statutory frame or even without a frame that governs proceduralisation. It is here where administrative governance and contract governance meet. As the results of the process are not predefined, there is room for experimentalism by all those who are given a role in the procedure. Through the use of standardisation in private law the EU is at the forefront of the development to overcome 'ignorance of state officials' (*Sabel/Zeitlin*) involved in the law making.[134] This move, which yielded critique from a constitutional perspective, did not raise much attention among private law scholars. The same is true with regard to new modes of private and administrative governance in the enforcement of private law. [135]

3.2. The postclassical move

The emergence of the genuine European model of justice in private law is explained through the move from the *classical* to the *post classical*, from the idea of law as a *system*[136] in the nation state to law as an *order (Culver, Giudice)*[137] that lacks coherence[138] and takes a neoformalist postclassical outlook (*D. Kennedy*). Part III is dedicated to give shape to the postclassical private law order. Its characteristics are its tri-partite structure, that ties substance and procedure to a particular legal status. Such a private law beyond the nation state merges contract and regulation, substance and procedure, rule making and rule enforcement. Notwithstanding the blending of boundaries that characterises the postclassical move, this private legal order encapsulates a distinct form of justice that complements national patters of social justice.

Inspired by *M. Reimann*[139] I understand the loose and open structure of the European legal order as a promising experiment that allows study of the outlook of the post nation state, the private law order and the patterns of justice.[140] The European experiment links to theories on proceduralisation (*Luhmann/Teubner*),[141] on competition and practice as a discovery procedure (Entdeckungsverfahren Wettbewerb und Praxis) (*Hayek/Joerges*),[142] on democratic and administrative (*Sabel/Zeitlin*),[143] on judicial (*Gerstenberg/Frerichs*)[144] and societal ex-

and human rights rationales, EUI-ERC Working Papers Nr. 4., 2017.

[131] N. Luhmann, *Die Rückgabe des zwölften Kamels. Zum Sinn einer soziologischen Analyse des Rechts* (1985), in G. Teubner (ed.), *Die Rückgabe des zwölften Kamels. Niklas Luhmann in der Diskussion über Gerechtigkeit*, Lucius & Lucius, Stuttgart, 2000, p. 3-60.

[132] J. Habermas, *Faktizität und Geltung*, Suhrkamp, Franfurt a.M., 1992, p. 516; outspoken with regard to private law D. Hart, *Substantive and Reflective Elements in Modern Contract Law*, in Th. Bourgoignie (ed.), *Unfair Terms in Consumer Contracts*, Cabay, Louvain-la-Neuve - Brussels, 1983, p. 3-32.

[133] For a deeper discussion of governance as proceduralisation, M. Dawson, *New Governance and the Transformation of European Law. Coordinating EU social law and policy* Cambridge University Press, Cambridge, 2011, p. 103.

[134] Ch. F. Sabel and J. Zeitlin, *Experimentalism in the EU: Common ground and persistent differences*, in *Regulation & Governance*, 6, 2012, p. 410-426, who draw a distinction between ignorance and uncertainty, the former is characterized by the lack of knowledge of the state officials which is compensated by knowledgeable parties, whereas uncertainty is characterized through on overall lack of knowledge.

[135] A notable exception is H. Schepel, *The Constitution of Private Governance*, Hart Publishing, Oxford, 2005, more recently in particular with regard to private law B. van Leeuwen, *European Standardisation of Services and its Impact on Private Law*, Hart Publishing, Oxford, 2017).

[136] J. Dickson, 'Towards a Theory of European Union Legal Systems', in J. Dickson and P. Eleftheriadis (eds.), *Philosophical Foundations of European Union Law* (Oxford: Oxford University Press, 2012), pp. 25-53.

[137] K. Culver and M. Giudice, *Not a System but an Order. An Inter-Institutional View of European Union Law*, in J. Dickson and P. Eleftheriadis (eds.), *Philosophical Foundations of European Union Law* (Oxford: Oxford University Press, 2012), pp. 54-76.

[138] Th. Wilhelmsson, *The Contract Law Acquis: Towards more Coherence through Generalisations?*, in *4. Europäischer Juristentag*, Wien, Manz, 2008, pp. 111-145.

[139] M. Reimann, *The American Advantage in Global Lawyering*, (2014) 78 *Rabels Zeitschrift für ausländisches und internationales Privatrecht* 1-36.

[140] H.-W. Micklitz, *A European Advantage in Legal Scholarship?*, in R. van Gestel, H.-W. Micklitz and Ed. L. Rubin (eds.), *Rethinking Legal Scholarship. A Transatlantic Dialogue*, New York, Cambridge University Press, 2016, pp. 262-309.

[141] G. Teubner, *Recht als autopoetisches System*, Frankfurt a.M., Suhrkamp, 1989 and Ch. Joerges and G. Teubner (eds.), *Rechtsverfassungsrecht – Recht-Fertigung zwischen Privatrechtsdogmatik und Gesellschaftstheorie,* Baden-Baden, Nomos, 2003.

[142] Ch. Joerges, *Verbraucherschutz als Rechtsproblem* (Heidelberg: Verlagsgesellschaft Recht und Wirtschaft, 1981), pp. 133-134.

[143] Sabel and Zeitlin, *Learning from Difference*.

[144] S. Frerichs, *Judicial Governance in der Europäischen Rechtsgemeinschaft* (Baden-Baden: Nomos, 2008); O. Gerstenberg, *The Question of Standards for the EU: From*

perimentalism (*Ladeur*),[145] or on *my* understanding of the European project as a laboratory.[146]

Each of the theoretical strands has its particular impact on private law discourse beyond the nation state. Proceduralisation is the intellectual construct that embraces the society and the economy.[147] In the EU context it is most obviously reflected in the constitutionalisation process of the European legal order, in the constitutionalisation of European private law through human and fundamental rights and through the rise of procedural elements within the European concept of justice.[148] The transfer of *Hayek's* competition as a discovery procedure nourishes fears of EU neo-liberalism early on. *Joerges'* twist of the discovery procedure towards practice, embraces social and societal processes beyond the market and helps to explain the emerging European private law.

Governance not least through its broad umbrella allows to bring different strands of discourses together. Much of the new governance literature is written in the context of administration and regulation. However, there is an emerging second strand within the private law discourse. Its multi-faceted character grants governance a prominent position in the postclassical private law. Multi-level governance refers to the distribution of competence between Member States and the EU and to transparency, accountability and legitimacy. The new approach on technical standards, later transferred to the Banking Union paved the way for new modes of law making that crossed the boundaries of public and private law. The Open Method of Co-ordinated institutionalised bargaining processes in industrial and societal relations outside and beyond the Treaty. New modes of enforcement within private law respond to regulatory failure resulting from the over-complexity of a multi-level structure of the EU. Governance in the EU is characterised through experimentalism rooted in the ignorance of the public officials.[149] The EU is experimenting with new forms of law-making, as documented in the evolution from the new approach over the Lamfalussy procedure to better regulation or in law enforcement through recommendations, guidelines or more formalised commitment decisions. *Gerstenberg* identified experimentalism in the European judiciary on the control of standard terms. *Ladeur* added societal experimentalism with private law as a building block allowing for *relational* transaction without state interference.

The depths and array of legal thought is 'intimidating' (*M. Dawson*). However, for the purposes of this book it suffices to highlight that the different theoretical strands are united in the search for the design of the legal order in the post-nation state era. They are referred to in the unfolding of the overall argument, however, without discussing their pros and cons and without explicitly taking sides. The categorisation of the European project as an 'experiment' is meant to demonstrate that the European Union breaks away from the economic and philosophical foundations of the Member States and yields its own narrative.[150] The particular experimental character of the EU is enshrined in the constant change of paradigms, from integration through law in the early days, through integration without law once the ideal of building a European state on the model of the 19th century nation state crumbled, up to the current stage of integration beyond the state. Europe is constantly in the making, each stage leaving a particular footprint on the design of European labour, non-discrimination and consumer law. Its process is programme and the foundations behind the European Union cannot be found in nation state bound political philosophy.[151]

3.3. Intellectual history and legal consciousness

The reconstruction of the evolutionary process of the nation states that are transforming through the European integration process and yielding a new genuine pattern of justice requires a methodology that embraces legal culture, legal thought and the economic, political and social foundations of both the Member States and the EU. *Legal consciousness*[152] is the mode of thinking that typifies the so-

'Democratic Deficit' to 'Justice Deficit?', in D. Kochenov, G. de Búrca and A. Williams (eds.), *Europe's Justice Deficit?*, Oxford, Hart Publishing, 2015), pp. 67-78.

[145] K.-H. Ladeur, *Globalization and Public Governance - a Contradiction?*, in K.-H. Ladeur (ed.), *Public Governance in the Age of Globalization*, Aldershot, Ashgate, 2004, pp. 1-24.

[146] H.-W. Micklitz, *Philosophical Foundations of European Union Law*, by Julie Dickson and Pavlos Eleftheriadis (eds), 2013, (32) *Yearbook of European Law,* 538-554.

[147] A. Somek, *Rechtstheorie zur Einführung*, Junius, Hamburg, 2017, p. 22, argues that system theory is the very response to the decline of legal positivism.

[148] H.-W. Micklitz, *Principles of Social Justice in European Private Law*, in *Yearbook of European Law*, 19, 1999, p. 167-204.

[149] On that distinction C.F. Sabel, J. Zeitlin, *Experimentalism in the EU*.

[150] Even the so far most ambitious project in the search for the European narrative is largely missing the point in that the European particularities are established through the lenses of nation state political and moral philosophy, my book review article 'Philosophical Foundations of European Union Law'.

[151] K. Tuori, *European Constitutionalism*, Cambridge University Press, Cambridge, 2015.

[152] U. Raulff (ed.), *Mentalitäten-Geschichte. Zur Historischen Rekonstruktion geistiger Prozesse*, Wagenbach, Berlin, 1987;

cial psychology of a particular society, predominantly shaped by the understandings of the societies' most influential philosophers. Legal consciousness is inherently linked to *intellectual history*, the historiography of ideas and thinkers. History, this is the understanding, cannot be considered without the knowledge of the humans who created, discussed, wrote about it.[153]

The focal point around which legal consciousness and intellectual history is built, is *Wieacker's* common European legal culture, characterized by personalism, legalism and intellectualism.[154] It will have to be shown that all three can be found in British, French and German societies. However, each one of these three European legal consciousnesses has professed one aspect of the general legal consciousness in detriment of the others. The ideal type (*Max Weber*) looks like this: The English emphasised personalism, the French intellectualism, and the Germans legalism. The respective legal consciousness and the patterns of justice turn out to be rather stable over time. It is therefore possible to identify and determine differences and national particularities. This is notable as the three countries underwent the same grand economic, social and political transformations in the 17th, 18th and 19th century.[155] The strong and stable exchange between the grand philosophers of Europe did not suffice to break down the national particularities.[156] During these times the Netherlands served many important philosophers as a refuge where they could escape political pressure in the respective home countries and freely speculate on moral and political philosophy. Personalism, legalism, intellectualism are enshrined in the *ius commune*,[157] which embraces not only continental European but also the common law countries.[158]

After World War II, *Wieacker's* common European legal culture became the backbone of the then established European Economic Community. Looking back in order to build the future of Europe, this was the post war agenda of so many great politicians, but also philosophers and lawyers. This does not mean that *legal consciousness* is a static concept. It is subject to change, just as the socio-economic environment and the great ideas that shape the philosophical discourse. At some point in time, in the mid-1970s, there is a breakthrough in the general European legal consciousness. Scientists put in question the idea that the world can be explained with immutable, objective laws. They first changed their approach to legal norms. They no longer expected them to be coherent. General awareness of the scientific revolution coincides with the onset of the loosing impetus of the national welfare state and the rise of 'the Social' in the EU. EU legal scholars no longer wanted to build the United States of Europe and they began deconstructing their status related law. The result is a genuine EU model of justice, a genuine European legal culture and genuine post national European consciousness.

H. SCHULZE, *Mentalitätsgeschichte – Chancen und Grenzen eines Paradigmas der französischen Geschichtswissenschaft*, in *Geschichte in Wissenschaft und Unterricht*, 36, 1985, p. 247-270; D. KENNEDY, *Three Globalizations of Law and Legal Thought* and *The Rule of Law, Political Choices and Developing Common Sense*, in D. M. TRUBEK, A. SANTOS (eds.), *The New Law and Economic Development. A Critical Appraisal*, Cambridge University Press, Cambridge - New York, 2006, p. 95-173. In a European historical perspective S. CONRAD, S. RANDERIA, *Geteilte Geschichten: Europa in einer postkolonialen Welt*, in S. CONRAD, S. RANDERIA (eds.), *Jenseits des Eurozentrismus: Postkoloniale Perspektiven in den Geschichts- und Kulturwissenschaften*, Campus Verlag, Frankfurt a.M., p. 9-49.

[153] Only indirectly it touches upon 'legal evolution' which is a distinct feature in Deakin's and Wilkinson's analysis of the (English) law of the labour market; DEAKIN, WILKINSON, *The Law of the Labour Market*, p. 26-36.

[154] F. WIEACKER, *Voraussetzungen europäischer Rechtskultur*, Verlag Göttinger Tageblatt, 1985), translated into English by E. Bodenheimer and published as *Foundations of European Legal Culture*, in *The American Journal of Comparative law* , 38, 1990, p. 1-29.

[155] There is a plethora of literature on the socio-economic history K. W. NÖRR, *Die Republik der Wirtschaft, Part I and II,* Mohr Siebeck, Tübingen, 1999 and 2007; for the history of the Federal Republic of Germany C. TORP, *Konsum und Politik in der Weimarer Republik* (Göttingen: Vandenhoeck & Ruprecht, 2011), H.G. HAUPT, C. TORP (eds.), *Die Konsumgesellschaft in Deutschland 1890-1990*; with regard to the Consumer Society for the UK J. DARWIN, *The Empire Project. The Rise and Fall of the British World-System. 1830-1970* (Cambridge; New York: Cambridge University Press, 2009), P. MATHIAS AND S. POLLAND (eds.), *The Cambridge Economic History of Europe,* Volume VIII, Cambridge University Press, Cambridge - New York, 1989, p. 103.

[156] Q. SKINNER, *Thomas Hobbes and His Disciples in France and England*, in *Comparative Studies in Society and History*, 8, 1966, p. 153-167; U. WESEL, *Geschichte des Rechts - Von den Frühformen bis zur Gegenwart*, 2nd ed., C. H. Beck, München, 2001, p. 409; B. RUSSELL, *A History of Western Philosophy*, Unwin Hyman Paperbacks, Sydney, 1979, in German, *Philosophie des Abendlandes*, Piper, München, 2004).

[157] R. ZIMMERMANN, *Savigny's Legacy: Legal History, Comparative Law, and the Emergence of a European Science*, in *Law Quarterly Review*, 112, 1996, p. 576-605 and the critique against the European private law codification project which is inspired by and based on the destruction of the common philosophical ground of private law in the civil and common law systems, H. EIDENMÜLLER, F. FAUST, H. C. GRIGOLEIT, N. JANSEN, G. WAGNER AND R. ZIMMERMANN, *The Common Frame of Reference for European Private Law – Policy Choices and Codification Problems*, in *Oxford Journal of Legal Studies*, 28, 2008, p. 659-708.

[158] With regard to the roman law foundations of the common law, R. ZIMMERMANN, *Heard melodies are sweet, but those unheard are sweeter...: Condicio tacita, implied condition und die Fortbildung des europäischen Vertragsrechts*, in *Archiv für die civilistische Praxis*, 193, 1993, p. 121-173.

The Eurobarometer surveys shed light on European consciousness in all its shakiness and contradictions.[159] This does not mean that the common heritage of Europe or the particular national variations of the three legal consciousnesses have vanished or are about to vanish. The new consciousness, as will be demonstrated, exists side by side with 'old' consciousnesses.[160] This process is far from being soft and without conflicts. The much debated Economic Constitution of Europe and its German construction provides ample evidence of the painstaking path from a national to a European concept.[161]

However, in the move from the classical to the post classical in the EU legal order a new intellectual current is appearing, which is much younger and which leads back to the ground-breaking shattering of national science and (legal) philosophy in the early 20th century. *Einstein* questioned *Newton's* world of a logical and coherent natural science, and *Nietzsche* questioned the philosophical justification of the (nation) state and the understanding of law as a system.[162] One may wonder to what extent this submerged strand of *European* (not national) commonality can be used to explain the post national European consciousness and deeper intellectual foundations of the post nation state and the post nation state private (legal) order. This somewhat neglected part of the intellectual history remained all too often in the background or even underground of the mainstream political and moral philosophy. It must be regarded as an integral part of the common European legal culture.

4. How to read the book.

The first part: The 20th century is marked by the rise of the 'Social' in private law. First labour law, then consumer law today non-discrimination law, all three fields have considerably affected the concept of private law. The nation state later the welfare state is seen to be in charge of providing social justice through appropriate legislative means and through courts monitoring the correct application. The limits of what the welfare state can do via private law to guarantee social justice became ever clearer from the late 1970s on. The enormous expectations nourished through the social democratization of politics cannot or at least cannot be fully met. The challenges coming from within – from what is possible and manageable to achieve via law, from the doubtful redistributive effects – the poor pay for the better off, from without – from the pressure globalization and economic efficiency put on welfare states. The nation state/welfare state is changing, so too is social justice. The intellectual history and the changing legal consciousness of the rise and decline of the 'Social' will be told via a careful reconstruction of the private law orders of Germany, France and the United Kingdom.

The second part: the declining impetus of the welfare state goes hand in hand with an accelerating European integration process, which reached the 'Social' through the Single European Act in the 1980s, exactly when nation states started to realize the limits of what can be redistributed to the weaker party via law. The EU took over the 'Social' from the Member States, thereby transforming the 'social' dimension in private law, from social private law to the law of the labour and consumer market society, from social justice to access justice. The emergent European model of justice is to be explained through the decline of the nation/state welfare state and the gradually transformation of the EU into a quasi-statutory body. It does not replace or substitute national patterns of justice, but adds a new transnational dimension. Access justice captures what is distinctive about the European experiment, the building of a legal order with a 'social outlook' beyond the state through a supranational Treaty, through transnational agencies and through an activist transnational Court.

The third part: The politics of justice can be retraced in private law beyond the nation state. The key to its understanding is the differentiation of private law into a tri-partite legal order – *universal*

[159] L. DIEZ-SANCHEZ, *'Justice Index' Eurobarometer and the Issue of Justice. 1990 - 2015*, manuscript 2017, on file with the author.

[160] With regard to the divided legal culture, H.-W. MICKLITZ, *The (Un)-Systematics of (Private) Law as an Element of European Culture*, in G. HELLERINGER, K. PURNHAGEN (eds.), *Towards a European Legal Culture*, C.H. Beck - Hart Publishing - Nomos, München - Oxford - Baden-Baden, 2014, p. 81-115, review from H. COLLINS, in *European Review of Contract Law*, 12, 2016, p. 72-76.

[161] On the origins of ordo-liberalism and its impact on the German respectively the European Economic Constitution, D. GERBER, *Constitutionalizing the Economy: German Neo-Liberalism, Competition Law and the 'New' Europe*, in *American Journal of Comparative Law* , 42, 1994, p. 25-84; and in a historical perspective M. STOLLEIS, *Prologue: Reluctance to Glance in the Mirror. The Changing Face of German Jurisprudence after 1933 and post-1945* and J. H. H. WEILER, *Epilogue*, in CH. JOERGES, N. S. GHALEIGH, *Darker Legacies of Law in Europe. The Shadow of National Socialism and Fascism over Europe and its Legal Traditions*, Hart Publishing, Oxford, 2003, p. 1-18 and p. 389-402 respectively, follow-up in the Special Issue: *European Integration in the Shadow of The "Darker Legacies of Law in Europe" Europe's Darker Pasts Revisited*, in *German Law Journal*, 7, 2006, D. AUGENSTEIN (guest editor); U. BECK, *German Europe*, Polity Press, Cambridge, 2013.

[162] With regard to the parallel between Newton and the model of good governance (state), B. RUSSELL, *A History of Western Philosophy*, p. 652-653.

services, *social market law* and *societal private law*. Owing to the impact of the European Union, national social labour law, national social consumer law and national non-discrimination law differentiates in two directions. The nucleus remains, although the EU is turning social labour and social consumer law into the law of the labour and the consumer market society. This move triggered hard ideological battles on the decline of social justice and on abolishing the protection of the weaker party. It is largely a battlefield over whether the EU minimum standard access justice can and should be topped by higher national standards of social justice. However, the EU introduced two new layers, universal services as the bottom line for the protection of the vulnerable and a new 'general private law' that imposes responsibilities on the market citizen, on civil society organisations and companies in building a market and a society beyond the nation state. Access justice dominates universal services, whilst the new general law broadens the perspective towards societal justice.

The conclusions are built around four themes. *First*, *the grand narratives* hark back to the path dependence of national legal consciousness, the development of European legal consciousness and, as a consequence, the hybridization of consciousness. *Secondly,* access justice and societal justice are claimed as *the great EU achievements* together with the tri-partite European private law order of the labour and consumer market society and the shared responsibilities of the EU, the Member States and private parties. *Thirdly, the drivers behind the transformation* of the state, of Labour and Consumer Law and of justice are economic, social and political forces. They help to clarify the role of the EU as catalyst and a driver, the function of the rationality test and the constitutive importance of the European laboratory. *Fourthly, the remaining imponderables*: the impact of Brexit on European legal consciousness, the relationship between the tri-partite European legal order and the national private law orders and the impact of the move from the 'geometric (Newton/Hobbes)' to the 'relative state' (Einstein and modern state theories).