

Introduction

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 Eurozone 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 traditions² 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’³ to rethink national patterns of social justice and their compatibility with the European concept of justice. This book defends the European experiment as good and useful. The European legal order and European society yield genuine social

¹ J. Neyer, ‘Justice and the Right to Justification: Conceptual Reflections’, discusses justice in the EU as a substitute for democracy; R. Forst, ‘Justice, Democracy and the Right to Justification: Reflections on Jürgen Neyer’s Normative Theory of the European Union’, claims that a just political order can only be a democratic order, in D. Kochenov, G. de Búrca and A. Williams (eds.), *Europe’s Justice Deficit?* (Oxford: Hart Publishing, 2015), pp. 211–226; pp. 227–234, respectively.

² U. Mattei and A. di Robilant, ‘The Art and Science of Critical Scholarship. Post-Modernism and International Style in the Legal Architecture of Europe’ (2002) 10 *European Review of Private Law* 29–59.

³ H. J. Berman, *Recht und Revolution. Die Bildung der westlichen Rechtstradition* (Frankfurt a.M.: Suhrkamp, 1991), at pp. 47, 65.

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 which arose at the beginning of the twenty-first century.

The Argument

The clarion call for justice in private law, which first emerged in the late nineteenth century, places the nation-state in a prominent position. Today, the nation-state is subject to deeply penetrating transformation processes that affect its ability to deliver its preferred option of justice.⁴ 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 materialises 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 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 United Kingdom.

⁴ 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, S. Blockmans and J. Wouters (eds.), *The EU's Role in Global Governance. The Legal Dimension* (Oxford: Oxford University Press, 2013), pp. 59–78.

Despite all the alterations, the three legal orders demonstrate intellectual path dependency, which, however, was severely shattered only after the Second World War through the European integration process. How the EU is interfering in the foundations of private law and the patterns of justice is the theme of the Part II. It goes to show that the EU is developing a genuine model of access justice that sits uncomfortably with national patterns of justice and provokes strong political and ideological reactions.⁵ 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 lead 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 private law, the nation-state and social justice needs to be structured. D. Kennedy's⁶ distinction between the three waves of globalisation of legal thought, from classical legal thought to the Social and from there to neoformalism 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 apogee 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.⁷ 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,

⁵ In a similar direction though not discussing private law, F. de Witte distinguishes between market, communitarian and aspirational solidarity in *Justice in the EU. The Emergence of Transnational Solidarity* (Oxford: Oxford University Press, 2015).

⁶ 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; New York: Cambridge University Press, 2006), pp. 19-73.

⁷ D. Kennedy uses neoformalism, in particular through his claim of 'managing difference'. 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' (2015) 78 *Law and Contemporary Problems* i-x.

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.⁸

The next step is to delineate access justice from pure market justice⁹ and to clarify the relationship between the European model of access justice and national patterns of social justice. The substantive part of this 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 spots¹⁰ in the national welfare state *and* to provide a forum for the suggested post-classical move that lays bare the architecture of 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 reconstructed, explained and made comprehensible. In what comes I will first analyse the transformations, then locate access justice before I turn to the preconceptions 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 twentieth century their own model of social justice in private law. For the purposes of this book, private law is understood as economic law. It covers contract and tort as well as labour law, non-discrimination law and consumer law.¹¹ 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

⁸ D. Patterson and A. Afilalo, *The New Global Trading Order: The Evolving State and the Future of Trade* (Cambridge; New York: Cambridge University Press, 2008); P. Bobbitt, *The Shield of Achilles: War, Peace, and the Course of History* (New York: Anchor Books, 2003).

⁹ J. N. Adams and R. Brownsword, 'The Ideologies of Contract' (1987) 7 *Legal Studies* 205–223.

¹⁰ C. 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. (Alphen aan den Rijn: Kluwer Law International; Nijmegen: Ars Aequi Libri, 2004), pp. 159–190.

¹¹ H. D. Assmann, G. Brüggemeier, D. Hart and C. Joerges (eds.), *Wirtschaftsrecht als Kritik des Privatrechts* (Königstein/Ts.: Athenäum, 1980).

models have in common that sooner or later it is for the (nation) state¹² 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,¹³ 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 twentieth century were made possible through the economic, social, political and technological developments that shook Europe between the seventeenth and nineteenth century and that freed private law from feudal and corporative (*ständische*) barriers.¹⁴ Social justice itself is a product of the late nineteenth and early twentieth centuries, 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 nineteenth and early twentieth centuries. The second wave of social justice started after World War II with the rise of the consumer society.¹⁵ 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

¹² 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* (London: Mansell Publishing, 1986), pp. 114–153, p. 122 ‘very uneven development’.

¹³ ‘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, www.tenlaw.uni-bremen.de/.

¹⁴ 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 (Berlin: Heymann, 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).

¹⁵ 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* (London: Penguin Books, 2016); on the rise of the consumer society after World War II, p. 272.

about to segregate from private law independent of its form, whether it is part of a national civil code or not.¹⁶

The European Economic Community (EEC) 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.¹⁷ 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,¹⁸ which is currently being superseded by debates about the injustice resulting from the Eurozone crisis and the way it is managed through the EU, Member States and the IMF.¹⁹ The democratic and social deficit critiques are not new. They have accompanied 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 Eurozone crisis has added a new layer to the debate about the justice deficit and its proclaimed neoliberal outlook,²⁰ which 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

¹⁶ H.-W. Micklitz, ‘Do Consumers and Businesses Need a New Architecture for Consumer Law? A Thought Provoking Impulse’ (2013) 32 *Yearbook of European Law* 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* (New York: Springer International Publishing, 2014), pp. 31–42 and pp. 599–610, respectively.

¹⁷ 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.

¹⁸ F. Rödl, ‘Labour Constitution’, in A. v. Bogdandy and J. Bast (eds.), *Principles of European Constitutional Law*, 2nd ed. (Oxford: Hart Publishing, 2009), pp. 623–658; N. Countouris, ‘European Social Law as an Autonomous Legal Discipline’ (2009) 28 *Yearbook of European Law* 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’ (2010) 16 *European Law Journal* 273–291.

¹⁹ F. W. Scharpf, ‘Monetary Union, Fiscal Crisis and the Pre-Emption of Democracy’ (2011) 9 *Zeitschrift für Staats- und Europawissenschaften / Journal for Comparative Government and European Policy* 163–198.

²⁰ W. Streeck, *How Will Capitalism End?* (London: Verso, 2016).

more sophisticated understanding here enshrined in the model of shared responsibilities.²¹

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 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’²² 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.²³

‘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 are 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.²⁴ In reaction to the Eurozone crisis, the EU legislator is gradually developing a genuine approach with regard to investor protection and debtor protection, though it seems

²¹ Y. Svetiev, ‘The EU’s Private Law in the Regulated Sectors: Competitive Market Handmaiden or Institutional Platform?’ (2016) 22 *European Law Journal* 659–680, at 679–680; also see in more detail in Part II. 4.2, this volume.

²² B. Eichengreen, *The European Economy since 1945: Coordinated Capitalism and Beyond* (Princeton: Princeton University Press, 2008), pp. 335–341; S. Weatherill, ‘Competence and Legitimacy’, in C. Barnard and O. Odudu (eds.), *The Outer Limits of European Union Law* (Oxford: Hart Publishing, 2009), pp. 17–34, stresses the potential of EU law to overcome nationalism and protectionism in Member States.

²³ C. Crouch, *The Strange Non-Death of Neo-Liberalism* (Cambridge: Polity Press, 2011); A. Somek, *The Cosmopolitan Constitution* (Oxford: Oxford University Press, 2014).

²⁴ 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.

as if the European Court of Justice (ECJ), rather than the EU legislator, is the driving force.²⁵

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 1985²⁶ has triggered a fierce debate; first, on Europe's *social deficit* in the aftermath of *Viking* and *Laval*²⁷ and, second, on Europe's *justice deficit*. Scholars ask why Member States were not ready to grant the EU more 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,²⁸ and commercial and company law.²⁹ 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'.

²⁵ G. Comparato, *The Financialisation of the Citizen* (Oxford: Hart Publishing, forthcoming 2018).

²⁶ COM (85) 310 final, 14.6.1985

²⁷ 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.

²⁸ 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* (Oxford: Hart Publishing, 2009), pp. 1–29, at p. 3.

²⁹ S. Deakin and F. Wilkinson, *The Law of the Labour Market. Industrialization, Employment and Legal Evolution* (Oxford: Oxford University Press, 2005), p. 2, covers social security, active market policy, and even elements of commercial, competition and company law.

National consumer law, in contrast, was not at rest yet in Member States when the European Union took on a leading policy role.³⁰ 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 Eurozone crisis.³¹ That is why consumer law *with or without* protection³² is of particular interest for the concept of justice. In national law, van der Heijden characterises regulatory intervention as ‘inequality compensation’³³: ‘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.³⁴

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

³⁰ 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’ (2009) 28 *Yearbook of European Law* 3–59.

³¹ F. Della Negra, *Private Law and Private Enforcement in the Post-Crisis EU Retail Financial Regulation*, PhD thesis, European University Institute (2017).

³² 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’ (2012) 35 *Journal of Consumer Policy* 283–296.

³³ 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), pp. 133–148, 135–136; R. Dukes, *The Labour Constitution: The Enduring Idea of Labour Law* (Oxford: Oxford University Press, 2014).

³⁴ R. Münch, ‘Constructing a European Society by Jurisdiction’ (2008) 14 *European Law Journal* 519–541, analyses the role of the ECJ in the making of transnational society.

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.³⁵ 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.³⁶

Since the White Paper on the Completion of the Internal Market³⁷ 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 or electricity, 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 in 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 twentieth-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;³⁸ however, there

³⁵ Part II. 2.2.

³⁶ Kennedy, ‘Three Globalizations of Law and Legal Thought’.

³⁷ COM (85) 310 final, 14.6.1985.

³⁸ L. Azoulay, ‘The Court of Justice and the Social Market Economy: The Emergence of an Ideal and the Conditions for its Realisation’ (2008) 45 *Common Market Law Review* 1335–1355; Svetiev, ‘The EU’s Private Law in the Regulated Sectors’; C. F. Sabel and J. Zeitlin, ‘Learning from Difference. The New Architecture of Experimentalist