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DOI
10.5040/9781509941704.ch-004
Publication date
2023
Document Version
Final published version
Published in
Civil Courts and the European Polity

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Reimagining Europe Through Private Law Adjudication

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I. PRIVATE LAW AND A EUROPEAN POLITY

In times of COVID-19, Brexit, climate change, economic hardship and a migration crisis, an exploration of the utopian dimensions of European private law adjudication might seem slightly out of place. Dystopian accounts may seem to offer a more truthful picture of such uncertain times,[1] in which the idea of European unity is under pressure. The series of crises has highlighted a persistent lack of civic solidarity in addressing Europe-wide problems,[2] and it is not sure to what extent legal institutions can contribute to shared solutions. This is particularly urgent in civil cases that address specific effects of the developments, such as evictions following the collapse of housing markets in the wake of the economic crisis of 2008. How should courts in civil cases handle disputes among those who suffer the consequences of societal developments? To what extent might the reasoning of judges in private legal disputes on the validity of contract terms or on liability in tort law gain any broader meaning at all? And to what extent can and should national judges in civil cases be concerned with the development of a European polity that unites rather than divides those affected by the many crises?

This chapter addresses the question of to what extent judges in civil cases can and should contribute to the reimagination of a European political community.[3] Its focus lies on the way in which fundamental rights reasoning[4] may open up space for deliberations on the underlying

* The research for this chapter was made possible by a grant of the Dutch Research Council for the project 'Judges in Utopia' (NWO Vidi 2014–2019).

[1] Reflected in literature in such novels as M Atwood, *The Handmaid's Tale* (London, Vintage, 1996 [1985]) and *The Testaments* (New York, Nan A Talese/Doubleday, 2019) concerning women's rights; JM Coetzee, *The Childhood of Jesus* (London, Harvill Secker, 2013) on migration; and N Ammaniti, *Anna* (Turin, Einaudi, 2015), on a pandemic.

[2] J Habermas, *The Crisis of the European Union: A Response* (Cambridge, Polity Press, 2012) 3–4.

[3] In line with the idea of institutional imagination presented by R Mangabeira Unger, 'Legal Analysis as Institutional Imagination' (1996) *59 Modern Law Review* 1.

[4] The concept of 'fundamental rights' here is broadly understood to include both supranational human rights standards and national constitutional rights. Although the differences in the scope and applicability of different rights are acknowledged, it is assumed that the formal basis of a certain right is not decisive for its possible influence on legal reasoning in private legal cases. The analysis focuses on substantive effects of fundamental rights in private legal cases and, accordingly, does not elaborate on formal-technical conditions for the applicability of such rights in the private legal context.

legal-political questions in private legal cases with a European dimension. Adopting a bottom-up perspective, both the interaction with norms deriving from EU law and those protected under the European Convention on Human Rights (ECHR) are included. Three high-profile cases will illustrate how judges have approached the differences between norms deriving from the European level and those embedded in national private legal orders. On the basis of the case law analysis, it will be submitted that the adjudication of disputes on the interface of national private law and European fundamental rights contributes to a process of polity-building, in particular by creating space for the inclusion of views that receive less attention in legislative processes.

Normatively, two premises underpin the analysis. First, it is postulated that solidarity among Europeans is something worth striving for.[5] Insofar as private law can contribute to this process, it can and should not be considered only in economic terms, but also in the light of its justice dimensions.[6] Second, it is assumed that the 'constitutionalisation of European private law' should not be limited to an investigation of the meaning of certain fundamental rights for specific private legal questions.[7] The question is rather to what kind of European 'constitutional settlement'[8] the adjudication of private legal disputes may contribute.

In the following, first, the place of civil adjudication in the European legal landscape will be determined and a theoretical framework for understanding the role of judges will be presented. In particular, I will contrast Michael W Dowdle's theory on the doubly constitutional character of contract law with the democratic theory of judicial law-making that I am developing. Second, an analysis of three cases will show how and to what extent judicial reasoning can be explained in the light of these two theories. On the basis of this analysis, the meaning of private law adjudication for the reimagination of a European political community will, in particular, be found in the extent to which private legal cases allow for the inclusion of affected individuals and groups in legal-political deliberations. As such, each case forms a building block for an inclusive European polity. It will be concluded that judges in civil cases can and should make a contribution to the process of European integration, especially when the legislature remains silent.[9]

[5] S Rodotà, *Solidarietà: un'utopia necessaria* (Rome/Bari, Laterza, 2014) 5–7; Habermas (n 2) 2–3.

[6] Study Group on Social Justice in European Private Law, 'Social Justice in European Contract Law: A Manifesto' (2004) 10 *European Law Journal* 653; D Caruso, '*Qu'ils mangent des contrats*: Rethinking Justice in EU Contract Law' in D Kochenov, G de Búrca and A Williams (eds), *Europe's Justice Deficit?* (Oxford, Hart Publishing, 2015); M Fabre-Magnan, 'What is a Modern Law of Contracts? Elements for a New Manifesto for Social Justice in European Contract Law' (2017) 13 *European Review of Contract Law* 376.

[7] The rich literature on this theme includes: OO Cherednychenko, *Fundamental Rights, Contract Law and the Protection of the Weaker Party: A Comparative Analysis of the Constitutionalisation of Contract Law, with Emphasis on Risky Financial Transactions* (Munich, Sellier, 2007); A Colombi Ciacchi, 'The Constitutionalization of European Contract Law: Judicial Convergence and Social Justice' (2006) 2 *European Review of Contract Law* 167; H Collins, 'On the (In)Compatibility of Human Rights Discourse and Private Law' in HW Micklitz (ed), *Constitutionalization of European Private Law* (Oxford, Oxford University Press, 2014). See also C Mak, *Fundamental Rights in European Contract Law: A Comparison of the Impact of Fundamental Rights on Contractual Relationships in Germany, the Netherlands, Italy and England* (Alphen aan den Rijn, Kluwer Law International, 2008).

[8] Study Group on Social Justice in European Private Law (n 6) 667; MA Wilkinson, 'Political Constitutionalism and the European Union' (2013) 76 *Modern Law Review* 191, 192–93.

[9] S Rodotà, *Il diritto di avere diritti* (Rome/Bari, Laterza, 2012) 96, referring to an earlier essay entitled 'Nel silenzio della politica i giudici fanno l'Europa'.

II. UTOPIAN THINKING IN EUROPEAN PRIVATE LAW ADJUDICATION

A. Judicial Utopias

The place of private law adjudication in the European legal order may be considered to be 'utopian' insofar as it is the subject of continuous reimagination, like Europe itself. In this sense, it has some affinity with Thomas More's *Utopia*,[10] although a comparison with that not uncontroversial ideal society will not be made here. In the context of legal theory, 'Utopia' may be considered as an imaginary 'view from nowhere'.[11] It is an ideal that may never be realised and as such offers an alternative worldview, a point of reference for considering changes to the status quo.[12] Utopian thinking allows for the imagination of new legal-substantive and institutional constellations to address societal developments, and thus, as Loughlin has submitted, the continuous process of constitutional imagination that creates political realities.[13] Utopian thinking is also prominent in the rise of fundamental rights protection, which transcends the level of nation-states in Europe.

While acknowledging critical views on fundamental rights utopianism, this chapter will explore the more constructive, emancipatory role that such rights may have in private law adjudication in Europe. Many authors have pointed to the problematic dimensions of the emergence of fundamental rights discourses, in particular regarding the international human rights movement. From a constitutional point of view, Loughlin questions the potential for human rights to change the status quo and instead sees a shift to their integration in existing schemes of governance.[14] From a legal-historical perspective, Moyn has observed that the turn to international human rights as a 'last utopia' does not seem to offer programmatic change[15] or address inequality in societies.[16] In contrast to such views, the analysis presented here agrees with a more constructive view of what human rights reasoning can contribute to polity-building. As Benhabib points out in reply to Moyn's historical account, politics and morality are not necessarily separated from each other in the interpretation and application of human rights.[17] She submits that, instead, we should see human rights as 'straddl[ing] a necessary line between morality and legality': they differ from moral norms, which transcend space and time, by

[10] T More, *Utopia* (1516), full text available at: www.theopenutopia.org (edited and with an introduction by S Duncombe, 2012). The name 'Utopia' is composed by the Greek *ou* and *topos*, literally meaning 'no place' (at xxxii).

[11] M Loughlin, 'The Constitutional Imagination' (2015) 78 *Modern Law Review* 1, 13. See also J Habermas, 'The Concept of Human Dignity and the Realistic Utopia of Human Rights' in *The Crisis of the European Union: A Response* (Cambridge, Polity Press, 2012) 71–100, who explains the development of human rights in utopian terms: 'Human rights constitute a *realistic* utopia insofar as they no longer paint deceptive images of a social utopia which guarantees collective happiness but anchor the ideal of a just society in the institutions of constitutional states themselves' (at 95). It may be noted that 'utopian thinking' may not only serve the development of law, but can also play a role in legal education; see D Kennedy, 'Legal Education and the Reproduction of Hierarchy' (1982) 32 *Journal of Legal Education* 591, 613–14.

[12] In line with the Rawlsian approach of theorising justice in terms of a 'realistic utopia', which presents an ideal for an 'achievable social world'; see J Rawls, *The Law of Peoples* (Cambridge, MA, Harvard University Press, 1999) 11–12. For a conceptual map of ideal and more realistic theories, see L Valentini, 'Ideal vs Non-ideal Theory: A Conceptual Map' (2012) 7 *Philosophy Compass* 654.

[13] Loughlin (n 11) 12–13.

[14] ibid 24–25.

[15] S Moyn, *The Last Utopia: Human Rights in History* (Cambridge, MA, Harvard University Press, 2010).

[16] S Moyn, *Not Enough: Human Rights in an Unequal World* (Cambridge, MA, Harvard University Press, 2018).

[17] S Benhabib, 'Moving beyond False Binarisms: On Samuel Moyn's *The Last Utopia*' (2013) 22 *Qui parle* 81, 86–88.

providing justiciable rights that can be invoked in specific jurisdictions.[18] In line with this view, and like Benhabib taking inspiration from Habermas' conceptualisation of human rights,[19] the present analysis looks into the potential of fundamental rights to contribute to a reimagination of private legal solutions to politically sensitive questions. This contribution is primarily found in case law, in which recourse to fundamental rights requires all actors involved in civil litigation to deliberate on the meaning of the core concepts of private law (freedom of contract, good faith, public policy) against the backdrop of moral and political questions raised by the specific cases. Such deliberative processes, for which European private law cases provide space, may contribute to the development of alternative answers to societal questions. The imagination of such alternatives may inspire the development of legal solutions by judges in civil cases, who are called upon to assess these questions in light of a transnational, European context.

An example can be found in the case law concerning the enforcement of mortgage contracts following the economic crisis of 2008, especially the Spanish cases that were referred to the Court of Justice of the European Union (CJEU).[20] Spanish law allowed banks to invoke mortgage contracts in accelerated procedures, on the basis of standard terms and conditions that one-sidedly favoured the interests of the banks as credit providers. Homeowners who found themselves in financial difficulties as a consequence of the crisis faced eviction after having failed to pay a few instalments, while not being able to repay the entire debt to the banks. In the landmark case of *Aziz*, the judge, who was asked to assess the fairness of the standard conditions that made such proceedings possible, rephrased the question in European terms.[21] He noted that homeowners could not effectively be protected under the EU Unfair Contract Terms Directive (UCTD)[22] if the outcome of an assessment of the bank's conditions could not halt the mortgage enforcement proceedings and eventual eviction.[23] The CJEU's confirmation of this observation resulted in important changes in the Spanish law of civil procedure, which was amended so as to enable the assessment of the fairness of mortgage conditions at the outset of the enforcement proceedings.[24] Given the emphasis that the Court placed on the protection of the home in *Aziz* and further judgments, this case law has been read as providing a form of 'hidden constitutionalisation' of contract law.[25] Moreover, both the Opinion of Advocate General Kokott and the CJEU's judgment sparked the debate on how to address the position of homeowners following the economic crisis.[26] For these reasons, the Spanish mortgage cases may serve as an illustration of the way in which alternative or utopian reimaginations of the legal framework may open up space for the development of new solutions.

[18] ibid 88.

[19] Habermas (n 2) 476–78.

[20] JML van Duin, *Effective Judicial Protection in Consumer Litigation: Article 47 of the EU Charter in Practice* (Cambridge, Intersentia, 2022). See also van Duin's chapter in this volume.

[21] Case C-415/11 *Mohamed Aziz v Caixa d'Estalvis de Catalunya, Tarragona i Manresa (Catalunyacaixa)* EU:C:2013:164.

[22] Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts [1993] OJ L95/29.

[23] *Aziz* (n 21) para 29.

[24] Ley 1/2013, BOE No 116, 15 May 2013, 36373.

[25] HW Micklitz and N Reich, 'The Court and Sleeping Beauty: The Revival of the Unfair Contract Terms Directive (UCTD)' (2014) 51 *Common Market Law Review* 771, 800–01; G Comparato and HW Micklitz, 'Regulated Autonomy between Market Freedoms and Fundamental Rights' in U Bernitz, X Groussot and F Schulyok (eds), *General Principles of EU Law and European Private Law* (Alphen aan den Rijn, Kluwer, 2013) 140. See also Van Duin's chapter in this volume. For a judicial perspective on the *Aziz* case, see Judge Fernández Seijo's chapter in this volume.

[26] Van Duin, *Effective Judicial Protection in Consumer Litigation* (n 20) 162–76.

While judicial interventions such as those in the *Aziz* case generally receive praise for offering solutions, they also encounter a critique of judicial activism.[27] Is the CJEU overstepping its competence within the European (private) legal order?[28] This critique relates not only to the interventions of European courts, but also to the approach of national courts in cases with a strong political dimension. Recent developments in climate change litigation illustrate the point: cases such as *Urgenda*, in which courts award claims for tort liability in relation to questions of climate change, based on ECHR rights, have received criticism for overstretching the boundaries of legitimate judicial law-making.[29] From an institutional perspective, it is questioned to what extent courts may be intervening in the sphere of competence of the executive and legislative branches.[30] Moreover, from a substantive point of view, the extent to which tort law can accommodate climate change questions is the subject of debate.[31] Thus, these cases raise the question of how judges should handle such politically sensitive questions. The analysis in the following sections will suggest that an answer may be found by moving away from the debate on judicial activism and trying to understand how the type of reasoning that emerges in the case law may be understood to be part of the role of judges in European private law.

B. Understanding Utopianism

In the following discussion, two ways in which the critique of judicial activism in European private law may be countered will be discussed and contrasted: first, Michael Dowdle's theory of 'responsive adjudication'; and, second, my proposal for a democratic framing of judicial law-making.

In his chapter in this volume, Michael Dowdle argues that contract law has a 'doubly constitutionalising' character, which can explain and justify the activism of the CJEU in the field of consumer contract law.[32] On the one hand, Dowdle submits, contract law enables and regulates market transactions. On the other hand, insofar as rules of contract law are enacted through public legal processes, contract law allows for the pursuit of public goals through markets.[33] This doubly constitutional function of contract law, then, facilitates political inclusion by giving citizens the freedom to use their economic resources to pursue ends of their own choice.[34] According to Dowdle's understanding of constitutionalism, courts handling contract cases cannot help but be activist, given the inherent normative inconsistencies between the state-constitution and the market-constitution that contract law upholds.[35] 'Responsive

[27] HW Micklitz, 'Mohamed Aziz – Sympathetic and Activist, But Did the Court Get it Wrong?' in A Sodersten and JHH Weiler (eds), *Where the Court Gets it Wrong* (European Constitutional Law Network, 2013), www.ecln.net/florence-2013.html.

[28] ibid 8; M Dawson, B de Witte and E Muir, *Judicial Activism at the European Court of Justice* (Cheltenham, Edward Elgar, 2013). On national courts, see A Beka, *The Active Role of Courts in Consumer Litigation: Applying EU Law of the National Courts' Own Motion* (Cambridge, Intersentia, 2018).

[29] LE Burgers, 'Should Judges Make Climate Change Law?' (2020) 9 *Transnational Environmental Law* 55, 57–58.

[30] ibid.

[31] M Hinteregger, 'Civil Liability and the Challenges of Climate Change: A Functional Analysis' (2017) 8 *Journal of European Tort Law* 238, 240; and see also Hinteregger's chapter in this volume.

[32] M Dowdle, 'On the Doubly Constitutionalising Character of European Contract Law', ch 3 in this volume, section IV.

[33] ibid section I.

[34] ibid section II.A.

[35] ibid section III.A.

adjudication', in this view, makes such inconsistencies visible and seeks to find a balance for interpretive activism.[36] According to this view, a justification for judicial activism may be found in a theory of 'judicial politics' rather than that of separation of powers.[37]

The second view, which I will defend here, is based on democratic theory.[38] While it shares some features with Dowdle's perspective, its underlying premises are markedly different. Like Dowdle's view, it asserts that the functionalities of courts not only comprise dispute resolution and norm generation, but also encompass a political dimension. In particular, the adjudication of politically charged questions of private law gives a voice to those whose interests may not have been heard or may have been overruled in legislative processes.[39] As such, case law may provide new rule-solutions or induce legislative action. However, in my view, the justification for this form of judicial law-making should rather be found in democratic reasons than in the constitutionalising function of contract law as defined by Dowdle. Judicial activism in European private law seems to be inspired both by the regulation of the market and by the deliberation of justice concerns that underlie regulatory frameworks.[40]

This theoretical framework, which will be further elucidated in the remainder of this chapter, builds on the dialogue between Jürgen Habermas and Nancy Fraser, combined with insights from European constitutional theory and private law theory. My main claim is that courts in civil cases do and should contribute to a transnational sphere of deliberation, which includes and mediates diverse legal-political views on the handling of private legal questions. In this way, courts provide space for the democratic development of new rules. While arguably attributing a more active role to courts in democratic constellations than Habermas does,[41] this theoretical view shares his idea on the role of public spheres. The possibility to discuss societal questions in a public space, encompassing debating rooms, cafés and (social) media, allows for these questions to be brought to the attention of legislative powers.[42] In my view, case law may help maintain such public spaces, insofar as it inspires debate.[43] Courts are not so much part of public space themselves – and hence distinct from the aforementioned fora – but rather contribute to the maintenance of a public sphere for deliberations on the societal questions underlying specific private legal disputes. Such deliberative processes are thus distinct from the judicial deliberations in the cases themselves, which provide a justification for the judgments. The link that I see is that, by including judicial reasoning on the societal aspects of cases – often in the language of fundamental rights – judgments contribute to the maintenance of the public deliberation on what the law should say. Importantly, judges do not have to follow

[36] ibid.

[37] ibid, referring to Ayres and Braithwaite.

[38] C Mak, 'First or Second Best? Judicial Law-Making in European Private Law' in JM Mendes and I Venzke (eds), *Allocating Authority* (Oxford, Hart Publishing, 2018).

[39] ibid 232–33; see also C Mak, 'Civil Courts as Constitutional Courts: Polity-Building through Private Law in Europe' (2020) 28 *European Review of Private Law* 953, inspired by the work of Habermas and Fraser.

[40] HW Micklitz, *The Politics of Justice in European Private Law: Social Justice, Access Justice, Societal Justice* (Cambridge, Cambridge University Press, 2018) 16–17.

[41] In his seminal work *Between Facts and Norms* (Cambridge, Polity Press, 1996), Habermas makes a distinction between 'discourses of justification' and 'discourses of application'. Judges should apply the existing law and, in principle, not enter into the justification of new norms (at 172). Judicial activism as discussed in the present chapter may seem to sometimes come close to a justifying logic of argumentation, especially in cases where national legislation is deemed to be non-compliant with European fundamental rights.

[42] ibid 373.

[43] On this basis, Laura Burgers submits that climate change litigation can be considered to be democratically legitimate; see LE Burgers, 'Justitia, the People's Power and Mother Earth: Democratic Legitimacy of Judicial Law-Making in European Private Law Cases on Climate Change' (PhD thesis, University of Amsterdam, 2020), https://hdl.handle.net/11245.1/0e6437b7-399d-483a-9fc1-b18ca926fdb5, 73–74.

public opinion, but while deciding on the legal merits of the case allows for much broader discourses on the issue at hand.[44]

Importantly, public spheres are inclusive; although publics composed many varieties, ranging from those attending a concert or theatre performance to Twitter or Facebook followers around the world, these spheres in principle remain 'porous' or 'permeable'.[45] All who will be governed by certain norms should thus be able to have a say in the development of these norms. Nancy Fraser's critical discussion of Habermas' work makes an important addition on this point, as she rightly observes that inclusive public opinion no longer overlaps with the borders of nation-states.[46] Accordingly – and this is of great relevance for the claim defended here – it is not primarily shared citizenship that defines a public, but rather common structures or institutions that affect people's lives.[47]

The following analysis will assess this theoretical claim that courts in civil cases should contribute to inclusive transnational deliberative spheres and thus the shaping of a political community. It will look into why and to what extent a democratic, public sphere theory of adjudication provides a convincing explanation and justification for judicial activism in European private law, in particular in comparison to Dowdle's view on contract law adjudication. However, before moving on to this analysis, it should first be briefly examined which types of cases involving the interaction of civil courts and the CJEU and the European Court of Human Rights (ECtHR) may be representative for such inclusive processes.

C. Judicial Conversations

The role of courts in maintaining deliberative processes in European private law combines aspects of judicial dialogue with judicial deliberations. The interaction of national courts with the CJEU and the ECtHR, as well as with courts in other countries, is often called a 'judicial dialogue'.[48] Through the interaction among courts, the interpretation of rules is clarified and questions of competence are handled. While this process is frequently characterised as one of conflict resolution,[49] the emphasis in the current analysis instead lies on legitimation through inclusion.[50] I submit that the interaction among courts on different levels of governance contributes to the maintenance of an inclusive public sphere, in which new legal solutions may emerge. To capture this dimension, and reduce the emphasis on conflicts of rules, I propose the term 'judicial conversations'. While a dialogue only involves two actors, a conversation mediated through the interaction of courts can likely include more than two speakers.

[44] For example, both the Opinion of AG Kokott (EU:C:2012:700) and the judgment of the CJEU in the *Aziz* case (n 21), which explicitly acknowledged the socio-economic context of the case, inspired debates on the handling of eviction cases after the economic crisis, both in Spain and in the transnational European sphere. See section III.B below.

[45] Habermas (n 41) 374.

[46] N Fraser, 'Transnationalizing the Public Sphere: On the Legitimacy and Efficacy of Public Opinion in a Post-Westphalian World' in N Fraser et al (edited by K Nash), *Transnationalizing the Public Sphere* (Cambridge, Polity Press, 2014) 30.

[47] ibid.

[48] A Arnull, 'Judicial Dialogue in the European Union' in J Dickson and P Eleftheriadis (eds), *Philosophical Foundations of European Union Law* (Oxford, Oxford University Press, 2012); A Torres Pérez, *Conflicts of Rights in the European Union: A Theory of Supranational Adjudication* (Oxford, Oxford University Press, 2009) 109 ff.

[49] G Letsas, 'Harmonic Law' in J Dickson and P Eleftheriadis (eds), *Philosophical Foundations of European Union Law* (Oxford, Oxford University Press, 2012) 91–92.

[50] *cf* Torres Pérez (n 48) 110–13.

Judicial conversations are shaped by the deliberations made in judgments, which are instrumental for developing answers to the questions posed in civil cases. They explain the line of reasoning and, in private law, the manner in which a balance is struck among the interests of the parties involved. Moreover, the legitimacy of judgments may be strengthened by the style of reasoning, for instance through the motivation of choices among different solutions.[51] Thus, judicial deliberations provide substance to the institutional interaction of courts.

In the following, three cases will be analysed that illustrate how judicial deliberations on politically sensitive topics are shaped in transnational judicial conversations in European private law – two involve the CJEU and one the ECtHR. In particular, it will be assessed to what extent deliberations that connect the national to the European dimension of private law may contribute to the inclusion of under-represented interests. Making these interests explicit in the conversations among courts, it will be shown, may clarify the legal framework or even induce legislative reform. The question is how this 'convening power' of courts may be explained. In the context of this chapter in particular, the two theories that were introduced in the previous section are explored: can judicial activism in European private law be understood as making visible the inconsistencies among state-constitutions and market-constitutions, as Dowdle submits?[52] And why might a democracy-based theory of judicial conversations offer a plausible alternative?

The cases have been selected on the basis of the debates they have raised among academics as well as, to a greater or lesser extent, a general audience. Furthermore, the aim has been to identify cases that are relevant to a larger number of European jurisdictions. Perhaps unsurprisingly, given these criteria, the selection comprises matters that go to the foundations of private law and have a clear fundamental rights dimension:[53] contracts on broadcasting rights for information of public interest (*Sky Österreich*), housing justice (*Aziz*) and surrogacy arrangements (*Mennesson v France*). It should be underlined that the aim of the analysis is not to give a full overview of case law or to advance the idea that there is one consistent approach to judicial conversations in European private law. Rather, it is attempted to show that there is more to the interaction of national and European courts in private legal cases than doctrinal aspects or an economic understanding of contract law. Analysing the cases in their social and political context, as well as their place in time in the private law debate, serves to substantiate the claim that the democratic, public sphere dimension of judicial conversations should be added to a theory of what courts do and should do in their handling of politically sensitive questions of private law.

III. THREE JUDICIAL UTOPIAS

A. Freedom of Information and Contract Law: *Sky Österreich*

Europa League football matches tend to attract a lot of public interest. The case of *Sky Österreich* concerned the business models that have been developed around television

[51] M de S-O-L'E Lasser, *Judicial Deliberations: A Comparative Analysis of Judicial Transparency and Legitimacy* (Oxford, Oxford University Press, 2009) 20–23; on the CJEU, see 349–52.

[52] *cf* Dowdle (n 32); see section II.B above.

[53] Note that these cases are meant as illustrations of judicial conversations in European private law. It is not the aim to give a full overview here, but rather to gain a better understanding of the process and the role of courts in the shaping of rules of private law in Europe.

broadcasting of these events and limitations to such models under EU law.[54] Sky had acquired an exclusive licence to broadcast Europa League matches in Austria in the seasons from 2009/2010 to 2011/2012 and provided viewers with access to a paid digital channel. A contract with the public broadcasting channel Österreichischer Rundfunk (ORF) initially stipulated that it would pay a price of €700 per minute for short news reports on the football matches. However, at the request of ORF, the Austrian media authority KommAustria determined that a possibility to present such short news report should be provided by Sky at the cost of providing access to the satellite signal, which in this case equalled zero.[55] In the appeal against this decision, the preliminary question was raised as to whether the European provision that led to this conclusion – Article 15(6) of the Audiovisual Media Services Directive – limited Sky's freedom to enjoyment of property as well as its freedom of contract in a disproportionate manner.[56] The CJEU held that there was no reason to doubt Article 15(6)'s validity, as the European legislature had struck a fair balance between Sky's freedom to conduct a business (Article 16 of the Charter of Fundamental Rights of the European Union (EUCFR)) and EU citizens' freedom of information and the freedom of media pluralism (Article 11 EUCFR).[57] The public interest in access to reports on Europa League football outweighed Sky's freedom of contract.

The case seems to fit Dowdle's view on judicial law-making, insofar as it makes visible inconsistencies between state-constitutions and market-constitutions. This comes to the fore when considering the case law of the German and Austrian Constitutional Courts, which was briefly referred to by the CJEU.[58] These Courts had determined that a right to broadcast short news reports free of charge was disproportionate and, accordingly, infringed the constitutional rights to professional freedom and protection of property. In his Opinion in the case, Advocate General Bot carefully examined the different balances struck by the CJEU and national courts, emphasising that each court has to consider the structure and objectives of the legal framework when assessing fundamental rights. Accordingly, he observed, 'it follows that the weighing of the different fundamental rights at stake does not necessarily call for the same response at national or EU level'.[59] Although the CJEU itself did not elaborate on this point, its judgment was in line with this observation, as it firmly placed the balance of Charter rights within the framework established by the Directive's objectives. While respecting the essence of the freedom to conduct a business, the Court observed, Article 15 of the Directive sought to guarantee access for the general public to information relating to events of high interest – that football matches qualify as such was not in question.[60] Interestingly, the Court, thus shaped a space for the 'social function' of the freedom to conduct a business.[61] With Dowdle, one could say that the reasoning in *Sky Österreich* visibly anchored the pursuit of a certain public interest within the EU's market-constitution.

Still, it seems that the constitutional dimension of contract law in *Sky Österreich* goes further than 'judicial politics'. The CJEU placed considerable emphasis on the importance of safeguarding the fundamental freedom to receive information and media pluralism in a 'democratic and pluralistic society' on the basis of Article 11 EUCFR.[62] Its reflections on the

[54] Case C-283/11 *Sky Österreich v Österreichischer Rundfunk* EU:C:2013:28.
[55] ibid paras 16–18.
[56] ibid paras 21, 24.
[57] ibid paras 59, 66–67.
[58] ibid para 23.
[59] Case C-283/11 *Sky Österreich*, Opinion of AG Bot, EU:C:2012:341, para 80.
[60] *Sky Österreich* (n 54) paras 49–52.
[61] ibid para 45.
[62] ibid paras 52, 66.

balance of fundamental rights accordingly took into account both the protection of the freedom of business and the interest of the general audience to have access to short reports on football events of high public interest. This democratic dimension seems even more present in the Advocate General's comparative exploration of the approaches chosen in the Council of Europe's Convention on Transfrontier Television, the case law of the ECtHR and the decisions of the German and Austrian Constitutional Courts.[63] Clarification of the relations of EU law to other European and national legal orders in this case served the demarcation of the 'democratic society' for which the CJEU was balancing the rights to information of public interest and the contractual freedom of exclusive rights-holders. In that sense, *Sky Österreich* provided a space for deliberation on a shared European direction.

The democratic dimension of these deliberations is further underscored by the discussion on the extent to which freedom of contract should be constitutionalised. In particular, the CJEU's later judgment in *Alemo-Herron*[64] has been widely criticised for giving too much weight to the essence of the freedom to conduct a business under Article 16 EUCFR.[65] Since the scope and meaning of this freedom, including the freedom of contract, are subject to continuous democratic reassessment, a strong constitutionalisation of a European 'essence' of Article 16 EUCFR is highly problematic.[66] Given the diverse understandings of freedom of contract in different national traditions, the definition of a European constitutional version of this freedom that may overrule national social policies likely lacks democratic support. Importantly, though, *Alemo-Herron* is seen as an 'aberration' between *Sky Österreich* and later judgments.[67] Its significance for the current analysis mostly lies in its contribution to the judicial conversation on the constitutional nature and limits of freedom of contract. As such, it remains of relevance for the shaping of a European political community.[68]

B. Unfair Contract Terms Control in the Housing Market: *Aziz*

The case law on Spanish mortgages that followed the 2008 economic crisis provides another example of judicial conversations on matters of notable legal-political significance. Like *Sky Österreich*, the individual cases arose against the backdrop of a fundamental debate on the balance that should be struck between the interests of different private actors. However, the stakes were much more personal for the debtors, as the object of the contracts were their homes. The aforementioned *Aziz* case is emblematic of how the interaction among civil courts

[63] Opinion of AG Bot (n 59) paras 73–80.

[64] Case C-426/11 *Mark Alemo-Herron and Others v Parkwood Leisure Ltd* EU:C:2013:521.

[65] J Prassl, 'Freedom of Contract as a General Principle of EU Law? Transfers of Undertakings and the Protection of Employer Rights in EU Labour Law' (2013) 42 *Industrial Law Journal* 434; J Prassl, 'Business Freedoms and Employment Rights in the European Union' (2015) 17 *Cambridge Yearbook of European Legal Studies* 189; S Weatherill, 'Use and Abuse of the EU's Charter of Fundamental Rights: On the Improper Veneration of "Freedom of Contract"' (2014) 10 *European Review of Contract Law* 167; M Bartl and C Leone, 'Minimum Harmonisation after *Alemo-Herron*: The Janus Face of EU Fundamental Rights Review' (2015) 11 *European Constitutional Law Review* 140.

[66] M Bartl and C Leone, 'Minimum Harmonisation and Article 16 of the CFREU: Difficult Times Ahead for Social Legislation?' in H Collins (ed), *European Contract Law and the Charter of Fundamental Rights* (Antwerp, Intersentia, 2018) 123.

[67] Prassl, 'Business Freedoms and Employment Rights in the European Union' (n 65) 190; Weatherill (n 65) 176.

[68] *cf* O Gerstenberg, *Euroconstitutionalism and its Discontents* (Oxford, Oxford University Press, 2018) 86–87, who observes that the case law was taken into account in subsequent legislative reforms.

allowed for a deliberation and reimagination of how the contractual relationships between banks and homeowners should be assessed.[69]

Again, Dowdle's perspective goes a long way towards explaining the 'judicial activism' with which the CJEU's *Aziz* judgment is often associated. Insofar as access to fair conditions for mortgage credit is essential for providing adequate housing, the judgment clearly established the links between market-oriented and social dimensions to the contractual relationship between bank and homeowner. The CJEU, following Advocate General Kokott, considered that it was problematic that there was no option under national law to halt mortgage enforcement proceedings while judicial review of the fairness of the contract terms was pending, since the only remedy available to the homeowner in the event of an eventual finding of unfairness of the terms would be monetary compensation.[70] In line with the concerns raised by the national judge who had referred the case,[71] the deliberations thus included a recognition of the tension between economic and social interests. If the CJEU were seen as a 'responsive' court in this saga,[72] one could say that its broad interpretation of the Unfair Terms Directive allowed for a deliberation of the approaches taken to mortgage and credit contracts in several Member States.[73]

However, the contribution of the judicial conversation on Spanish mortgages can hardly be detached in the debate on Europe's democratic and justice deficits.[74] While Dowdle's analysis convincingly explains why the market-constitutional dimension of contract law is more visible in the case law of the CJEU than that of national courts, it leaves this specific democratic concern unexplored. By focusing on the interaction between state-constitutions and market-constitutions, the model of national constitutionalism seems to be inadvertently transposed to the EU. As a consequence, the extent to which the EU's constitutional constellation may differ from national constellations is not fully taken into account. For cases like *Aziz*, this is problematic, insofar as a main concern raised by this case law is its democratic legitimacy: how can the interaction between the CJEU and national courts be explained, and to what extent can its impact on national legislative processes be justified?

The democratic theoretical framework proposed in this chapter seeks to address criticism on the type of judicial activism discerned in the *Aziz* judgment by fully engaging with the question of where boundaries to judicial law-making in European private law are and should be drawn.[75] From this perspective, it may be noted that the CJEU left the basis for its development of a remedy in the *Aziz* judgment implicit, relying on a legal-technical interpretation of the effectiveness of the UCTD. Thus, rather than establishing a fully developed view on the extent to which private legal questions should be constitutionalised, the *Aziz* case might instead be seen as a contribution to an ongoing conversation. In its judgment, the Court acknowledged the social dimension of the case, regarding the protection of the homes of Mr Aziz as well as many other homeowners in Spain. Yet, it refrained from addressing the fundamental rights

[69] See section II.A above.

[70] *Aziz* (n 21) paras 60–61.

[71] See Judge Fernández Seijo's chapter in this volume.

[72] Dowdle (n 32) section III.A.

[73] For comparative studies, see van Duin, *Effective Judicial Protection in Consumer Litigation* (n 20); M Józon, 'Judicial Governance by Unfair Contract Terms Law in the EU: Proposal for a New Research Agenda for Policy and Doctrine' (2020) 28 *European Review of Private Law* 909. From a point of view of democratic experimentalism, see Gerstenberg (n 68) 104; Mak (n 38) 236–37.

[74] Micklitz (n 27) 8–9.

[75] Mak (n 38) 221–23. See also Burgers (n 43) 52–57 and 271–80 on the boundaries of legitimate judicial law-making in climate change cases.

dimension of housing and, accordingly, left the relation between the UCTD and the EUCFR in the middle; as noted by Micklitz and Reich, *Aziz* could be read as 'hidden constitutionalisation' of the private law debate.[76]

In later case law, the CJEU did more explicitly address the fundamental rights dimension of private legal relations. In judgments such as *Sánchez Morcillo*[77] and *Kušionová*,[78] it placed the financing of housing in the key of the Charter, although emphasis remained on the procedural dimension of effective judicial protection (Article 47 EUCFR) rather than a substantive elaboration of what a right to housing (Article 7 EUCFR) should entail in horizontal contractual relationships.[79] Moreover, the Court's case law on the meaning of Charter provisions for private legal relationships expanded the potential reach of fundamental rights. In its judgment in *Bauer and Broßonn*, the Court held that Charter rights which are 'mandatory and unconditional in nature' may apply to private legal relations that fall within the scope of EU law.[80] As the Charter provisions that pertain to housing may not be able to fulfil these criteria, it remains to be seen which effects they may be inspire.[81] Still, tracing the developments in case law surrounding the *Aziz* judgment has shown how transnational judicial deliberations may shape the debate on housing justice in Europe. The fundamental rights dimension of the reasoning in these cases allowed for a broader debate on their socio-economic context.

C. Recognition of Children's Rights in the Balance with Immoral Contracts: *Mennesson v France*

Contrasting the interaction of courts under EU law with judicial conversations under the ECHR may serve to further substantiate the claim defended here on the democratic side to utopian reasoning in European private law adjudication. In fact, from a private law perspective, both types of Europeanisation are of importance. Since cases arise from the private legal relations between the parties, the applicable rules of private law determine the scope for European influence. As we have seen, both EU Directives and Charter rights have gained increasing impact in defining freedom of contract in the interplay with national private legal orders. A comparison with similar effects of ECHR rights may further clarify the role of judicial conversations in this field.

The case of *Mennesson v France*,[82] on child–parent affiliation after surrogacy, illustrates well what is at stake. The case concerned the registration in France of the birth certificates of two children who had been born through surrogacy in California in the US. While surrogacy is allowed under Californian law, it is forbidden in France. Accordingly, contracts for surrogacy

[76] Micklitz and Reich (n 25) 800–02.

[77] Case C-169/14 *Juan Carlos Sánchez Morcillo and María del Carmen Abril García v Banco Bilbao Vizcaya Argentaria, SA* EU:C:2014:2099, para 35.

[78] Case C-34/13 *Monika Kušionová v SMART Capital, a.s.* EU:C:2014:2189, paras 45–47.

[79] I Domurath, 'Mortgage Debt and the Social Function of Contract' (2016) 22 *European Law Journal* 758, 766–67; van Duin, *Effective Judicial Protection in Consumer Litigation* (n 20) 107.

[80] Joined Cases C-569/16 and C-570/16 *Stadt Wuppertal v Maria Elisabeth Bauer and Volker Willmeroth v Martina Broßonn* EU:C:2018:871, para 85.

[81] I Domurath and C Mak, 'Private Law and Housing Justice in Europe' (2020) 83 *Modern Law Review* 1188, 1217.

[82] *Mennesson v France* App No 65192/11 (ECtHR, 26 June 2014), CE:ECHR:2014:0626JUD006519211; ECtHR (Grand Chamber) 10 April 2019, Advisory opinion concerning the recognition in domestic law of a legal-parent child relationship between a child born through a gestational surrogacy arrangement abroad and the intended mother, requested by the French Cour de Cassation, request no P16-2018-001.

are considered to be void as they infringe upon the French conception of *ordre public international*.[83] Since the French public authorities refused to register the children's birth certificates, the two girls remained US citizens and it was impossible to formalise the relationship with their French intended parents. In legal proceedings challenging this decision, the French highest court in civil cases, the Cour de Cassation, upheld this prohibition, considering that it was against the principle of inviolability of the civil status to give effect to a surrogacy arrangement.[84] The parents brought a complaint against the judgment to the ECtHR, based on an alleged violation of respect for their private and family life under Article 8 of the Convention.[85] While the Court did not find a violation of the parents' rights, it considered that the children's rights under Article 8 had been harmed. It emphasised the children's identity within French society depended on the recognition of the parent–child relationship.[86] Although it accepted France's discouraging policy towards international surrogacy, it held that the best interests of the children demanded that at least the biological relationship with their intended father should be recognised.[87] In a subsequent advisory opinion, which had been requested by the Cour de Cassation, the ECtHR further extended the children's right under Article 8 to the relationship with the intended mother, given the interest of the children of 'legal identification of the persons responsible for raising [them], meeting [their] needs and ensuring [their] welfare, as well as the possibility … to live and develop in a stable environment'.[88] Although the ECtHR allowed states to choose which legal form to give to the recognition of the child–parent relationship, the Cour de Cassation eventually decided that the Mennessons did not have to go through the adoption procedure that would be required under national law: since the proceedings regarding their affiliation to the intended parents had already lasted for more than 15 years, in order to minimise the infringement of the children's rights under Article 8 ECHR, the Cour de Cassation ruled that the registration of their birth certificates should not be annulled.[89]

Of the three cases discussed in this chapter, *Mennesson v France* probably most clearly illustrates the differences between Dowdle's theory of the doubly constitutionalising function of contract law and my democracy-based perspective. In particular, while we fully agree that contract law has a constitutional dimension, we appear to disagree on the place of non-economic factors in this dimension.

Dowdle's theory may explain why some legal systems, such as that of California, where the Mennesson girls were born, give precedence to contract law's facilitative economic function – the market-constitution then aligns with an 'economic constitution' of the state. His theory could also explain why the French legal system takes a different approach and considers surrogacy contracts to lack validity – the open norm of 'public policy' allows for a judicial assessment of such contracts, which does not have to engage with the tension between the market-constitution and the state-constitution.[90] Considerations on the affiliation of the

[83] C Pavillon, 'Case 5: Surrogate Motherhood Contracts – France' in A Colombi Ciacchi, C Mak and Z Mansoor (eds), *Immoral Contracts in Europe* (Cambridge, Intersentia, 2020) 289.

[84] Cour de cassation 1re civ, 6 April 2011, no 10-19053, Bulletin 2011, I, no 72, in line with the case law of the Cour de Cassation that considers surrogacy contracts to infringe upon this principle as well as the principle of inalienability of the human body; Pavillon (n 83) 290; H Beale et al, *Cases, Materials and Text on Contract Law*, 3rd edn (Oxford, Hart Publishing, 2019) 670–74.

[85] *Mennesson* (n 82) para 43.

[86] ibid paras 80, 96.

[87] ibid paras 99–100.

[88] ECtHR, 10 April 2019 (n 82) para 42.

[89] Cour de cassation ass plén, 4 October 2019, no 10-19.053, paras 15–19.

[90] Dowdle (n 32) section III.C.

children in principle remain out of sight in this analysis, as they are not a matter of contract law.[91] It seems that neither the Cour de Cassation nor the ECtHR's judgments in the *Mennesson* case would be deemed to be activist in any way, since the courts did not have to engage with the question of whether surrogacy contracts should be allowed, but just handled the consequences of such arrangements under family law.

If my understanding of what Dowdle's theory would say about the *Mennesson* judgments is correct, then there is a clear contrast with my view on judicial law-making in Europe. In my 'utopian' theory, the interaction between the French court and the ECtHR provided a space for deliberation on the legal regulation of surrogacy. As many European countries deal with the question of whether to continue to prohibit surrogacy or rather to pragmatically facilitate the use of international 'baby markets' for their citizens,[92] the French case was of great importance for the debate on how to address the tension between national prohibitions and the affiliation of children born in countries where surrogacy is allowed. Although the courts have not managed to fully reconcile the interest of states to *ex ante* establish that surrogacy contracts should remain without effect with the best interests of the child that requires *ex post* affiliation, judicial deliberations have contributed to the broader, transnational debate. In particular, the judgments have given voice to the interests of children born as a result of surrogacy through the interpretation of Article 8 ECHR as well as a public debate on the case.[93] These insights are likely to affect further judicial as well as legislative decisions on surrogacy in Europe.[94]

IV. THE EUROPE-MAKING CAPACITY OF ADJUDICATION

In the previous sections, we explored three judicial utopias, representing three highly diverse areas of European private law: limits to freedom of contract of broadcasters aimed at providing a general audience with information on European football matches; judicial control of mortgage contracts in order to ensure housing justice; and looking past prohibitions on surrogacy contracts in order to enable the recognition of children's interests to be legally affiliated to their intended parents. As different as their substance and institutional setting were, the cases share several features. In particular, in each case, the interaction between a national court and a European counterpart – either the CJEU or the ECtHR – inspired deliberations that went beyond the economic basis of the contract at issue, in order to include social and political aspects. Moreover, the judgments gave a voice to those that are not often heard in legislative processes on the subject matter involved, respectively the European audience for

[91] MR Marella, 'The Old and the New Limits to Freedom of Contract in Europe' (2006) 2 *European Review of Contract Law* 257, 262.

[92] For an excellent introduction to this debate, see BC van Beers, 'Is Europe "Giving in to Baby Markets?" Reproductive Tourism in Europe and the Gradual Erosion of Existing Legal Limits to Reproductive Markets' (2014) 23 *Medical Law Review* 103; M Fabre-Magnan, *La gestation pour autrui* (Paris, Fayard, 2013). For a pragmatic perspective, see NF Bromfield and K Smith Rotabi, 'Global Surrogacy, Exploitation, Human Rights and International Private Law: A Pragmatic Stance and Policy Recommendations' (2014) 1 *Global Social Welfare* 123.

[93] See, for instance, this interview with Fiorella and Valentina Mennesson: 'Née d'une GPA: "Qui osera me dire: c'est horrible que tu existes ?"' *Le Parisien* (14 September 2018), www.leparisien.fr/societe/nee-d-une-gpa-qui-osera-me-dire-c-est-horrible-que-tu-existes-14-09-2018-7885803.php.

[94] In this context, it is interesting to mention that the Dutch legislature has proposed to regulate surrogacy through contract law in order to discourage international surrogacy and have a judicial check on the arrangements before the pregnancy. The pending proposal has already attracted a considerable amount of criticism, since it is contested whether the proposal can achieve its aims. See B van Beers and L Bosch, 'A Revolution by Stealth: A Legal-Ethical Analysis of the Rise of Pre-conception Authorization of Surrogacy Arrangements' (2020) 26 *New Bioethics* 351.

football matches in the CJEU in *Sky Österreich*, less affluent homeowners in the CJEU in *Aziz*, and children born as a result of surrogacy arrangements in the ECtHR in *Mennesson v France*. Thus, the interaction between national private law adjudication and the European level inspired new solutions for these individuals and groups.

Therefore, in conclusion, I would like to submit that the interaction between national courts in civil cases and the European level has a 'Europe-making capacity'.[95] The conversations among national and European courts open up inclusive deliberative spaces for debates on the underlying legal-political stakes of private legal questions. Judicial conversations in private law thus have the power to shape accounts of political (co-)existence that continuously allow for the imagination and reimagination of political reality in Europe, be it in relation to TV broadcasts, housing, reproductive treatment or other societal themes, such as climate change (*Urgenda*).[96] Each case provides a building block for a European polity.

A theoretical underpinning for the type of utopian thinking in adjudication that fuels this process was found in public sphere theory. Building on the dialogue between Habermas and Fraser, it is held that the interaction among national civil courts and the CJEU and the ECtHR maintains transnational public spaces for deliberation of societal questions. Thus, the judicial contribution to polity-building has a democratic dimension, which complements national and European legislative processes. Arguably, this theoretical view of judicial law-making in Europe can provide a more convincing or, in any case, more complete explanation of judicial conversations than Michael Dowdle's theory of 'responsive adjudication'. While Dowdle's theory gives a plausible explanation of the economic constitutional dimension of both national and European contract laws, its assertion that Europe's democratic deficit does not influence the interaction of national and European courts is, in my opinion, mistaken. Repairing a lack of democratic legitimacy, or even a justice deficit, is exactly what the CJEU and the ECtHR seemed to be doing when they gave a voice to the interests that had not been sufficiently taken into account in the legal framework for the cases at hand. This inclusive aspect of European private law adjudication is explained and made explicit by a public sphere theory as proposed in this chapter.

Thus, the question whether courts should be engaging in utopian conversations on European private law may be answered in the affirmative. As human rights needed a 'utopian gap in the temporal dimension' to develop into enforceable rights,[97] the process of European integration depends on realistic possibilities to reconcile national structures with overarching transnational deliberations. Private law adjudication, in some cases, may offer such utopian spaces needed for the constitutional imagination of Europe.

[95] Analogous to Loughlin's 'world-making' capacity of the constitutional imagination; Loughlin (n 11) 3.
[96] On the latter, see Burgers (n 29).
[97] Habermas (n 2) 93.