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CORE ANALYSIS

Giving voice: a public sphere theory of European private law adjudication

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Abstract

This Article addresses the question of how to explain and justify the allocation of politically sensitive legal questions to civil courts in the European Union. It proposes a pluralist theoretical view on interactions of private law adjudication with legislative initiatives in the process of building a European political community. This is elaborated on the basis of a reconstruction of the interaction between judicial and legislative processes in three high-profile cases (concerning non-discrimination, housing and climate change) in light of three theoretical perspectives: social justice, constitutionalism and public sphere theory. The first two perspectives shed light on the legal-political dimension of private legal questions in the European Union and manners in which to handle the plurality of sources and institutions in this field. They do, however, not fully clarify the distinction and relation between Habermasian discourses of justification and discourses of application of law in European Private Law adjudication. The Article suggests that public sphere theory, with a basis in Fraser's work on transnationalisation, can complement the theoretical understanding of the role of judges in European Private Law. It is submitted that the interaction between national and European levels of adjudication helps maintain transnational deliberative spheres in which the legal-political stakes behind private law can be discussed. This opens up space for the inclusion of different voices in democratic deliberations on questions of social justice. Private law adjudication may thus be considered to contribute to the initiation of discourses of justification which serve the re-imagination of a European political community.

Keywords: European Private Law; theory of adjudication; deliberative democracy; public sphere

1. A judge-made Europe?

'In the silence of politics, judges are making Europe,' Stefano Rodotà once observed.[1] This assertion related to the judicial elaboration of fundamental rights protection under the European Union's Charter of Fundamental Rights (EUCFR) in the early years of the millennium. It seems to ring equally true for current developments in case law on topical questions such as climate change, the housing crisis and inclusive labour markets. What is more, in many of these cases recourse is sought to classical doctrines of private law to address fundamental societal questions: employment contracts frame the debate on which restrictions may be placed on the manifestation of religious beliefs in the workplace, housing has become one of the main areas in which unfair contract terms control takes effect, and climate change is addressed through tort-based claims.[2] The old question on how legislative and judicial processes relate to one another, thus, requires renewed attention.

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

[2]See section 2 for references to cases and literature.

This Article aims to reconstruct the role of the judiciary in European Private Law in theoretical terms, in order to establish to what extent an expansion of political deliberation from legislative to judicial processes in Europe may be justified. Since reconstructions may never be deemed to be normatively innocent,[3] it will first explain the background to this idea on the changing role of civil courts in Europe in some detail and specify the normative assumptions underlying this view, which rely on democratic ideals of inclusion and representation. It will do so on the basis of a demarcation of the field of European Private Law (EPL), illustrated by an elaboration of three cases that show how the role of judges in this area has evolved in recent years (Section 2). In the subsequent analysis, three theoretical frameworks for understanding EPL adjudication will be presented and explored. First, it will be investigated to what extent the influential literature on social justice and EPL can explain and guide adjudication in this area (Section 3). Second, the constitutional dimension of EPL adjudication will be examined (Section 4). Third, having found these two theories to be of value but not fully able to address questions of inclusion in transnationalised private legal settings, the analysis will move on to an elaboration of theories on the function of public spheres in contemporary democratic systems, relating them to developments in European private law. In particular, the work of Habermas, Fraser and Benhabib will form a foundation for the further development of a theory of European Private Law adjudication (Section 5). It will be submitted that this latter theoretical approach is necessary to complement insights that theories on social justice and constitutionalism have to offer on EPL adjudication, especially regarding the role of case law in maintaining spaces for public deliberation on desirable legal solutions for addressing societal problems. Throughout this theoretical analysis, the three aforementioned examples from case law will serve as touchstones to assess which aspects of EPL adjudication the different frameworks can and cannot grasp.

Methodologically, the analysis fits within a strand of New Private Law Theory (NPLT), as defined by Hans Micklitz, Stefan Grundmann and Moritz Renner in their recent book with the same title.[4] NPLT's core ideas are that theoretical work on private law should be (i) pluralistic, taking into account insights from different disciplines, (ii) comparative, looking into different legal systems and different legal theoretical approaches (including legal culture and legal history), (iii) application-oriented, (iv) not State-centred or exclusively national, and (v) reflecting critical approaches to private law.[5] This view, thus, promotes a pluralist interdisciplinary openness of legal scholarship and practice as a normatively desirable way in which to consider questions of private law.[6] This paper, in accordance with the premises of NPLT, combines a contextual analysis of representative cases in the field of EPL with a both critical and (re)constructive analysis of the role of the judiciary in this area, in particular in relation to national and European legislatures.

In conclusion, it will be submitted that the comparative strength of a public sphere theory of EPL adjudication lies in its capacity to explain and justify the manners in which judicial interactions contribute to the inclusion of underrepresented groups (Section 6). Not only do these interactions provide space for the voices of those who are not heard, or not recognised on par with others, in legislative processes. They also contribute to the prioritisation of issues and the development of new and more effective remedies to respond to the needs of these groups. As such, in conclusion, it is sustained that European Private Law adjudication, despite all its imperfections, makes a valuable contribution to deliberations on the legal–political background to rules of private law in Europe and, accordingly, the constitution of a European polity. A theory of judicial law-

[3]K Tuori, *European Constitutionalism* (Cambridge University Press 2015) 9.

[4]S Grundmann, H-W Micklitz and M Renner, *New Private Law Theory: A Pluralist Approach* (Cambridge University Press 2021).

[5]Ibid., 'Introduction' 1–5.

[6]See also S Grundmann, 'Pluralistische Privatrechtstheorie: Prolegomena zu einer pluralistisch-gesellschaftswissenschaftlichen Rechtstheorie als normativem Desiderat ("normativer Pluralismus")' 86 (2002) *Rabels Zeitschrift für ausländisches und internationales Privatrecht* 364–420.

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making in Europe, therefore, needs to incorporate insights from public sphere theory in order to explain and guide private law adjudication in this broader legal-political context.

2. Maps of a changing landscape: the evolving role of judges in European private law

A. Three examples from case law

As a contribution to scholarship that theorises what judges do and should do when assessing cases between private actors (individuals, companies),[7] the following analysis aspires to map and critically analyse[8] important changes in the role of civil courts in Europe. Three examples from recent case law may serve as an illustration and starting point.[9]

The first one concerns non-discrimination in employment relations. In October 2022, in a case referred to as *L.F. v SCRL*, the Court of Justice of the European Union (CJEU) ruled that company policies that prohibit employees from manifesting their religious beliefs through the wearing of visible signs, such as an Islamic headscarf, do not constitute direct discrimination as long as such policies are applied in a general and undifferentiated manner.[10] Comments on the judgement were quick to point out that it sustains a line of case law of the CJEU that leaves considerable space to employers to impose 'neutrality policies' that are likely to discourage in particular Muslim women from participating in the labour force.[11] While some welcome the space given to companies' economic interests in justifying such policies, many warn for negative effects that the Court's balancing of the rights of employers and employees may have on Muslim women.[12] Rulings in the cases of *Achbita*,[13] *Bougnaoui*[14] and *Wabe & Müller*,[15] which preceded *L.F. v SCRL*, inspired a lively and critical debate not only in law journals, but also on blogs and other fora, engaging scholarship[16]

[7]In particular, but not limited to views on adjudication and the scholarly debate between Dworkin and Habermas; J Habermas, *Between Facts and Norms* (Polity 1996) 211–37, in particular 222–6.

[8]R Mangabeira Unger, 'Legal Analysis as Institutional Imagination' 59 (1996) The Modern Law Review 1–23.

[9]This paper does not aim to give a full overview of EPL case law, but rather works with representative examples to illustrate changes in the role of the judiciary. Examples have been selected on the basis of (i) the clear legal-political dimension of the disputes they addressed, (ii) the combination of national and European elements in the legal framework for their assessment, and (iii) their immediate importance for multiple jurisdictions in the EU.

[10]Case C-344/20 *L.F. v SCRL* ECLI:EU:C:2022:774.

[11]N Dube, 'Not Just Another Islamic Headscarf Case: *LF v SCRL* and the CJEU's Missed Opportunity to Inch Closer to Acknowledging Intersectionality' (European Law Blog 19 January 2023) <https://europeanlawblog.eu/2023/01/19/not-just-another-islamic-headscarf-case-lf-v-scrl-and-the-cjeus-missed-opportunity-to-inch-closer-to-acknowledging-intersectionality/> last accessed 26 July 2023.

[12]Contributions to the academic debate on the CJEU's headscarf cases include: T Loenen, 'In Search of an EU Approach to Headscarf Bans: Where to Go After *Achbita* and *Bougnaoui*?' 10 (2017) Review of European Administrative Law 47–73; M Hashemi, '*Eweida* versus *Achbita*: A Storm in a Teacup?' (2019) European Employment Law Cases 174–8; E Howard, 'Headscarves Return to the CJEU: Unfinished Business' 27 (2020) Maastricht Journal of European and Comparative Law 10–28; E Howard, 'Headscarves and the CJEU: Protecting Fundamental Rights or Pandering to Prejudice' 28 (2021) Maastricht Journal of European and Comparative Law 648–66; M-C Foblets, 'Islam under the Rule of Law in Europe: How Consistent is the Human Rights Test?' 12 (2021) Religions 857; A Gutiérrez-Solana Journoud, 'Unveiling Complex Discrimination at the Court of Justice of the European Union: The Islamic Headscarf at Work' 29 (2021) Feminist Legal Studies 205–30; R Xenidis, 'Intersectionality from Critique to Practice: Towards an Intersectional Discrimination Test in the Context of "Neutral Dress Codes"' (2022) European Equality Law Review 21–37; M Hunter-Henin, 'Religious Neutrality at Europe's Highest Courts: Shifting Strategies' 11 (2022) Oxford Journal of Law and Religion 23–46.

[13]Case C-157/15 *Achbita v G4S Secure Solutions* ECLI:EU:C:2017:203.

[14]Case C-188/15 *Bougnaoui v Micropole* ECLI:EU:C:2017:204.

[15]Joined Cases C-804/18 and C-341/19 *IX v Wabe & MH Müller Handels GmbH v MJ*, ECLI:EU:C:2021:594.

[16]Blog post on the CJEU's case law include: R McCrea, 'Faith at Work: The CJEU's Headscarf Rulings' (EU Law Analysis 17 March 2017) <http://eulawanalysis.blogspot.com/2017/03/faith-at-work-cjeus-headscarf-rulings.html>; I Tourkochoriti, 'Protection with Hesitation: on the recent CJEU Decisions on Religious Headscarves at Work' (Verfassungsblog 21 March 2017) <https://verfassungsblog.de/protection-with-hesitation-on-the-recent-cjeu-decisions-on-religious-headscarves-at-work/>; S Kholwadia, 'EU Headscarf Bans: The CJEU's Missed Opportunity for Reflection on Neutrality in *IX v Wabe and MH Müller Handels v MJ*' (Oxford Human Rights Hub 4 August 2021) <https://ohrh.law.ox.ac.uk/eu-headscarf-bans-the-cjeus-missed-

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as well as civil society organisations.[17] A contribution by former Advocate General Sharpston has been very influential in informing this discussion on diversity and inclusion. AG Sharpston had initially been assigned the case of *Wabe & Müller* before her departure from office following Brexit. The opinion that she prepared for this case was published as a 'shadow opinion' in the form of a blog post[18] and provides important insights in the ways in which the construction of direct and indirect discrimination in EU law developed. In particular, she warned against the creation of a 'kind of "black hole" between direct discrimination and indirect discrimination into which a number of questionable practices fall'.[19] Considerations from Sharpston's shadow opinion were widely picked up, not only in comments on the CJEU's *Wabe & Müller* judgement,[20] but also in the adjudication of new cases such as *L.F. v SCRL*, in which Advocate General Medina's opinion took into account several of these observations.[21]

Secondly, a line of case law from the CJEU that led to wide-ranging debates involving academic scholars as well as a broader audience concerned the fairness of contract terms relating to housing. Starting from the *Aziz* case in March 2013,[22] the Court recognised the possibility to challenge terms in mortgage contracts under the EU Directive on Unfair Terms in Consumer Contracts. Spanish procedural law was found not to be in compliance with the Directive and was amended by the Spanish legislature following the CJEU's judgment in the *Aziz* case. This case had arisen as a result of the economic crisis of 2008 that affected many homeowners in Spain, who were no longer able to pay the instalments of their mortgage loans and faced eviction proceedings initiated by the banks that had granted them these loans on terms that rather one-sidedly favoured these banks. The *Aziz* case was broadly discussed in Spanish societal debates[23] as well as internationally.[24] Although Mr Aziz and his family did eventually not benefit from the CJEU's judgement themselves,[25] the importance of the

opportunity-for-reflection-on-neutrality-in-ix-v-wabe-and-mh-muller-handels-v-mj/>; M van den Brink, 'Pride or Prejudice? The CJEU Judgement in *IX v Wabe and MH Müller Handels GmbH*' (Verfassungsblog 20 July 2021) <https://verfassungsblog.de/pride-or-prejudice/>; T Sultan, 'Court of Justice of the EU allows prohibition of religious symbols in the workplace' (UK Human Rights Blog 22 October 2021) <https://ukhumanrightsblog.com/2021/10/22/court-of-justice-of-the-eu-allows-prohibition-of-religious-symbols-in-the-workplace/>; and Dube 2023 (n 11), all last accessed 26 July 2023.

[17]W Hutten and N Mustafa, 'Reclaiming "Neutrality" in the Debate on Religious Dress Bans' (Open Society Justice Initiative) <https://www.justiceinitiative.org/uploads/824239dd-31dd-450f-9477-7a70e102292f/neutrality-fact-sheet-03292022.pdf> last accessed 26 July 2023.

[18]'Shadow Opinion of Former Advocate-General Sharpston: Headscarves at Work (Cases C-804/18 and C-341/19)' (EU Law Analysis Blog 23 March 2021) <http://eulawanalysis.blogspot.com/2021/03/shadow-opinion-of-former-advocate.html> last accessed 26 July 2023.

[19]Ibid., para 202.

[20]Howard, 'Headscarves and the CJEU' (n 12) 648–9, 653–4; Xenidis (n 12) 32–3; Hunter-Henin (n 12) 38–9.

[21]Case C-344/20 *LF v SCRL* Opinion of Advocate General Medina ECLI:EU:C:2022:774 para 33.

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

[23]See also J Álvarez and LF Rodríguez, *La última trinchera. Un retrato inédito de los jueces que protagonizan la actualidad de nuestro país* (Ediciones Península 2016); JM Fernández Seijo, 'Lights and Shadows of the Aziz Case' in C Mak and B Kas (eds), *Civil Courts and the European Polity: The Constitutional Role of Private Law Adjudication in Europe* (Hart Publishing 2023) 257–60.

[24]From the extensive academic debate, the following contributions may be mentioned: H-W Micklitz, '*Mohamed Aziz* – Sympathetic and Activist, but Did the Court Get It Wrong?' (2013) <http://www.ecln.net/florence-2013.html>; H-W Micklitz and N Reich, 'The Court and Sleeping Beauty: The Revival of the Unfair Contract Terms Directive (UCTD)' 51 (2014) Common Market Law Review 771–808; S Nasarre-Aznar, '"Robinhoodian" Courts' Decisions on Mortgage Law in Spain' 7 (2015) International Journal of Law in the Built Environment 127–47; O Gerstenberg, 'Constitutional Reasoning in Private Law: The Role of the CJEU in Adjudicating Unfair Terms in Consumer Contracts' 21 (2015) European Law Journal 599–621, in particular 605 and 611; JA Mayoral and A Torres Pérez 'On Judicial Mobilization: Entrepreneuring for Policy Change at Times of Crisis' 40 (2018) Journal of European Integration 719–36; JML van Duin, *Effective Judicial Protection in Consumer Litigation: Article 47 of the EU Charter in Practice* (Intersentia 2022) 155–67.

[25]Fernández Seijo (n 23) 260.

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adjudication of his case can hardly be overstated. Not only did the CJEU's judgement in the case induce a reform of Spanish procedural law, it also formed the starting point for a further series of preliminary references to the Court concerning the assessment of standard terms in mortgage in loan contracts in Spain as well as in other EU Member States, including Poland[26] and Hungary.[27] Moreover, the societal debate surrounding these cases allowed for those affected by economic hardship following the crisis to be heard and for legal remedies to be developed for them.

A third example is found in national cases on climate change that rely on European and transnational sources and institutions. Perhaps more so than any other contemporary adjudication, climate change litigation has in recent years induced broad societal discussions that bridge national and transnational spheres. The claim of NGO Urgenda against The Netherlands attracted worldwide attention, being one of the first cases in which tort liability was successfully invoked to obtain an injunction, in this case against the Dutch government, to do more to reduce greenhouse gas emissions that contribute to dangerous climate change.[28] In a final judgement in the case in December 2019, the Dutch Supreme Court held that such a duty is substantiated by the State's obligations under Articles 2 and 8 of the European Convention on Human Rights (ECHR), which safeguard the right to life and the right to protection against serious damage to one's environment respectively.[29] The judgements in all three instances of the *Urgenda* case led to intense national and international debates, both in legal scholarship[30] and in the media.[31] They, moreover, paved the way for further climate change litigation, providing a line of argumentation that was adopted in similar law suits in, for instance, Belgium[32] and France.[33] A judgement of the district court of The Hague in the case of *Milieudefensie v Shell* in May 2021, furthermore, opened the discussion on the possibility to hold private actors liable in a similar manner as the State.[34] Imposing an injunction on oil company Shell to change its business model

[26]A Wiewiórowska-Domagalska and M Grochowski, 'Consumer Law in Poland: Or There and Back Again' in H-W Micklitz (ed), *The Making of Consumer Law and Policy in Europe* (Hart Publishing 2021) 193–233, in particular 227–30; M Grochowski and M Taborowski, 'Effectiveness and EU Consumer Law: The Blurriness in Judicial Dialogue' in F Casarosa and M Moraru (eds), *The Practice of Judicial Interaction in the Field of Fundamental Rights: The Added Value of the Charter of Fundamental Rights of the EU* (Edward Elgar Publishing 2022) 235–56.

[27]M Józon, 'Judicial Governance by Unfair Contract Terms Law in the EU: Proposal for a New Research Agenda for Policy and Doctrine' 28 (2020) European Review of Private Law 909–30, in particular 911–8.

[28]The case was brought by NGO Urgenda against the State of the Netherlands in 2013 and, after the claim was awarded by the District Court of The Hague and upheld by the Court of Appeal in The Hague, culminated in the Dutch Supreme Court's judgement of 20 December 2019 ECLI:NL:HR:2019:2007, of which an English translation is available here: <https://deeplink.rechtspraak.nl/uitspraak?id=ECLI:NL:HR:2019:2007> last accessed 26 July 2023.

[29]Dutch Supreme Court *Urgenda* (n 28) para 5.8.

[30]Contributions include: E Fisher, E Scotford and E Barritt, 'The Legally Disruptive Nature of Climate Change' 80 (2017) The Modern Law Review 173–201; M Hinteregger, 'Civil Liability and the Challenges of Climate Change' 8 (2017) European Review of Tort Law 238–60; LE Burgers, 'Should Judges Make Climate Change Law?' 9 (2020) Transnational Environmental Law 55–75; C Lepage, 'Climate Justice in Europe: The Growing Role of Courts' (December 2021) *Revue Européenne du Droit* <https://geopolitique.eu/en/articles/climate-justice-in-europe-the-growing-role-of-courts/> last accessed 26 July 2023; J Spier with B Kock, *Climate Litigation in a Changing World* (Eleven 2023) 106–15.

[31]On its website, NGO Urgenda provides links to articles about its climate case in international media: <https://www.urgenda.nl/en/themas/climate-case/> last accessed 26 July 2023.

[32]The Court of First Instance of Brussels held Belgian authorities liable for negligent climate policies in a judgement of 17 June 2021. <https://affaireclimat.cdn.prismic.io/affaireclimat/ba83701c-db4e-4064-b816-11a91d27d5da_Jugement_version-originale_FR.pdf>. At the time of writing of this paper, the appeal in the case is pending; for a timeline and documentation, see <https://affaire-climat.be/en both> last accessed 26 July 2023.

[33]In two decisions in the *Grande-Synthe* case, the French Council of State held that the French government should do more to reduce greenhouse gas emissions; see <https://www.conseil-etat.fr/fr/arianeweb/CE/decision/2020-11-19/427301> and <https://www.conseil-etat.fr/fr/arianeweb/CE/decision/2021-07-01/427301> last accessed 26 July 2023. Note that, unlike the Dutch Supreme Court in *Urgenda*, the French judgements did not accept the claims on the basis of Articles 2 and 8 ECHR.

[34]District Court The Hague *Milieudefensie v Shell* ECLI:NL:RBDHA:2021:5339. For a discussion of the District Court's judgement, see, for instance the conversation between Mayer and Burgers: B Mayer, 'The Duty of Care of Fossil-Fuel Producers for Climate Change Mitigation: *Milieudefensie* v *Royal Dutch Shell*' 11 (2022) Transnational Environmental Law

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so as to reduce greenhouse gas emissions, the district court took into account the obligations that may arise for businesses on the basis of Articles 2 and 8 ECHR as well as the non-binding UN Guiding Principles on Business and Human Rights.[35] As the debate on these national cases with European and transnational elements continues, both the CJEU and the European Court of Human Rights (ECtHR) are also being addressed.[36] The developments in climate change litigation, thus, form another primary example of the changing role of courts in the interaction between national, European and transnational levels of governance. Importantly, this role is inspired, shaped and guided by the public debates in which climate change is put on the political agenda.[37]

B. The development of European private law

The practice of judicial reasoning in private legal cases that we witness in the three case examples involves a combined application of rules and principles deriving from national, European and transnational levels of governance. These cases are representative of private legal disputes that arise and need to be resolved in the interplay of different levels of governance.[38] Mapping the changing landscape in which courts perform their roles, thus, requires for a meaningful account to be developed on the differences between such 'Europeanised' cases and ones that are adjudicated primarily on the basis of national sources of law. Whereas the latter cases may be understood in their national context, the legal landscape in which private legal relations with a European element are assessed becomes more complex, both substantively and institutionally. For instance, the substantive rules that determine the outcomes of cases on non-discrimination or housing derive from the implementation of EU Directives in national laws. If there are doubts on the interpretation of such Directives, national courts rely on guidance from the CJEU. In such Europeanised cases, accordingly, questions arise on the relation between rules of private law deriving from different levels of governance and the interaction between institutions that enact and interpret transnational and European private law.

'European Private Law' (EPL) as a field is defined here as comprising the compound[39] of national, European and international rules and principles that govern private legal relations in Europe. It should be admitted that the definition remains a tentative one. EPL has been a long time in the making[40] and as yet there is no unified instrument of private law at the European level, such

407–18; LE Burgers, 'An Apology Leading to Dystopia: Or, Why Fueling Climate Change is Tortious' 11(2022) Transnational Environmental Law 419–31; B Mayer, 'Judicial Interpretation of Tort Law in *Milieudefensie* v *Shell*: A Rejoinder' 11 (2022) Transnational Environmental Law 433–6. See also C Macchi and J van Zeben, 'Business and Human Rights Implications of Climate Change Litigation: *Milieudefensie et al v Royal Dutch Shell*' 30 (2021) Review of European, Comparative and International Environmental Law 409–15.

[35]District Court The Hague, para 4.4.2 and 4.4.14–4.4.15. Note that the case is currently pending at the Court of Appeal of The Hague.

[36]J Hartmann, 'European Climate Litigation: A Tale of Two Courts' (The Global Network for Human Rights and the Environment) <https://gnhre.org/2022/04/european-climate-litigation-a-tale-of-two-courts/> last accessed 26 July 2023.

[37]P Paiement, 'Urgent Agenda: How Climate Litigation Builds Transnational Narratives' 11 (2020) Transnational Legal Theory 121–43, at 141, sees climate case litigation as 'a form of shared narrative building', which transcends national legal orders. Academic blogs offer important contributions to the debates; see, for instance, LE Burgers and PA Nollkaemper on *Urgenda* (Blog of the European Journal of International Law 2020) <https://www.ejiltalk.org/a-new-classic-in-climate-change-litigation-the-dutch-supreme-court-decision-in-the-urgenda-case/>; N de Arriba-Sellier on the *Grande-Synthe* case (Verfassungsblog 2020) <https://verfassungsblog.de/another-urgenda-in-the-making/> and (Verfassungsblog 2021) <https://verfassungsblog.de/the-grande-synthe-saga-continues/> all last accessed 26 July 2023.

[38]L Miller, *The Emergence of EU Contract Law: Exploring Europeanization* (Oxford University Press 2011) 153–6.

[39]C Eckes, *EU Powers under External Pressure: How the EU's External Actions Alter its Internal Structures* (Oxford University Press 2019) 5.

[40]The drafting of Principles of European Contract Law (PECL) and a Draft Common Frame of Reference (DCFR) formed important academic contributions to the debate on whether a further harmonisation of private law in Europe was feasible and desirable; H Beale and O Lando (eds), *Principles of European Contract Law. Part I and II: Combined and Revised. Prepared by*

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as a Civil Code,[41] which outlines the legal framework within which concerns of a private legal nature are dealt with in Europe. The relative vagueness of the definition has the advantage that it leaves space for a continuous reassessment of EPL's goals and meaning.[42] It does justice to the dynamic nature of the development of rules of private law in a transnational and European context.

For practical purposes, in the following analysis 'Europe' territorially is considered as encompassing the EU Member States and the United Kingdom (UK). A reason for the focus on the EU is that the case law of the CJEU has been very influential in shaping the rules that govern private legal relations on the interface of the national and European level. Although other relevant European legal instruments, such as the European Convention on Human Rights, involve more countries than the EU Member States, the study of the EU and its institutions, accordingly, is likely to provide meaningful insights into the role of courts in the development of private law in Europe. Keeping the UK within the selection, furthermore, may be justified on the basis of its long membership of the EU preceding Brexit and the continuing significance of the Common Law as one of the leading traditions of private law in the world.[43]

Private law is understood here in a broad sense, including all rules and principles that govern relations between private actors. The analysis is, thus, not limited to economic transactions, but potentially captures all relations between private actors in which the law is of significance. While EU law does not make an explicit distinction between public and private law, the scope of the analysis may be considered to extend to questions that in national systems of private law would be deemed to be part of sub-fields of contract, tort, property, family and company law. Further distinctions might be made according to, for instance, specific types of contracts (tenancy, employment, consumer sales, etc.). Since it is not the purpose of this analysis to give a comprehensive account of private law in the EU, representative examples will be discussed in order to develop a theoretical account of the role of the judiciary in the development of the field of European Private Law.

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the Commission of European Contract Law (Kluwer Law International 2000); C von Bar and E Clive (eds), *Principles, Definitions and Model Rules of European Private Law: Draft Common Frame of Reference. Prepared by the Study Group on a European Civil Code and the Research Group on EC Private Law* (Sellier 2009). See also H Collins, *The European Civil Code: The Way Forward* (Cambridge University Press 2008); R Zimmermann, 'The Present State of European Private Law' 57 (2009) American Journal of Comparative Law 497–512; Miller (n 38) 106–49; P Giliker, 'The Draft Common Frame of Reference and European Contract Law: Moving from the 'Academic' to the 'Political' in J Devenney and M Kenny (eds), *The Transformation of European Private Law: Harmonisation, Consolidation, Codification or Chaos?* (Cambridge University Press 2013) 23–44; MW Hesselink, *Justifying Contract in Europe: Political Philosophies of European Contract Law* (Oxford University Press 2021) 16–23.

[41]AS Hartkamp, MW Hesselink, EH Hondius, C Mak and CE du Perron (eds), *Towards a European Civil Code* (fourth revised and expanded edition, Kluwer Law International/Ars Aequi Libri 2011); H-W Micklitz, 'Failure or Ideological Preconceptions? Thoughts on Two Grand Projects: The European Constitution and the European Civil Code' in K Tuori and S Sankari (eds), *The Many Constitutions of Europe* (Ashgate 2010) 109–40. In more recent years, Hesselink has proposed that a codification of private law might form part of a solution in response to Pistor's critique of the role of private law in creating inequalities; MW Hesselink, 'Reconstituting the Code of Capital: Could a Progressive European Code of Private Law Help Us Reduce Inequality and Regain Democratic Control?' 1 (2022) European Law Open 316–43; in response to K Pistor, *The Code of Capital: How the Law Creates Wealth and Inequality* (Princeton University Press 2019).

[42]A Colombi Ciacchi, 'Non-Legislative Harmonisation of Private Law under the European Constitution: The Case of Unfair Suretyships' 13 (2005) European Review of Private Law 290, observing that '"European private law" is a very popular expression, despite or perhaps even thanks to its vagueness'.

[43]It may be noted here that the examples discussed in this paper mostly derive from legal systems within the Civil Law tradition. A further analysis of case law from the Common Law tradition is needed to establish to what extent the theoretical views presented here can serve to explain and guide the role of the judiciary in this tradition. Participants to the Singapore Symposium in Legal Theory noted that the case of *Donoghue v Stevenson*, [1932] AC 562, might provide a point of reference for this. On this example, see, for instance, J Stapleton, 'Taking the Judges Seriously v. Grand Theories' in J Stapleton (ed), *Three Essays on Tort* (Oxford University Press 2021) 14–5, who notes that the judgement in *Donoghue v Stevenson* opened the door for an incremental development of a principle that 'when a person acts affirmatively he or she is, subject to rare exceptions, under a duty of care to the whole world to take care to avoid his or her act being a cause of foreseeable physical loss to them'.

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C. The Changing Role of Civil Courts in Europe

When considering the work of courts in the area of EPL, one may wonder why such politically sensitive matters as those concerning non-discrimination, housing and climate change are made the topic of litigation at all. Would it not be rather for the political process to develop solutions for societal questions that concern communities at large? What is it that makes these questions emerge in case law rather than in legislative processes?[44]

Rodotà's observation on the role that judges claimed in the silence of politics comes to mind once more.[45] This assertion related to the application of the EUCFR in the time period between its official proclamation in December 2000 and the moment it became legally binding with the entry into force of the Lisbon Treaty in December 2009. While the Charter did not have a legal status during that time frame, national as well as supranational courts abundantly referred to its provisions and, thus, gave substance to the EU's fundamental rights catalogue in the prelude to its formal enactment.[46] In doing so, the courts contributed to the development of a vision of Europe that looks beyond the rationales of economic collaboration in order to articulate an idea of political community with a basis in shared fundamental rights and principles.

As the Charter slowly but steadily found recognition in different fields governed by EU law after 2009,[47] Rodotà's words gained further meaning and importance. Partly, this was due to changing political tides – while the early years of the new millennium were characterised by relative Euro-optimism, the economic and financial crises that unfolded after 2008 brought the EU in much more troubled waters. In the absence of political consensus on the handling of problems in, for instance, national housing markets, courts in different EU Member States were faced with an extensive number of cases in which they had to reconcile European and national rules and principles.[48]

These developments challenge traditional distinctions between public law and private law. The extent to which access to adequate and affordable housing is realised for all members of a society, for instance, does not only depend on regulation by public authorities, but also on the terms set by private parties such as landlords and mortgage providers.[49] The series of preliminary references in Spanish mortgage cases, accordingly, questioned not only the procedural framework for mortgage enforcements set out by the Member State, but also addressed the substantive limits to the conditions that banks could impose on lenders under the Unfair Terms Directive.[50] In a similar vein, questions were raised on the obligations arising under the Charter for private employers: To what extent are they bound to the non-discrimination principle in a similar way as public entities?[51]

[44]On comparative institutional analysis, see N Komesar, *Imperfect Alternatives. Choosing Institutions in Law, Economics and Public Policy* (University of Chicago Press 1994); and N Komesar, *Law's Limits. The Rule of Law and the Supply and Demand of Rights* (Cambridge University Press 2001).

[45]Rodotà, *Il diritto di avere diritti* (n 1) 96.

[46]Rodotà, *Il diritto di avere diritti* (n 1) 96. See also E Frantziou, *The Horizontal Effect of Fundamental Rights in the European Union: A Constitutional Analysis* (Oxford University Press 2019) 29–30, 33–5.

[47]Here, it should be noted that the Charter's application is triggered by a case falling within the scope of EU law. For private law, this is mostly through Directives and free movement provisions; see AS Hartkamp, *European Law and National Private Law* (2nd ed, Intersentia 2016) 197–204; Frantziou (n 46) 113–6.

[48]Van Duin (n 24) 71–2; C Mak, 'On Beauty and Being Fair: The Interaction of National and Supranational Judiciaries in the Development of a European Law on Remedies' in K Purnhagen and P Rott (eds), *Varieties of European Economic Law and Regulation (liber amicorum for Hans Micklitz)* (Springer 2014) 823–34.

[49]I Domurath, 'Mortgage Debt and the Social Function of Contract' 22 (2016) European Law Journal 757–61, sees a shift of welfare from the public to the private realm on the basis of a growing reliance on private credit to meet housing needs, which assigns a societal role to contract law.

[50]Van Duin (n 24) 9, highlighting the link between substantive and procedural protection that is implied in the right to an effective judicial remedy safeguarded by Article 47 EUCFR; A Beka, *The Active Role of Courts in Consumer Litigation: Applying EU Law of the National Courts' Own Motion* (Intersentia 2018).

[51]Illustrated by the headscarf cases. See also H Collins, 'The Vanishing Freedom to Choose a Contractual Partner' 76 (2013) Law and Contemporary Problems 71–88.

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Can Charter provisions on, inter alia, the right to representation[52] or the right to compensation in lieu of annual leave be directly invoked against private employers?[53] In answer to these questions, the Court of Justice of the EU gradually defined and extended the scope of application of the EUCFR, establishing that all Charter rights in principle have the potential to bind private actors as well as public entities, provided they are 'mandatory and unconditional in nature'.[54] Although the number of Charter provisions that have been recognised to fall within this category so far remains limited,[55] the case law shows that the responsibility for safeguarding European fundamental rights is by no means limited to public authorities, but is shared with private actors.

Cases adjudicated in the interaction between national civil courts and the CJEU have, accordingly, become a point of reference for discussing solutions for societal questions that transcend individual disputes. Courts are regularly asked to determine which duties may exist for private actors under EU fundamental rights in private legal relationships. In addition to the above-mentioned examples, such cases often concern EU Directives in the field of consumer contract law.[56] Furthermore, in climate cases, non-discrimination law and other areas, the ECtHR is addressed as well.[57] Since European and national legislatures have often not fully clarified the relation between EU law and national private laws, or are not able to do so in the process of drafting or implementing EU legislation, courts in individual cases face fundamental questions on the legal and institutional framework within which they have to adjudicate these disputes.

D. First or second best

The evolving engagement of courts with the balancing of fundamental rights of private parties has met with considerable resistance in legal scholarship. A first line of critique questions the process of constitutionalisation of private law, that is, the extent to which courts assess private legal matters as constitutional questions, in particular through reference to fundamental rights.[58] A second objection concerns the division of competences between judiciary and legislature, expressing concern with judicial activism or even a judicial *coup d'état*.[59]

[52]Case C-176/12 *Association de Médiation Sociale v Union locale des syndicats CGT and Others* ECLI:EU:C:2014:2.

[53]Joined Cases C-569/16 and C-570/16 *Stadt Wuppertal v Maria Elisabeth Bauer and Volker Wilmeroth v Martina Broßonn* ECLI:EU:C:2018:871. See also E Frantziou, '(Most of) the Charter of Fundamental Rights is Horizontally Applicable' 15 (2019) European Constitutional Law Review 306–23.

[54]Joined Cases C-569/16 and C-570/16 *Bauer and Broßonn* (n 53) para 85.

[55]For overviews and analyses of the case law, see E Frantziou, 'The Horizontal Effect of the Charter: Towards an Understanding of Horizontality as a Structural Constitutional Principle' 22 (2020) Cambridge Yearbook of European Legal Studies 208–32; M Manfredi, 'Enhancing Economic and Social Rights Within the Internal Market Through Recognition of the Horizontal Effects of the European Charter of Fundamental Rights' 6 (2021) European Papers 293–309.

[56]B Kas and H-W Micklitz, 'Judge-Made European Private Law and European Polity Building' in C Mak and B Kas (eds), *Civil Courts and the European Polity: The Constitutional Role of Private Law Adjudication in Europe* (Hart Publishing 2023) 19–41.

[57]Although the ECtHR does not judge in cases between private actors, but only assesses complaints against State Parties to the ECHR, its judgements may extend to private legal acts, insofar as these encroach upon human rights protected under the Convention; ECtHR nr. 69498/01 *Pla and Puncernau v Andorra* ECLI:CE:ECHR:2004:0713JUD006949801 para 59: 'Admittedly, the Court is not in theory required to settle disputes of a purely private nature. That being said, in exercising the European supervision incumbent on it, it cannot remain passive where a national court's interpretation of a legal act, be it a testamentary disposition, a private contract, a public document, a statutory provision or an administrative practice appears unreasonable, arbitrary or, as in the present case, blatantly inconsistent with the prohibition of discrimination established by Article 14 and more broadly with the principles underlying the Convention'; and ECtHR nr. 70133/16 *Dimici v Turkey* ECLI:CE:ECHR:2022:0705JUD007013316 para 127.

[58]OO Cherednychenko, 'Subordinating Contract Law to Fundamental Rights: Towards a Major Breakthrough or towards Walking in Circles?' in S Grundmann (ed), *Constitutional Values and European Contract Law* (Kluwer Law International 2008) 35–60; B De Vos, *Horizontale werking van grondrechten: een kritiek* (Maklu 2010).

[59]Stone Sweet speaks of a *coup d'état* in constitutional lawmaking when adjudication modifies constitutional law; A Stone Sweet, 'The Juridical *Coup d'État* and the Problem of Authority' 8 (2007) German Law Journal 916, and critical reflections on the concept in the same special issue of the journal.

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The critique of private law adjudication that concerns its constitutionalisation may be considered to have at least two components: (i) private autonomy and (ii) the relation between private law and constitutional theory. Firstly, both in national jurisdictions and in relation to the case law of the CJEU and ECHR concerning private legal matters it has been suggested that the translation of such matters into a balancing of fundamental rights endangers the autonomy of private actors.[60] A famous example can be found in the German *Bürgschaft* case, in which the German Constitutional Court established that civil courts should have invalidated a suretyship contract concluded by the daughter of the principal, since she had not been able to fully assess the severe financial implications of a contract that she had mainly entered into to help her father.[61] The Constitutional Court's judgement relied on the consideration that private autonomy of both parties should not only be safeguarded in formal terms (eg the daughter having reached the age of majority), but also in terms of substantive equality: the one-sided stipulation of contract terms by the bank, which was in a much better position to understand the complex financial products it offered, had reduced the daughter's autonomous decision-making to almost zero. Accordingly, the German Constitutional Court held that civil courts should consider suretyship contracts null and void in order to redress the balance between contracting parties in cases like these.[62] It has been submitted that such far-reaching fundamental rights-based interventions in the interpretation of contract law imply an end to private autonomy.[63] Private actors' freedom to decide on their contractual arrangements would be significantly restricted by considerations of a public nature.

Such a reading of the case law, however, seems to not fully consider the extent to which restrictions of private autonomy may be in line with a legal community's view on why and how individual freedom should be limited. Maria Rosaria Marella, in this context, distinguishes limitations of freedom of contract based on models of paternalism, perfectionism and social justice.[64] In her view, one explanation of the *Bürgschaft* judgement is that it can be justified by the paternalistic view that family relations should not become part of the sphere of contract law, as family solidarity may be endangered by the market-oriented nature of contractual relations.[65] Another explanation, Marella submits, could be found in a model based on social justice, according to which freedom of contract should be limited to protect weaker parties.[66] Following Marella's line of reasoning, therefore, the constitutionalisation of private law should not be dismissed beforehand. As also suggested by other authors who do not consider the limitation of autonomy to cause unsurmountable problems,[67] constitutionalisation deserves further scrutiny in light of the broader debate on social justice in EPL.

A second critique of constitutionalisation of private law submits that private law itself encompasses a detailed and sophisticated set of rules and principles, the logic and coherence of which might be disrupted if private legal questions are considered in terms of fundamental

[60]H Collins, 'On the (In)compatibility of Human Rights Discourse and Private Law' in H-W Micklitz (ed), *Constitutionalization of European Private Law* (Oxford University Press 2014) 26–7; D Leczykiewicz and S Weatherill, 'Private Law Relationships and EU Law' in D Leczykiewicz and S Weatherill (eds), *The Involvement of EU Law in Private Law Relationships* (Hart Publishing 2013) 6–7.

[61]German Constitutional Court 19 October 1993, BVerfGE 89, 214 (*Bürgschaft*).

[62]Ibid., 234–5.

[63]H Wiedemann, 'BVerfG, 19.10.1993 – 1 BvR 567 u. 1044/89. Zur verfassungsrechtlichen Inhaltskontrolle von Verträgen' 49 (1994) *JuristenZeitung* 412–3; J Schapp, 'Privatautonomie und Verfassungsrecht' 11 (1999) *Zeitschrift für Bankrecht und Bankwirtschaft* 33. See, in contrast, Colombi Ciacchi's reading of the German case law as constituting a fundamental right to private autonomy; A Colombi Ciacchi, 'Party Autonomy as a Fundamental Right in the European Union' 6 (2010) European Review of Contract Law 303, 308.

[64]MR Marella, 'Old and New Limits to Freedom of Contract' 2 (2006) European Review of Contract Law 257–74.

[65]Ibid., 264–5, placing Gunther Teubner's reading of the *Bürgschaft* judgement in this category.

[66]Ibid., 267.

[67]Colombi Ciacchi (n 63); Collins, 'On the (In)compatibility of Human Rights Discourse and Private Law' (n 60).

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rights.[68] Through such processes of constitutionalisation, private law might become subordinated to constitutional law[69] and the type of judicial reasoning that is usually reserved to highest (constitutional) courts might be required from judges in civil courts.[70]

This line of critique, like the first one, creates a contrast between private law and constitutional law that is not necessarily helpful for theorising the judicial role in contemporary EPL. The case law on employment, housing and climate change cannot fully be understood or guided if one only looks at it through the lens of private legal doctrines, such as those concerning enforcement of contracts or establishment of tort liability. Whereas a limited contractual perspective would not question the enforcement of companies' neutrality policies towards employees who feel impelled to wear a symbol manifesting their religious beliefs, or the enforcement of mortgage contracts that homeowners freely entered into, these cases become highly problematic when considered from a fundamental rights perspective. The responsibility of governments and companies in regard to a big societal problem such as climate change, at the same time, becomes more tangible when addressed through duties of care in tort law. In the light of these developments, constitutionalised cases of private law seem to have become a part of the work of judges in courts of all instances.[71]

Besides these two objections against the process of constitutionalisation of private law, resistance against the growing influence of judicial interventions in EPL relates to a concern with the relation between branches of government. In particular constitutional scholars have critically scrutinised apparent movements towards a *gouvernement des juges*.[72] Not surprisingly, climate change litigation is one of the areas in which such concerns regarding the judiciary taking up tasks of the legislature or executive power have prominently arisen. Cases like *Urgenda* have raised the question whether it is for courts to decide in individual cases that so clearly address a theme that requires a political debate and legislative intervention.[73] Similarly, the mortgage cases following the reference of *Aziz* to the CJEU raised many questions of a macro-economic nature that went beyond the individual disputes between homeowners and banks.[74] And in EU private law, non-discrimination in employment relations is an area that is as much subject to regulation and administrative enforcement as it is to case law.[75] From a theoretical perspective, EPL adjudication on such politically sensitive topics might, thus, seem to be a second-best solution.[76]

[68]Collins, 'On the (In)compatibility of Human Rights Discourse and Private Law' (n 60) 35–6, 45; Gerstenberg, 'Constitutional Reasoning in Private Law' (n 24) 614; and specifically on constitutionalisation of private law in Germany, M Kumm, 'Who is Afraid of the Total Constitution? Constitutional Rights as Principles and the Constitutionalization of Private Law' 7 (2006) German Law Journal 341, 344–5 and 361–3.

[69]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* (Sellier 2007) 53–4.

[70]Collins, 'On the (In)compatibility of Human Rights Discourse and Private Law' (n 60) 40, observing that insofar as constitutional courts are requested to address such cases, they might not have sufficient expertise on private law.

[71]See Grundmann (n 6) 366–7, referring to the German and Italian experiences. It may be noted that this approach to constitutionalisation likely resonates more with legal systems that are part of the Civil Law tradition. In the Common Law tradition, similar reliance on private law to develop new remedies may not be framed as a fundamental rights issue; see also Collins, 'On the (In)compatibility of Human Rights Discourse and Private Law' (n 60).

[72]Stone Sweet (n 59); Kumm (n 68) 345, observing that a total constitution would lead to a juristocracy.

[73]Burgers, 'Should Judges Make Climate Change Law?' (n 30) 58, with further references.

[74]F de Elizalde, 'The Rain in Spain Does Not Stay in the Plain: Or How the Spanish Supreme Court Ruling of 25 March 2015, on Minimum Interest Rate Clauses, Affects European Consumers' 4 (2015) Journal of European Consumer and Market Law 184–7.

[75]H-W Micklitz, *The Politics of Justice in European Private Law. Social Justice, Access Justice, Societal Justice* (Cambridge University Press 2018) 215–22.

[76]C Mak, 'First or Second Best? Judicial Law-Making in European Private Law' in JM Mendes and I Venzke (eds), *Allocating Authority* (Hart Publishing 2018) 217–40.

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E. Maps, milestones and compasses

In sum, the evolving role of judges in the field of EPL requires mapping of a dynamic rather than a static kind.[77] In order to understand and guide EPL adjudication, we need to draft maps of a changing landscape. High-profile cases such as the ones on non-discrimination, housing and climate change may be seen as milestones in this legal landscape, that provide points of reference for analysing the judicial role. Different theoretical perspectives, finally, may serve as compasses to guide our understanding and enrich the theoretical framework.

In the following, accordingly, the landscape of EPL adjudication will be assessed from three different theoretical perspectives: social justice, constitutionalism, and public sphere theory. Relating these perspectives to the three cases, it will be examined what they can teach us about EPL adjudication and what remains out of their reach. Adopting the pluralist normative premises of New Private Law Theory,[78] the analysis will seek to establish where theoretical views complement one another, rather than to determine the analytical or normative superiority of one theory.

3. Social Justice and EPL Adjudication

A. Private law and social justice

An influential strand of scholarship that has sought to deconstruct as well as reconstruct dynamics of European Private Law is one that considers the field in terms of social justice. Where private legal relations are often considered to primarily concern the relation between two private actors, the argument goes, the rules governing such relations have broader societal implications.[79]

The distinctive approaches can be traced back to the Aristotelian concepts of corrective and distributive justice.[80] Corrective justice theories in private law explain parties' legal obligations on the basis of their interpersonal relation, which, for instance, justifies a tortfeasor's liability towards the person who incurred damage because of their actions.[81] Concerns of a distributive nature, such as the financial situation of the tortfeasor, are in this view not of significance when establishing liability.[82] Similarly, rules of contract law do not have to pay heed to differences in bargaining power between contracting parties. Theories of distributive justice in private law, in contrast, hold that the impact of private legal rules on the distribution of wealth and power in societies should be taken into account.[83] Under such theories, it may, for example, be justified to consider an oil company's market position when assessing a tort-based climate change claim, or to redress the contractual balance between businesses and individuals by imposing rules on unfair terms assessment in consumer contracts.

In the field of European Private Law, the debate does currently not so much concern the question whether private law has distributive consequences,[84] but rather how to understand and address these.[85] Furthermore, in the layered legal order comprised of national, European and

[77]Compare M Loughlin, *Foundations of Public Law* (Oxford University Press 2010) 311 on reflexive constitutionalism; MA Wilkinson, 'Political Constitutionalism and the European Union' 76 (2013) The Modern Law Review 191.

[78]Grundmann, Micklitz and Renner (n 4); Introduction to this paper.

[79]D Kennedy, 'The Political Stakes in "Merely Technical" Issues of Contract Law' 10 (2002) European Review of Private Law 7–28.

[80]Aristotle, *The Nicomachean Ethics* (translated by D Ross, revised and with an Introduction and Notes by L Brown; Oxford University Press 2009) 82 ff.

[81]EJ Weinrib, *Corrective Justice* (Oxford University Press 2012) 10–11.

[82]Ibid., 17–18.

[83]Marella (n 64) 265–9; Hesselink, *Justifying Contract in Europe* (n 40) 274.

[84]See Pistor (n 41).

[85]Among many others, Micklitz, *The Politics of Justice in European Private Law* (n 75); MW Hesselink, 'The Justice Dimensions of the Relationship between Fundamental Rights and Private Law' 24 (2016) European Review of Private Law 425–56; D Caruso, 'The Baby and the Bath Water: The American Critique of European Contract Law' 61 (2013) The American Journal of Comparative Law 479–506; Collins *The European Civil Code* (n 40) 4–7; A Colombi Ciacchi,

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transnational rules of governance, the question arises as to the division of tasks among legislature and courts in deciding on private legal matters with a distributive dimension.

B. Social justice and the EU legislature

Daniela Caruso identifies the publication of a Social Justice Manifesto in 2004 as a defining moment of reflection on the direction that the EU legislature's development of contract law could and should take.[86] The Manifesto, which was drafted by a group of leading scholars from different Member States,[87] submitted that the European Commission's technocratic, market-oriented approach to the harmonisation of rules of contract law was too one-sided. It obscured the 'real issues' underlying a project of creating a shared contract law in Europe, in particular the discussion of 'shared fundamental values concerning the social and economic relations between citizens',that is, an idea of social justice.[88]

While highlighting the success that the Manifesto has had in putting social justice on the European legislative agenda for contract law, Caruso mentions several points on which it has not fully lived up to its promise. A flaw, in her view, may be found in the Manifesto's strong reliance on deliberative processes in order to find consensus on questions of justice and lack of a further elaboration of what 'social justice' meant – the Manifesto did not specify how weaker contracting parties should be recognised and what idea of distributive justice should prevail.[89]

This critique, in my view, could possibly be countered in part by considering the ongoing elaboration of more comprehensive theories of justice for European private law as well as the increasing impact of the Charter of Fundamental Rights on the case law of the CJEU and national courts. First, while Caruso correctly pointed out that academic projects such as the Draft Common Frame of Reference (DCFR) understated the difficulty of reconciling different ideas of justice,[90] legal scholars have in recent years brought forward several theories of justice for European private law. The most influential so far is probably Micklitz's concept of 'access justice' as a self-standing notion underlying EU law, compared to distinct ideas of social justice in the contract laws of the main European traditions.[91] Hesselink, furthermore, is proposing a democratic theory of European private law, in which the deliberative process is fundamental but certainly not deprived of a conceptualisation of justice. Rather, in a Habermasian sense, justice would be served by a democratic process in which those addressed by rules of private law also have a say in the enactment of these rules.[92] The present analysis equally seeks to contribute to the theoretical framework for justice in European private law, by assessing the role of judges in this field and the inclusion of different voices in the debate through the process of adjudication. Although such theoretical views are surely not uncontested, and they may not address all points of concern that Caruso identified,[93] they do meet her more general call for clarification of what 'justice' means.

'The Constitutionalization of European Contract Law: Judicial Convergence and Social Justice' 2 (2006) European Review of Contract Law 167–80; Marella (n 64). See also M Bartl, 'Maybe We Just Don't Like the Justice We See' (Verfassungsblog 12 June 2015) <https://verfassungsblog.de/maybe-we-just-dont-like-the-justice-we-see-2/> last accessed 27 July 2023.

[86]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?* (Hart Publishing 2015) 367. Although her contribution focusses on contract law, many of Caruso's observations also seem to apply to other areas of private law, such as tort, property and company law.

[87]Study Group on Social Justice in European Private Law, 'Social Justice in European Contract Law: a Manifesto' 10 (2004) European Law Journal 653–74.

[88]Ibid., 655–7.

[89]Caruso, '*Qu'ils mangent des contrats*' (n 86) 371.

[90]Ibid. (n 86) 370–1.

[91]Micklitz, *The Politics of Justice in European Private Law* (n 75) 2 and 16.

[92]From this point of view, the idea of a European Civil Code would likely still be the best form for further legislative developments in EPL; Hesselink, 'Reconstituting the Code of Capital' (n 41) 324–5.

[93]In particular, the balance between reliance on deliberative processes and elaboration of how weaker parties should be defined remains problematic.

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Second, the increasing influence of the EUCFR on matters of private law has raised hope for a further development of the social side of private law in Europe. Although the prevailing market rationale is not absent from cases adjudicated under the Charter,[94] the recognition of a potentially broader impact of Charter provisions in private legal cases opens possibilities for strengthening social rights. In the case of *Bauer and Broßonn*, the CJEU determined that in principle the entire Charter, as a source of primary EU law, could have an impact on matters of private law.[95] It depends on each specific provision to what extent it may actually take such effect: the CJEU requires rights to be 'mandatory and unconditional in nature' for them to apply to private legal relationships.[96] It remains to be seen which Charter rights will be deemed to fulfil these criteria and to what extent they may serve to develop the social side of European private law. Still, in line with the reconstructive approach adopted in this analysis, it may be said that the CJEU has opened up possibilities for further addressing issues of social justice through EUCFR rights.

Further to her critique of the Manifesto, Caruso introduces several suggestions for furthering social justice through contract law. She proposes to focus more on consumer protection for those who are especially vulnerable because of illness or disability, to improve the methodology for gathering data on the manners in which EU contract law enhances people's legal protection, to recognise and help 'losers' of market integration, and to broaden the scope from consumer sales contracts to contracts for employment, housing and access to credit.[97] Caruso's suggestions resonate with other voices in today's discourse on European contract law. Images of the 'average' or 'vulnerable consumer' in European contract law, for instance, are broadly being debated.[98] Moreover, the impact of harmonised rules on different people in the centre or the periphery of the EU has become the subject of debate, insofar as EU law may unequally distribute wealth among citizens in older, Western European Member States and younger, Central and Eastern European Member States.[99]

A proposal for a rethinking of the Social Justice Manifesto has also been put forward by Muriel Fabre-Magnan. Reflecting on the relatively recent reform of the French law of obligations, she submits that contract lawyers in Europe should address several issues that could form part of a 'New Manifesto for Social Justice in European Contract Law'.[100] Similarly to Caruso, she suggests that a new Manifesto should take into account those types of contracts that are 'crucial' to people's access to essential goods and services, such as long-term or 'life time' contracts[101] for employment, accommodation, health care, banking and insurance, and perhaps access to internet services.[102] Furthermore, it should address how contract law may contribute to sustainability, eg by promoting the 'right to a durable product' to emphasise quality over quantity of consumer goods,

[94]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* (Intersentia 2017) 113–24.

[95]Joined Cases C-569/16 and C-570/16 *Bauer and Broßonn* para 79–92.

[96]Ibid. para 85 and 87.

[97]Caruso '*Qu'ils mangent des contrats*' (n 86) 372–6.

[98]N Reich, 'Vulnerable Consumers in EU Law' in D Leczykiewicz and S Weatherill (eds), *The Images of the Consumer in EU Law: Legislation, Free Movement and Competition Law* (Hart Publishing 2016) 139–58; V Mak, 'The Consumer in European Regulatory Private Law' in D Leczykiewicz and S Weatherill (eds), *The Images of the Consumer in EU Law: Legislation, Free Movement and Competition Law* (Hart Publishing 2016) 381–400; I Domurath, 'The Case for Vulnerability as the Normative Standard in European Consumer Credit and Mortgage Law – An Inquiry into the Paradigms of Consumer Law' 2 (2013) Journal of European Consumer and Market Law 124–38; and JA Luzak, 'Vulnerable Travellers in the Digital Age' 5 (2016) Journal of European Consumer and Market Law, 130–5.

[99]D Kukovec, 'Law and the Periphery' 21 (2015) European Law Journal 406–28.

[100]M Fabre-Magnan, 'What is a Modern Law of Contracts? Elements for a New Manifesto for Social Justice in European Contract Law' 13 (2017) European Review of Contract Law 376–88.

[101]See L Nogler and U Reifner, *Life Time Contracts. Social Long-term Contracts in Labour, Tenancy and Consumer Credit Law* (Eleven International Publishing 2014).

[102]Fabre-Magnan (n 100) 380–3.

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and a 'right to a sustainable contract' to safeguard a fair production process.[103] Fabre-Magnan's proposal adheres to a human rights approach: contract law should not only prevent parties from concluding contracts that infringe fundamental human rights, but should also guarantee that the performance of contracts does not violate such rights.[104]

C. Rethinking justice through adjudication

What should be the role of judges in civil cases against the background of this debate on social justice in European Private Law? It is submitted here that at this stage of the debate, we should take a step back and reconsider the framing of 'social justice' itself. Most of the aforementioned suggestions focus very much on distributive issues – among businesses and consumers, among richer and poorer people, among Western and Eastern European countries, and among Europe and the world.[105] Europe's justice deficit in the field of private law, however, cannot only be explained in the light of social justice understood as distributive justice. It also concerns questions of inclusion and representation. Consumers and consumer organisations, for instance, are known to have more difficulty in getting their views and interests taken into account than strong business lobbies.[106] Poorer consumers may benefit less from protective laws or may even bear the expenses for richer consumers' legal protection,[107] without a strong say in the creation of rules that govern them or possibilities to challenge these rules.[108] Perspectives of Central and Eastern Europeans may be less well represented in 'universal' legal rules and principles enacted by the EU than those of Western Europeans.[109] And views on sustainability and global issues, such as climate change, do not have a clear place in European democratic processes.[110] Europe's justice deficit in the area of private law, when assessed in light of theories of democratic involvement, thus concerns not only the manner in which overarching political stakes, or matters of public policy, are reflected in individual private legal cases. It also regards the opportunities for participation in rule-making processes for those who are governed by the rules.

The three cases that form our main points of reference in this analysis illustrate this. First, the judicial evaluation of company policies that prohibit employees from manifesting their religious beliefs does not only concern the interpersonal relation between employer and employee (corrective justice), or the redressing of an imbalance in the process of negotiating the conditions for an employment contract (distributive or social justice). The legal framework for assessing such company policies affects the possibility for certain societal groups to actively participate in the labour market. Insofar as these company policies are allowed, for instance because of the company's interest in satisfying customers that do not wish to be served by employees wearing a

[103]Ibid., 384 and 385 respectively.

[104]Ibid., 386. See also T Wilhelmsson, 'Varieties of Welfarism in European Contract Law' 10 (2004) European Law Journal 712–33, in particular 723 and 731.

[105]These dimensions may also overlap or reinforce each other, eg insofar as poorer consumers in Eastern European countries cross-subsidise consumer protection for richer Western Europeans.

[106]On the EU legislatures initiatives to improve possibilities for (collective) redress, see, critically, JML van Duin and C Leone, 'The Real (New) Deal: Levelling the Odds for Consumer-Litigants: On the Need for a Modernization, Part II' 27 (2019) European Review of Private Law 1227–50.

[107]O Ben-Shahar and EA Posner, 'The Right to Withdraw in Contract Law' 40 (2011) The Journal of Legal Studies 144–5. See also D Kennedy, 'Thoughts on Coherence, Social Values and National Tradition in Private Law' in MW Hesselink (ed), *The Politics of a European Civil Code* (Kluwer Law International 2006) 20–1, who expresses some criticism on the use of such arguments, but underlines the need to engage with them.

[108]See Fabre-Magnan (n 100) 381–2, pointing to limitations of non-discrimination law.

[109]Kukovec (n 99) 422–7.

[110]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 Amsterdam UvA 2020) <https://hdl.handle.net/11245.1/0e6437b7-399d-483a-9fc1-b18ca926fdb5 76-8>.

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religious headscarf,[111] these policies impede the social inclusion of women of Islamic faith.[112] Second, the judicial assessment of unfair terms in mortgage contracts does not only concern the interpersonal relationship between homeowner and bank (corrective justice), or the protection of individuals against the one-sided determination of contract terms by banks (distributive or social justice).

As became clear in the Spanish mortgage cases, the adjudication of specific contract terms formed an expression of societal tensions following the economic crisis of 2008. These concerned the stability of the financial system as well as questions on homeownership and the protection against evictions. Given the importance of people's homes for their personal lives and social inclusion, more was at stake than the protection of weaker parties in contract negotiations.[113] Third, tort-based climate change litigation explicitly looks beyond the private legal relation between a party responsible for emissions (State, company) and another party affected by climate change resulting from emissions (corrective justice). The fact that cases are often brought or supported by NGOs, who represent the collective, testify of this. Furthermore, climate change cases are not necessarily aimed at redistributing wealth or power (distributive or social justice), although claimants tend to point their arrows at those in a position to have an impact (States or powerful companies). A motivation for bringing climate cases to the judiciary rather seems to be to prioritise the topic of climate change on the political agenda and give voice to societal concerns on the slowness of the legislative process.[114]

In this light, it seems necessary to propose a rethinking of 'justice' in order to capture the role of the judiciary in the pluralistic and multi-level reality within which legal and political processes take shape. Theories of social justice shed light on one dimension of EPL and have been very influential in assessing the EU legislature's agenda. Yet, a theory of adjudication for EPL also needs to consider the institutional setting and public spheres within which the case law develops.

4 The constitutional dimension of EPL adjudication

A. Private law and European constitutionalism

The theoretical and conceptual framework within which the role of civil courts in Europe is studied here connects established notions of European Private Law to ideas of European constitutionalism. European constitutionalism's relation to private law is understood as encompassing questions on the division of competences among institutions as well as questions on the process of founding a European political community.[115]

In the first place, the question where the decision is made who has the ultimate authority to decide on a specific matter is inherent to Europe's institutional constellation. In a public legal setting, prominent manifestations of this fundamental question of *Kompetenz-Kompetenz*

[111]The CJEU's current framework for assessing company policies allows for this balance of fundamental rights to be made and, thus, justify policies that indirectly discriminate. For critical assessments of the case law, see the contributions mentioned in section 2.A above.

[112]See H Collins, 'Discrimination, Equality and Social Inclusion' 66 (2003) The Modern Law Review 16, 22, defining social inclusion as 'an aim or principle of justice', which 'concentrates its attention not on relative disadvantage between groups, but rather on the absolute disadvantage of particular groups in society'.

[113]On the importance of housing for participation in society, see, eg P Kenna, 'Housing and Human Rights' in SJ Smith (ed), *International Encyclopedia of Housing and Home* (Elsevier 2012) 703–8; I Domurath, *Consumer Vulnerability and Welfare in Mortgage Contracts* (Hart Publishing 2017).

[114]Spier (n 30) 289–91.

[115]It should be noted here that different authors may define different constitutional dimensions when discussing the constitutionalisation of private law. See also H-W Micklitz, 'Constitutionalization, Regulation and Private Law' in Grundmann, Micklitz and Renner (n 4) 166, who observes that '[c]onstitutionalization of private law is a dazzling term'. He relates it to materialisation of private law through fundamental rights, the idea of a private law society, and the self-constitutionalisation of private law beyond the state.

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have emerged in the debate on the interaction between national highest (constitutional) courts and the CJEU.[116] The private legal pendant of such cases concerning the coordination of constitutional competences may be found in cases with a similar, though perhaps less visible,[117] legal–political sensitivity. One may think of the aforementioned mortgage cases, which raised the question whether the CJEU's intervention in Spanish procedural law should be praised for its social impact or rather critiqued for its apparent judicial activism.[118] Older examples include the case law on the *ex officio* assessment of unfair terms in consumer contracts,[119] on the private legal enforcement of EU competition law,[120] and on the reach of Charter rights in private legal relations.[121] The constitutional question posed by these cases, 'who decides who decides?', is a first element that deserves consideration when understanding the role of civil courts in Europe in constitutional terms.

In the second place, a constitutional perspective on European private law raises the question what can and should be the contribution of private legal adjudication to the foundation of a European political community. Stefano Rodotà's observation on the development of judge-made law when legislatures remain silent,[122] when related to civil courts, suggests that the answer lies in the contribution of case law on private legal matters to the process of making Europe. In the absence of a full-fledged European Civil Code, the development of private law in the interaction between EU and Member States takes place through the enactment and interpretation of provisions of Union law that have a bearing on private legal relationships. These comprise both provisions of primary EU law (the Treaties[123] and Charter) and provisions of secondary law (in particular Regulations and Directives).[124] Often, these provisions cannot be applied directly to private legal relationships, such as consumer contracts, but have to be integrated in the interpretation of provisions of national private law (Civil Code, statutes).[125] Courts in civil cases, thus, face the Herculean task[126] of establishing the order among these instruments and defining answers for individual cases. It is this part of their work that may be deemed to be constitutional, insofar as it requires engagement with underlying values and principles that constitute the political community that is governed by European law, including private law.

To some extent, in this discourse private law may be seen to assume a constitutional role, defining the basic framework for interactions among private actors (individuals, companies) in a transnational setting.[127] The judicial interpretation of measures of European private law in

[116]For an overview of the different strands in legal scholarship on this topic, see PJ Castillo Ortiz, 'National Highest Courts and European Integration: A Survey of Six Decades of Academic Inquiry' 18 (2017) German Law Journal 799–822.

[117]Kennedy, 'The Political Stakes in "Merely Technical" Issues of Contract Law' (n 79) 8.

[118]Exploring both views: Micklitz '*Mohamed Aziz* – Sympathetic and Activist' (n 24) ('did the Court get it wrong?') and Micklitz and Reich (n 24) ('the revival of the Unfair Contract Terms Directive').

[119]Starting with the CJEU's ground-breaking judgement in Joined Cases C-240/98 to C-244/98 *Océano* ECLI:EU:C:2000:346.

[120]Case C-453/99 *Courage v Crehan* ECLI:EU:C:2001:465; Joined Cases C-295/05 to 298/04 *Manfredi* ECLI:EU:C:2006:461; later followed by Directive 2014/104/EU of 26 November 2014 on certain rules governing damages under national law for infringements of the competition law provisions of the Member States and of the European Union, OJ L 349/1.

[121]Case C-144/04 *Mangold v Helm* ECLI:EU:C:2005:709; Case C-555/07 *Kücükdeveci* ECLI:EU:C:2010:21; Frantziou, '(Most of) the Charter of Fundamental Rights is Horizontally Applicable' (n 53) 75–8.

[122]See the Introduction to this paper.

[123]The Treaty on European Union (TEU) and the Treaty on the Functioning of the European Union (TFEU).

[124]For a comprehensive study on the impact of EU law on national private law, with a focus on the Dutch legal system, see Hartkamp (n 47).

[125]Hartkamp (n 47) 13–21; S Weatherill, *Law and Values in the European Union* (Oxford University Press 2016) 153 ff; C Joerges, *Conflict and Transformation: Essays on European Law and Policy* (Hart Publishing 2022) 109–10.

[126]In a Dworkinian understanding of the judicial role; R Dworkin, *Taking Rights Seriously* (1977, fourth impression with a Reply to Critics, Duckworth 1984) 105–6.

[127]S Rodotà, 'The Civil Code within the European "Constitutional Process"' in MW Hesselink (ed), *The Politics of a European Civil Code* (Kluwer Law International 2006) 115–24, looking back at the historical role of private law codifications, such as the German and French Civil Codes.

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individual cases not only concerns the individual case but also relates to the bigger question of which shared ideas form the basis of a European political community. A full-fledged polity may not be there at this moment. Yet, starting from the normative proposition that the further development of a European polity is something worth striving for, the question arises to what extent private law adjudication can and should contribute to the constitution of Europe.

B. Who gets the last word in EPL adjudication

Constitutional theorists have conceptualised the normativity of 'European constitutionalism' in different degrees. Tuori, for instance, defines constitutionalism in Europe in a 'normatively more neutral sense' compared to thicker notions of national constitutionalism.[128] Since European constitutionalism is dependent – or even 'parasitic'[129] – on national constitutional law, democratic and constitutional legitimacy should be found in the interaction of the national and European levels of constitutionalism.[130] In order to develop a general theory of the European constitution, Tuori accordingly takes the perspective of European law, while remaining aware of the existence of Member States' points of view. In this sense, he distinguishes his work from that of constitutional pluralists, who aim to rise above the perspectives of EU and Member States in order to theorise the relations between national and European constitutionalism.[131]

Proponents of constitutional pluralism, such as Walker, Kumm and Maduro, have proposed different models for conceptualising the interaction between the EU and the Member States' legal orders, in particular through constitutional courts' engagement with EU law.[132] While it remains the subject of debate to what extent such theories present a descriptively convincing[133] and normatively desirable[134] approach to coordination among legal orders in the EU, most do seek a point of reference for defining which legal order, or which court, has the final say on a specific question. Overarching principles, on the meta-level that surveys national and European legal orders, determine how these orders should interact.[135] It has been observed that, as such, theories of constitutional pluralism seem to support a *monist* view on the European legal order.[136] Although they raise the question of internal coherence to an overarching level that encompasses

[128]Tuori (n 3).

[129]Ibid., 4.

[130]Ibid., 3–4.

[131]Ibid., 7.

[132]N Walker, 'The Idea of Constitutional Pluralism' 65 (2002) The Modern Law Review 317–59; M Poiares Maduro, 'Contrapunctual Law: Europe's Constitutional Pluralism in Action' in N Walker (ed), *Sovereignty in Action* (Hart Publishing 2003) 501–37; M Kumm, 'Who Is the Final Arbiter of Constitutionality in Europe? Three Conceptions of the Relationship between the German Federal Constitutional Court and the European Court of Justice' 36 (1999) Common Market Law Review 351–86. See also, N Krisch, *Beyond Constitutionalism. The Pluralist Structure of Postnational Law* (Oxford University Press 2010); JHH Weiler, 'Prologue: Global and Pluralist Constitutionalism – Some Doubts' in G De Búrca and JHH Weiler (eds), *The Worlds of European Constitutionalism* (Cambridge University Press 2011) 8–18; M Avbelj and J Komárek (eds), *Constitutional Pluralism in the European Union and Beyond* (Hart Publishing 2012); N Walker, 'Pluralism Then and Now' in G Davies and M Avbelj (eds), *Research Handbook on Legal Pluralism and EU Law* (Edward Elgar 2018) 408–9.

[133]G Letsas, 'Harmonic Law: The Case Against Pluralism' in J Dickson and P Eleftheriadis (eds), *Philosophical Foundations of European Union Law* (Oxford University Press 2012) 77–108, who reframes the debate in terms of positivism and non-positivism, arguing that according to a non-positivist view no genuine normative conflicts of fundamental rights exist in Europe.

[134]C Timmermans, 'The Magic World of Constitutional Pluralism' 10 (2014) European Constitutional Law Review 349, 350; J Baquero Cruz, *What's Left of the Law of Integration? Decay and Resistance in European Union Law* (Oxford University Press 2018) 27–52.

[135]For an overview and critical assessment of the development of constitutional pluralism in constitutionalist theory, see Baquero Cruz (n 134) 39–41.

[136]S Douglas-Scott, 'Europe's Constitutional Mosaic: Human Rights in the European Legal Space: Utopia, Dystopia, Monotopia or Polytopia?' in N Walker, J Shaw and S Tierney (eds), *Europe's Constitutional Mosaic* (Hart Publishing 2011) 129.

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both the EU and its Member States' legal orders, in essence they are looking for consensus on guiding principles in a way that is not so different from what national legal systems purport.[137]

While a pluralist account of European private law may be criticised on similar points as theories of constitutional pluralism, it may serve to obtain a better understanding of how institutional choices are made in the interaction of EU law and national private laws.[138] A model of 'moderate pluralism', for example, could guide the interpretation and application of contract law in the interaction of national courts with the CJEU.[139] Inspired by theories of constitutional pluralism, moderate contract legal pluralism would rely on meta-principles that determine which court should decide a dispute on the interface of EU and national law. In addition, these principles would take into account the substantive dimension of contract law. Private law, including contract law, does not only care about the institutional question of who decides, but also about the outcome of the legal assessment. Is the contract valid or not? Which remedies may be claimed in case of non-performance? So, a theory of moderate pluralism would indicate which legal order, or in fact, which court was in the best position to answer the substantive question.[140]

Pluralist theories on the interaction of courts in EPL may, thus, be able to solve questions of *Kompetenz-Kompetenz*. Yet, these types of analysis do not seem to fully answer queries on whether certain cases should be the topic of case law at all or should instead be directed to the legislative process. When further considering the polity dimension of European constitutionalism, the relation between the judiciary and the legislature deserves attention.

C. Justification and application: horizontal effects of fundamental rights revisited

In scholarship that adopts a methodological approach that has affinity with NPLT,[141] the roles of legislatures and judiciaries in a political community are regularly assessed on the basis of a framework inspired by Jürgen Habermas's seminal book *Between Facts and Norms*.[142] Burgers has, for instance, developed the view that climate change litigation in EPL is democratically legitimate, since the protection of the environment is a constitutional matter that should be protected by courts.[143] Hesselink's democratic theory of EPL, furthermore, defines the roles of courts and legislatures on the basis of a Habermasian understanding of their interrelations.[144] Finally, insofar as NPLT incorporates other sub-disciplines, a deliberative theory such as the one proposed by Torres Pérez provides further insights into the way in which the interaction between courts in Europe can be understood.[145]

This type of theoretical work usually distinguishes legislative and judicial processes according to the different logics of argumentation associated with these branches of government, which Habermas names 'discourses of justification' and 'discourses of application'.[146] Discourses of justification refer to the democratic deliberative procedures in which, in Western democracies,

[137]Baquero Cruz (n 134) 47.

[138]This fits with the observation made by Michaels that theories of pluralism in private law are not theories of strong legal pluralism, but rather theories of ordered legal pluralism; R Michaels, 'Why We Have No Theory of European Private Law Pluralism', in L Niglia (ed), *Pluralism and European Private Law* (Hart Publishing 2013) 139–59; V Mak, *Legal Pluralism in European Contract Law* (Oxford University Press 2020) 124.

[139]C Mak, 'The One and the Many: Translating Insights from Constitutional Pluralism to European Contract Law Theory' 21 (2013) European Review of Private Law 1189–210.

[140]Compare, for instance, the reasoning in the cases of *Aziz* and *Freiburger Kommunalbauten*. Mak, 'The One and the Many' (n 139) 1207–9.

[141]Grundmann, Micklitz and Renner (n 4).

[142]Habermas, *Between Facts and Norms* (n 7).

[143]Burgers, 'Justitia, the People's Power and Mother Earth' (n 110) 74–82 and 271–80.

[144]Hesselink, *Justifying Contract in Europe* (n 40) 8 and 49–54; Hesselink, 'Reconstituting the Code of Capital' (n 41) 323.

[145]A Torres Pérez, *Conflicts of Rights in the European Union: A Theory of Supranational Adjudication* (Oxford University Press 2009).

[146]Habermas, *Between Facts and Norms* (n 7) 172.

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parliamentary bodies justify and adopt laws.[147] Discourses of application concern decisions on which norms in existing law are appropriate in situations that have been defined as precisely as possible, normally in judicial proceedings.[148] Accordingly, Burgers argues, insofar as environmental protection is part of the preconditions of a democratic system,[149] judges in climate cases are applying existing law. They are not entering into discourses of justification on new measures against climate change that should be adopted, but are enforcing climate obligations to which public authorities, and in some cases private companies, have bound themselves. Moreover, when transposing the distinction to the development of EPL, a democratic process requires participation of European citizens through legislative discourses of justification. Democratic private law would then, as Hesselink proposes, require legislative initiatives, such as a European Civil Code.

The distinction between discourses of justification and discourses of application, however, becomes more complex when considering the pluralist dimension of adjudication in Europe. Concerning the interpretation of fundamental rights in EU law, Torres Pérez, for example, draws on Habermas's discourse theory to find legitimacy in the assessment of such rights on the basis of a dialogue between the CJEU and national courts.[150] She does not challenge the idea that courts engage in discourses of application when interpreting fundamental rights. Her theory of supranational adjudication rather addresses another aspect of this interpretive process, namely the interaction among courts fulfilling this interpretative role in an institutional setting in which no clear hierarchy can be established among them.[151] The dialogue among courts as interpretive institutions in this view contributes to the legitimacy of rights protection in the EU.

Theorising the role of courts in EPL in light of a Habermasian understanding of deliberative democracy, thus, requires further scrutiny of the manner in which discourses of application take shape in a multi-level system of governance, in which national courts in civil cases interact with each other and the CJEU. In particular, the relation of this judicial interaction to discourses of justification deserves closer attention. For climate change litigation, Burgers' claim that environmental protection has become part of the preconditions of a democratic system elegantly seeks the democratic legitimacy of cases like *Urgenda* within a Habermasian understanding of discourses of justification that have taken place in legislative processes. In this view, courts do no more than apply existing law that safeguards environmental (human) rights. For other cases, however, it might not be possible to (re)construct the legitimacy of judicial law-making in EPL in a similar manner, in particular when it is not clear how the political community to which the law applies should be demarcated. Another avenue that might, therefore, be explored is one that further problematises the role of courts in a multi-level setting, in which the relation between legislatures and courts does not have to be the same as in nation-states.

5. Public sphere theory and EPL adjudication

A. Private law and democratic inclusion

What seems to be missing in social justice accounts and constitutional accounts of EPL adjudication is an answer to the question why and how certain topics – housing, non-discrimination in employment, climate change – are sometimes allocated to the judicial process rather than the political, legislative process. On the basis of the previous analysis, it may be

[147]Ibid., 171–2.

[148]Ibid., 172.

[149]Burgers submits that for today's European systems the climate should be explicitly added to Habermas' category of basic rights to the provision of certain living conditions as listed in Habermas. See Burgers, 'Justitia, the People's Power and Mother Earth' (n 110) 123.

[150]Torres Pérez (n 145) 104–6.

[151]Ibid., 68–9 and 117. See also section 4.A above.

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submitted that more attention should be paid to the role of courts in discourses of justification. This is not to say that courts themselves provide a full justification of new legal rules or remedies, as this would primarily remain the role of legislatures. What courts add in politically charged cases could rather be theorised as a contribution to the deliberative processes that make possible such justificatory discourses.[152]

In this final part of the analysis, it will be proposed that public sphere theory can provide clarity on this point. Building on Nancy Fraser's political-theoretical views,[153] and taking a reconstructive approach inspired by Jürgen Habermas, it is submitted that through case law a space may be maintained for deliberation on different ideas of justice or world views. This third theoretical view, thus, elaborates on the idea of democracy and the nature of the emerging European polity according to which choices are made on the division of tasks between legislatures and judiciaries in the EU.[154]

The principle of democratic inclusion that is advanced here has a basis in the idea of co-originality of public and private autonomy developed by Habermas. In Habermas's reconstructive theory of democracy, public autonomy implies that those who are addressees of the law at the same time have a role as authors in the enactment of the law.[155] This idea of self-legislation by citizens does not so much concern the moral self-legislation of individual persons, but rather captures a more abstract notion of the institutional legislative process in which those governed by the law should have a say.[156] Public autonomy, in Habermas's view, co-originates with private autonomy. Legal subjects are allowed a sphere of private autonomy in which they do not have to account to others for their action plans. Both elements are present in private law, since private law defines the boundaries to the autonomous development of action plans through legal rules enacted in law-making processes.

While this idea of democracy clearly aims at inclusion of those governed by the law in the process of developing new rules, it encounters at least two challenges in the European setting. In the first place, the theory of democracy presented in Habermas's *Between Facts and Norms* mostly seems to reconstruct the constellations found within nation-states. It explains the system of rights on which a (Western) democracy may thought to be based and the institutional roles of the legislature and judiciary in this setting. A further elaboration of the theory is needed to grasp the dynamics of a post-national order, in which multiple legislatures and judiciaries interact, such as in Europe.[157] How can self-government by those addressed by laws deriving from different levels of government be realised? In later work, Habermas has relied on the idea of dual citizenship to

[152]I wish to thank Andrew Halpin for his observations on this distinction between discourse and justification.

[153]N Fraser, *Scales of Justice: Reimagining Political Space in a Globalising World* (Polity Press 2008).

[154]For example, visible in Gerstenberg, 'Constitutional Reasoning in Private Law' (n 24) 614–7 and O Gerstenberg, *Euroconstitutionalism and its Discontents* (Oxford Press 2018) 102, on the CJEU's Aziz judgement introducing a proportionality test in national laws on unfair terms control; G Comandé, 'The Fifth European Union Freedom: Aggregating Citizenship . . . around Private Law' in H-W Micklitz (ed), *Constitutionalization of European Private Law* (Oxford University Press 2014) 61–101. See, furthermore, Joerges, *Conflict and Transformation* (n 125) 109–13, whose famous 'conflicts-law constitutionalism' sees a potential for mending democratic deficits in the relationship between the EU and its Member States in an approach inspired by conflicts law. The reconstruction of the constitutional role of contract law in terms of fundamental rights is challenged by MW Dowdle, 'On the Doubly Constitutionalising Character of European Contract Law' in C Mak and B Kas (eds), *Civil Courts and the European Polity: The Constitutional Role of Private Law Adjudication in Europe* (Hart Publishing 2023) 43–61, who submits that this view does not fit the constituting role of contract law for both the State and the market.

[155]Habermas, *Between Facts and Norms* (n 7) 120–1.

[156]Ibid., 121.

[157]It may be recalled here that Habermas' theory of communication as such does not seem to be limited to processes within nation-states. In his later work, Habermas himself makes a clear distinction between the national and European levels, developing a theory on how the nation-State model may be transposed to Europe and the world. J Habermas, *The Crisis of the European Union: A Response* (Polity Press 2012) 12–13. See also M Renner, 'Private Law and Theories of Communication' in S Grundmann, H-W Micklitz and M Renner (eds), *New Private Law Theory: A Pluralist Approach* (Cambridge University Press 2021) 107.

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meet this challenge.[158] Individuals, who are both citizens of their home Member State and of the EU, participate in legislative processes on both levels. In this way, they take part in the process of building a political community simultaneously in the roles of citizens of the Member States and (future) citizens of the emerging European polity.[159]

In the second place, however, the focus on citizenship poses another challenge to the idea of democratic inclusion. While the *duality* of European citizenship that Habermas defines raises questions of both an empirical and a normative nature – how can individuals reconcile competing national and European interests within their choices, and should they strive for this? – it is the *concept of citizenship* itself that entails even more pressing concerns for inclusion in the process of law-making in the field of private law. If self-government requires the authorship of all addressees of the rules, citizenship in certain instances may be too restrictive to include them all. For example, individuals do not necessarily have to be citizens of a Member State and the EU to conclude mortgage contracts or sales and services contracts that are governed by European Private Law. Similarly, one does not have to be a citizen of an EU Member State to bring a non-discrimination claim under national laws implementing EU Directives. Furthermore, climate change claims are usually brought by an NGO on behalf of the residents or inhabitants of a certain territory, without distinguishing among those who have citizenship within that territory and those who do not.[160] The question then arises to what extent and how their interests can be taken into account in law-making processes in order to realise the democratic ideals of public and private autonomy.

B. A matter of principle: all affected or all subjected

A normative assumption underlying this view on the inclusive dimension of private law adjudication in Europe is that inclusion in the democratic process serves the ideal of a more just society. Both Habermas's and Fraser's views on justice emphasise the importance of inclusion in law-making processes of those who have a stake in the outcome. Inclusion, accordingly, becomes part of a reframed notion of justice, in which full participation in social life does not only depend on economic structures and cultural values but also on politics of inclusion and exclusion in decision-making processes.[161] Insofar as private law adjudication may give voice to underrepresented groups in legislative processes, the question is to what extent and how judicial reasoning should strive for contributing to inclusiveness.

An assessment of the inclusiveness of decision-making processes in Europe requires a normative principle for evaluating the framework. As a most likely candidate, Fraser proposes the 'all-subjected principle', which holds that 'all those who are subject to a given governance structure have moral standing as subjects of justice in relation to it'.[162] She contrasts this principle with those of membership, humanism and affectedness, which she rejects in turn. Her criticism of the membership principle concerns its restrictiveness – this rings true for the European context, where the criterion of citizenship might not encompass all parties who have a stake in law-making processes. Fraser rightly points out that a humanist principle, as a criterion for demarcation, may have the opposite effect of being overly inclusive, as it abstracts from historical social relations and thus proposes a notion of personhood that may potentially give standing to everyone in respect to everything.[163] The principle of affectedness, finally, is at a similar risk of being overinclusive, as it is prone to the butterfly effect according to which everyone is affected by everything.[164]

[158]Habermas *The Crisis of the European Union* (n 157) 28 ff and 36, referring to A von Bogdandy, 'Grundprinzipien', in A von Bogdandy and J Bast (eds), *Europäisches Verfassungsrecht* (2nd ed, Springer 2009), 13, 64.

[159]Habermas, *The Crisis of the European Union* (n 157) 36–7.

[160]For example District Court The Hague *Milieudefensie v Shell* ECLI:NL:RBDHA:2021:5339 paras 4.2.1–4.2.4.

[161]Fraser, *Scales of Justice* (n 153) 16–17.

[162]Fraser, *Scales of Justice* (n 153) 65.

[163]Ibid., 64.

[164]Ibid.

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The all-subjected principle would not have these drawbacks and would allow us to identify the plurality of relevant frames of governance for specific issues.[165]

The all-subjected principle fits the area of European private law, insofar as it allows for the distinction of different governance structures – national, European, hybrid – in which individuals may participate. What is more, such participation does not necessarily require citizenship, although this is encompassed in the notion of subjectedness.[166]

Still, at least two reservations may be made. First, the all-subjected principle might not cover all concerns, since it presumes the existence of a governance structure and does, therefore, not apply in cases where such a structure is lacking.[167] In non-regulated areas, private powers cannot be held to account. Furthermore, persons who are affected by, but not directly subject to, certain rules would not have political standing under the all-subjected principle.[168] Fraser counters these objections by postulating the idea of an overarching regime of global governance to which everyone is subject and which provides a basis for a global public sphere.[169] Both participation on a lower level of governance and on the overarching level could then be justified on the basis of the all-subjected principle.[170] As elegant as this solution is, it raises the empirical question whether a global regime can be identified as well as the normative question how such a broad understanding of the principle will allow it to make more convincing distinctions than the ones of humanism and affectedness.

Despite these reservations, nevertheless, it seems that for private law adjudication in Europe the all-subjected principle could work quite well. At least within the spheres of EU law and the ECHR overarching governance regimes may be discerned. The principle could serve the assessment of the interaction of these frames with those of national private laws in the context of case law. From this normative perspective, it would then need to be evaluated to what extent judicial interaction can contribute to transnational public spheres. Which voices are included? Who are subjected to the governance structure in European private law and how is their equal participation secured?

C. Transnationalised public spheres and EPL adjudication

The beginning of an answer to these queries lies in the concept of the 'public sphere' that, in a Habermasian reconstruction, serves the deliberative processes in which law is developed. In this view, the public sphere is understood as a network for communicating information that yields public opinions on defined topics.[171] It serves as a sounding board and amplifier for problems that must be solved by the political process.[172] The informal flow of public opinions, as well as court decisions in politically sensitive cases, may influence democratic deliberations on solutions for the identified problems.[173] For courts in civil cases this implies that their reasoning on politically charged matters has a certain democratic dimension. It may give space to voices that would otherwise remain unheard in the legislative process, whether the affected parties are citizens or not. Moreover, it may serve to prioritise topics on the political agenda.

[165]Ibid., 65–6.

[166]N Fraser, 'Publicity, Subjection, Critique: A Reply to My Critics' in K Nash (ed), *Transnationalizing the Public Sphere* (Polity Press 2014) 149.

[167]D Owen, 'Dilemmas of Inclusion: The All-Affected Principle, the All-Subjected Principle, and Transnational Public Spheres' in K Nash (ed), *Transnationalizing the Public Sphere* (Polity Press 2014) 121–2; Fraser, 'Publicity, Subjection, Critique' (n 166) 150–1.

[168]Owen (n 165) 122–3; Fraser, 'Publicity, Subjection, Critique' (n 166) 151.

[169]Fraser, 'Publicity, Subjection, Critique' (n 166) 153.

[170]Ibid., 153–4.

[171]Habermas *Between Facts and Norms* (n 7) 360.

[172]Ibid., 359.

[173]Ibid., 371–2.

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A complicating factor concerns the conceptualisation of a public sphere in the European multi-level constellation. Again, the question arises how to address Europe's post-national[174] or transnational dimension. Nancy Fraser's work on a critical theory for transnationalising public spheres offers guidance on this point. In particular, Fraser problematises the Westphalian framing of public spheres, which fails to account for communicative opinion forming that transcends the boundaries of nation-states.[175] She outlines the prerequisites for a meaningful discussion on the question to what extent transnationalised public spheres can perform the democratic political function that is ascribed to them in national settings.[176] An essential condition, which is of great relevance for the European situation, is that of inclusiveness to all who have a stake in the outcome of deliberative processes.[177] In particular, it has to be made sure that all in principle are given similar chances to participate in the deliberations.[178] The question of political representation of affected parties, thus, has to be addressed alongside questions of economic distribution and cultural recognition.[179] Bringing back the focus to the democratic role of courts in civil cases, it may therefore be inquired to what extent Habermas's view on the contributions of case law to the public sphere can be translated to the interaction of national and European judiciaries in the field of private law. To what extent can courts in civil cases contribute to improving inclusion and equal participation in deliberative spheres?

Inclusion in the context of European Private Law is understood here in two distinct but related manners. In the first place, in line with Habermas's theory, it regards the possibility for those governed by certain laws to participate in the deliberative processes that generate these laws. In the second place, following the social justice debate in European private law, the concern is with the substantive improvements that may be reached for underrepresented groups. The two are related insofar as inclusion in deliberative processes may serve substantive goals of social justice, such as the enactment of rules that protect weaker parties. The protection of mortgage holders in relation to banks in the Spanish mortgage saga illustrates this, in particular as it took shape in the debate surrounding the *Aziz* case. Mr Aziz did not have Spanish citizenship, and he had thus not been included in legislative processes concerning the laws governing his mortgage contract, as he could not vote in national elections. His case against the bank and its referral to the CJEU, however, did have an unmistakable impact on Spanish legislative processes, as the CJEU's judgement inspired a reform of national procedural law. Although Mr Aziz and his family sadly did not benefit from this reform, with attempts to regain their home remaining unfruitful, the judgement in their case led to substantive improvements for economically vulnerable mortgage holders from a social justice perspective.[180] The Spanish mortgage cases like the ones of Aziz, thus, contributed to maintaining a space for deliberation on which legislative action was needed to redress imbalances between groups in society.

Fundamental rights reasoning once more contributes to building bridges between the national and transnational levels. The considerations of these rights can not only serve to make more explicit underlying legal–political stakes in private law, such as the need for effective remedies for homeowners confronted with detrimental terms and conditions that have one-sidedly been imposed by banks. With an eye on democratic will-formation, Seyla Benhabib has submitted that the debate on the interpretation of fundamental rights may give space to 'democratic

[174]J Habermas, *Die postnationale Konstellation: Politische Essays* (Suhrkamp 1998).

[175]N Fraser, 'Transnationalizing the Public Sphere. On the Legitimacy and Efficacy of Public Opinion in a Post-Westphalian World' in K Nash (ed), *Transnationalizing the Public Sphere* (Polity 2014) 9, 15 and 19.

[176]Fraser, 'Publicity, Subjection, Critique' (n 166) 26–34.

[177]Ibid., 27–8.

[178]Ibid., 28.

[179]Fraser, *Scales of Justice* (n 153) 16–17.

[180]Fernández Seijo (n 23).

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iterations' across transnational legal sites.[181] A dissenting opinion of an ECtHR judge, for instance, allows for debate on new elements in the transnational discussion.[182] In a similar way, both the Advocate-General's Opinion in the *Aziz* case and the CJEU's judgement induced broad societal debates in Spain. Climate cases such as *Urgenda*, moreover, have given rise to national as well as transnational discussions and have inspired other tort claims with a basis in rights protected under the ECHR. Climate claims against companies, in this context, are likewise being perceived as providing more effective means to take action to reduce emissions.[183] Fundamental rights reasoning in civil cases, in these cases, connects national and European elements in transnationalised public spheres.[184]

D. The Europe-making capacity of EPL adjudication

A presumption underlying this line of inquiry is that a system of private law in principle coincides with a community.[185] Rather than limiting this overlap to the territory and jurisdiction of the nation-state, the composite nature of a private law that is partly national and partly European necessitates a reimagination of the community that is governed by EPL.[186]

The imagination of a European polity challenges understandings of democracy that are limited to the model of the nation-State. As Wilkinson has shown, for example, models of foundational constitutionalism that derive their authority from the people that it represents, a 'demos', are difficult to transpose to the EU in the absence of such a unified constituency.[187] Adaptations of the theory are necessary to capture the different manner in which a plurality of 'demoi' coexist and interact. With Nicolaïdis, one may even speak of a 'demoicracy'.[188] What is more, it is unlikely that the imagination of a European political community can copy the nation-State model in which one theory of justice can explain and guide interactions in society.[189] Given the compound nature of the polity, democratic processes are shaped by a combination of national and supranational institutions and proceedings. Moreover, democratic processes in some Member States may adhere to different ideas of justice than those in other Member States and in EU institutions. A theory of EPL adjudication that acknowledges democracy as a premise of the European polity, thus, has to say something about the manner in which case law on private legal matters handles the plurality of decision-making structures and values within which specific private legal questions arise.

On the basis of the analysis made here, what emerges is a role for EPL adjudication in maintaining inclusive transnationalised public spheres that allow for deliberation on underlying legal–political questions. Such deliberative processes may serve for voices of groups that were underrepresented in earlier legislative processes to be heard. Urgent societal questions, such as those concerning non-discrimination, housing and climate change receive public attention and

[181]S Benhabib, 'Transnational Legal Sites and Democracy-Building: Reconfiguring Political Geographies' 39 (2013) Philosophy and Social Criticism 471, 477–8.

[182]Ibid., 480–1, referring to Judge Tulkens' dissenting opinion in the case of *Leyla Sahin v Turkey*.

[183]G Ganguly, J Setzer and V Heyvaert, 'If at First You Don't Succeed: Suing Corporations for Climate Change' 38 (2018) Oxford Journal of Legal Studies 841, 843–6 and 863.

[184]It should be kept in mind that Benhabib's theory has a basis in cosmopolitanism. On the extent to which cosmopolitan strands may be discerned in transnational private law, see H Collins, 'Cosmopolitanism and Transnational Private Law' 8 (2012) European Review of Contract Law 311–25; MW Dowdle, *Transnational Law: A Framework for Analysis* (Cambridge University Press 2022) 61–4 and 72–4.

[185]See B Anderson, *Imagined Communities. Reflections on the Origin and Spread of Nationalism* (revised edition, Verso 2006).

[186]G Comparato, *Nationalism and Private Law in Europe* (Hart Publishing 2014).

[187]Wilkinson (n 77) 194, with further references.

[188]K Nicolaïdis, 'The Idea of European Demoicracy' in J Dickson and P Eleftheriadis (eds), *Philosophical Foundations of European Union Law* (Oxford University Press 2012) 247–74.

[189]See also Wilkinson (n 77) 200 ff on limitations of freestanding constitutionalism.

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may, thus, be put on the political agenda for further legislative initiatives to be developed.[190] Legislative and judicial processes may, accordingly, be said to prevail over one another in cyclical patterns, in certain areas increasingly complemented by private regulation.[191]

This brings us back to the polity-building dimension of private law adjudication in Europe, or the Europe-making capacity of EPL adjudication.[192] In light of the principle of democracy defined here, judicial interaction may be held to contribute to the maintenance of transnational public spheres for deliberation on the political stakes in private law. An essential feature of such spheres is that those with a stake in the debate can participate in an equal manner. Building on Fraser's convincing plea for an inclusive principle of all-subjectedness that requires participation 'as peers, *regardless of political citizenship*',[193] a tentative conclusion that emerges from this exploration is that courts in civil cases, through their interaction with the European level, may to some extent mend the democratic deficit in European Private Law. Their role in the maintenance of national and transnational deliberative spaces allows for inclusion of those who are subjected to the relevant regimes but may not be heard in legislative processes. To the extent that case law may induce the development of new remedies, it can serve substantive inclusion, or solidarity, as well.[194] Ideally, developments in EPL adjudication, in this way, catalyse discourses of justification and, thus, contribute to the process of building a European political community.

6. Discourse, justification and EPL adjudication

Surveying the legal landscape shaped by legislation and adjudication in European Private Law, developments in case law raised the question if and how the allocation of politically sensitive legal questions to civil courts could be explained and justified. From three case examples selected for the analysis in this paper a changing role of the judiciary emerged: parties bring private legal claims on non-discrimination, housing and climate change to national courts in the EU, which in their turn seek guidance from the Court of Justice of the EU, and in some instances the European Court of Human Rights. With the aim of contributing to a theory of EPL adjudication, this paper combined three theoretical perspectives in order to obtain a better understanding of the dynamics of law-making between legislatures and judiciaries.

The three theoretical compasses each explain and guide aspects of the judicial role in EPL. First, a social justice perspective makes clear which legal–political stakes are at play in high-profile cases such as the ones on non-discrimination, housing and climate change. Although rules of private law may often seem to be of rather technical nature, the balancing of parties' interests in cases between private actors is not neutral. Outcomes of such balancing processes may be considered to be reflective of the (re)distribution of wealth and power among groups in societies, which is of relevance for providing adequate legal protection to employees, tenants and mortgage holders, and those affected by greenhouse gas emissions. What a social justice perspective does, however, not fully clarify is why the judiciary may be called upon to strike a balance of broader societal interests that is usually entrusted to the legislature.

[190]Hinteregger (n 30) 245; Ganguly, Setzer and Heyvaert (n 181) 845–6. See also Kas and Micklitz on public interest litigation in EU consumer law, Kas and Micklitz (n 56) 38; B Kas, 'Transforming the European "Legal Field" by Strategic Litigation' in L de Almeida, M Cantero Gamito, M Djurovic and K Purnhagen (eds), *The Transformation of Economic Law: Essays in Honour of Hans-W Micklitz* (Hart Publishing 2019) 347–66; and Gerstenberg, *Euroconstitutionalism and its Discontents* (n 154) 36–8, who justifies constitutionalisation through adjudication on the basis of a theory of democratic experimentalism.

[191]F Cafaggi, 'Does Private Regulation Foster European Legal Integration?' in K Purnhagen and P Rott (eds), *Varieties of European Economic Law and Regulation: Liber Amicorum for Hans Micklitz* (Springer 2014) 270–1.

[192]M Loughlin, 'The Constitutional Imagination' 78 (2015) The Modern Law Review 1–25.

[193]Fraser, 'Transnationalizing the Public Sphere' (n 175) 30–1.

[194]Recall Caruso's concerns on the social justice dimension of EPL; Section 3.B above.

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In the second place, a constitutional perspective offers further theoretical guidance on the interaction among institutions at different levels of governance, the national and the European. In particular, a constitutional-pluralist view, that seeks to define principles for the coordination of law-making among different legal orders, can serve the theorising of judicial conversations among national civil courts and the CJEU and ECtHR. When looking into reasons for institutional choices between legislative and judicial processes, however, constitutional theory does not provide full answers for EPL either. This seems due to the difficulty of establishing to which political community EPL pertains and, accordingly, where discourses of justification take place that legitimise rules of private law.

In the third place, transnational public sphere theory elucidates the democratic dimension of judicial law-making in EPL. It shows how even those who are not connected through citizenship to a jurisdiction in which a case arises may be engaged in deliberative processes on the legal–political dimension of the legal question through their participation in public debates that transcend the borders of nation-states. For instance, case law on companies' dress codes may contribute to debates and legal choices on how to create inclusive working environments for people of all convictions. And case law on Spanish mortgages has had wide-ranging effects on the way that credit contracts are legally assessed and debated in EU Member States. National cases on climate change that are widely debated transnationally, finally, may contribute to public awareness and the start of similar cases elsewhere.

When combining the insights from these three theoretical perspectives, adjudication does not seem to be a second-best option in EPL when compared to legislative processes. Instead, it fulfils a role in cyclical processes in which politically sensitive topics are put on the legislative agenda. This is particularly important in a multi-level setting, where legislative change might be difficult to achieve and time-consuming. Adjudication may then serve to address and prioritise matters that cannot wait, thus contributing to the discourses needed to justify new legal solutions. In this way, judges in private legal cases may, indeed, be said to be making Europe – not by themselves, but by maintaining spaces for public deliberation on private legal questions.

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