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FIRST OR SECOND BEST?
JUDICIAL LAW-MAKING IN EUROPEAN PRIVATE LAW

Chantal Mak

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First or second best?

Judicial law-making in European private law

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Abstract: This paper examines the interaction among institutions in European private law in times of societal change. It is submitted that a translation of national constitutional models of division of powers to the European Union cannot fully do justice to the nature of the interplay of courts and legislatures in Europe's multi-level private legal order. A clarification of the legal-political significance of judicial law-making against the backdrop of the economic crisis can better explain judicial activism in certain areas of European private law. It also serves to address the (re)definition of the principle of democracy in this field and the possible contribution of democratic experimentalism. This, then, provides starting points for a re-imagination of the judiciary's role in the communicative process of generating legal normativity in European private law.

'It is true that we cannot be visionaries until we become realists. It is also true that to become realists we must make ourselves into visionaries.'

Roberto Mangabeira Unger¹

1. European courts in times of societal change

Is it possible to imagine a constellation in which courts sometimes are in a better position than legislatures to contribute to the democratic legitimation of new rules of private law? How can, for instance, the interaction of national courts and the Court of Justice of the European Union (CJEU) in the continuing series of Spanish mortgage cases be explained and maybe justified? In theoretical models of a constitutional division of powers, courts perform different functions. Courts are, in the first place, responsible for the interpretation and application of the law, especially in the Civil Law tradition of the European continent.² In the second place,

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

² J. Habermas, *Between Facts and Norms* (Cambridge: Polity Press, 1996), 172-173, distinguishes discourses of justification (in legislative processes) from discourses of application (in adjudication); A. Stone Sweet, *Governing with Judges* (Oxford: Oxford University Press, 2000). Compare C. Müllers, *The Three Branches: A Comparative Model of Separation of Powers* (Oxford: Oxford University Press, 2013), 130-131.

the judiciary may have a certain role in processes of shaping new rules. The question is, however, what this law-making role is or should be in a democratic legal system. The task of defining policy objectives and translating these to the legal framework is primarily assigned to the legislature, which assesses societal needs and develops longer-term programmes rather than case-by-case solutions. The legislature thus provides democratic legitimacy to law-making, since the legislative process involves representative bodies (such as a parliament) that give a voice to and are accountable to those who will be governed by the rules coming out of this process.³ The judiciary, on the other hand, would not be able to rely on such legitimacy and should, therefore, in principle not enter into the consideration of policy argumentation and the making of new rules.⁴ Any legal system exclusively assigning certain law-making tasks to the judiciary would, from such a theoretical perspective, offer a second-best solution in terms of democratic legitimacy.

In this paper, the contribution that the judiciary can make to the democratic legitimacy of rules of European private law will be assessed from three perspectives: reconstructive theory, legal realism and democratic experimentalism. It will be argued that a reconstructive theoretical model of constitutionalism does not seem to be able to fully explain nor normatively guide the current interaction among legal institutions in the field of European private law, understood as comprising the interplay of national and supranational rules governing legal relations among private actors in the European Union (EU). Especially in times of societal change, such as the handling of the economic crisis that the EU is going through, courts assume a different type of legal-political role, which places them in a position to sometimes respond to the developments in a more effective manner than the legislature. Paradoxically, as I will demonstrate, this does not necessarily diminish the democratic legitimacy of rule-making in European private law, and may even enhance it. The empowerment of national judiciaries in respect to legislatures opens new possibilities for citizens' access to the deliberation of value and policy choices and the translation of these choices into new rules of European private law, as a legal-realist assessment will show. Judicial interaction in private law then provides opportunities for democratic experimentalism. Under these circumstances, the judiciary's second-best position in terms of democratic legitimacy may be the least imperfect or even best option available in a multi-level institutional constellation. Still, this type of experimentalism has certain drawbacks, as its procedural nature does not guarantee that outcomes will comply with more substantive notions of justice. Accordingly, the conception of democratic legitimacy in European private law requires rethinking.

³ F.W. Scharpf, 'Economic Integration, Democracy and the Welfare State', (1997) *Journal of European Public Policy* 4:1, 19.

⁴ In this sense, R. Dworkin, *Taking Rights Seriously* (London: Duckworth 1977; fourth impression with a Reply to Critics, London: Duckworth 1984); R. Dworkin, *Law's Empire* (Cambridge, MA: Belknap Press 1986).

2. Institutional constraints: dividing powers among legislatures and judiciaries

2.1 Constitutionalism and private law in Europe

European private law involves a variety of actors on different levels of governance, who together define the legal framework within which private actors (individuals and businesses) interact. At EU level, legislative tasks have been assigned to the European Commission, European Parliament and Council, whereas questions regarding the interpretation and application of EU law are to be addressed to the Court of Justice of the EU. At the national level of the Member States, rules of private law are enacted in legislation and enforced through court systems, where Common Law countries traditionally leave courts in civil cases more leeway to develop new rules than Civil Law countries. Together, these bodies form the institutional structure within which private law develops.

Apart from the mandatory and default rules provided by EU Treaty provisions, Regulations and Directives and Member States' private laws, moreover, private actors have an important role in setting the rules governing their relationships, in particular insofar as they contractually establish the terms of their engagement. On this point, questions of European private law are distinct from those in (institutional) European public law. While private law relies on the institutional framework defined in public law for its enactment and enforcement, it is also concerned with the outcomes of cases in light of party autonomy. It matters whether a certain contract is considered to be valid or not, how its terms are interpreted and which remedies are available upon non-performance. Respect for the autonomy of private actors requires careful consideration of the substantive boundaries to their interactions that are determined in the legal rules that govern their relationships. Law-making in the field of European private law, thus, has to take into account both public and private autonomy. Public autonomy, in a Habermasian sense, concerns the idea of self-legislation by citizens, according to which those who are subject to certain rules (as addressees) also participate in their enactment (as authors).⁵ Private autonomy regards the sphere within which legal subjects are free to make their own choices, without having to justify their decisions to others or give publicly acceptable reasons for their action plans.⁶ The question then is how – substantively and procedurally – and by which institutions – national and European – the borderlines to private autonomy are determined in a process that allows private actors to participate in the development of the rules of European private law that define those boundaries.

Constitutional theory has sought to make sense of the interaction among legal institutions in Europe by exploring the monistic and pluralistic features of the EU's multi-level legal order. Some constitutional models aspire to relate all rule-solutions within the scope of EU law to one overarching set of values or principles, which would, thus, indicate a hierarchy among EU and national legislatures and courts.⁷ Other models accommodate the

⁵ Habermas 1996, 120-121, 123.

⁶ Habermas 1996, 120.

⁷ E.g. Möllers 2013.

plurality of values and principles underlying legal rules by either accepting the incommensurability or irreconcilability of these values and principles (and shifting the choice to the political process),⁸ or trying to define meta-principles that determine which value or principle and which institution should decide a specific case.⁹

Private law theory is exploring similar themes, especially in light of the principle of freedom of contract that underlies national and supranational rules of contract law.¹⁰ This investigation relates to the constitutional debate, in particular insofar as the CJEU has included freedom of contract in the scope of the freedom to conduct a business safeguarded by Article 16 of the EU Charter of Fundamental Rights (e.g. CJEU *Sky Österreich*¹¹ and CJEU *Alemo-Herron*¹²). A constitutional analysis of the place of private law in the EU's legal order advocates the importance of not only looking into procedural principles indicating which institution ultimately decides a case, e.g. the CJEU or a national court.¹³ In addition, in this type of (re)constructive theory, there is a need for considering the outcomes of such processes, e.g. the validity of a contract in light of conceptions of morality. Theoretical views based on substantive conceptions of justice, moreover, look into the possibility of defining substantive principles that can guide the decision-making process, taking into account the existence of varying limits to freedom of contract on different levels of governance.¹⁴

These views, in particular the monistic and moderately pluralistic ones, present a coherent picture of the division of powers among legislative and judicial institutions in

⁸ G. Itzcovich, 'Legal Order, Legal Pluralism, Fundamental Principles. Europe and Its Law in Three Concepts' (2012) *European Law Journal* 18, 366: '[E]xternal conflicts between legal orders are unsolvable or irrelevant because, by virtue of the autonomy and authority of the legal order, the norms belonging to different legal orders are incommensurable. This is the principle of the relativity of legal values, which is the logical consequence of the closure of the legal order.' His addition of a theory of 'authoritativeness' of legal orders, however, seems to correspond to constitutional pluralist views on the European legal order. On institutional choice, see also N. Komesar, *Imperfect Alternatives. Choosing Institutions in Law, Economics and Public Policy* (Chicago: University of Chicago Press, 1994).

⁹ E.g. N. Walker, 'The Idea of Constitutional Pluralism', (2002) *Modern Law Review* 65, 317-359; M. Poiares Maduro, 'Contrapunctual Law: Europe's Constitutional Pluralism in Action', in N. Walker (ed), *Sovereignty in Action* (Oxford: Hart Publishing, 2003) 501-537; 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', (1999) *Common Market Law Review* 36, 351-386; N. Krisch, *Beyond Constitutionalism* (Oxford: Oxford University Press, 2010).

¹⁰ E.g. R. Brownsword, H-W. Micklitz, L. Niglia and S. Weatherill (eds), *The Foundations of European Private Law* (Oxford: Hart publishing, 2011); L. Niglia, *Pluralism and European Private Law* (Oxford: Hart publishing, 2013).

¹¹ Case C-283/11, *Sky Österreich GmbH v. Österreichischer Rundfunk*, CJEU 22 January 2013, nyr.

¹² Case C-426/11, *Alemo-Herron and others v Parkwood Leisure Ltd*, CJEU 18 July 2013. See J. Prassl, 'Freedom of Contract as a General Principle of EU Law? Transfers of Undertakings and the Protection of Employer Rights in EU Labour Law. Case C-426/11 *Alemo-Herron and others v Parkwood Leisure Ltd*', (2013) *Industrial Law Journal* 42, 434-446; M. Bartl and C. Leone, 'Minimum Harmonisation after *Alemo-Herron*: The Janus Face of EU Fundamental Rights Review', (2015) *European Constitutional Law Review*, 140-154; M.W. Hesselink, 'The Justice Dimensions of the Relationship between Fundamental Rights and Private Law', (2016) *European Review of Private Law*, 425-456.

¹³ C. Mak, 'The One and the Many. Translating Insights from Constitutional Pluralism to European Contract Law Theory', *European Review of Private Law* 2013, 1189-1210.

¹⁴ E.g. I. Benöhr, *EU Consumer Law and Human Rights* (Oxford: Oxford University Press, 2013); J. Klijnsma, *Contract Law as Fairness. A Rawlsian Perspective on the Position of SMEs in European Contract Law* (PhD thesis Amsterdam UvA, 2014, on file with author).

Europe, including both EU and national bodies. They resonate with the description of the task of the judiciary as it is perceived by some judges themselves. Koen Lenaerts, vice-president of the CJEU, has for instance asserted that:

‘[N]ational diversity and EU legislative consensus must both comply with values which are regarded as all-European, i.e. those that are the object of a constitutional consensus at EU level. It is this latter consensus that guarantees that the forces that bring Europeans together are stronger than those that pull them apart.’¹⁵

Broadly speaking, the type of conceptualisation of the division of powers described here emphasises institutional constraints on judicial law-making. Both in a descriptive and in a normative sense, a primary site for legitimate rule-making is found in the legislative processes involving deliberations in representative institutions, i.e. national parliaments and the European Parliament. The judiciary’s main role is to interpret and apply rules enacted through such processes, respecting a principle of democracy that divides authority to make and to apply laws into two branches of government.¹⁶ Moreover, the legislature retains the power to reverse or confirm judicial decisions.

2.2 Democratic legitimacy in a multi-level order

Since the division of powers in the EU’s multi-level setting concerns two levels of governance, reference must be made to a principle of *dual* democracy.¹⁷ While respecting national constitutional arrangements, EU governance has added a supranational layer of democratic decision-making, reflecting the idea that citizens in Europe must be able to participate and be represented in the policy decisions affecting their rights under EU law.¹⁸ Being simultaneously citizens of their respective Member States as well as EU citizens, people in Europe can take part in law-making processes at the national level and at the European level.

The democratic legitimacy of the rules of private law that make up a composite order of European private law in the interplay of national and EU law, accordingly, depends on the process of the coming into being of these rules. Four categories may be distinguished:

In the first place, the democratic legitimacy of a new rule of private law, e.g. a rule of a Civil Code, may be assessed at the national level, looking into the legislative procedure

¹⁵ K. Lenaerts, ‘Upholding Union Values in Times of Societal Change: The Role of the Court of Justice of the European Union’, annual lecture, Durham European Law Institute, 17 February 2014, available on <https://www.dur.ac.uk/resources/deli/events/annual%20lecture%202014/Lenaerts_2014_Durham.pdf> Note that the reference to ‘values’ raises further questions on the way in which Lenaerts conceptualises the relationship between the EU legal order and national legal orders; M.W. Hesselink, ‘Private Law and the European Constitutionalisation of Values’, CSECL Working Paper Series, <<http://ssrn.com/abstract=2785536>> A further elaboration of this dimension, however, lies beyond the scope of this paper.

¹⁶ Habermas 1996, 172.

¹⁷ J. Habermas, *Zur Verfassung Europas* (Berlin: Suhrkamp Verlag, 2011), 67.

¹⁸ K. Lenaerts, ‘The Principle of Democracy in the Case Law of the European Court of Justice’, *International and Comparative Law Quarterly* 2013, 271-315.

through which it was enacted. The application of the rule by the national judge then guarantees legal protection in individual cases. Judicial application may also affirm the legitimacy of the democratic process, insofar as (Constitutional) courts provide for the judicial enforcement of a certain democratic ideal.¹⁹ To the extent that the rule falls outside of the scope of EU law, the national democratic process alone determines to what extent its enactment was legitimate.

In the second place, in case a rule derives from the EU level, its democratic legitimacy will be assessed in light of the EU's legislative process. The dynamics in principle are similar to those at the national level: The legislature guarantees that new rules are generated through participatory procedures, whereas the judiciary is responsible for the application of the rules resulting from deliberation. An important difference, nevertheless, concerns the extent to which judicial decisions can be reversed. Given the complexity of amending EU legislation, a decision of the CJEU cannot easily be overturned by changing applicable provisions in the Treaties or secondary legislation.²⁰

In the third place, insofar as rules of EU law have to be implemented in national laws, as is the case with rules adopted in EU Directives, these rules also go through a democratic legislative process at the national level. They are doubly legitimised, though by two constituencies that only partly overlap – EU citizens and national citizens.

In the fourth place, a rule of private law may be democratically legitimate according to EU law, while its legitimacy is contested from the perspective of one or more Member States. This type of situation may occur if a rule of national private law is found to be non-compliant with EU law, in particular in a preliminary ruling of the CJEU. The implication of this assertion of non-compliance may be that national law must be changed, irrespective of the authentic preferences of national citizens as these are usually taken into account in national processes of law-making.

It is particularly the latter category that is of importance for the present analysis. It raises questions regarding the role of the judiciary, since the CJEU is in principle engaged on the initiative of a national judge who refers a preliminary question. While the national judge, thus, performs her role as a European judge by safeguarding EU law (cf. Article 19 TEU), she may create tensions in respect to courts of higher instance that seek to uphold national private law.²¹ The involvement of the CJEU in law-making processes, moreover, is likely to affect national legislatures' power to reverse judgments. As will become clear in the discussion of Spanish mortgage cases in the following part of this paper, national legislatures may be required to amend national legislation on the basis of a CJEU judgment establishing non-compliance of national law with European law. The question arises to what extent such types

¹⁹ Möllers 2013, 130-131.

²⁰ F. Scharpf, 'Legitimacy in the Multilevel European Polity', (2009) *European Political Science Review*, 183.

²¹ E.g. the French Cour de Cassation's objections against courts *ex officio* testing the unfairness of standard terms in consumer credit contracts; Case C-473/00, *Cofidis SA v Jean-Louis Fredout*, CJEU 21 November 2002, [2002] ECR I-10875. An insightful account of the referring judges' struggles with the Cour de Cassation's approach, and their recourse to the CJEU, can be found in Emmanuel Carrère's novel 'D'autres vies que la mienne' (Folio, P.O.L éditeur, 2009).

of reforms of national laws can be considered to be democratically legitimised on the national level.

2.3 Input and output legitimacy

In terms of democratic legitimacy, the view described here on the division of powers between legislature and judiciary underlines the political system's assignment and responsibility to guarantee output as well as input legitimacy, based on the idea of collective self-determination. I borrow the distinction made by Fritz Scharpf here:

'Democracy aims at collective self-determination. It must thus be understood as a two-dimensional concept, relating to the *inputs* and to the *outputs* of the political system at the same time. On the input side, self-determination requires that political choices should be derived, directly or indirectly, from the *authentic preferences* of citizens and that, for that reason, governments must be held accountable to the governed. On the output side, however, self-determination implies *effective fate control*.'²²

Input-oriented authenticity and output-oriented effectiveness, thus, are both necessary to guarantee democratic self-determination. This insight informs Scharpf's analysis of the division of powers between EU and member states. He convincingly demonstrates that issues of legitimacy do not affect European decision-making in its entirety, but only policy areas that are characterised by conflicts of interests and ideological disagreements.²³ In these areas, law-making competences should in principle be left to the member states insofar as no consensus representing citizens' authentic preferences can be identified at EU level. As Scharpf points out, however, output legitimacy might be endangered in case the policies concerned cannot be effectively realised at the nation-state level anymore as a result of European integration.²⁴

The extent to which rules may be seen as democratically legitimate is dependent on law-making institutions' explanations and justifications for policies and rules. Input-oriented legitimacy requires for institutions to justify their decisions in communicative discourses in which they seek to persuade the constituency of the necessity and appropriateness of their choices.²⁵ This is particularly significant in cases in which EU and national objectives diverge. As Scharpf observes, the approach that has been adopted by the Court of Justice of the EU is problematic in this regard:

'In the framework developed by the ECJ, the European concerns that might justifiably override democratically legitimated national institutions and policy legacies are defined as subjective rights of individuals and firms, rather than as substantive requirements on which

²² Scharpf 1997, 19.

²³ Scharpf 1997, 22: 'In other words, it is incorrect to discuss the democratic deficit as if it were a general problem. It does not affect European decision-making across the board, but only certain types of policy area in which conflicts of interest and of ideology are endemic.'

²⁴ Scharpf 1997, 22-23.

²⁵ Scharpf 2009, 189.

the viability of the European community of nations, or the internal market, for that matter, would depend. (...) Subjective rights derived from (the interpretation of) European law may, in principle, override all countervailing national objectives, *regardless of their salience as manifestations of democratic self-determination*. [emphasis added, CM]²⁶

Here, a beginning of an explanation can be found for the discomfort with judicial law-making in civil cases where EU and national laws differ.²⁷ In particular, a disconnect between coordinating constitutional principles and substantive private legal outcomes may result from the CJEU's supremacy-based approach. The CJEU's *Viking* and *Laval* judgments form notorious examples, insofar as they inserted national social rights (the right to take collective action) in the framework of the EU's economically oriented free movement law.²⁸ Such cases challenge both public and private autonomy, since those legal subjects who were affected by the rulings, especially workers in multinational companies, had very limited possibilities to contest the redefinition of their legal positions in the European market. National governments' objections against a codification of the CJEU's case law seemed to be the most that could be attained.²⁹

Yet, does the difficulty of politically justifying such case solutions imply that judicial law-making is always incompatible with democracy in European private law? The claim made in this paper is that a strong focus on the legislature and CJEU leaves out of the picture what is and what should be the contribution of judicial interaction to legitimate law-making in a multi-level European private legal order. How do national courts in their interaction with the CJEU and European and national legislatures handle cases in which input legitimacy (authenticity) or output legitimacy (effectiveness) of rules of private law are at stake? Can the judiciary make up for a lack of democratic legitimacy in the legislative process and, thus, sometimes offer a best, rather than second-best, solution? In what type of cases and under which circumstances would this apply? In the following, it is submitted that the reality of case law shows that courts seem inclined to stretch the division of law-making powers in certain ideologically charged areas of private law, especially in times of societal change (section 3). Such developments call for a further exploration of the concept of democratic legitimacy in European private law, for which theories of democratic experimentalism may offer inspiration (section 4).

²⁶ Scharpf 2009, 193.

²⁷ The fourth category described in section 2.2.

²⁸ Mak 2013, 1202-1203; Scharpf 2009, 191-192; H. Schepel, 'Constitutionalising the Market, Marketising the Constitution, and to Tell the Difference: On the Horizontal Application of the Free Movement Provisions in EU Law', (2012) *European Law Journal*, 177-200; N. Reich, 'Free Movement v. Social Rights in an Enlarged Union – the *Laval* and *Viking* Cases before the ECJ', (2008) *German Law Journal*, 125-161.

²⁹ The European Commission's Proposal for a Council Regulation on the exercise of the right to take collective action within the context of the freedom of establishment and the freedom to provide services, COM(2012) 130 was withdrawn after Member States had objected against it in a 'yellow card' procedure. See <http://www.ipex.eu/IPEXL-WEB/dossier/document/COM20120130.do> (last consulted 28 July 2016).

3. Institutional realism: judicial law-making in European private law

3.1 On Spanish mortgages

Observing recent case law in the area of European private law, it appears that both the CJEU and national courts have under certain circumstances deviated from (ideal) theories of justice that assign a primary role to legislatures. The economic crisis in the EU has induced courts to more openly engage with policy argumentation going beyond the individual case at hand. This has even resulted in legislative reforms at the national level.

The interaction of domestic judges and the CJEU in the development of the legal framework for the assessment of mortgage contracts under Spanish law may serve as an illustration.³⁰ A first, ground-breaking judgment, in the *Aziz* case,³¹ set in motion a process of legal reform. Subsequently, further judicial intervention was required to fine-tune the new rules (e.g. CJEU *Sánchez Morcillo* and *Unicaja Banco*).³² In all decisions, the courts assessing the cases made specific reference to the socio-economic circumstances in which the disputes arose, which related to the problems on the Spanish housing market resulting from the European economic crisis. Furthermore, the judgments inspired public debate on the protection of home-owners and their families.³³ Judicial interaction, thus, created a space for public deliberation of the rules that should govern mortgage contracts and their enforcement.

The *Aziz* saga concerns the implications of EU Directive 93/13 on unfair terms in consumer contracts (hereafter: Unfair Terms Directive) for the assessment of standard terms relating to the enforcement of a mortgage contract under Spanish law. The CJEU's judgment in the pioneer case, sought by a national judge who was well aware of the societal impact of such enforcement proceedings, contributed to the initiation of a reform of Spanish procedural law. Subsequent cases concern complications arising in the application of the new rules.

3.2 *Aziz*

³⁰ See also H.-W. Micklitz, 'Unfair Contract Terms – Public Interest Litigation before European Courts Case C-415/11 *Mohamed Aziz*', in *Landmark Cases of EU Consumer Law – in Honour of Jules Stuyck*, eds V. Colaert & E. Terry (Cambridge: Intersentia, 2013), 615.

³¹ Case C-415/11, *Aziz v Catalunyaacaixa*, CJEU 14 March 2013, nyr. On the implications of this judgment for the conceptualisation of a European private legal order, see also my contribution to the liber amicorum for Hans Micklitz: 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* (Springer, 2014), 823-834.

³² Case C-169/14, *Sánchez Morcillo and Abril García v Banco Bilbao*, CJEU 17 July 2014; Joined Cases C- 482/13, C- 484/13, C- 485/13 and C- 487/13, *Unicaja Banco and Caixabank*, CJEU 21 January 2015. For an analysis of the case law, see F. Gómez Pomar and Karolina Lyczkowska, 'Spanish Courts, the Court of Justice of the EU, and Consumer Law. A Theoretical Model of their Interaction', *InDret* 4/2014.

³³ E.g. 'Más de 300 reclamaciones por las cláusulas abusivas hipotecarias', *El País – Cataluña* 5 May 2013, <http://ccaa.elpais.com/ccaa/2013/05/05/catalunya/1367767343_786819.html> (last consulted 8 June 2015); 'El juez declara abusiva la hipoteca del "caso Aziz"', *El País – Cataluña* 3 May 2013, <http://ccaa.elpais.com/ccaa/2013/05/02/catalunya/1367520137_907887.html> (last consulted 8 June 2015); 'La trastienda de los jueces estrella', *El País* 2 April 2016 <http://politica.elpais.com/politica/2016/04/02/actualidad/1459589958_048547.html> (last consulted 18 August 2016).

The facts of the *Aziz* case go back to July 2007, when Mr Mohamed Aziz concluded a loan agreement with the CatalunyaCaixa bank in Barcelona. Security for the loan was provided by a mortgage on his family home. About a year later, at the time the economic crisis hit European markets, Aziz lost his job, got into financial problems and failed to pay several of the monthly instalments of the loan. The bank then invoked its contractual option to terminate the contract earlier (a so-called ‘acceleration clause’) and to claim back the total amount of the loan. Furthermore, the bank started mortgage foreclosure proceedings regarding Aziz’s property. Under Spanish law only limited grounds for objection against the foreclosure were available, none of which was applicable in this case. Furthermore, Aziz did not appear in these proceedings nor did he manage to prevent the public sale of the house by paying the remaining amount of the loan plus interest and costs. Following a public sale that attracted no bidders, the bank obtained property of the house for 50% of its contractually established value. Aziz lost ownership of the house and was left with a remaining debt to the bank amounting to 40,000 euro. In order to put the bank in possession of the house, finally, the Aziz family was evicted from the property.

The national judge handling the case, José María Fernández Seijo (Juzgado de lo Mercantil no 3 de Barcelona), was in doubt as to Spanish law’s compliance with EU consumer protection law, insofar as it offered no possibility to bring mortgage enforcement proceedings to a halt while judgment on the fairness of the contract terms was pending. He therefore referred a preliminary question to the CJEU concerning Spanish law’s compliance with EU standards of consumer protection as reflected in the Unfair Terms Directive. An interview with the judge reveals that the reasons for involving the CJEU surpassed the individual case: Firstly, according to the judge, between 2000 and 2009 banks did not sufficiently inform clients of the terms of mortgage contracts. Secondly, unlike many other European countries, Spanish law did not offer debtors any opportunities to redress their debts and return to a normal financial situation.³⁴

The CJEU confirmed that Spanish law infringed the Unfair Terms Directive, since it did not guarantee effective consumer protection. In particular, rules of procedural law precluded the court assessing the fairness of the bank’s general terms and conditions from *staying the mortgage enforcement proceedings* that had been initiated separately. In its judgment of 14 March 2013, the Court held:

‘60 As also observed by the Advocate General in point 50 of her Opinion, without that possibility, where, as in the main proceedings, enforcement in respect of the mortgaged immovable property took place before the judgment of the court in the declaratory proceedings declaring unfair the contractual term on which the mortgage is based and annulling the enforcement proceedings, that judgment would enable that consumer to obtain only subsequent protection of a purely compensatory nature, which would be incomplete and insufficient and would not constitute either an adequate or effective means of preventing the

³⁴ ‘Más de 300 reclamaciones por las cláusulas abusivas hipotecarias’, *El País – Cataluña* 5 May 2013, <http://ccaa.elpais.com/ccaa/2013/05/05/catalunya/1367767343_786819.html> (last consulted 8 June 2015).

continued use of that term, contrary to Article 7(1) of Directive 93/13.

61 That applies all the more strongly where, as in the main proceedings, the mortgaged property is the family home of the consumer whose rights have been infringed, since that means of consumer protection is limited to payment of damages and interest and does not make it possible to prevent the definitive and irreversible loss of that dwelling.’

In the national judgment following the CJEU’s decision, the Spanish judge concluded that the general terms and conditions imposed on Aziz had to be declared null and void.³⁵ As a consequence, the contract did not allow the CatalunyaCaixa bank to claim the full amount of the mortgage, but only the unpaid instalments plus interest.

In the observations leading to this conclusion, the national judge emphasised that his task was to assess the *Aziz* case on its legal merits – a view that is in line with the institutional constraints indicated in the previous section. Still, the judge was well aware of the economic, social and political context of the dispute:

‘From the beginning of the proceedings both the plaintiff and the defendant in their briefs – writ of summons and defence – have introduced elements of an economic, social and legal-political nature that transcend the strictly legal scope of the dispute and of the parties’ claims.

These factors intensified from November 2012 onwards, when the Opinion of the Advocate General at the Court of Justice of the European Union (CJEU) was published, in which she answered the questions referred to the CJEU from the perspective of Community law.

Without a doubt, the dissemination of this Opinion and the CJEU’s judgment of 14 March 2013 have given the proceedings a dimension that by far exceeds the scope of the present case insofar as it coincided with an intense public debate – of a political, legislative, social and economic nature – that has prompted a process of legislative reform that has not yet come to an end.

Regardless of these factors, the truth is that also the parties themselves have brought to the fore those meta-legal elements that without a doubt serve to understand the dispute – it is not without reason that the judiciary’s function is to apply and interpret the laws in the context and reality in which they take effect, as is established in Article 3 of the [Spanish] Civil Code: “Legal provisions are to be interpreted according to the proper meaning of their words, in relation to the context, the historical and legislative background and the social reality at the time of their application, serving primarily the spirit and finality of those” (...).³⁶

³⁵ Juzgado de lo Mercantil no 3 de Barcelona, 2 May 2013, SJM B 21/2013, under the heading ‘Consideraciones previas a las alegaciones de las partes’, <http://www.poderjudicial.es/stfls/SALA_DE_PRENSA/NOVEDADES/J.Mercantil_3_Barcelona.pdf> (last consulted 8 June 2015).

³⁶ *Ibid.* Translation by Mak 2014. Note that the judgment was reversed in appeal: <<https://alonsocuevillas.files.wordpress.com/2014/12/sap-bcn-ejec-hipotec.pdf>> (last consulted 15 September 2016). At the time of finalisation of this paper, the case was pending at the Spanish Supreme Court, the Tribunal Supremo.

As indicated by the judge, the European intervention in Spanish law speeded up the reform of the relevant rules of procedural law. On 15 May 2013, just two months after the CJEU's *Aziz* judgment, Ley 1/2013³⁷ entered into force. Among other remedies for home-owners in financial difficulties, it introduced a possibility to stay mortgage enforcement proceedings upon a debtor's request to the competent court to assess the fairness of the standards terms and conditions applying to the mortgage contract.

3.3 *Sánchez Morcillo*

The Spanish legislature's response to *Aziz* was soon followed by new questions. In the case of *Sánchez Morcillo and Abril García v Banco Bilbao*,³⁸ the referring judge particularly questioned the (in)equality of procedural defence mechanisms available to the parties involved in mortgage enforcement proceedings. Article 695(4) of the Spanish Law on Civil Procedure stipulated that in such cases appeals could only be brought against a judicial order staying the proceedings or displaying an unfair contract term. This effectively offered the bank a possibility to immediately appeal against the sustenance of a home-owners objection to enforcement, whereas the party against whom enforcement was sought (the owner of the house) could not appeal if his or her objection was dismissed. The national judge in the present case doubted whether this was in line with the consumer protection offered under the Unfair Terms Directive, read in combination with Article 47 of the EU Charter of Fundamental Rights. According to the CJEU, the relevant provisions of EU law indeed precluded a rule such as Article 695(4) of the Spanish procedural code, which gave the bank (creditor) an unjustified advantage in respect to the home-owner (debtor). The Court considered that the Spanish system of mortgage enforcement did neither offer adequate nor effective protection (in the sense of Article 7 of the Unfair Terms Directive) to home-owners, insofar as it still did not effectively prevent unjustified evictions: A judge in enforcement proceedings could assess the unfairness of contract terms, but this assessment was not mandatory and bound by time restrictions. Furthermore, in case home-owners started parallel proceedings regarding the unfairness of the contract terms and the judge in those proceedings eventually established that the terms of the mortgage contract were unfair, the consumer could only claim monetary compensation³⁹ – this is what happened in *Aziz*. In addition, the procedural defences available to the consumer were of a much weaker nature than those available to the bank – Spanish law did, thus, not respect the principle of equality of arms or procedural equality, safeguarded by Article 47 of the Charter.⁴⁰

Again, the national court's recourse to the CJEU seemed to have, at least in part, been inspired by the context in which the case evolved. The referring judge's request for an

³⁷ BOE No 116, of 15 May 2013, p. 36373. The preamble of Ley 1/2013 extensively refers to the socio-economic context in which the law was passed and the need to avoid social exclusion of citizens. Furthermore, it specifically mentions the CJEU's *Aziz* judgment.

³⁸ Case C-169/14, *Sánchez Morcillo and Abril García v Banco Bilbao*, CJEU 17 July 2014.

³⁹ CJEU *Sánchez Morcillo*, para. 43.

⁴⁰ CJEU *Sánchez Morcillo*, para. 48-51.

accelerated procedure before the EU Court underscores this, insofar as it was motivated by the observations ‘that the answer provided by the Court could have significant consequences for litigation in Spain given that, in the light of the economic crisis experienced by that Member State, a large number of natural persons are subject to mortgage enforcement measures in respect of their dwellings’ and ‘the proceedings that may be affected by the Court’s answer also concern the main dwelling of debtors’, which ‘would be liable to be sold at auction before the Court even handed down its ruling’.⁴¹

3.4 *Unicaja Banco and Caixabank*

A number of joined cases of consumers against the Unicaja Bank and Caixabank⁴² focused on another provision resulting from the Spanish law reform, which imposes a ceiling (at three times the statutory interest rate) on the default interest that may be recovered through the enforcement of a mortgage. If that ceiling is exceeded, courts should give creditors (in this case: banks) the possibility to adjust the default interest rate so as to make it comply with the statutory limit. In the contracts at issue default interest rates ranged from 18% to 22.5%. The referring courts in essence asked whether they, in case they found these clauses to be unfair in light of Directive 93/13, should declare the clauses to be void and not binding or rather should mitigate the interest clauses. Furthermore, the national judges questioned the compatibility of the reform law with the Unfair Terms Directive.

The CJEU ruled that in this case the Spanish rules did not come into conflict with EU law, since they did not prevent national judges from assessing the fairness of default interest clauses and, in case of unfairness, declare them null and void.⁴³ A default rate of less than three times the statutory interest rate is not automatically deemed to be fair and may still be scrutinised,⁴⁴ whereas a higher default rate may, depending on the circumstances, either be mitigated under Ley 1/2013 or be declared unfair under the Directive.

Although in this case the CJEU’s decision did not directly alter domestic law, the preliminary reference procedure did provide space for deliberation of the manner in which the objectives of EU law and their articulation (consumer protection by holding unfair terms non-binding) affected national goals and their expression in law (protection of debtors by mitigating excessively high default interest rates). Moreover, it induced the Spanish Supreme Court to develop general principles on the unfairness of general clauses regarding interest on late payments, making ample reference to the CJEU’s case law.⁴⁵

⁴¹ Case C-169/14, *Sánchez Morcillo and Abril García v Banco Bilbao*, Order of the President of the Court, 5 June 2014, para. 7-8.

⁴² Joined Cases C- 482/13, C- 484/13, C- 485/13 and C- 487/13, *Unicaja Banco and Caixabank*, CJEU 21 January 2015.

⁴³ CJEU *Unicaja and Caixabank*, para. 36.

⁴⁴ CJEU *Unicaja and Caixabank*, para. 40.

⁴⁵ Tribunal Supremo (Sala de lo Civil) 22 April 2015, no. 2351/2012, <http://www.poderjudicial.es/stfls/SALA_DE_PRENSA/NOTAS_DE_PRENSA/TS_Civil_22-04-2015.pdf> (last consulted on 8 June 2015).

3.5 Social reality and democratic ideals

From the perspective outlined in section 2 of this paper, the question arises if the Spanish judge in the *Aziz* case may only have been paying lip-service to established ideas of the division of powers between legislature and judiciary, while effectively having used the opening provided by the reference to ‘the social reality at the time of application’ in Article 3 of the Spanish Civil Code to redirect the outcome of the case. This form of interaction between national and supranational legislative and judicial institutions may raise criticism for not sufficiently respecting the principle of democracy underlying European (private) law-making. Rather than awaiting legislative intervention, the European and domestic judiciaries intervened in the Spanish national law of civil procedure and even provoked its reform. This may seem to be at odds with the idea of democratic legitimacy according to which EU citizens’ voice in EU and national law-making processes is primarily guaranteed through the legislative process, not the judicial process.⁴⁶

In the remaining part of this paper, I will defend that the democratic legitimacy of rules of European private law is not necessarily diminished by the expansion of the judiciary’s role in law-making processes. In particular under circumstances of societal change, access to judicial institutions may offer better means of democratic legitimisation than legislative processes, especially in a multi-level order such as that of European private law. Moreover, the role and function of the concept of democratic legitimacy itself needs to be reassessed in light of ideas of justice in the EU.

4. Institutional imagination: rethinking the role of the judiciary

4.1 Democracy and European private law adjudication

‘The task of democratic government is not to maximize change. It is to balance order and change, and the scholarly challenge is to account for how and why institutions remain stable as well as how and why they change,’ Johan Olsen states in relation to institutional sources of democratic change and continuity.⁴⁷ It might be argued that the CJEU’s and national courts’ far-reaching intervention in the legal framework for standard terms in (Spanish) mortgage contracts signifies a change in the division of powers between legislature and judiciary in Europe, even a *coup d’état*.⁴⁸ This leads back to the question how this case law can be understood from the point of view of democratic legitimacy.

The shift may be explained, and partly justified, in light of an emphasis on output legitimacy.⁴⁹ Judges sometimes find themselves in a better position than legislators to

⁴⁶ Section 2 above.

⁴⁷ J.P. Olsen, ‘Change and Continuity: an Institutional Approach to Institutions of Democratic Government’, (2009) *European Political Science Review* 1:1, 4.

⁴⁸ From a constitutional perspective, A. Stone Sweet, ‘The Juridical *Coup d’État* and the Problem of Authority’, (2007) *German Law Journal* 8:10, 915-927, defines a ‘*coup d’état*’ as ‘a fundamental transformation in the normative foundations of a legal system through the constitutional lawmaking of a court’.

⁴⁹ Section 2 above.

effectively achieve certain EU policy goals – in this case, protection of consumers who were about to lose their family homes.

Yet, is this what courts are supposed to do? In terms of input legitimacy the question arises if authentic preferences of European citizens, in their dual roles as national and EU citizens, are fully respected in the process of judicial interaction.⁵⁰ Are their voices heard in the development of rules of European private law through judicial law-making?⁵¹ In other words, does judicial involvement in law-making processes endanger democratic input-oriented legitimacy? Several arguments support the view that this is not necessarily the case and that judicial deliberations of policy questions may even enhance the democratic nature of European private law.

In the first place, European citizens' access to law-making processes in the field of private law can be served by involving the judiciary. European citizens' involvement in preliminary reference procedures may substantively affect the outcomes of private-legal disputes. The *Aziz* saga illustrates the point, insofar as the interaction of Spanish and European judiciaries influenced and informed the reform of national rules on mortgage contracts. Litigation here provided an accessible means⁵² of contesting the legal framework that kept in place contractual terms detrimental to weaker parties.⁵³

In the second place, judicial reference to EU rights can open up deliberative processes in (national) private law. The enforcement of EU law through national legal procedures (cf. Article 19 TEU) requires national courts to consider the policy questions underlying private legal cases.⁵⁴ Again, the Spanish mortgage cases may serve as an illustration. In the absence of EU laws on housing and tenancy contracts, recourse to the judicial interpretation of the Unfair Terms Directive offered access to the deliberation of the compliance of Spanish law with (European) ideas of social justice. Moreover, the judicial deliberation of the fairness of Spanish mortgage contracts for consumers tapped into the public debate on the problems on the housing market and their relation to Europe's economic crisis.

In the third place, courts' roles in multiple regulatory environments sometimes put them in a better position to represent citizens' interests than other institutions. Rules

⁵⁰ F. Scharpf, 'After the Crash: A Perspective on Multilevel European Democracy', (2015) *European Law Journal*, 398.

⁵¹ Note that under emergency laws exceptions may be made to rules of democratic law-making. These situations fall beyond the scope of this paper, since *Aziz* and similar cases were not adjudicated under laws applying to a state of emergency. The focus here lies on courts' powers in the default setting of democratic law-making processes.

⁵² Litigation is in principle open to all. It should be noted, though, that accessibility is affected by other factors, such as financial resources. See further section 4.4 below.

⁵³ Compare, for US law, William H. Simon, 'Justice and Accountability: Activist Judging in the Light of Democratic Constitutionalism and Democratic Experimentalism', (2016) *Law, Culture and the Humanities*, 6-7.

⁵⁴ An analogy may be made to the 'constitutionalisation of private law', which makes explicit legal-political stakes in private legal disputes; Stone Sweet 2000, 129; C. Mak, *Fundamental Rights in European Contract Law* (Alphen a/d Rijn: Kluwer Law International, 2008). See also Möllers 2013, 141: 'If civil and criminal law courts are obliged to implement a basic rights jurisprudence by a constitutional court, they are asked to apply constitutional law; a kind of legal reasoning that is less formalist, less textual, less technical, closer to political theory, and therefore in a certain sense more political and more general. The constitutionalization of the court system is then also a form of politicization of the judiciary.'

governing private-legal relations in the EU are generated in at least three environments: national legal systems, EU law, and contractual negotiations between private parties. The judiciary is the only legal institution to play a role in all these environments.⁵⁵ It interprets and applies national and EU rules of private law and assesses the validity and implications of parties' contracts. The judiciary is represented on the supranational and national level and its decision-making is relatively easily accessible⁵⁶ to the everyday citizenry. It is, thus, in the position to transmit and translate arguments for normative changes among different regulatory environments.

These considerations raise questions concerning the conceptions of democracy and democratic legitimacy in European private law. On the one hand, the central ideas remain participation and representation in law-making processes by those who will be governed by the resulting rules. On the other hand, it seems that the manner in which these ideals are realised in the multi-level sphere of European private law does not necessarily have to take the same institutional shape as in national constitutional orders, in particular as regards the division of powers between legislature and judiciary.⁵⁷ A one-on-one translation of a conception of democracy from the nation-state level to the EU encounters difficulties – while the underlying ideas of participation and representation retain their importance, part of their meaning may be lost in translation if the division of powers in European private law is based on existing divisions of tasks among national legislatures and judiciaries.

Consequently, the idea of dual democracy, referring to the engagement of EU citizens in both national and supranational democratic processes, does not automatically imply that citizens' democratic involvement should take the same institutional shape on both levels of governance. In particular in regard to the development of rules governing private-legal relationships, judiciaries involved in the integration of EU Regulations and Directives in national systems provide important opportunities for democratic deliberation of the reconciliation of the plurality of values that delimitates freedom of contract – and, thus, for input legitimacy (inclusion of European citizens' authentic preferences) as well as output legitimacy (effective realisation of European policies, e.g. consumer protection). Judicial actors may, thus, from the democratic perspective, deserve a greater role in law-making processes on the interface of national and supranational law than they do in the national

⁵⁵ Compare Dowdle 2008 on similar regulatory dynamics in Chinese constitutional developments; M.W. Dowdle, 'On the Regulatory Dynamics of Judicialization. The Promise and Perils of Exploring "Judicialization" in East and Southeast Asia', in: T. Ginsburg and A.H.Y. Chen (eds), *Administrative Law and Governance in Asia* (London/New York: Routledge, 2008), 23-37.

⁵⁶ In some Member States, such as Poland and Croatia, however, only a selected number of judgments of the Supreme Court are made public, which limits the opportunities for public debate on civil cases. Thanks to Joasia Luzak and Mia Junuzovic for bringing this point to my attention.

⁵⁷ Compare H. Collins, 'Cosmopolitanism and Transnational Private Law', (2012) *European Review of Contract Law*, 324: 'What is needed is sometimes described paradoxically as the constitutionalization of transnational commercial law, though what is really needed is not subordination to any particular national constitution but rather the construction of a transnational economic constitution or rules ensuring compatibility with other normative legal orders that protect public policy and external interests,' referring also to Gunther Teubner's *Constitutional Fragments: Societal Constitutionalism and Globalization* (Oxford: Oxford University Press, 2012).

setting, especially in times of societal change – or at least they should not be reproached for assuming that role.

4.2 *Democratic experimentalism*

Is it possible to imagine an institutional constellation in which courts sometimes are in a better position than legislatures to contribute to the democratic legitimation of new rules of private law? A point of reference for a re-imagination of the judiciary's role in the communicative process of generating legal normativity in European private law may be found in theories on democratic experimentalism. In Roberto Unger's words, ideas on democratic experimentalism refer to a practice of 'existential bootstrapping', i.e. 'using the smaller variations that are at hand to produce the bigger variations that do not yet exist'.⁵⁸ Democratic experimentalism has been proposed as a counterpoint to critique of judicial activism, since it challenges the premise that judgments on substantive justice are incompatible with democracy.⁵⁹ While not aiming at presenting a full-fledged theory on democratic experimentalism in European private law here, an exploration of the judiciary's contribution to the democratic legitimacy of new rule-solutions in civil cases in Europe may indicate how this type of institutional imagination⁶⁰ can contribute to the debate. In particular, the focus here will be on the question in which situations judicial law-making can provide a first-best democratically legitimate solution rather than a second-best one in comparison to the legislative process.

In the work of Roberto Unger, Charles Sabel and other authors, democratic experimentalism distinguishes itself from monist and pluralist theories⁶¹ particularly by challenging the ideas of necessity and indivisibility of systems of social organisation.⁶² It adheres to the pragmatist view that 'the objectives presumed in the guiding understandings of theories, strategies, or ideals of justice are transformed in the light of the experience of their pursuit, and these transformations in turn redefine what counts as a means to a guiding end'.⁶³ The pervasiveness of unintended consequences is, accordingly, seen as *constitutive* of thought and action, rather than as a side-effect of the division of powers in political systems.⁶⁴ Democratic deliberation offers a means for identifying and correcting unintended consequences of coordination among private actors.⁶⁵

In theories of democratic experimentalism, judicial law-making is not inconsistent with democracy. Typically, a central institution provides a framework for experimentation

⁵⁸ R. Mangabeira Unger, *The Self Awakened. Pragmatism Unbound*, Cambridge, Massachusetts: Harvard University Press 2007, 43.

⁵⁹ W.H. Simon, 'Justice and Accountability: Activist Judging in the Light of Democratic Constitutionalism and Democratic Experimentalism', (2016) *Law, Culture and the Humanities*, 1-20.

⁶⁰ Unger 1996.

⁶¹ See section 2.1 above.

⁶² Unger 2007, 185.

⁶³ M. Dorf and C. Sabel, 'A Constitution of Democratic Experimentalism', (1998) *Columbia Law Review* 98, 285.

⁶⁴ Dorf and Sabel 1998, 285.

⁶⁵ Dorf and Sabel 1998, 286.

with different solutions at a decentralized level, while local units report back to this central institution.⁶⁶ Stakeholders take part in deliberative processes in which new solutions are formulated. Whereas general principles are, thus, developed locally, they may gain recognition and be adopted more widely. The role of courts, in the first place, is to ensure that experimentation falls within the scope of mandates given and that citizens' rights are respected.⁶⁷ In the second place, courts may contribute to the development of new solutions and the formation of consensus on substantive rules.⁶⁸ The *legitimacy* of courts' judgments, then, does not have an immediate democratic basis. Rather, democratic experimentalism 'suggest[s] that it rests on the potential contribution of such judgments to the processes of democratic decision-making and consensus formation'.⁶⁹

4.3 Experiments in European private law

To what extent can democratic experimentalism justify judicial law-making in European private law? What smaller variations can be found in case law, which may produce bigger, democratically legitimate variations in the rules that govern private legal relationships in the EU? And what do they say about the division of powers between legislatures and judiciaries? The *Aziz* saga offers further inspiration.

A framework for the experimentation with new rule-solutions can be found in Article 47 of the EU Charter of Fundamental Rights, which safeguards the right to an effective judicial remedy in case of a violation of rights under EU law. Some judgments in the Spanish series contain references to this provision, sometimes in combination with other fundamental rights, such as Article 38 of the Charter, which ensures a high level of consumer protection. In the *Sánchez Morcillo* judgment, for instance, Article 47 substantiated the conclusion that Spanish law did not respect the principle of equality of arms insofar as banks could appeal a decision on unfair terms control at an earlier stage in legal proceedings than consumers could.⁷⁰ To the extent that the interaction of the CJEU with national courts within the framework of the Charter explores which substantive forms of consumer protection can be offered in national legal orders, it appears to comply with the basic features of democratic experimentalism.⁷¹

Furthermore, as Hans Micklitz has observed, the *Aziz* judgment itself may be deemed to have added a layer of 'hidden' constitutionalisation to European private law: While neither Advocate General Kokott nor the CJEU explicitly mentioned the Charter (in particular Article 34(3) on housing), the fundamental rights dimension does shine through in their

⁶⁶ Simon 2016, 11.

⁶⁷ Dorf and Sabel 1998, 288.

⁶⁸ Dorf and Sabel 1998, 288; Simon 2016, 13.

⁶⁹ Simon 2016, 20.

⁷⁰ See section 3.3 above.

⁷¹ In a similar vein, from a public law perspective, O. Gerstenberg, '(The Failure of) Public Law and the Deliberative Turn', in: C. MacAmhlaigh, C. Michelon and N. Walker (eds), *After Public Law* (Oxford: Oxford University Press, 2013), 219: 'Thus, the role of courts in this proceduralist model, including the ECtHR or the CJEU, lies in mobilizing other actors, namely national courts, through the formulation of a broad framework of principles.'

considerations on the mortgage credit's purpose to provide Aziz and his family with a home.⁷² This again suggests that the European judiciary seeks to place the preliminary reference procedure in a broader constitutional framework. The interaction of national courts with the CJEU through this procedure could be seen as a form of democratic experimentalism in which EU law provides the space within which alternative rule-solutions may be considered on the initiative of national civil courts raising preliminary questions.

Oliver Gerstenberg submits that from an experimentalist view, the Court would have 'a democracy-sustaining, collaborative role in a broader, EU-wide process of public opinion formation'.⁷³ The interaction of the CJEU with national courts may strengthen democratic legitimacy rather than undermine it, since '[t]he EU multilevel system enables consumers to put national law and politics under pressure to reform and overcome insularity'.⁷⁴ This is not a one-way process in which the European Court imposes its views on national legal orders. Experimentalism supports a mutual learning process, or 'hybridisation', in which national courts apply general criteria to specific cases, while creating possibilities for the CJEU to revise these general criteria in light of their unintended consequences.⁷⁵

From a democratic-experimentalist perspective, therefore, the interaction of the CJEU and national civil courts in *Aziz* and similar cases is certainly not undemocratic. It opens up a deliberative space for looking into different alternatives and urges courts to make explicit the reasons for their support of a certain rule-solution. This may contribute to the finding of a new consensus on where to define boundaries to private autonomy, as well as means to protect and support autonomous decision-making of private actors.

4.4 *First or second best?*

The question remains whether judicial law-making in European private law should be considered a first-best or a second-best solution in terms of democratic legitimacy. Theories of democratic experimentalism offer a justification for the development of new rules of private law through the judicial process. Still, they have drawbacks. Whether judicial law-making should be preferred over alternative ways of ensuring democratic legitimacy depends on its potential to give European citizens a real and better opportunity to author new rules of private law that affect them than other (legislative) processes do.⁷⁶ Moreover, it depends on the relation between pragmatic and principled approaches to European private law: Is it possible to reconcile instances of experimentalist judicial law-making with principled views on the nature and desirable development of European private law? Specifically, attention needs to be paid to the tension between, on the one hand, national civil courts that refer

⁷² Micklitz 2013, 649-650.

⁷³ O. Gerstenberg, 'Constitutional Reasoning in Private Law: The Role of the CJEU in Adjudicating Unfair Terms in Consumer Contracts', (2015) *European Law Journal*, 620.

⁷⁴ Gerstenberg 2015, 620.

⁷⁵ Gerstenberg 2015, 620. On hybridisation, see also N. Reich, *General Principles of EU Law* (Antwerp: Intersentia, 2014), 98.

⁷⁶ Sections 2.3 and 4.1 above.

politically sensitive questions to the CJEU and, on the other hand, the legislature and higher courts in their domestic legal orders that hold different opinions.

If the hypothesis that judicial law-making can offer a first-best solution is taken as a starting point, several objections present themselves. A first, radical argument concerns the critique that these types of deliberative processes may merely mirror existing distributions of power and can, thus, not improve the democratic legitimacy of rules of European private law. As Di Robilant observed in her evaluation of democratic experimentalism in property law, new deliberative forms ‘may fail to involve, and may actually exclude, potential participants, such as those least able to participate on account of resources or education, those marginalized on account of race, gender or sexuality, or those with ideologically radical views’.⁷⁷ Similar concerns may be expressed on the potential of deliberative processes originating in judicial interaction to involve European citizens affected by the outcomes of these processes. Judgments in civil cases in principle only regard the parties to the dispute. Since civil litigation is not equally accessible to all because of social and economic factors, deliberation through adjudication cannot include all affected parties and, therefore, cannot contribute to democratic legitimacy, the argument would be. If this line of reasoning were followed, judicial interactions in European private law would offer no advantages or first-best solutions. If, on the other hand, emphasis is put on judicial law-making’s *contribution* to democratic legitimacy rather than its competition with or complete *substitution* of legislative processes, a different picture emerges. While judicial law-making may not directly rest on democratic principles, it can contribute to the formation of public consensus and democratic decision-making.⁷⁸ The public debate concerning, for instance, *Aziz* and other Spanish mortgage cases involved the Spanish population as a whole and even transcended national borders, as it drew Europe-wide attention.⁷⁹ Although differences in terms of education and background may still lead to some people being more involved than others, the deliberative space that is opened up through judicial interaction in civil cases in principle includes all affected by European private law. It may, thus, contribute to the democratic legitimation of rules of private law by providing an additional space for deliberation on alternative rule-solutions and consensus formation.⁸⁰

A second objection relates to the limitations on input-oriented legitimacy that result from the CJEU interfering in areas of private law regardless of the effects of its interventions on national policies and laws. The CJEU’s subjective rights approach may endanger national rules of private law that form expressions of democratic self-determination on the national

⁷⁷ A. di Robilant, ‘Property and Democratic Deliberation: The *Numerus Clausus* Principle and Democratic Experimentalism in Property Law’, (2014) *The American Journal of Comparative Law*, 414.

⁷⁸ Simon 2016, 20. See also section 4.2 above.

⁷⁹ E.g. ‘Spain’s evicted fight back’, *Euronews* 11 April 2013, <<http://www.euronews.com/2013/04/11/spain-s-evicted-fight-back>> (last consulted 18 August 2016).

⁸⁰ The possibilities for this type of deliberative space to open up are highly dependent on the extent to which case law is published. See the reservations made in footnote 56 above. Still, other factors, such as the easy distribution of information through the Internet may facilitate access to a larger public.

level.⁸¹ To the extent that this indeed can be a(n unintended) consequence of judicial law-making, input-oriented legitimacy might be at risk. Since national legislatures will have to adjust to the CJEU's evaluation of the compliance of national law with EU law, as happened in the Spanish reform of procedural law after *Aziz*, the national constituency's preferences will only play a marginal role in the reform of rules of national private law through the preliminary reference procedure. Still, as said, these types of judicial interactions may bring to light societal problems and expand the deliberative space in which these can be discussed. Whether this places the judiciary in the first-best position to address such societal problems is likely to differ from case to case, e.g. depending on national legislatures resistance to address certain issues, as in the Spanish mortgage cases. The possibility for judicial law-making to offer a best solution, or least imperfect alternative,⁸² is, however, not ruled out.

A third and fundamental objection concerns the pragmatic background to democratic experimentalism. Pragmatism supposes the impossibility of defining first principles that will survive the efforts made to realise them.⁸³ It seeks to find ways to respond to unexpected circumstances rather than define ideal principles for the organisation of a political community. As such, it may fail to deliver just outcomes: Focussing on experimentalist deliberative procedures may lead to results that are democratically legitimate, but do not comply with substantive notions of justice.⁸⁴ This does not necessarily imply that judicial law-making cannot yield a best solution in terms of a proceduralist conception of democratic legitimacy. Yet, it does raise the question if judicial interaction in the EU's preliminary reference procedure can sufficiently take into account the different conceptions of social justice⁸⁵ reflected in national and EU laws. National rules of private law that express the national constituency's view on social justice may be 'overruled' by a decision of the CJEU, which can be conceived of as reflecting a European conception of social justice. Whilst judicial interaction may, thus, lead to a democratically legitimate best solution from an EU perspective, it does not solve the conflict between diverging conceptions of social justice in the EU and the Member State involved.

While it is, thus, not unlikely that judicial interaction in civil cases can offer first-best democratically legitimate solutions in some disputes, the consideration of the merits of procedural theories of democratic experimentalism underscores the substantive 'justice deficit' in EU law.⁸⁶ A more substantive idea of deliberative democracy would be needed, emphasising the involvement of free and equal citizens in democratic law-making processes, to respond to the objections against pragmatic approaches.⁸⁷ Alternatively, evidence would

⁸¹ See section 2.3 above.

⁸² Cf. Komesar 1994.

⁸³ Dorf and Sabel 1998, 285.

⁸⁴ Compare Di Robilant 2014, 410-411.

⁸⁵ H.-W. Micklitz (ed), *The Many Concepts of Social Justice in European Private Law* (Cheltenham: Edward Elgar Publishing, 2011); D. Kochenov, G. de Búrca and A. Williams (eds), *Europe's Justice Deficit?* (Oxford: Hart publishing, 2015).

⁸⁶ Kochenov, De Búrca and Williams 2015.

⁸⁷ Di Robilant 2014, 411.

have to be presented for the assertion that this type of democratic deliberation usually provides the least imperfect way to reach just outcomes.⁸⁸ In private law, pressing issues are to what extent judges in civil cases have to take into account the moral dimension of a dispute and how they should handle varying conceptions of social justice (e.g. concerning a right to housing) in determining the boundaries to party autonomy in a multi-layered European legal order.⁸⁹ From that perspective, *Aziz* is not just an example of judicial action in times of societal change, but also a manifestation of persistent foundational questions of European private law. Experimentalist judicial law-making may, therefore, not unequivocally be deemed to offer the best solution for addressing societal problems. Still, looking at *Aziz*-type of cases from an experimentalist perspective can clarify and, to a certain extent, justify the role that courts can play in the democratic legitimation of rules of European private law.

5. Realists and visionaries

Reconstruction, realism and experimentalism were the three lenses through which judicial interaction in European private law was explored in this paper. Each of these three views provides different insights in the interaction of courts in this field of law, which is composed of rules of private law deriving from the EU level and the national level. A reconstructive approach offers an account of the institutional setting in which European private law is shaped, paying attention to public autonomy as well as private autonomy in democratic processes. A realist perspective highlights the contextual factors that can explain a certain judicial approach to a dispute among private actors in an asymmetrical contractual relationship. An experimentalist approach, finally, offers a justification for national judges referring a civil case to the CJEU in order to create space for a fundamental deliberation of the rule-solution provided in national law and possible alternatives deriving from an EU conception of social justice.

The Spanish mortgage cases arose against the background of a national crisis on the housing market, which was strongly connected to the economic crisis in the EU. A more fundamental dimension of European private law that is highlighted in this case law concerns the judiciary's position on the interface of national and EU laws that endorse different conceptions of social justice. Can democratic experimentalism in European private law find a place in a (partial) theory of adjudication that goes beyond crisis management? To the extent that judicial law-making in European private law can offer a first rather than second-best solution in terms of democratic legitimacy, by shaping a space for new consensus formation, *Aziz* is just a beginning.

⁸⁸ *Ibid.*

⁸⁹ C. Mak, *Justice through European Private Law* (inaugural lecture, Amsterdam UvA), available at http://www.oratiereeks.nl/upload/pdf/PDF-5662weboratie_Mak_-_DEF.pdf