



UvA-DARE (Digital Academic Repository)

Judges in Utopia The Transformative Role of the Judiciary in European Private Law

Burgers, L.; van Duin, J.; Mak, C.

Publication date

2020

Document Version

Final published version

Published in

European Review of Private Law

License

Article 25fa Dutch Copyright Act (<https://www.openaccess.nl/en/policies/open-access-in-dutch-copyright-law-taverne-amendment>)

[Link to publication](#)

Citation for published version (APA):

Burgers, L., van Duin, J., & Mak, C. (2020). Judges in Utopia The Transformative Role of the Judiciary in European Private Law. *European Review of Private Law*, 28(4), 865-883. <https://kluwerlawonline.com/journalarticle/European+Review+of+Private+Law/28.4/ERPL2020052>

General rights

It is not permitted to download or to forward/distribute the text or part of it without the consent of the author(s) and/or copyright holder(s), other than for strictly personal, individual use, unless the work is under an open content license (like Creative Commons).

Disclaimer/Complaints regulations

If you believe that digital publication of certain material infringes any of your rights or (privacy) interests, please let the Library know, stating your reasons. In case of a legitimate complaint, the Library will make the material inaccessible and/or remove it from the website. Please Ask the Library: <https://uba.uva.nl/en/contact>, or a letter to: Library of the University of Amsterdam, Secretariat, Singel 425, 1012 WP Amsterdam, The Netherlands. You will be contacted as soon as possible.

UvA-DARE is a service provided by the library of the University of Amsterdam (<https://dare.uva.nl>)

Judges in Utopia The Transformative Role of the Judiciary in European Private Law

Laura BURGERS^{*}, Joanna van DUIN^{*} & Chantal MAK^{**}

Abstract: This article introduces four contributions to a special issue on ‘judicial law-making in European private law’, which seeks to reconstruct and understand (aspects of) the evolving transformative role of the judiciary in light of the interaction between the national and European level. The paradigmatic examples of climate change litigation and judicial dialogue in consumer mortgage cases show how courts are asked to address sensitive political questions in cases brought by private parties in civil proceedings. A ‘utopian’ (self-)understanding of the judicial task explains and justifies how and to what extent judges may address such societal problems through private law, and at the same time transform private law itself.

Résumé: Cet article introduit quatre contributions au numéro spécial du European Review of Private Law (ERPL) concernant « le pouvoir législative de l’autorité judiciaire en droit privé Européen », qui a pour objet de reconstruire et comprendre (des aspects de) l’évolution du rôle transformateur du pouvoir judiciaire à la lumière de l’interaction entre les échelles nationale et Européenne. Il est démontré comment les juges sont demandés de répondre aux questions politiques délicates, à l’aide des exemples paradigmatiques: les actions juridiques contre le changement climatique et le dialogue judiciaire dans les affaires sur les hypothèques de consommateurs. Une (auto-)compréhension « utopique » de la mission de l’autorité judiciaire explique et justifie comment et jusqu’à quel degré les juges pourraient adresser ces problèmes sociaux par le biais du droit privé, et, en même temps, transformer le droit privé lui-même.

Zusammenfassung: Dieser Aufsatz introduziert vier Beiträge für die Spezialausgabe zur ‘rechtlicher Rechtsformung im Europäischen Privatrecht’. Diese Ausgabe bezweckt verschiedene Aspekte der entwickelnden transformativen Rolle der Justiz

* PhD researchers at the Amsterdam Centre for Transformative Private Law (ACT), University of Amsterdam. Emails: L.E.Burgers@uva.nl & j.m.l.vanduyn@uva.nl.

** Professor of private law at the Amsterdam Centre for Transformative Private Law (ACT), University of Amsterdam. Email: C.Mak@uva.nl Their research in the *Judges in Utopia* project was made possible by a generous grant of the Netherlands Organization for Scientific Research (NWO Vidi 2014-2019). The authors wish to thank Betül Kas, who contributed as a post-doc researcher to the *Judges in Utopia* project, for her comments on an earlier version of this article and Fien de Ruiter, who was affiliated as a student assistant, for her valuable assistance on the editing of the contributions to this special issue. The final version of this contribution was submitted on 14 May 2020.

hinsichtlich der Interaktion zwischen nationalem und europäischem Niveau zu rekonstruieren und begreifen. Die paradigmatischen Beispiele des Klimaprozessierens und der Justizdialogen bei Fällen über Verbraucherhypotheken demonstrieren wie Gerichte gefragt wurde, sensitive politische Fragen zu adressieren. Ein ‘utopisches’ (Selbst)Verständnis der richterlichen Aufgabe erklärt und verantwortet wie und in welchem Umfang Richter solche gesellschaftlichen Probleme mittels Privatrechts adressieren und im gleichen Moment Privatrecht selbst transformieren dürfen.

‘Human rights constitute a realistic utopia insofar as they no longer paint deceptive images of a social utopia that guarantees collective happiness but anchor the ideal of a just society in the institutions of constitutional states themselves’.

Jürgen Habermas¹

1. Transformations of European Private Law

This special issue revolves around the role of the judiciary in European private law. It presents the articles following from a workshop held as part of the research project *Judges in Utopia*. Taking inspiration from Habermas’ reconstructive theory of democracy, this project aims to elaborate a normative theoretical framework that reconceptualizes the role of courts in civil cases in today’s Europe, especially in their relation to the legislature. Furthermore, it seeks to provide judges with methodological guidance for the adjudication of disputes at the crossroads of national private law and European law. Whilst ‘utopianism’ can be associated with an imagined society based on dreams, ideals and visions – a blueprint – for an unknown future, the idea of Utopia may also act as a criticism of the status quo and a call for transformation.² In this introductory contribution, the role of the judiciary in European private law as ‘utopian’ is conceived in a constructive sense.

We focus on European private law adjudication as an institutional framework for the deliberation of ‘utopian’ ideas, grounded in fundamental or human rights. European private law is understood as encompassing the interplay of national private law and civil procedure with European law, as well as the comparison of national private laws in the EU. For the purposes of this special issue, we adopt a broad understanding of the judiciary in European private law. It encompasses the Court of Justice of the European Union (CJEU) as well as national (civil)

-
- 1 J. HABERMAS, ‘The Concept of Human Dignity and the Realistic Utopia of Human Rights’, 41. *Metaphilosophy* 2010, pp 464, 476, reminiscent of J. RAWLS, *The Law of Peoples* (Cambridge, Massachusetts: Harvard University Press 1999), pp 7, at 11-12.
 - 2 Compare M. LOUGHLIN, ‘The Constitutional Imagination’, 78. *The Modern Law Review* 2015, pp 12-13.

courts adjudicating cases concerning norms of European private law. In addition, our analysis comprises courts operating according to rules of civil procedure.³ Recent cases brought before the CJEU and national (civil) courts show that norms of private law, in the interplay with rules of European origin, are invoked by private parties and by courts, to create space for the judicial development of innovative solutions for large societal issues, such as climate change and access to justice in the wake of the 2008 financial crisis. Fundamental rights laid down in the European Convention on Human Rights (ECHR) and the EU Charter of Fundamental Rights (EUCFR) regularly provide support for addressing such societal questions and allow to bridge (doctrinal) distinctions between national private laws and European law.

The main claim in this introductory contribution is that these cases are indicative of the evolving transformative role of the judiciary in European private law. Courts are called upon to settle sensitive political issues that are the topic of extensive national and transnational debates. As such, courts contribute to the transformation of private law in Europe.⁴ They use private legal frameworks to address cases concerning fundamental societal questions, while at the same time rethinking the boundaries of private law itself.

In what follows, we present two paradigmatic case studies that illustrate this transformative role of the judiciary in European private law: climate change litigation, of which *Urgenda* is a seminal case (section 2), and effective remedies in consumer mortgage cases under the Unfair Contract Terms Directive (UCTD),⁵ illustrated by the Spanish mortgages saga (section 3). Subsequently, we introduce the perspectives on judicial law-making in European private law offered in the contributions to this special issue (section 4). Shared themes in these contributions are then highlighted and connected to the two case studies (section 5). We conclude with some overarching reflections (section 6).

2. A Turn to the Judiciary: The Case of Climate Change Litigation

2.1. Controversy around Climate Change Litigation

Climate change is one of the most urgent problems of our times. Scientific research has shown that many human activities cause an increase of greenhouse gasses in the air, which leads to global warming and results in dangers including deadly heatwaves, droughts, rising sea-levels, acidification of oceans, dying coral reefs and diminished

3 This includes, for instance, the Dutch climate case *Urgenda*, in which Dutch civil courts interpreted a national provision on non-contractual liability in light of European norms, even though the case concerned State liability.

4 H.-W. MICKLITZ, 'The Transformation of Private Law', in L.M. Poiarés Maduro and M. Wind, *The Transformation of Europe: Twenty-five Years On* (Cambridge University Press: Cambridge 2017), pp 289–302; H.-W. MICKLITZ, *The Politics of Justice in European Private Law* (Cambridge University Press: Cambridge 2018), pp 398–400.

5 Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts, OJ 1993, L 95/29.

biodiversity. This will result in humanitarian and economic crises many times bigger than the one caused by the corona virus. International politics have led to a global consensus: we need to reduce greenhouse gasses so that global warming does not exceed 2 °C.⁶ *How* to achieve this is however still a hotly debated, political question, certainly at the national level. Where to start with cutting greenhouse gasses? Lowering maximum speeds, forbidding diesel cars, closing down coal plants? Who is to pay for this? Should action only be undertaken in concert with others (other States, companies, consumers) or is individual action required, even if one actor's emissions are only a minimal contribution to the whole? In short, anthropogenic climate change is said to present a 'perfect moral storm': it is detrimental to people in the poorest nations, to future generations, and to non-human species and ecosystems, whereas democratic leaders fail to come up with policies because these are costly to their current electorates.⁷

One of the responses in civil society has been a resort to the judiciary to hold governments and private parties accountable for their share in causing the dangers resulting from climate change. Worldwide, over 2500 legal cases on the subject of climate change have been launched.⁸ These are cases before national, regional and international fora. Climate change – exactly because of its global and long-term impact – does not easily fit into legal boxes.⁹ Varying per system, the litigating environmentalists frame the issue as administrative, criminal, or constitutional. Climate cases are launched in European private law as well. They include cases from the Netherlands, Belgium, Norway, Sweden, Germany and France.

Yet, it is contentious whether the judge should mingle into political questions. Arguably, judges should merely apply laws that are the outcome of political debates. Many of the climate cases against *governments* are highly controversial for this reason. For example, the Dutch State has appealed the *Urgenda* case before the Supreme Court of the Netherlands, because in this case, brought by a private foundation, both the Court of First Instance and the Court of Appeal ordered the State to make its greenhouse gasses reduction goal more ambitious.¹⁰ The State argues that these courts have overstepped the boundaries of their position in the

-
- 6 This consensus is laid down in the UN Framework Convention on Climate Change. Although the president of the United States of America (USA) announced their withdrawal from the Convention, such has not taken place yet, to our knowledge.
 - 7 Compare the analysis of Gardiner in M. GARDINER & D. WEISBACH, *Debating Climate Ethics* (Oxford: Oxford University Press 2016).
 - 8 See the database of the Sabin Centre, <http://columbiaclimatelaw.com>. (12 May 2020)
 - 9 Compare E. FISCHER, E. SCOTFORD & E. BARRITT, 'The Legally Disruptive Nature of Climate Change', 80. *The Modern Law Review* 2017, p 2.
 - 10 For a complete overview of the case in light of the debate on the separation of powers, see L. BURGERS & T. STAAL, 'Climate Action as Positive Human Rights Obligation: The Appeals Judgment in *Urgenda v the Netherlands*', in R. Wessel, W. Werner & B. Boutin (eds), *Netherlands Yearbook of International Law 2018* (The Hague: T.M.C. Asser Press 2019).

governmental separation of powers between legislature, executive and judiciary. Indeed, for the same reason, the Oslo Court of First Instance has dismissed the claim of environmental organization *Natur og Ungdom* against the Norwegian government, stating that climate policy is to be dealt with in international politics rather than by courts.¹¹

2.2. *Transformative Climate Change Litigation in European Private Law*

As said, the Hague Courts of First Instance and of Appeal in the Dutch *Urgenda* case *did* step in. They both ordered the State to employ a greenhouse gasses reduction goal of at least 25% compared to the levels of 1990. The Advocate General and Procurator General advised the Supreme Court to uphold this judgement,¹² which it did, in December 2019.¹³ Interestingly, the *Urgenda* case is manifestly *not* a case of judicial review, as the courts were *civil courts* establishing an obligation on part of the executive, awarding a claim based on norms of private law.

Now it goes beyond the scope of this introductory contribution to discuss the *Urgenda* case in full detail. We will suffice with the observation that the private legal doctrine underlying the judgment on first instance is that of hazardous negligence, which holds that it is tortious to create an unnecessarily dangerous situation.¹⁴ It is a fine example of legal creativity to apply this doctrine in the *Urgenda* case, establishing that the State acts hazardingly negligent in failing to take sufficient measures against the dangers of climate change. In awarding this claim, the Court of First Instance considered the rights to life and private life enshrined in Articles 2 and 8 ECHR likely to be infringed by the consequences of climate change. These Articles formed the direct legal basis of the judgment by the Court of Appeal, that upheld the judicial order to the government to reduce at least 25% of greenhouse gasses emissions by 2020, compared to 1990 levels.¹⁵ The Supreme Court approved of this.

It is certain that many environmentalists worldwide feel inspired by the success in the *Urgenda* case. They organize in networks and often invoke

11 Oslo District Court (*Oslo Tingrett*) 4 January 2018, *Natur og Ungdom & Greenpeace v. Staten (The People v. Arctic Oil)* case number 16-166674TVI-OTIR/06.

12 Opinion in *Foundation Urgenda v. State of the Netherlands*, Deputy Procurator General Langemeijer and Advocate General Wissink 13 September 2019, ECLI:NL:PHR: 2019:887.

13 Dutch Supreme Court (*Hoge Raad*) 19 December 2019 *Foundation Urgenda v. State of the Netherlands*, ECLI:NL:HR:2019:2006.

14 The Hague District Court (*Rechtbank Den Haag*) 24 June 2015, *Stichting Urgenda v. Staat der Nederlanden* ECLI:NL:RBDHA:2015:7145.

15 The Hague Court of Appeal (*Hof Den Haag*) 9 October 2018, *Stichting Urgenda v. Staat der Nederlanden* ECLI:NL:GHDHA:2018:2591.

Urgenda in their claims. The Swedish climate case *Magnolia*, for instance, was also based on non-contractual liability of the State. In this case, however, both the Stockholm Court of First Instance and the Court of Appeal dismissed the claim for damages.¹⁶ The Courts reasoned that in the Swedish law of damages, a mere risk to damage is not enough to establish liability.

Environmentalists do not only target governments, but also private companies, holding them responsible on the basis of rules of private law. For example, the Peruvian national Saúl Luciano Lliuya litigates against the German Energy Giant RWE AG. Whereas this firm was initially called Rheinisch-Westfälisches Elektrizitätswerk it simply goes by RWE since 1990. Mr Lliuya alleges that a glacier near his house is more likely to melt due to anthropogenic climate change, enhancing the risk of a flood that would destroy his property. Since RWE contributes 0.47% of global greenhouse gasses emissions, he claims the exact same percentage of the costs to take protective measures, on the basis of a German Civil Code provision on neighbour nuisance.

On first instance, the case was dismissed; the District Court of Essen held it was impossible to establish causality between the emissions of RWE and the damage of Mr Lliuya.¹⁷ On appeal, however, the Higher Regional Court of Hamm in a preliminary judgment held it legally possible to establish such a causal link – it allowed the case into the evidentiary phase.¹⁸ Thus, although there is no substantive judgment yet, it seems as if the Court is looking for ways to fit the problem of climate change in the framework of private law, echoing how the Dutch court updated the doctrine on hazardous negligence in *Urgenda*.

Both *Urgenda* and *Lliuya* inspired a group of concerned individuals to bring a case against the EU before the General Court of the EU Court of Justice.¹⁹ Under the name *People's Climate Case*, they argue that the Union's climate policy is not ambitious enough, as the consequences of climate change (will) adversely impact their fundamental rights.²⁰ The reduction targets for greenhouse gasses in at least three pieces of EU legislation should be increased. Thus, the claimants want the Court to annul these pieces of legislation in so far as the reduction target is concerned, and to order the European Parliament and the Council to adopt targets that would *not* violate fundamental rights.

16 Stockholm District Court (*Stockholms Tingsrätt*) 30 June 2017, *Push Sverige, Fältbiologerna et al v. Staten (Magnolia)*.

17 District Court of Essen (*Zivilkammer des Landgerichts Essen*) 15 December 2016, *Lliuya v. RWE AG*.

18 Higher Regional Court of Hamm (Oberlandesgericht Hamm) 30 November 2017, *Lliuya v. RWE AG*.

19 Both cases also inspired the Dutch NGO *Milieudefensie* (Friends of the Earth Netherlands) to hold Royal Dutch Shell liable for its climate policy based on the doctrine of hazardous negligence. Unlike Mr Lliuya but similar to *Urgenda*, *Milieudefensie* does not ask for damages but for an injunction, ordering Shell to adopt a 'green' business strategy.

20 Case T-330/18 *Carvalho and others v. Parliament and Council (People's Climate Case)*.

The claim has two legal bases: an action for annulment and, most interesting for our purposes, non-contractual liability of the Union. According to Article 340 of the Treaty on the Functioning of the European Union (TFEU), non-contractual liability is to be established ‘in accordance with the general principles common to the laws of the Member States’. On 8 May 2019, the General Court declared the case inadmissible, saying the applicants are not be individually concerned with the Union’s acts on climate change.²¹

This order has received critique, because such a reasoning leads to the paradox that the larger and more-encompassing damage is, the less remedies are available.²² The claimants appeal with similar arguments. It will be highly interesting to see what the CJEU will make of this on appeal: will it be able to overcome the hurdle of standing, and establish ‘general principles’ of non-contractual liability when it comes to holding the Union liable for future damage resulting from inadequate climate policy? Given that non-contractual liability in many States is seen as a matter of private law, such principles would likely in part stem from private law. The *People’s Climate Case* also has the potential to turn around the question whether climate change policy can be linked to governmental obligations under fundamental rights.

It is too early to decipher a positive consensus when it comes to climate change and the European-wide private law judiciary. Yet we may conclude that at least certain actors perceive European private law adjudication as a means to address dangers relating to climate change. As climate change is so clearly a transnational problem, private parties communicate across the boundaries of nation states and legal systems. In transforming climate change into an issue of private law, they push the courts to, in their turn, contribute to transforming society and the environment.²³

3. Proactive Courts: Effective Judicial Protection in Consumer Mortgage Cases

3.1. Proactive Courts in European Consumer Law

While our research has identified climate change litigation as one new area for judicial law-making in European private law, cases in the field of consumer law have also increasingly been recognized to inspire courts to take a proactive stance. Following the 2008 financial crisis, national courts discovered the Unfair Contract Terms Directive (UCTD) as a means for safeguarding the interests of home-

21 Order of the General Court (Second Chamber) *Carvalho and others v. the European Parliament and the Council of the European Union* 8 May 2019, case T-330/18 (*The People’s Climate Case*).

22 C. AAL, ‘The People’s Climate Case’, *Nederlands Juristenblad* 2019, p 2297.

23 A similar argument is made in L.E. BURGERS, *Justitia, the People’s Power and Mother Earth* (PhD Thesis, forthcoming in autumn 2020).

owners - in their capacity of consumer-debtors - in mortgage enforcement proceedings.²⁴ Thus, norms of European private law are ‘instrumentalized’ to address societal issues.²⁵

The case law of the CJEU on effective judicial protection and *ex officio* control of unfair contract terms under the UCTD is well known. Not only must consumers be enabled to take legal action against traders who use unfair terms, national (civil) courts also have a duty to ensure the protection envisaged by the Directive, if necessary of their own motion. The requirements for the decentralized enforcement and protection of the rights consumers derive from the UCTD are largely judge-made. The CJEU has developed these requirements in response to preliminary references from courts that were confronted with shortfalls in the applicable national legal framework, also in cases where the connection with EU (consumer) law was not immediately obvious.

The case of *Sánchez Morcillo*²⁶ provides an example. It concerned two Spanish mortgage debtors who had filed an objection in court against the enforcement of the mortgage by the bank. In first instance, no issue of unfair terms was raised - neither by the debtors nor by the court (*ex officio*). Whilst the bank did have the right to appeal if the enforcement would have been terminated, the debtors did not have that right when their objection was dismissed. The Court of Appeal questioned this procedural asymmetry in light of, inter alia, the principle of equality of arms. In order to make a preliminary reference to the CJEU, the case was framed in such a manner that it could fall within the scope of the UCTD, read together with Article 47 EUCFR.

3.2. *The Spanish Mortgages Saga*

Sánchez Morcillo is one of the cases that reached the CJEU in the aftermath of the 2008 financial crisis. Civil courts in Spain, Hungary and other EU Member States were flooded with claims brought by financial institutions against indebted consumers. Horizontal disputes got a *vertical* dimension where courts were called on to correct (perceived) errors or omissions of the legislature by removing procedural obstacles, filling legislative gaps or otherwise going beyond the existing legal framework. These cases had a *European* dimension in so far as provisions of EU (consumer) law were invoked. Many preliminary references pertain to rules that

24 H.-W. MICKLITZ & N. REICH, ‘The Court and Sleeping Beauty: the Revival of the Unfair Contract Terms Directive (UCTD)’, 51(3) *Common Market Law Review* 2014, pp 771-808. The CJEU’s case law in unfair terms cases does not only pertain to mortgage enforcement, but in this introductory contribution we will focus on this particular issue.

25 This is different from ‘instrumentalization’ in the context of the internal market; cf C. SCHMID, ‘The Instrumentalist Conception of the Acquis Communautaire in Consumer Law and its Implications on a European Contract Law Code’, *European Review of Contract Law* 2005, pp 211-227. Rather, it is bottom-up and not only or not primarily about achieving EU law objectives; national courts construct a link with EU (consumer) law in their search for solutions.

26 Case C-169/14 *Sánchez Morcillo v. BBVA* ECLI:EU:C:2014:2099.

prevent or deter consumers from exercising their rights, or that exclude or severely limit the scope for judicial intervention. Thus, courts started looking for ways to step in and compensate not only for procedural omissions of affected consumers, but also for the absence of legislative guidance.²⁷

In Spain, courts operated as catalysts of legislative reforms that increased the protection of consumers in, inter alia, mortgage enforcement proceedings. In this respect, the judges who resorted to EU (consumer) law to induce legislative changes have been called ‘judicial entrepreneurs’²⁸ as well as ‘Robinhoodian’, because they were the drivers behind a rebalancing of the consumer-creditor relationship that helped to ensure social justice.²⁹ At least three explanations could be given as to why Spanish civil courts turned to the CJEU in consumer mortgage cases, which may shed light on their motives to rely on norms of European private law.

First, cases like *Sánchez Morcillo* were referred to the CJEU as a judicial response to a social emergency after the financial crisis.³⁰ The burst of the so-called ‘housing bubble’ caused many mortgage debtors in Spain to lose their home. Large numbers of foreclosures affecting thousands of citizens, as well as the government’s reluctant attitude and a lack of guidance from the highest courts, increased the number of cases in lower courts.³¹ The failure of the Spanish legal order to provide satisfactory solutions led to ‘judicial mobilization’.³²

The Spanish mortgage enforcement regime was built on procedural asymmetries, for instance a restriction of opposition grounds and no right of appeal for debtors. The role of courts was restricted to a formality check on whether the foreclosure took place in accordance with procedural rules.³³ Yet, the weaker position of consumer-

-
- 27 See also J.M.L. VAN DUIN & C. LEONE, ‘The Real (New) Deal: Levelling the Odds for Consumer Litigations. On the Need for a Modernisation, Part II’, 27. *European Review of Private Law* 2019, p 1227. The points raised in this section are elaborated further in J.M.L. VAN DUIN, *Justice for Both: Effective Judicial Protection under Article 47 of the EU Charter of Fundamental Rights and the Unfair Contract Terms Directive* (PhD thesis, forthcoming in autumn 2020).
- 28 J.A. MAYORAL & A. TORRES PÉREZ, ‘On Judicial Mobilization: Entrepreneurship for Policy Change at Times of Crisis’, 40. *Journal of European Integration* 2018, pp 719, at 725.
- 29 S. NASARRE-AZNAR, ‘“Robinhoodian” Courts’ Decisions on Mortgage Law in Spain’, 7. *International Journal of Law in the Built Environment*, pp 127, 128, at 138.
- 30 F. GÓMEZ POMAR & K. LYCZKOWSKA, ‘Spanish Courts, the European Court and Consumer Law: Some Thoughts on Their Interaction’, in F. Cafaggi & S. Law (eds), *Judicial Cooperation in European Private Law* (Edward Elgar Publishing 2017), pp 95-97.
- 31 S. IGLESIAS SÁNCHEZ, ‘Unfair Terms in Mortgage Loans and Protection of Housing in Times of Economic Crisis: *Aziz v. CatalunyaCaixa*’, 51. *Common Market Law Review* 2014, pp 955-956; F. ESTEBAN DE LA ROSA, ‘The Treatment of Unfair Terms in the Process of Foreclosure in Spain: Mortgage Enforcement Proceedings in the Aftermath of the ECJ’s “Ruling of the Evicted”’, *Zeitschrift für Europäisches Privatrecht* 2015, p 366.
- 32 J.A. MAYORAL & A. TORRES PÉREZ, 40. *J. Eur. Integration* 2018, pp 720, at 723.
- 33 See e.g. J. MARCO MOLINA, ‘Spanish Law in 2010-2012: The Influence of European Union Law and the Impact of the Economic Crisis’, 6. *Journal of Civil Law Studies* 2013, pp 401, at 430.

debtors vis-à-vis financial institutions gave rise to questions about the balance between the interests at stake.³⁴ Substantive and procedural inequalities between the parties are not only aggravated where the case concerns the family home, which increases the debtor's vulnerability, but also by a lack of effective (judicial) remedies and procedural safeguards, which puts debtors in an even more subordinated position.³⁵

However, macroeconomic challenges to the Spanish financial system and the mortgage market were a major concern for the Spanish government and the Supreme Court, which were deemed to outweigh the needs of individual debtors.³⁶ Lower courts were therefore seen as the 'last trench'³⁷ to address problems that would not be solved otherwise. They began to question the applicable legislation by elevating 'cracks' in the legal system to EU level.³⁸ The UCTD provided an 'indirect remedy'³⁹ that has proven to be one possible avenue to enhance the (procedural) protection of consumer-debtors against evictions. A 'dialogue'⁴⁰ between national courts, the CJEU and the national legislature has created more space for judicial scrutiny in this respect.

Secondly, numerous preliminary references indicate that Spanish civil procedure is too rigid for courts to be able to fulfil their role as 'decentralized EU-judges'. The CJEU's case law reflects a tension between traditional procedural principles and the more active role required of national (civil) courts in providing both substantive and procedural protection to weaker parties under EU (consumer)

-
- 34 I. SABATÉ, 'The Spanish Mortgage Crisis and the Re-Emergence of Moral Economies in Uncertain Times', 27. *History and Anthropology* 2016, pp 107, at 118-119.
- 35 M. GONZÁLEZ PASCUAL, 'Social Rights Protection and Financial Crisis in Europe. The Right to Housing, a Cautionary Tale', 9. *Inter-American and European Human Rights Journal* 2016, pp 260, at 269-272.
- 36 See e.g. Opinion AG MENGOCZI in Joined Cases C-154/15, C-307/15 and C-308/16 *Gutiérrez Naranjo* et al., ECLI:EU:C:2016:552, point 72. See also H. DÍEZ GARCÍA, 'Igualdad de Armas y Tutela Judicial Efectiva En El Art. 695.4 LEC Tras El Real Decreto-Ley 11/2014, de 5 de Septiembre: Crónica de Una Reforma Legislativa Anunciada (de Los AATC 70/2014, 71/2014, 111/2014, 112/2014 y 113/2014 a La STJUE de 17 de Julio de 2014)', *Derecho Privado y Constitución* 2014, p 234.
- 37 J. ÁLVAREZ & L. F. RODRÍGUEZ, *La Última Trinchera* (Planeta 2016), p 107.
- 38 M. AGUILERA MORALES, 'TJUE, Proceso Civil y Tutela Del Consumidor: Repaso de Un Año Que Termina y Previsiones En Torno a Otro Que Comienza', 44 *Revista General de Derecho Procesal* 2018, p 29; F. GÓMEZ POMAR AND K. LYCZKOWSKA, 'Spanish Courts, the Court of Justice of the European Union and Consumer Law. A Theoretical Model of Their Interaction', *Indret* 4/2014, p 11 www.indret.com/pdf/1093.pdf. See for an overview of Spanish preliminary references and subsequent legislative reforms: M. GARCÍA-VALDECASAS DORREGO, *Dialogue Between the Spanish Courts and the European Court of Justice Regarding the Judicial Protection of Consumers under Directive 93/13/EEC* (Fundación Registral 2018), pp 179-181.
- 39 I. BARRAL-VIÑALS, 'Aziz Case and Unfair Contract Terms in Mortgage Loan Agreements: Lessons to Be Learned in Spain', 4. *Penn. St. J.L. & Int'l Aff.* 2015, pp 69, at 71.
- 40 F. CAFAGGI, 'Towards Collaborative Governance of European Remedial and Procedural Law?', 19. *Theoretical Inquiries in Law* 2018, pp 235, at 238.

law.⁴¹ This became apparent in the follow-up to the often-cited judgment in *Aziz*,⁴² where the referring court found it could not prevent the eviction even though it was based on unfair terms. The Court of Appeal in Barcelona subsequently observed that Spanish civil procedure is very restrictive, and that some ‘rigorisms’ should be made more flexible pursuant to the CJEU’s case law.⁴³

Thirdly, questions similar to the ones posed in *Aziz* and *Sánchez Morcillo* – in cases regarding the same constellation of (procedural) rules – had already been put by lower courts before the Spanish Constitutional Court, to no avail.⁴⁴ In short, the Constitutional Court had held that the debtors’ constitutional right of access to court was sufficiently guaranteed and that it was not for the judiciary to change the law.⁴⁵ Socio-economic issues were considered as prerogatives of the legislature and the executive.⁴⁶ In a concurring opinion, one of the Magistrates nevertheless warned against ‘constitutional reductionism’; the Court should not be insensitive to the social reality in which the legal norms, values and principles of the Constitution apply.⁴⁷

Aziz and *Sánchez Morcillo* are both cases in which the CJEU ultimately provided a higher level of protection than the Spanish Constitutional Court.⁴⁸ Perhaps the CJEU cannot solve any systemic dysfunctions of the Spanish mortgage enforcement regime,⁴⁹ but its case-law has resulted in an amplification of

-
- 41 E. ARROYO AMAYUELAS, ‘No Vinculan Al Consumidor Las Cláusulas Abusivas: Del Derecho Civil Al Procesal y Entre La Prevención y El Castigo’ in E. Arroyo Amayuelas & A. Serrano de Nicolás (eds), *La Europeización del Derecho privado: cuestiones actuales* (Marcial Pons 2016), pp 71–72; V. PÉREZ DAUDÍ, *La Protección Procesal Del Consumidor y El Orden Público Comunitario* (Atelier 2018), p 161; M.P. CALDERÓN CUADRADO, ‘Derechos, Proceso y Crisis de La Justicia’, *Revista General de Derecho Procesal* 2015, pp 37, at 43.
- 42 Case C-415/11 *Aziz v. Catalunyaixa*, ECLI:EU:C:2013:164.
- 43 Court of Appeal Barcelona, decision no. 407/14 of 15 December 2014, JUR\2015\86196.
- 44 See e.g. *Tribunal Constitucional*, order no. 113/2011 of 19 July 2011, ECLI:ES:TC:2011:113A and order no. 70/2014 of 10 March 2014, ECLI:ES:TC:2014:70A.
- 45 *Tribunal Constitucional*, order no. 206/2014 of 2 July 2014, ECLI:ES:TC:2014:206A. See also H. DÍEZ GARCÍA, *Derecho Privado y Constitución* 2014, pp 225, at 231–234, 243–245; M. GONZÁLEZ PASCUAL, 9. *Inter-Am. & Eur. Hum. Rts. J.* 2016, p 267.
- 46 K. CASLA, ‘The Rights We Live in: Protecting the Right to Housing in Spain through Fair Trial, Private and Family Life and Non-Retrogressive Measures’, 20. *The International Journal of Human Rights* 2016, pp 285, 294.
- 47 Concurring opinion of E. GAY MONTALVO, order no. 113/2011.
- 48 ESTEBAN DE LA ROSA 2015; T. JIMÉNEZ PARÍS, ‘El Incidente de Oposición En La Ejecución Hipotecaria Por Existencia de Cláusulas Abusivas y Las SSTJUE de 17 de Julio de 2014 y 21 de Enero de 2015’, *Revista Crítica de Derecho Inmobiliario* 2015, p 985.
- 49 S. IGLESIAS SÁNCHEZ, 51. *Common Mkt L. Rev.* 2014, p 973; M^a PAZ GARCÍA ABURUZA, ‘Directiva 93/13 CEE versus Derecho Procesal Civil Español’ *Revista Aranzadi Doctrinal* 9/2014 parte Estudio, pp 13–15; I. BARRAL-VIÑALS, 4. *Penn. St. J.L. & Int’l Aff.* 2015, p 95.

procedural rights of consumers and procedural powers of civil courts. In this respect, European private law has been attributed transformative capacity.⁵⁰

4. Four Perspectives on the Transformative Role of the Judiciary

Despite their highly different subject matter and context, there are parallels between the cases on consumer mortgages and climate change. First of all, both types of cases attest of a (perceived) need for courts to settle issues that are a topic of extensive political debate, at a national *and* transnational level. The adjudication of these cases is placed within a broader political debate where the legislature would be expected to play a leading role. Private actors seek recourse to the courts to provide legal support for change, in the absence of political consensus or legislative action.

Secondly, norms of European private law are invoked to bring about transformation. The adjudication of climate change cases and consumer mortgage cases is not limited to purely private interests: it transcends the courtroom and concerns collective or public interests that have an impact across national borders.

Thirdly, in both types of cases private actors make a request to the courts to explore the boundaries of the private legal framework in order to address issues that do not fit the classical mould of private law because of their transnational and socio-economic dimensions. Thus, private law is not only an instrument for change, but the reinterpretation of private legal norms on the interface of national and European law also has a profound impact on the development and further harmonization of private law in the EU.

In this special issue, various authors reflect on these dynamics of private law adjudication in Europe. Their contributions provide different theoretical lenses through which to assess the changing role of courts, as well as specific insights on the dynamics of law-making in different parts of the EU. Hans Petter Graver traces the changing role of the judiciary in relation to the legislative and executive branches of government, focusing on climate change litigation in the Scandinavian countries and making a case for ‘judging for Utopia’. Mónica Józson gives further starting points for a research agenda on judicial governance, based on the experience of the interaction between national courts and the CJEU in unfair contract terms cases. Aurelia Colombi Ciacchi’s contribution takes a more comprehensive comparative view and elucidates the cultural backgrounds to judicial governance, presenting a taxonomy of three judicial cultures of fundamental rights application in European private law. Chantal Mak’s contribution, finally, assesses the dynamic interaction of national civil courts and the CJEU in light of the broader ‘hybridization’ of European private law, finding a constitutional role for civil courts insofar as their dialogue with the CJEU helps build a European political community.

50 MAYORAL & TORRES PÉREZ, 40. *J. Eur. Integration* 2018, pp 729, at 731.

In the following, the four perspectives are introduced and a number of cross-cutting themes are highlighted. We then revisit the climate change and mortgage cases to illustrate how and to what extent the different points of view can explain and justify the judiciary's evolving transformative role in European private law.

4.1. *Graver's Judging for Utopia*

Hans Petter Graver, in his contribution to this special issue, considers the question to what extent the judiciary in Europe should actively 'strive for Utopia', especially in response to climate change litigation. He sets out to analyse how in the Nordic countries, 'Utopian law-making' was an activity for the executive as well as the legislature in the development of successful Nordic Welfare States. Graver posits that judging for Utopia only becomes controversial when, such as with the climate cases, it goes against the other branches of government.

Graver considers the climate cases in light of Jeremy Waldron's famous core case against judicial review of legislation. Waldron's reservations are based on inter alia the assumptions that society has functioning democratic institutions and that there is a strong commitment to rights on the part of most members of society. Especially these two assumptions are absent when thinking of climate change, Graver argues. That is, democratic institutions clearly fail in respect of adopting the necessary measures. Moreover, the relevant members of society when speaking of climate change extend well beyond those active in national democracies, as they include people outside Europe and future generations, so a strong commitment to rights is also lacking. Graver concludes that climate change litigation is, thus, a non-core case of judicial review: the courts *should* step in here.

4.2. *Józson's Integrative Understanding of EU Consumer Law and National Private Law*

Mónika Józson discusses the 'bottom-up unification' of European private law, as well as the criticism that ad hoc judicial law-making and a pluralism of legal sources may lead to fragmentation and legal uncertainty. In Hungary, like in Spain, there has been an on-going 'trialogue' between the judiciary, the legislature and the CJEU in response to problems concerning consumer credit agreements affected by the financial crisis, in particular loans in a foreign currency.⁵¹ Analysing the line of cases brought to the CJEU in the past years, Józson advocates an integrative understanding of EU consumer law and national private law. The emphasis should be on substantive justice rather than (only) on 'proceduralization',⁵² although the

51 See most recently Case C-118/17 *Dunai v. ERSTE Bank Hungary* ECLI:EU:C:2019:207, with references to previous case law originating from Hungary and Spain.

52 The term 'proceduralization' has also been used to refer to the adoption of EU procedural rules in legislative instruments, e.g. the European Small Claims Regulation or the Consumer ADR

availability of remedies and procedures remains a necessary precondition for effective consumer protection.

In this respect, Józson raises the question to what extent judicial methodology in the area of unfair terms is legal interpretation or policy-making. Courts have been pressed into a regulatory or supervisory role. In her view, courts must remain the driving force behind the ‘Europeanization’ process of private law, but they should not be blamed for enforcement gaps in ‘a multilayer legal environment full of inner conflicts’. Józson calls for legislative gap-filling and a closer cooperation between national judiciaries and legislatures to provide a clarification of competences in the ‘hybrid’ law on unfair terms.

4.3. *Colombi Ciacchi’s Cultures of Judicial Governance*

Aurelia Colombi Ciacchi addresses the application of fundamental rights in private law as an instance of judicial governance. She submits that horizontal effects of fundamental rights challenge the traditional distinction of ‘legal families’ in comparative private law, comprising common law, civil law and mixed jurisdictions, with further sub-categories. Research based on a ‘law in action’ approach, in particular the methodology adopted in the project on the *Common Core of European Private Law*,⁵³ shows that the application of fundamental rights in private law in different EU Member States does not match this categorization of legal orders in the traditional ‘legal families’ at all.

Colombi Ciacchi proposes a new taxonomy, which comprises three categories. Firstly, young continental European democracies (including Germany, Italy, Poland, Portugal and Spain), represent a post-authoritarian culture. This culture shows a relative distrust in Parliament, a relatively strong reliance on judicial activism and the primacy of constitutional fundamental rights. Secondly, old continental European democracies (including France, Belgium, the Netherlands and Luxembourg), reflect the old continental culture. This culture places more trust in Parliament, modest judicial activism, and openness towards international human rights. Thirdly, non-continental European democracies (including the United Kingdom, Finland, Norway and Sweden) express a Nordic-insular culture. In this

Directive. The CJEU’s progressive interpretation of the UCTD has led to a more indirect, judge-made ‘Europeanization’ of national remedies and procedures: A. BEKA, *The Active Role of Courts in Consumer Litigation: Applying EU Law of the National Courts’ Own Motion* (Antwerp: Intersentia 2018), pp 10, at 17. It could be said that the CJEU has started off the ‘proceduralization’ process: M. TULIBACKA, ‘Proceduralisation of EU Consumer Law and Its Impact on European Consumers’, 8. *Review of European administrative law* 2015, pp 51, at 53–54. See further F. DELLA NEGRA, ‘The Uncertain Development of the Case Law on Consumer Protection in Mortgage Enforcement Proceedings: Sánchez Morcillo and Kušionová’, 52. *Common Market Law Review* 2015, pp 1009, at 1010.

53 www.common-core.org.

culture, judicial application of fundamental rights occurs less frequently, and the incorporation of international human rights is more complicated. Mapping legal orders according to this new taxonomy, Colombi Ciacchi offers explanations for the manners in which EU Member States integrate fundamental rights argumentation in private law, understood as a form of judicial governance.

4.4 *Mak's Reflexive Polity-building through European Private Law*

The deliberative qualities of national civil courts' interaction with the CJEU are further explored in Chantal Mak's contribution. In the context of European private law, the term 'hybrid' law generally refers to rules that contain both national elements and European requirements.⁵⁴ Mak uses the term 'hybridization' as referring to a compound of provisions of EU law as well as national private law on the basis of which cases are adjudicated. She submits that national civil courts contribute to a 'hybrid' sphere of deliberation for legal-political questions underlying concrete cases and, as such, to polity-building in Europe. Descriptively, she notes that civil courts engage with the European legal and judicial order, *inter alia* via preliminary references. Normatively, she calls for 'a reflexive process of imagining a European legal order between our current place and a future Utopia'. According to Mak, private law does not exist in a 'political vacuum, but is linked to the political community'. In this respect, she argues that national civil courts perform a constitutional task in the sense that they maintain a European public sphere that allows for pluralism and judicial interaction.⁵⁵

5. Climate Change and Consumer Mortgage Cases between EU and Utopia

5.1 *Societal Change through Private Law*

A turn towards the courts inevitably implies that certain societal questions are (partly) taken from the political, legislative process and made the subject of a legal claim. The climate change and consumer mortgage cases are clear examples of such dynamics. In climate change litigation, private actors seek recourse to courts when political actors fail to act. In consumer mortgage cases, national judges refer to the CJEU when the national legislature does not adequately protect homeowners'

54 N. REICH, 'The Principle of Effectiveness and EU Private Law' in U. Bernitz, X. Groussot & F. Schulyok (eds), *General Principles of EU law and European Private Law* (Alphen a/d Rijn: Kluwer Law International 2013), pp 308-309. B. KAS, 'A Socio-Legal Study on the Operation of Hybrid Collective Remedies in the Area of European Social Regulation', in H.-W. Micklitz, Y. Svetiev & G. Comparato (eds), *European Regulatory Private Law – The Paradigms Tested*, EUI Working Papers LAW 2014/04, pp 19-26.

55 On the concept of a transnational public sphere, see N. FRASER, *Scales of Justice* (Cambridge: Polity Press 2008), pp 76-99.

interests. In both types of cases, societal change is pursued through private law, insofar as this field offers legal basis in tort, contract law and civil procedure that may provide a means to address (aspects of) the problems. Accordingly, the judiciary's role is affected on at least three points: the judiciary's relation to the legislature; its place in the EU's system of multi-level governance; and its interpretation and application of rules of private law in combination with EU law and fundamental rights.

In the first place, while all authors recognize the shift from legislature to judiciary, some are more positive about this development than others. Graver finds an explanation and justification for judicial intervention in the climate change debate within the judicial task itself. Where political institutions do not recognize the rights of the most affected groups – persons outside the national polity and people who are yet unborn – and where international norms are not effectively enforced, the judiciary should step in to 'bring the system forward on the right track'. Józson finds a similar explanation for judicial action on consumer cases and, furthermore, makes clear how the multi-level dimension of European private law requires national courts to step in where national legislatures have not fully integrated EU law. However, she remains critical of imposing a 'market policing' role on national civil courts and firmly places the task of providing a 'legal framework suited to the needs of consumers' back with the legislature. Colombi Ciacchi explains different divisions of tasks from a cultural perspective, which shows how different legal cultures reflect different levels of trust in the political process and corresponding levels of judicial activism or restraint. Mak, finally, recognizes a normative potential in judicial law-making, insofar as the interaction of national civil courts with the CJEU serves to maintain a public sphere for deliberating private legal cases and may, thus, contribute to building a European political community.

In the second place, the judiciary's evolving role in European private law may, accordingly, be said to be both driven by and necessitated by the multi-level nature of judicial governance in the EU. As the cases of climate change and consumer mortgages demonstrate, courts are called upon when the political process does not respond adequately to societal questions. This is all the more so in cases where the problem is not located within national boundaries, but has a transnational dimension. Climate change does not stop at national borders, and consumer mortgage contracts were strongly affected by the economic crisis in the Eurozone. Judicial intervention is, moreover, necessary, insofar as EU law explicitly assigns the task of enforcement to the Member States. The discussion, therefore, does not so much concern the question *if* the role of judges is changing in light of the on-going Europeanization of private law, but rather *in what way* it is changing. A crucial point here is to what extent national judges in civil cases may be proactive in fulfilling their role as European judges – a dimension that Graver addresses.

In the third place, the dynamics of European private law push judges towards a more instrumentalist approach to their own role. This is not only because, as has been known since a long time, European private law is instrumental

to achieving the goals of the EU's internal market.⁵⁶ The climate change and consumer contract cases attest of a call for action on issues relating to social justice, which goes beyond a narrow economic conceptualization of the European project. In that sense, judicial law-making may contribute to the agenda of those who have been advocating a stronger alignment of European private law with the social dimension of private legal relationships.⁵⁷ In line with this idea, the CJEU has recently taken some steps towards a further elaboration of social rights under the EUCFR, in the case of *Bauer*.⁵⁸ Still, the debate on which kind of social justice is or may be developed through an instrumentalist use of European private law remains the subject of debate.

5.2. *Transforming European Private Law*

Judicial law-making in European private law does not only affect the issues at stake, but may also profoundly impact the law itself. In the area of climate change litigation, for instance, the *Urgenda* case required courts to rethink the boundaries of tort law in light of the claim that the Dutch State was liable for not doing enough to prevent greenhouse gas emissions. In the mortgage cases, similarly, the CJEU was asked to determine the outlines of effective consumer protection under the UCTD, which in turn affected national legislation on the adjudication of mortgage enforcement. The contributions to this special issue map as well as criticise⁵⁹ aspects of this transformative role of judges in civil cases: the horizontal effects of fundamental rights; the relation between substantive and procedural law; and the European constitutional dimension of this new role.

In the first place, all contributions to this special issue comment on the increasing references to fundamental rights in cases under European private law. Graver discusses references to Articles 2 and 8 ECHR, protecting the right to life and respect for the private sphere, in climate change litigation. While these provisions do not always have a decisive impact, they did offer a firm legal basis in the

56 C. SCHMID, *Eur. Rev. Contract L.* 2005, pp 211-227.

57 For example Study Group on Social Justice in European Private Law, 'Social Justice in European Contract Law: A Manifesto', 10 *European Law Journal* 2004, pp 653-674; H. COLLINS, *The European Civil Code. The Way Forward* (Cambridge: Cambridge University Press 2008), pp 240-241; A. COLOMBI CIACCHI, 'The Constitutionalization of European Contract Law: Judicial Convergence and Social Justice', *European Review of Contract Law* 2006, pp 167-180; C. MAK, 'Unweaving the CESL: Legal-Economic Reason and Institutional Imagination in European Contract Law', *Common Market Law Review* 2013, pp 277-296; D. CARUSO, 'Qu'ils mangent des contrats: Rethinking Justice in EU Contract Law', in D. Kochenov, G. de Búrca & A. Williams (eds), *Europe's Justice Deficit?* (Oxford: Hart Publishing 2015), pp 367-378; H.-W. MICKLITZ, *The Politics of Justice in European Private Law* 2018, p 398-400.

58 Joined cases C-569/16 and C-570/16 *Bauer and Broßonn*, ECLI:EU:C:2018:871.

59 Compare R. MANGABEIRA UNGER, 'Legal Analysis as Institutional Imagination', 59. *The Modern Law Review* 1996, p 20.

Urgenda case, in particular upon the Court of Appeal's recognition of the State's positive duties under the ECHR. Józson expresses doubts as to the potential of fundamental rights in consumer cases, but she still observes that with fundamental rights, 'the CJEU has a tool in hand with which it may impact on national policy'. Colombi Ciacchi's analysis concerns the horizontal effects of fundamental rights and their explanation in light of different legal cultures. As such, it gives indications for establishing in which jurisdictions fundamental rights argumentation is more likely to affect the interpretation of private law. This provides starting points for a further elaboration of the added value of fundamental rights reasoning in private law. In that light, Mak proposes that fundamental rights may contribute to the deliberation among national civil courts and the CJEU in a joint constitutional process.⁶⁰

In the second place, and related to the previous point, judicial transformations of European private law underscore the importance of adequate procedures for achieving substantive justice. This is, in fact, the basis of many references to the CJEU in consumer mortgage cases, where national procedural laws stood in the way of effective (judicial) remedies for consumers against unfair contract terms.⁶¹ As Józson's analysis confirms, national courts had to address these obstacles in preliminary references to the CJEU in order to 'upgrade'⁶² national law to the required level of consumer protection.

In the third place, judicial law-making serves the 'constitutionalization of European private law',⁶³ encompassing effects of fundamental rights in private law as well as the building of a political community. The consideration of fundamental rights argumentation allows judges to look beyond the confines of doctrines of private law. This became clear in both the climate change cases and consumer mortgages cases, in which courts expressed their awareness of the particular political and socio-economic context of the issues addressed. As is explored in Mak's contribution, the interaction among civil courts and the CJEU in the

60 See also C. MAK, 'Judges in Utopia. Fundamental Rights as Constitutive Principles of a European Private Legal Culture', in K.P. Purnhagen and G. Helleringer (eds), *Towards a European Legal Culture* (Oxford/Baden-Baden/München 2014), pp 375-395.

61 J.M.L. VAN DUIN, 'Metamorphosis? The Role of Article 47 of the EU Charter of Fundamental Rights in Cases Concerning National Remedies and Procedures under Directive 93/13/EEC', *EuCML* 2017, pp 190-198.

62 N. REICH, *General Principles of EU Civil Law* (Cambridge/Antwerp: Intersentia 2014), pp 97-99.

63 C. MAK, *Fundamental Rights in European Contract Law* (Alphen a/d Rijn: Kluwer Law International 2008); O. CHEREDNYCHENKO, *Fundamental Rights, Contract Law and the Protection of the Weaker Party* (München: Sellier 2007); A. COLOMBI CIACCHI, G. BRÜGGEMEIER & G. COMANDÉ (eds), *Fundamental Rights and Private Law in the European Union: Volumes 1 and 2* (Cambridge: Cambridge University Press 2010); H.-W. MICKLITZ, *Constitutionalization of European Private Law* (Oxford: Oxford University Press 2014); H. COLLINS, *European Contract Law and the Charter of Fundamental Rights* (Cambridge/Antwerp: Intersentia 2017).

language of fundamental rights may provide space for deliberations on the foundations of European private law, and the European legal and political community.

6. Realists with a Vision

What should be the role of judges in civil cases in the development of European private law? The cases of climate change and consumer mortgage litigation show that civil courts are asked more and more often to address pressing societal issues. The contributions to this special issue provide different perspectives to assess the legal, political, social, economic and cultural implications of the changing role of the judiciary as well as the transformative role of judges as regards rules of private law in Europe.

Following the suggestion Hans Petter Graver makes in his contribution, then, we may ask what the utopian feature of judges in European private law could or should be. Are we thinking of dreamers, or ideal judges? In line with Graver's suggestion, we could say that rather than focussing on the person of the judge, *Judges in Utopia* is concerned with the (self-)understanding of the judicial task. In many of the cases that we encounter in this field, we can see a new transformative role - as Graver observes, this is a 'judging for Utopia', practiced by 'judges today who pursue a better world through their judging' and are 'realists with a vision'.

As scholars, our task then may be found in mapping the field in which judges do their work, as well as criticize the status quo and give directions for the further development of private law in Europe.⁶⁴ The contributions to this special issue aim to do just that, by reimagining the judicial task between reality and Utopia.

64 Compare R. MANGABEIRA UNGER, 59. *The Modern L. Rev.* 1996, p 23.

