



UvA-DARE (Digital Academic Repository)

Civil Courts as Constitutional Courts: Polity-building through private law in Europe

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/in-the-netherlands/you-share-we-take-care>)

[Link to publication](#)

Citation for published version (APA):

Mak, C. (2020). Civil Courts as Constitutional Courts: Polity-building through private law in Europe. *European Review of Private Law*, 28(4), 953-972.
<https://kluwerlawonline.com/journalarticle/European+Review+of+Private+Law/28.4/ERPL2020056>

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>)

Civil Courts as Constitutional Courts: Polity-building through private law in Europe

Chantal MAK*

Abstract: What can and should be the role of national civil courts in a European private legal order? This article explores the courts' position against the backdrop of experiences in the 'failed' projects envisaging a European Civil Code and a European Constitution. It is held that rather than aspiring to find a lasting settlement in such static foundational texts, which courts should interpret and apply, the more dynamic interaction of national and European sources and institutions should be embraced. Descriptively, civil courts' contributions can be accounted for in terms of 'hybridization', insofar as their judgments merge elements of EU law with rights and remedies under national private laws in a deliberative process that transcends national and European boundaries. Normatively, it is submitted that civil courts may be considered to perform a constitutional task insofar as they contribute to a dynamic process of polity-building in Europe.

Résumé: Quel est le rôle et quel devrait être le rôle des tribunaux civils nationaux dans l'ordre juridique du droit privé européen ? Cet article examine la place des tribunaux dans le contexte des expériences de projets « échoués » qui avaient envisagé un Code Civil Européen et une Constitution Européenne. Il est démontré que, au lieu de chercher à trouver une solution permanente dans tels textes fondamentaux qui doivent être interprétés et appliqués par les tribunaux, l'interaction dynamique des sources et institutions nationales et européennes devrait être adoptée. Du point de vue descriptif, les contributions des tribunaux peuvent être appréhendées au travers du terme de « l'hybridation », dans la mesure où leurs décisions mélangent les éléments du droit de l'UE avec les droits et recours du droit civil national dans le cadre d'un processus délibératif qui dépasse les frontières nationales et européennes. Du point de vue normatif, il est soutenu que les tribunaux civils peuvent être vus comme accomplissant une mission constitutionnelle dans la mesure où ils contribuent au processus dynamique de construction d'un régime politique dans l'Europe.

Zusammenfassung: Was kann und sollte die Rolle der nationalen Zivilgerichte in einer europäischen Privatrechtsordnung sein? Dieser Beitrag untersucht die

* Professor of private law, in particular fundamental rights and private law, Amsterdam Centre for Transformative Private Law (ACT), University of Amsterdam, the Netherlands; team leader of the research project 'Judges in Utopia' (NWO Vidi 2014-2019). I would like to thank Betül Kas, Anna van Duin, Laura Burgers, Fien de Rooter, Nik de Boer, Federico Fabbrini and Rónán Condon for their comments on an earlier version of the paper. All remaining errors are of course mine. The final version of this contribution was submitted on 14 May 2020. Email: C.Mak@uva.nl.

Position der Gerichte vor dem Hintergrund der Erfahrungen aus den ‘gescheiterten’ Projekten eines Europäischen Zivilgesetzbuches und einer Europäischen Verfassung. Es wird die Auffassung vertreten, dass anstatt danach zu streben, in solchen statischen Grundlagentexten, die die Gerichte interpretieren und anwenden, eine dauerhafte Ordnung zu finden, sollte vielmehr die dynamischere Interaktion von nationalen und europäischen Rechtsquellen und Institutionen einbezogen werden. Aus deskriptiver Sicht kann der Beitrag der Zivilgerichte im Sinne einer ‘Hybridisierung’ erklärt werden, insofern ihre Urteile Elemente des EU-Rechts mit Rechten und Rechtsbehelfen aus den nationalen Privatrechtsordnungen in einem deliberativen Prozess vereinen, der nationale und europäische Grenzen überschreitet. Aus normativer Sicht kann angenommen werden, dass die Zivilgerichte eine verfassungsmäßige Aufgabe erfüllen, insofern sie zu einem dynamischen Prozess der Bildung einer politischen Gemeinschaft in Europa beitragen.

1. Judges in Utopia

The role of courts has regained prominence in the debate on European private law in recent years, after the European Commission’s proposal for a Common European Sales Law (CESL) was ‘derailed’ in 2014.¹ The CESL might be seen as the endpoint of the exploration of the possibilities for enacting a European Civil Code, which captured the academic and political imagination in private legal Europe for more than two decades.² Part of this development coincided with the search for a constitutional arrangement of the European legal order, which was equally unsuccessful insofar as no written European Constitution was enacted.³ In a legal and political setting that has currently abandoned the idea of such comprehensive foundational texts,⁴ the search is for new ways of understanding a more fragmented order of private law in the EU. Civil courts are important

-
- 1 See the European Parliament’s legislative train schedule, <http://www.europarl.europa.eu/legislative-train/theme-connected-digital-single-market/file-common-european-sales-law> (accessed 8 May 2020).
 - 2 For instance made visible in the four editions of the edited volume by A.S. HARTKAMP et al. (eds), *Towards a European Civil Code* (Kluwer Law International 1994, 1998, 2004, 2011).
 - 3 For an exploration of the synergy of these two ‘failures’, see H-W. MICKLITZ, ‘Failure or ideological preconceptions - Thoughts on Two Grand Projects: the European Constitution and the European Civil Code’, EU Working Papers Law 2010/04. As Micklitz states, speaking of the ‘failure’ of these projects might be ‘too dramatic and too superficial’, since they both survived in some manner and were not formally retracted; H-W. MICKLITZ, EU Working Papers Law 2010, p (1). Still, this paper will adopt this terminology in order to mark the transition in the private legal and constitutional debates.
 - 4 While the search for a comprehensive codification seems to have reached a temporary endpoint, this does not mean that the harmonization of private law in Europe has come to a complete standstill. A new initiative for unification of parts of private law may, for instance, be found in the French-German idea for a European Business Code; see M. LEHMANN, ‘Das Europäische Wirtschaftsrecht - Eine Projektskizze’, *Zeitschrift für das Privatrecht der Europäischen*

actors in this endeavour, given the fact that the task of coordinating the interplay of EU law and national private law once more primarily rests in their hands.

In this contribution, the role of courts in European private law is assessed in light of the courts' contribution to the development of a political community in the EU. As such, the paper explicitly endorses the European project and seeks to more clearly define and guide the possible contribution of private law adjudication to European integration.⁵ The case law resulting from civil courts' interaction with the Court of Justice of the EU (CJEU), it is submitted, brings to the fore a constitutional dimension of the development of European private law. In particular, references to the EU Charter of Fundamental Rights (EUCFR) in private legal disputes make explicit the legal-political background to disputes that civil courts refer to the CJEU. Examples include horizontal application of the EU free movement provisions, mortgage cases under the Unfair Terms Directive, and intermediary liability for copyright infringements. The hybrid nature of the institutional and legal frameworks for these cases, it is submitted, fosters a transnational public sphere, in which deliberative processes on legal-political questions of European private law can take shape. Through their engagement with EU law, national civil courts can, thus, be considered to contribute to the on-going formation of the European polity.

In the following, this role of civil courts is explored in both a descriptive and a normative manner. Firstly, the courts' role will be conceptualized in terms of 'hybridization'. Insofar as civil courts operate on the interface of national private law and EU law, they contribute to the creation of a sphere of deliberation that is neither fully national nor fully European and may, thus, be seen as 'hybrid' (section 2). Secondly, it will be submitted that from the normative point of view of constitutionalism, civil courts contribute to a dynamic process of constructing a political community in Europe (section 3). Building on the work of Martin Loughlin and Michael Wilkinson, it will be held that civil courts' hybrid position fits within an idea of 'reflexive constitutionalism' according to which Europe's Constitution is imagined as a continuous process of polity-building.⁶ Through their interaction with the CJEU, civil courts create spaces for deliberation of legal-political stakes in the hybrid sphere of European private law. They may, in this way, contribute to polity-building in the EU. At the same time, they highlight the extent to which the European constitutional framework still falls short of reaching ideals of political integration. Understanding

Union 2017, pp 262-270; K. RIESENHUBER, 'Und Jetzt ein Europäisches Wirtschaftsgesetzbuch?', *Zeitschrift für das Privatrecht der Europäischen Union* 2017, pp 270-274.

5 Though one should be careful not to overstate the role of law in the process of European integration; J. H. H. WEILER, *The Constitution of Europe: 'Do the New Clothes Have an Emperor?' and Other Essays on European Integration* (Cambridge: Cambridge University Press 1999), pp 204-205.

6 M. A. WILKINSON, 'Political Constitutionalism and the European Union', *The Modern Law Review* 2013, pp 193, 207-208. M. LOUGHLIN, *Foundations of Public Law* (Oxford University Press 2010), p (311). See also M. LOUGHLIN, 'The Constitutional Imagination', *The Modern Law Review* 2015, pp 13-14 on the dialectical process between ideology and utopia.

civil courts as constitutional courts⁷ may, thus, help us to imagine a European private legal order after the failed project of a European Civil Code (section 4).

2. Judicial Law-making in European Private Law

2.1. *European Private Law after the ‘Failed’ Code and Constitution*

The question posed in this article goes to the heart of the European private law debate, asking what the field comprises and aspires. Any understanding of the role of civil courts in Europe, in fact, relates to the manner in which the field of European private law within which the courts work is conceived of. Relevant factors here are time and space. Insofar as European private law may be understood as concerning the actual and potential effects of EU law in national private law, its demarcation is fluid since new European rules keep influencing the structure and development of national systems of private law. It is not easy to make sense of the field’s shifting scope and the direction in which it is headed.

Given these features, it is – at least in hindsight – not surprising that attempts to enhance the coherence of European private law took the shape of a European Civil Code project. Codification was in line with post-war ideals of a harmonic European Union,⁸ and was partly meant to overcome frictions caused by the European legislature’s piecemeal interventions in national private laws.⁹ The European Commission, accordingly, focused its agenda for European private law on the drafting of a Common Frame of Reference and an optional CESL in the time period between 2001 and 2014.¹⁰

The rise and fall of the European Civil Code project partly coincided with the equally unsuccessful proposal for a European constitutional treaty, which eventually was reshaped and adopted as the Lisbon Treaty in 2009.¹¹ While it may be debated to what extent the process on the basis of which a draft Constitutional Treaty was presented in 2005 foresaw a true constitutionalization of the European legal

7 In this sense, civil courts would be part of the institutional framework of a ‘realistic utopia’ that safeguards human rights; J. HABERMAS, ‘The Concept of Human Dignity and the Realistic Utopia of Human Rights’, *Metaphilosophy* 2010, p (476).

8 H-W. MICKLITZ, *EUI Working Papers Law*2010, p (2).

9 M. W. HESSELINK, ‘The Ideal of Codification and the Dynamics of Europeanization: the Dutch Experience’, *European Law Journal* 2006, pp 290-293.

10 ‘Communication for the Commission to the European Parliament and the Council. A more coherent European Contract Law. An Action Plan’, COM(2003)68 final; ‘Communication from the Commission to the European Parliament and the Council. European Contract Law and the revision of the acquis: The way forward’, COM(2004)651 final; Study Group on a European Civil Code and Research Group on EC Private Law (Acquis Group), *Draft Common Frame of Reference* (Munich: Sellier 2009); ‘Proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law’, COM(2011)635 final.

11 Draft Treaty establishing a Constitution for Europe, *OJ* 2004/C 310; Treaty on European Union, *OJ* 2016/C 202.

order,¹² the idea of a European Constitution as such met with considerable resistance in Member States. The rejection of the Treaty in the French and Dutch referenda, followed by a reflection period, eventually led to renewed deliberations and a restructuring of the draft to what would become the Lisbon Treaty.¹³

One of the earliest commentators on the simultaneous ‘failure’ of the two Grand Projects was Hans Micklitz, whose analysis, in 2010, emphasized the links between the private legal and the constitutional debate.¹⁴ He rightly observed that what was presented as a European Constitution in fact did not resemble any national constitutional traditions and came closer to a codification of economic administrative principles.¹⁵ A bottom-up development of European private law would, in his view, be easier to achieve than the construction of a true European Constitution, in lack of a shared political identity.¹⁶ In a similar vein, Stefano Rodotà highlighted civil codes’ historical function as ‘the real Constitution[s] of civil society’, which had preceded comprehensive constitutional documents.¹⁷ Both Micklitz and Rodotà, thus, suggested that European private law ran in parallel to the European constitutional debate and even had the potential to take up a leading role in Europe’s further development.

After the CESL was discontinued in 2014 and was followed up by two much narrower proposals for Directives concerning the Digital Single Market,¹⁸ it might seem that the roles were reversed and that the constitutional dimension prevailed after all. A comprehensive instrument of European private law remains legally and politically very far away. Yet, such a conclusion may be too hasty. Keeping in mind Micklitz’s observation on the process of constructing a shared political identity, there is more to the relationship between the private legal and the constitutional debate. European private law’s development has not been put on hold. Rather, in the absence of further legislative action, its emphasis has shifted to another institutional

-
- 12 For example, P. ELEFTHERIADIS, ‘The Idea of a European Constitution’, *Oxford Journal of Legal Studies* 2007, pp 1-21.
 - 13 For a detailed and insightful account of events, see P. CRAIG, *The Lisbon Treaty: Law, Politics and Treaty Reform*, revised edition (Oxford: Oxford University Press 2013), pp 20-25. See also P. NORMAN, *The Accidental Constitution. The Story of the European Convention* (Brussels: EuroComment 2003).
 - 14 H-W. MICKLITZ, EUI Working Papers Law 2010, p (20).
 - 15 H-W. MICKLITZ, EUI Working Papers LAW 2010, pp 11-12.
 - 16 H-W. MICKLITZ, EUI Working Papers Law 2010, p (10).
 - 17 S. RODOTÀ, ‘The Civil Code Within the European “Constitutional Process”’, in: M.W. Hesselink (ed.), *The Politics of a European Civil Code* (Kluwer Law International 2006), pp 115-124.
 - 18 ‘Proposal for a Directive of the European Parliament and of the Council on certain aspects concerning contracts for the supply of digital content’, COM(2015) 634 final; ‘Amended proposal for a Directive of the European Parliament and of the Council on certain aspects concerning contracts for the online and other distance sales of goods, amending Regulation (EC) No 2006/2004 of the European Parliament and of the Council and Directive 2009/22/EC of the European Parliament and of the Council and repealing Directive 1999/44/EC of the European Parliament and of the Council’, COM(2017) 637 final.

branch: the judiciary. Civil courts have to assess the interaction among rules deriving from EU law and rules embedded in national private law in each individual dispute. Case by case, they provide building blocks for constructing European private law on the interface of national law and EU law. The interaction of national civil courts with the CJEU in specific cases, furthermore, allows for a judicial conversation across different levels of governance. Answers to the question of how the European private law project relates to European constitutionalism today, therefore, might be found in a closer study of civil courts' contribution to the shaping of the European legal order.

2.2. *Civil Courts in Europe*

Most national judges in civil cases will not in the first place think of themselves as European judges, let alone as ones with a constitutional vocation. They address the cases presented to them within the framework of national private law, be it a civil code or the common law's system of case law. Some judges are not even very confident of their knowledge of the place of EU law in their national systems.¹⁹ Others do actively engage with this European dimension to their work but with a very specific substantive purpose, for instance clarifying an interpretative question through the preliminary reference procedure at the CJEU²⁰ or coordinating the application of EU law with their colleagues by drafting guidelines.²¹ And yet, as will be argued in this article, judges in civil cases also have a further-reaching and fundamental role to play in the constitutional formation of the European legal order. In order to grasp this idea, let us first consider the judges' own point of view, before moving on to the further analysis of the hybrid sphere in which they are placed (section 2.3) and the normative constitutional reading of this sphere (section 3).

From a national judge's perspective, a substantive and an institutional dimension to her work in the field of private law may be distinguished. First, substantively, in a private legal case that falls within the scope of EU law, the

-
- 19 A study on judges' knowledge of EU law has been conducted in Germany, the Netherlands, Poland and Spain by J. MAYORAL, U. JAREMBA & T. NOWAK, 'Creating EU law judges: The Role of Generational Differences, Legal Education and Judicial Career Paths in National Judges' Assessment Regarding EU Law Knowledge', *Journal of European Public Policy* 2014, pp 1120-1141. Judicial training in the field of European private law has, for instance, been provided through EU-subsidized projects such as 'Active Charter Training through Interaction of National ExperienceS (Actiones)', coordinated by Fabrizio Cafaggi at the Centre for Judicial Cooperation, EUI, <https://www.eui.eu/Projects/CentreForJudicialCooperation/Projects/ACTIONES/ACTIONES> and 'Roadmap to European Effective Justice (REJus)', coordinated by Fabrizio Cafaggi and Paola Iamiceli at the University of Trento, <http://rejus.eu/> (accessed 8 May 2020).
- 20 On Spanish law, see J. MAYORAL & A. TORRES PÉREZ, 'On Judicial Mobilization: Entrepreneurship for Policy Change at Times of Crisis', *Journal of European Integration* 2018, pp 719-736.
- 21 In the Netherlands, e.g. a working group of judges has developed guidelines on *ex officio* assessment of unfair terms, <https://www.rechtspraak.nl/SiteCollectionDocuments/rapport-at-III-31-juli-2018.pdf> (accessed 8 May 2020).

judge has to take into account the combination of national rules of private law and rules of EU law that govern the dispute and, perhaps more importantly, their interrelation. In order to fully understand that relationship, moreover, the judge may have to study relevant CJEU cases originating in other European countries. This is beautifully illustrated in Emmanuel Carrère's novel *D'autres vies que la mienne*, in which two judges in a small provincial town in France are dealing with the question of how to provide effective consumer protection under EU law.²² The story, which is based on a real case, addresses the difficulties the judges faced within the French legal system around the turn of the millennium. Their national law and highest courts did not allow them to assess the fairness of standard terms in consumer credit contracts of their own motion. As a consequence, the judges had to award many claims on the basis of terms unilaterally imposed by businesses that were not challenged by consumers. A solution presented itself one day when one of the judges was reading up on recent case law of the CJEU and came across the judgment in the Spanish *Océano* case, in which the Court introduced *ex officio* control of standard terms.²³ Carrère's novel contains an almost movie-like scene, which will likely resonate with scholars in the field of European consumer law, in which the judge hastens himself to the courtroom in order to show his colleague what he has found. What follows is by now also part of the history of European private law: inspired by *Océano*, the judges referred a French case, *Cofidis*, to the CJEU and managed to remove a time limitation from national law that formed an obstacle to their *ex officio* assessment of unfair terms in consumer contracts.²⁴ Their example shows how a field of European private law is constructed on the basis of a further integration of EU law in national systems, through which parts of the national systems are harmonized. It also makes clear how national judges are both recipients and co-builders of European private law.

Second, the institutional dimension of civil courts' work is inextricably linked with its substantive side. The extent to which EU law is integrated into national private law is often highly dependent on the balance struck in the interaction among the relevant institutional actors. The line of Spanish mortgage cases that have recently made their way through the preliminary reference procedure, for instance, demonstrates how a reform of national procedural law was induced and shaped by the interaction between national judges and the CJEU. The story is well-known in European consumer law: since Spanish law did not provide judges with the possibility to stay mortgage enforcement proceedings while they were evaluating the fairness of standard terms imposed by the bank that had initiated the enforcement procedure, EU consumer protection remained without effect. This became especially important in the

22 E. CARRÈRE, *D'autres vies que la mienne* (Gallimard 2009).

23 Joined Cases C-240/98 to C-244/98, *Océano Grupo Editorial SA v. Rocío Murciano Quintero*, CJEU 27 June 2000, ECLI:EU:C:2000:346.

24 Case C-473/00, *Cofidis v. Jean-Louis Fredout*, CJEU 21 November 2002, ECLI:EU:C:2002:705.

wake of the economic crisis of 2008, when the number of enforcement cases and evictions in Spain rose dramatically.²⁵ The by now famous CJEU judgment in the *Aziz* case brought about a reform of national procedural law, which integrated the assessment of standard terms in mortgage enforcement proceedings in order to better protect homeowners' rights in their contractual relations with the banks.²⁶ *Aziz* was followed by more cases, which each fine-tuned the procedural rules governing mortgages and, thus, contributed to safeguarding consumers' rights to fair contracts. The institutional framework provided by the preliminary reference procedure made it possible for the national civil courts to engage in a meaningful dialogue with the CJEU. Although this dialogue is often far from perfect, it does allow national judges in civil cases to assess cases in their broader legal and socio-economic context.²⁷

The influence of EU Directives in the field of private law has, thus, institutionally given national judges in civil cases a role as European judges by bringing EU law within the scope of their competence and responsibility (cf. Article 19 Treaty on European Union (TEU)). At the same time, it has offered them access to a new range of substantive arguments for resolving private legal disputes.

2.3. *Hybridization*

In the absence of the comprehensive framework of a European Civil Code, scholarship is still searching for a conceptual structure that can explain and contain the judicial development of European private law. The dialogue between the CJEU and national civil courts has been characterized as inducing hybridization, both on a systemic level and in regard to the outcomes of judicial reasoning.²⁸ Systemically, the field of European private law is composed of elements of EU law as well as national private laws. As a consequence, remedies developed through judicial interaction include elements of both European and national law.²⁹ *Cofidis* and *Aziz* illustrate the point. The remedies developed in these cases result from transnational judicial interaction and cannot be neatly categorized within either the framework of EU law or that of national private law. As such, they call for contemplation on the manner in

25 F. GÓMEZ POMAR & K. LYCZKOWSKA, 'Spanish Courts, the Court of Justice of the European Union, and Consumer Law. A Theoretical Model of their Interaction', *Indret* 2014(4), p (5).

26 Case C-415/11, *Mohamed Aziz v. Caixa d'Estalvis de Catalunya, Tarragona i Manresa (Catalunyacaixa)*, CJEU 14 March 2013, ECLI:EU:C:2013:164.

27 C. MAK, 'Gutiérrez Naranjo. On Limits in Law and Limits of Law', *European Law Review* 2018, pp 447-459.

28 For example in Hans Micklitz's project on European Regulatory Private Law, <https://blogs.eui.eu/erc-erpl/project-description/> (accessed 8 May 2020).

29 N. REICH, 'Horizontal Liability in EC Law: Hybridization of Remedies for Compensation in Case of Breaches of EC Rights', *Common Market Law Review* 2007, pp 705-742; 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.

which European private law handles existing categories. Furthermore, the crafting of such new remedies challenges ideas of both the ordering of European law and of private law. It raises the question to what extent the concept of ‘hybridization’ can account for civil courts’ place in today’s European private law.

Legal hybrids defy traditional conceptualizations in law, insofar as they do not fit within existing taxonomies. In that sense they may to some extent be compared to biological species that cannot be placed within a quasi-Linnaean ordering.³⁰ They contain elements of different categories, which can normally not be placed within the same conceptual box. What is more, they may refer to specific rights or remedies, but also to entire parts or branches of law.³¹ The field of European private law may be understood in this sense, since it is not (yet) systematized in the form of a Civil Code and rather encompasses a compound of EU and national provisions governing certain private legal relationships in Europe.

Legal hybrids do not necessarily remain hybrids. Often, with the passing of time they find a place in the conceptual orderings that they bridge. Once a hybrid remedy is formed in European private law, for instance, both EU law and national private law seek to accommodate it into their structures. At the European level, this is frequently done by the CJEU, which refers to its previous case law in order to build its argumentation on new questions. The *Aziz* judgment is, for example, quoted in a line of cases on mortgage and credit contracts.³² At the national level, legislatures will adapt laws, if necessary,³³ or national courts will integrate CJEU decisions into their reasoning.³⁴ Legal hybrids may, thus, find their place in both of the original categories and may in the course of time change the meaning or scope of these categories.

Hybrid approaches for which such accommodation is not completed are rare but important. In European private law, two examples catch the eye. One concerns the balancing of economic freedoms with fundamental rights, while the other relates to the principled question of what idea of justice underlies the field.

30 K. TUORI, ‘On Legal Hybrids and Perspectivism’, in M. Maduro, K. Tuori & S. Sankari (eds), *Transnational Law: Rethinking European Law and Legal Thinking* (Cambridge University Press 2014), p (14).

31 K. TUORI, in *Transnational Law: Rethinking European Law and Legal Thinking*, p (15).

32 Including Case C-169/14, *Juan Carlos Sánchez Morcillo & María del Carmen Abril García v. Banco Bilbao Vizcaya Argentaria SA (Sánchez Morcillo)*, CJEU 17 July 2014, ECLI:EU:C:2014:2099; Case C-34/13, *Monika Kušionová v. SMART Capital*, CJEU 10 September 2014, ECLI:EU:C:2014:2189; Case C-421/14, *Banco Primus v. Jesús Gutiérrez García*, CJEU 26 January 2017, ECLI:EU:C:2017:60.

33 Case C-415/11, *Mohamed Aziz v. Caixa d’Estalvis de Catalunya, Tarragona i Manresa (Catalunyacaixa)*, CJEU 14 March 2013, ECLI:EU:C:2013:164.

34 Hoge Raad *Heesakkers/Voets*, 13 September 2013, ECLI:NL:HR:2013:691, *NJ* 2014/274, integrating the case law on *ex officio* assessment of standard terms in Dutch law.

The first example is that of the CJEU's judgments in *Viking*³⁵ and *Laval*,³⁶ in which a direct horizontal effect of EU freedoms in labour law was recognized. In *Viking*, the CJEU famously extended the effect of the freedom of establishment to horizontal relationships, thus encompassing collective actions of labour unions that interfered with a ferry line's plans to reflag one of its ships to lower wage costs. In *Laval*, the Court brought Swedish trade unions' collective actions against a Latvian company that had posted workers in Sweden within the scope of the freedom to provide services. As the Court held, the unions' actions could restrict service providers from other Member States in their possibilities to freely offer their services in Sweden. The *Viking* and *Laval* judgments initiated a political and academic debate on the relationship between EU economic freedoms and national fundamental rights, which has not yet come to an end.³⁷ In particular, objections have been raised against the subjection of fundamental rights protection to restrictions imposed on the basis of EU freedoms.³⁸ Strong national protection of the right to strike and take collective action loses its force in transnational labour relationships, in which businesses' rights to free establishment and free provision of services under EU law may overrule it. The continuing resistance against this line of CJEU case law results in the perpetuation of a hybrid situation. The regime for collective actions that are governed by EU law is not fully accepted and is not likely to be accommodated in the European private legal order soon.

The second example concerns a number of 'general principles of civil law' that were recognized by the CJEU in the time period between 2007 and 2010. In its judgments in *Société thermale d'Eugenie-les-Bains*,³⁹ *Hamilton*,⁴⁰ *Messner*⁴¹ and *E. Friz*,⁴² the Court acknowledged respectively the binding nature of the contract, the full performance of the contract, good faith and unjust enrichment, and a fair division of

35 Case C-438/05 *International Transport Workers' Federation and Finnish Seamen Union v. Viking Line*, ECLI:EU:C:2007:772 (2007) ECR I-10779.

36 Case C-341/05 *Laval un Partneri v. Svenska Byggnadsarbetetareförbundet and others*, ECLI:EU:C:2007:809 (1997) ECR I-11767.

37 For an overview, see M. R. FREEDLAND & J. PRASSL (eds), *Viking, Laval and Beyond* (Oxford: Hart publishing 2016).

38 See the unsuccessful '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 final. This proposal was withdrawn after Member States' objections in a 'yellow card' procedure, <http://www.ipex.eu/IPEXL-WEB/dossier/document/COM20120130.do> (accessed 8 May 2020).

39 Case C-277/05 *Société thermale d'Eugenie-les-Bains v. Ministère de l'Économie des Finances et de l'Industrie*, CJEU 8 July 2007, ECLI:EU:C:2007:440 (2007) ECR I-6415, para. 24.

40 Case C-412/06 *Annelore Hamilton v. Volksbank Filder*, CJEU 10 April 2008, ECLI:EU:C:2008:215 (2008) ECR I-2383, para. 42.

41 Case C-489/07 *Messner v. Firma Stefan Krüger*, CJEU 3 September 2009, ECLI:EU:C:2009:502 (2009) ECR I-7315, para. 29.

42 Case C-215/08 *E. Friz GmbH v. Carsten von der Heyden*, CJEU 15 April 2010, ECLI:EU:C:2010:186 (2010) ECR I-2947, para. 48.

risks among parties in a real property fund, as forming part of EU law, ‘in accordance with the principles of civil law’. Some of these principles had a basis in national laws (‘good faith’, ‘unjust enrichment’), others were new (‘full performance of the contract’). While legal scholarship has sought to understand the meaning of these principles,⁴³ the Court has no longer relied on them in later case law.⁴⁴ The place of ‘principles of civil law’ in the European private legal order, therefore, remains uncertain.

These two examples of imperfect accommodation elucidate the process of hybridization of private law in at least three manners. In the first place, they underscore the manner in which the CJEU’s active role in certain areas and certain periods of time affects national systems of private law.⁴⁵ Given the distribution of judicial tasks among the national courts and the CJEU that is prescribed by the EU Treaties, the European judicial system will institutionally always be of a hybrid nature. The interaction of courts with the Luxembourg Court in the preliminary reference procedure determines which topics are addressed in this hybrid structure and who has the last word – the national court or the CJEU. In the second place, the two examples make clear that legal hybrids can only be accommodated in the European and national systems insofar as their underlying principles and values can be aligned with the respective systems. To the extent that the EU’s economic orientation deviates too much from national socio-economic agenda’s, as in *Viking* and *Laval*, hybrid rules and remedies will not merge into existing systems and European private law will comprise two regimes for similar cases – a national approach and a European one.⁴⁶ In the third place, the examples show that a consensus on shared principles underlying EU law and national private laws has not yet been found, or in any case has not been fully articulated. The CJEU’s short-lived reliance on ‘general principles of civil law’, and the criticism on this approach,⁴⁷ affirm that a shared political identity can hardly be

43 S. WEATHERILL, ‘The “principles of civil law” as a basis for Interpreting the Legislative *Acquis*’, *European Review of Contract Law* 2010, pp 74–85; K. PURNHAGEN, ‘Principles of European Private or Civil Law?’, *European Law Journal* 2012, pp 844–867; C. MAK, ‘Hedgehogs in Luxembourg? A Dworkinian Reading of the CJEU’s Case Law on Principles of Private Law and Some Doubts of the Fox’, *ERPL (European Review of Private Law)* 2012, pp 323–346; M. W. HESSELINK, ‘Private Law Principles, Pluralism and Perfectionism’, 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 21–43; A. S. HARTKAMP, ‘The General Principles of EU Law and Private Law’, *RabelsZ* 2010, pp 241–259.

44 It referred to *E. Friz* and *Hamilton* in one case, but this did not affect the outcome; see Case C-174/12 *Alfred Hirman v. Immofinanz AG*, CJEU 19 December 2013, ECLI:EU:C:2013:856, para. 56–63. I would like to thank Inbar Ozer, who wrote his Master thesis at the University of Amsterdam under my supervision, for bringing this case to my attention.

45 K. ALTER, *The European Court’s Political Power* (Oxford: Oxford University Press 2009); O. GERSTENBERG, *Euroconstitutionalism and its Discontents* (Oxford: Oxford University Press 2018).

46 C. MAK, ‘The One and the Many. Translating Insights from Constitutional Pluralism to European Contract Law Theory’, *ERPL (European Review of Private Law)* 2013, pp 1189–1210.

47 For example, S. WEATHERILL, *European Review of Contract Law* 2010, pp 74–85.

found by the top-down imposition of general norms. European private law remains characterized by pluralism and diversity – national ideals of autonomy and social justice are complemented by the EU’s separate notion of justice.⁴⁸

In this light, the role of civil courts in a European private law composed of hybrid concepts and institutional structures can be thought of as comprising at least three strands, corresponding to the hybrid dimensions of the field. Firstly, in the preliminary reference procedure a national civil court has a guiding role insofar as it decides on the questions to be referred to the CJEU. At the same time, it has to adhere to CJEU’s decisions that affect the interpretation and application of EU rules in the field of private law. Civil courts, thus, directly and indirectly engage with the European judicial order, comprising the CJEU as well as civil courts in other EU Member States. Secondly, national civil courts may have to determine how to handle irreconcilable rules and principles of EU law and national regimes in case the legislature does not step in, as in *Viking* and *Laval*. They will have to fit in EU concepts and rules into their national systems.⁴⁹ Thirdly, civil courts find themselves on the fault lines of EU law’s and national private law’s underlying ideas of justice. They may not be able or be in the position to conclusively resolve tensions between conflicting ideals of justice, as this would require legislative intervention. Still, their dialogue with the CJEU and – indirectly – with civil courts in other Member States may be considered to open up spaces for deliberation on the legal-political questions underlying specific cases.⁵⁰

Analytically, in sum, the concept of ‘hybridization’ clarifies certain dynamics in the work of national civil courts in Europe. It explains how civil courts relate to the CJEU and to their counterparts in other EU countries. It also makes clear why some EU rules or remedies are more easily accommodated in national private law reasoning than others. What the concept of ‘hybridization’ does not do, however, is indicate in which types of cases civil courts may be expected to seek the dialogue with the CJEU⁵¹ and how they should coordinate conflicting rules and principles of EU law and national private law. It leaves opaque the nature of the transnational deliberative sphere that encompasses the dialogue among national civil courts and the Luxembourg Court. It, furthermore, does as such not say anything about the purpose of judicial interaction or the specific tasks that judges in civil cases fulfil on the interface of the European and

48 H-W. MICKLITZ, *The Politics of Justice in European Private Law. Social Justice, Access Justice, Societal Justice* (Cambridge: Cambridge University Press 2018); C. MAK, *ERPL* 2013, pp 1199–1204.

49 For example the Dutch Supreme Court’s judgment in *Heesakkers/Voets*; Hoge Raad 13 September 2013, ECLI:NL:HR:2013:691, *NJ* 2014/274.

50 This will be further elaborated in s. 3.

51 That is, on other (substantive) grounds than the procedural rules that determine when a court is obliged to refer to the CJEU.

national legal order. In short, while ‘hybridization’ elucidates the dynamic interaction of courts, it does not provide much normative insights into the role of civil courts in Europe.

3. Civil Courts as European Courts

3.1. *Civil Courts and the European Constitutional Question*

What *should* the role of civil courts be in the hybrid space⁵² of European private law? The contemplation of answers to this question inevitably leads beyond the confines of private law narrowly understood as a set of rules and principles that address relations between private actors, in which courts are the arbitrators who decide on the interpretation and application of these norms. Private law in general does not exist in a political vacuum, but is linked to the political community that it governs. The pride that most civil law systems take in their Civil Codes, moreover, attests of a foundational place of these texts in the imagined communities of nation-States.⁵³ National civil courts safeguard the private legal orders constituted by such foundational documents or, in common law countries, by a body of case law. In a hybrid structure of European private law, composed of suborders of national private law and a transnational EU private law, civil courts, thus, have become interpreters and keepers of three legal orders that are distinct as well as partly overlapping and interwoven: the national private legal order in which a civil court is embedded, the EU private legal order which needs national courts for its effective enforcement, and the compound European private legal order characterized by hybridization of national and EU elements. It is particularly this latter sphere that concerns us here, in light of civil courts’ current positioning in a hybrid European private law. What should be the courts’ role?

The nature of this question to some extent is constitutional, as it relates to the manner in which best to conceive of the EU as a political community, or polity.⁵⁴ What kind of polity is the EU and how does private law adjudication affect its formation and functioning? How can a shared political identity be found that supports a European private law beyond national borders? And what is the role of courts in this process? In response to these questions, in earlier work I have submitted that European private law needs to be ‘constitutionalized’ to some extent

52 P. SCHIFF BERMAN, *Global Legal Pluralism* (Cambridge: Cambridge University Press 2012), p (44); V. MAK, ‘Globalization, Private Law and New Legal Pluralism’, Jean Monnet Working Paper Series No. 14/15, NYU Jean Monnet Centre, pp 24–26.

53 G. COMPARATO, *Nationalism and Private Law in Europe* (Oxford: Hart Publishing 2014), pp 249–254; E. GELLNER, *Nations and Nationalism* (Oxford: Blackwell Publishing 1983), p (1); J. LEERSSEN, *National Thought in Europe. A Cultural History* (Amsterdam: Amsterdam University Press 2006); B. ANDERSON, *Imagined Communities. Reflections on the Origin and Spread of Nationalism*, rev. edition (London: Verso 2006).

54 M. A. WILKINSON, *The Modern Law Review* 2013, pp 191–192.

to overcome nationalist tendencies and create a true European political community.⁵⁵ Avoiding the constitutional question by conceptualizing the European legal order as radically pluralist⁵⁶ does not give any normative guidance on the judicial coordination of legal questions among national systems of private law and the EU legal order. Instead, it is necessary to engage with the basic premises of nationalism, which suppose a unity of the nation, political community and private legal order.⁵⁷

A loosening of the link between private law and national political communities can from this perspective be achieved in at least two ways. In the first place, European private law could be conceptualized from a comprehensive Euro-nationalist view. Private law would have a basis in a European polity that would correspond to a true ‘European community’, an imagined community of Europeans sharing a political identity.⁵⁸ In the second place, then, cosmopolitan strands in private law could be pursued, which let go of the conflation of nation and polity and, accordingly, transcend both the idea of the nation-State and that of a Euro-nation.⁵⁹ Constitutional meta-principles would be needed to guide the application of such a non-nationalist type of private law in the hybrid sphere of European private law.

At this moment there does not appear to be a shared political identity or true ‘European community’ in the sense envisaged by Europeanist versions of private law.⁶⁰ Given the lack of political support for a comprehensive codification in the form of a European Civil Code, the Euro-nationalist option currently seems further away than ever.

The cosmopolitan route seems to be more in line with some on-going developments in European law. One may especially think of the growing impact in private law of cosmopolitan ideals expressed in fundamental rights, including the EUCFR. Private legal questions in CJEU cases are more and more often framed as fundamental rights issues or influenced by fundamental rights discourse. In the aforementioned Spanish mortgage cases, for instance, reference has been made to Article 47 EUCFR in order to guarantee effective judicial protection of consumer rights,⁶¹ as well as to the

55 C. MAK, ‘Europe-Building Through Private Law. Lessons from Constitutional Theory’, *European Review of Contract Law* 2012, p 335, at 340.

56 N. KRISCH, *Beyond Constitutionalism. The Pluralist Structure of Postnational Law* (Oxford: Oxford University Press 2010).

57 C. MAK, *European Review of Contract Law* 2012, p (330).

58 G. COMPARATO, *Nationalism and Private Law in Europe*, p (251).

59 H. COLLINS, ‘Cosmopolitanism and Transnational Private Law’, *European Review of Contract Law* 2012, p 314; C. MAK, *European Review of Contract Law* 2012, p (340).

60 M. W. HESSELINK, ‘How Many System of Private Law are there in Europe?’, in L. Niglia (ed.), *Pluralism and European Private Law* (Oxford: Hart Publishing 2013), pp 199–247. See also s. 2.1 supra.

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’, *Journal of European Consumer and Market Law* 2017, pp 190–198.

importance of protection of the home.⁶² In cases on intermediary liability for copyright infringements, to name another example, the CJEU requires national systems to strike a fair balance among the fundamental rights of the affected actors: copyright holders' right to protection of intellectual property (Article 17 EUCFR), users' rights to protection of privacy and personal data (Articles 7 and 8 EUCFR), and internet providers' freedom to conduct a business (Article 16 EUCFR).⁶³ Fundamental rights introduce cosmopolitan ideals in private legal reasoning, which go beyond nationally entrenched ideals of private law.⁶⁴

Civil courts are key actors in this respect, insofar as the influence of fundamental rights in European private legal matters is mostly felt in case law. While legislatures take into account fundamental rights when drafting new rules, they often do not explicitly mention these rights in the final wording of these rules. Judges who address fundamental rights in civil cases, however, are inclined to more elaborately consider the legal-political background to the relevant rules and the legal-political stakes in the cases at hand.⁶⁵ They thus weave cosmopolitan strands into their private legal reasoning and overcome nationalist tendencies.⁶⁶ Still, as we have seen in relation to the CJEU's hesitant recognition of shared principles in private law, these cosmopolitan strands have not (yet) resulted in a clear pattern or seamless web⁶⁷ of European private law that national judges can consistently interpret and apply. The role of civil courts in Europe, as such, relates to the simultaneously on-going constitutional discourse on the conceptualization of a coherent European legal order.

3.2. *Reflexive Constitutionalism*

Although the project on a constitutional treaty remained without success, it is by no means said that the EU's legal order lacks a constitutional basis. The debate on European constitutionalism encompasses theories on the authority of constitutional law,⁶⁸ analyses of the pluralist nature of the European legal order,⁶⁹ and legal-cultural

62 I. DOMURATH, *Consumer Vulnerability and Welfare in Mortgage Contracts* (Oxford: Hart Publishing 2017). See also J. HOHMANN, *The Right to Housing. Law, Concepts, Possibilities* (Oxford: Hart Publishing 2014).

63 C. ANGELOPOULOS, *European Intermediary Liability in Copyright: A Tort-Based Analysis* (Alphen a/d Rijn: Kluwer 2017).

64 H. COLLINS, *European Review of Contract Law* 2012, pp 315-316.

65 C. MAK, *Fundamental Rights in European Contract Law* (Alphen a/d Rijn: Kluwer Law International 2008), p (294).

66 Compare H. COLLINS, *European Review of Contract Law* 2012, pp 311-325.

67 Compare R. DWORKIN, *Taking Rights Seriously* (London: Duckworth 1977), pp 115-117.

68 A. SOMEK, *The Cosmopolitan Constitution* (Oxford: Oxford University Press, 2014).

69 N. WALKER, 'The Idea of Constitutional Pluralism', *Modern Law Review* 2002, pp 317-359; M. POIARES MADURO, 'Contrapunctual Law: Europe's Constitutional Pluralism in Action', in N. Walker (ed.), *Sovereignty in Action* (Oxford: Hart Publishing 2003), pp 501-537; M. KUMM, 'Who is the Final Arbiter of Constitutionality in Europe? Three Conceptions of the Relationship between the

explorations of the many constitutions of Europe.⁷⁰ In much of this work, analytical and normative models are not clearly distinguished. It is, for instance, still contested to what extent theories of constitutional pluralism offer more than a descriptive model for the European legal order. Our investigation of what should be the role of civil courts in a European private legal order can be placed within this discussion on *what kind of constitution* is emerging in Europe. Since we are looking for guidance on this matter, models of constitutional ordering may draw the analytical and normative boundaries within which it can be assessed what is expected from civil courts.

It is submitted here that the hybrid nature of today's European private law corresponds to a *dynamic* rather than a static notion of Europe's constitutional order. The analysis of processes of hybridization in European private law in section 2 has underscored the complex and dynamic nature of the interaction of national civil courts with the CJEU. Taking inspiration from constitutional theory on this point, in particular the work of Martin Loughlin and Michael Wilkinson, it is submitted here that static accounts of constitutional ordering cannot fully capture the courts' role. A dynamic idea of 'reflexive constitutionalism' arguably provides a better fit for private law adjudication.^{71,72}

A traditional, foundational view on modern constitutionalism may serve as a starting point for defining the place of civil courts in the EU's legal order. In this view, modern constitutions can be seen as 'contracts drawn up by "the people" to establish and limit the powers of governing institutions'.⁷³ This contractual view on constitutionalism has increasingly been problematized in light of foundational questions. The contractual claim overlooks the paradoxical premise that a constitutional framework is needed to identify 'the people' who by contract authorize the constitution.⁷⁴ With regard to the European Union, the problematic dimension of

German Federal Constitutional Court and the European Court of Justice', *Common Market Law Review* 1999, pp 351-386; N. KRISCH, *Beyond Constitutionalism: The Pluralist Structure of Postnational Law*; M. AVBELJ & J. KOMÁREK (eds), *Constitutional Pluralism in the European Union and Beyond* (Oxford: Hart Publishing 2012).

70 K. TUORI, 'Transnational Law: On Legal Hybrids and Perspectivism', in M. Maduro, K. Tuori & S. Sankari (eds), *Transnational Law. Rethinking European Law and Legal Thinking* (Cambridge: Cambridge University Press 2014), pp 11-57; K. TUORI, *European Constitutionalism* (Cambridge: Cambridge University Press 2015).

71 M. LOUGHLIN, *Foundations of Public Law* (Oxford: Oxford University Press 2010), Ch. 10, 'The Constitutional Contract'; M. A. WILKINSON, *The Modern Law Review* 2013.

72 Here, I prefer referring to Loughlin's 'reflexive constitutionalism' rather than Wilkinson's term 'political constitutionalism' in order to avoid confusion with other constitutional theories, in particular Richard Bellamy's work; R. BELLAMY, *Political Constitutionalism* (Cambridge: Cambridge University Press 2007). Substantively, the reference is to both Loughlin's and Wilkinson's elaboration of a dynamic theory of constitutionalism for the EU legal order as an inspiration for the European private law debate.

73 M. LOUGHLIN, *Foundations of Public Law*, pp 278-282.

74 M. LOUGHLIN, *Foundations of Public Law*, p 310.

this foundational approach is even more pronounced, given the difficulty of finding one ‘European people’ to support a constitution. In light of this ‘no demos thesis’,⁷⁵ it is difficult to conceive of the European legal order in terms of foundational constitutionalism. What is more, one may even wonder to what extent this theoretical model, which has a basis in national systems, fits the European project and the EU’s inherent basis in a plurality of peoples.

In contrast to a foundational approach, which depends on a people’s shared identity, a freestanding approach emerges. In this second approach, a constitutional identity based in ideas of political morality defines constitutional authority.⁷⁶ This freestanding approach would find its basis in, or in any case be in alignment with, political-philosophical views on moral-legal values or principles that constitute societies.⁷⁷ In this view, such universal moral-legal strands in EU law and national constitutional law delineate a domain of ‘cosmopolitan constitutionalism’ that transcends national borders.⁷⁸ This freestanding view, however, is challenged in legal practice insofar as EU institutions, in particular the CJEU, demarcate borderlines between the EU and international legal orders⁷⁹ and EU and national borders.⁸⁰ A claim for cosmopolitan constitutionalism can, therefore, not clearly be discerned in today’s European (private) legal order.⁸¹ Furthermore, from a theoretical perspective, again it may be asked what a common European moral-legal vision would look like, insofar as European cooperation has a strong basis in respect for differences and is, thus, ‘united in diversity’.

A third approach, the reflexive constitutionalism proposed by Wilkinson,⁸² seeks to overcome the problems related to static conceptions of the European legal order. Its emphasis lies on a dynamic process of polity formation. This constitutional approach underlines the fragmented and pluralistic nature of the polity. It

75 M. A. WILKINSON, *The Modern Law Review* 2013, pp 196–200. See also J. H. H. WEILER, *The Constitution of Europe*, p 297.

76 M. A. WILKINSON, *The Modern Law Review*, p 200.

77 For example J. RAWLS, *A Theory of Justice* (Cambridge, Massachusetts: Harvard University Press 1971). For an elaboration of the meaning of this theory in European Contract Law, see J. G. KLIJNSMA, *Contract Law as Fairness. A Rawlsian Perspective on the Protection of SMEs in European Contract Law* (PhD thesis University of Amsterdam 2014), <http://hdl.handle.net/11245/1.418290> (accessed 8 May 2020).

78 M. A. WILKINSON, *The Modern Law Review*, p 202.

79 For example in the CJEU’s *Kadi* judgment; Joined Cases C-402/05 P and 415/05 P, *Yassin Abdullah Kadi and Al Barakaat International Foundations v. Council and Commission*, ECLI:EU:C:2008:461 (2008) ECR I-6351; C. ECKES, *EU Counter-Terrorist Policies and Fundamental Rights. The Case of Individual Sanctions* (Oxford: Oxford University Press 2009), Ch. 5.

80 For example in cases concerning the interpretation of open norms in private law, such as Case C-237/02, CJEU 1 April 2004, *Freiburger Kommunalbauten GmbH Baugesellschaft & Co KG v. Hofstetter*, ECLI:EU:C:2004:209.

81 M. A. WILKINSON, *The Modern Law Review* 2013, p 206. For similar concerns in European private law, see COLLINS, *European Review of Contract Law* 2012.

82 M. A. WILKINSON, *The Modern Law Review* 2013, p 207.

situates the European constitution within the frame of a *droit politique* or ‘political right’, in which the dynamic between the constitutional text and its context is key.⁸³ Rather than focussing on the relatively static concept of ‘the people’, emphasis shifts to the concept of the ‘public sphere’. A context for reflexivity on the regulation of the political sphere is found in a public sphere that is constituted in the interaction of competing constitutional claims. This public sphere is not demarcated by a demos or by an agreement on moral principle, but results from the practice and discourse of political right. As such, it opens up a space for deliberation⁸⁴ that is both post-nationalist or trans-nationalist⁸⁵ and yet not fully cosmopolitan.⁸⁶ European constitutionalism, in this view, is characterized by a process of dynamic polity-building.

3.3. *Reimagining Europe*

Connecting the lines of analysis, it is submitted here that a framework of reflexive constitutionalism can, to some extent, explain and guide judicial interaction in a hybrid European private law. In particular, reflexive constitutionalism shares two features with the hybrid conceptualization of European private law: an approach characterized by reflexivity, and a strong reliance on the public sphere. While these two features each come with their own conceptual strengths and weaknesses, they do offer a normative potential that ‘hybridization’ as such is lacking. The framework of reflexive constitutionalism acknowledges a role for the judiciary in European private law in maintaining a European public sphere that accommodates reflexive processes on legal-political questions of private law.

Reflexive constitutionalism ‘fits’ the idea of hybridization of European private law⁸⁷ insofar as it allows space for pluralism and dialogue. In the first place, the interaction between national courts in civil cases and the CJEU in the preliminary reference procedure contributes to the maintenance of a European public sphere. This goes beyond the institutional dimension. Given the courts’ influence on the choice and formulation of questions, judges actively contribute to the shaping of this public sphere and the representation of a plurality of views. In the second place, this constitutional framework allows for the possibility that some hybrids are not immediately or completely accommodated in legal ordering,

83 M. LOUGHLIN, *Foundations of Public Law*, p 311; M. A. WILKINSON, *The Modern Law Review* 2013, pp 207-209.

84 Inspired by Jürgen Habermas’ theory of deliberative democracy; J. HABERMAS, *Between Facts and Norms* (Cambridge: Polity Press 1996), in particular Ch. 8. I hope to further elaborate a view on the role of courts in maintaining deliberative spaces in a monograph within the ‘Judges in Utopia’ project.

85 Compare s. 3.1 *supra*.

86 M. A. WILKINSON, *The Modern Law Review* 2013, p 210.

87 Section 2.3 above, in particular the ways in which hybridization characterizes the judicial task.

as in the *Viking* and *Laval* cases. Since polity formation is an on-going process, in which the constitution provides a frame as well as opportunities for change, temporary hybrids are part of the process rather than anomalies. In the third place, judicial interaction makes explicit underlying legal-political claims in private legal cases. In the *Aziz* case, for instance, the judicial dialogue among the Spanish courts and the CJEU brought to the fore questions on the extent to which homeowners should be protected against banks in mortgage contracts. In cases on intermediary liability for copyright infringement, furthermore, the parameters were set for a ‘fair balance’ of rights of users, right holders and intermediaries. In both examples, moreover, new questions arose which highlighted justice deficits⁸⁸ in the current legal framework and, accordingly, led to new preliminary references.

This conceptualization of judicial dialogue in European private law requires further elaboration. It raises questions as to the nature of the public sphere that reflexive constitutionalism gives such an important place. Wilkinson defines it as ‘a space in which we appear to one another not merely as an aggregated heap of isolated individuals but potentially as coauthors of our laws’.⁸⁹ While this definition resonates with reconstructive Habermasian conceptualizations of law-making, it as such brings in critical theories of the public sphere.⁹⁰ As Fraser has submitted, processes of hybridization require a debate on the legitimacy and efficacy of public opinion beyond the nation-State.⁹¹ Who are included in the debate and how are their views taken into account? How can public opinion effectively influence law-making on the interface of national legal orders and the EU?⁹²

On the basis of this exploration, nevertheless, it may be said that reflexive (political) constitutionalism may not only explain but also justify the role of civil courts in the European legal order. From a normative point of view, the following hypothesis emerges: Civil courts’ contribution is needed for maintaining the public sphere that accommodates reflexive processes in the European legal order. The judicial dialogue between national civil courts and the CJEU allows for contextualized debates on private legal texts.⁹³ To the extent that Europe’s constitutional settlement is unfinished, and private law contributes to constitutionalization of the European legal order, civil courts may perform the role of constitutional courts in the European polity. Their contribution to the maintenance of a European public sphere in which reflexive processes take place turns them into European

88 D. KOCHENOV, G. DE BÚRCA & A. WILLIAMS (eds), *Europe’s Justice Deficit* (Oxford: Hart Publishing 2015).

89 M. A. WILKINSON, *The Modern Law Review* 2013, p (209).

90 J. HABERMAS, *Between Facts and Norms* 1996, pp 371-372.

91 N. FRASER, ‘Transnationalizing the Public Sphere. On the Legitimacy and Efficacy of Public Opinion in a Post-Westphalian World’, *Theory, Culture and Society* 2007, pp 15 and 23-24.

92 It goes beyond the scope of this paper to further elaborate answers to these questions. I hope to further develop the ideas presented here in future research.

93 Compare M. LOUGHLIN, *The Modern Law Review* 2015, p (15).

constitutional actors. This is of particular importance given the lack of engagement of some national highest courts with the CJEU. By maintaining the space for transnational dialogue, national civil courts become European constitutional courts.

4. Judging Towards Utopia

‘Hybridization’ and ‘constitutionalization’ offer two complementary frames for understanding the role of civil courts after the ‘failed’ project of a European Civil Code. In this article, it was submitted that the position of civil courts in the European legal order can be understood more profoundly in light of constitutional theory. What is more, the courts’ task *should* be considered in this light, since it touches upon the constitutional question of what the European legal order is about. The analysis has shown how civil courts’ hybrid functioning in European private law may find a partial justification in ideas on the constitutional nature of the European legal order, in particular a dynamic conception of ‘reflexive constitutionalism’. The contribution of civil courts is needed for maintaining the public sphere that accommodates reflexive processes in the European legal order.

From this normative point of view, national civil courts may to some extent become European constitutional courts. Their interaction with the CJEU can contribute to polity formation in the EU, as judicial dialogue in civil cases allows for space to reimagine Europe. On the one hand, judicial interaction and the broader academic and public debate on high-profile cases highlight the extent to which the European constitution still falls short of reaching ideals of political integration. On the other hand, different legal scenarios and solutions may be discussed in the interaction among national civil courts and the CJEU. Shared legal-political views on handling certain types of cases may be elaborated. Judges in the civil courts of EU Member States, thus, help maintain the reflexive process of imagining a European legal order between our current place and an aspired Utopia.