Edited by

HANS-W. MICKLITZ

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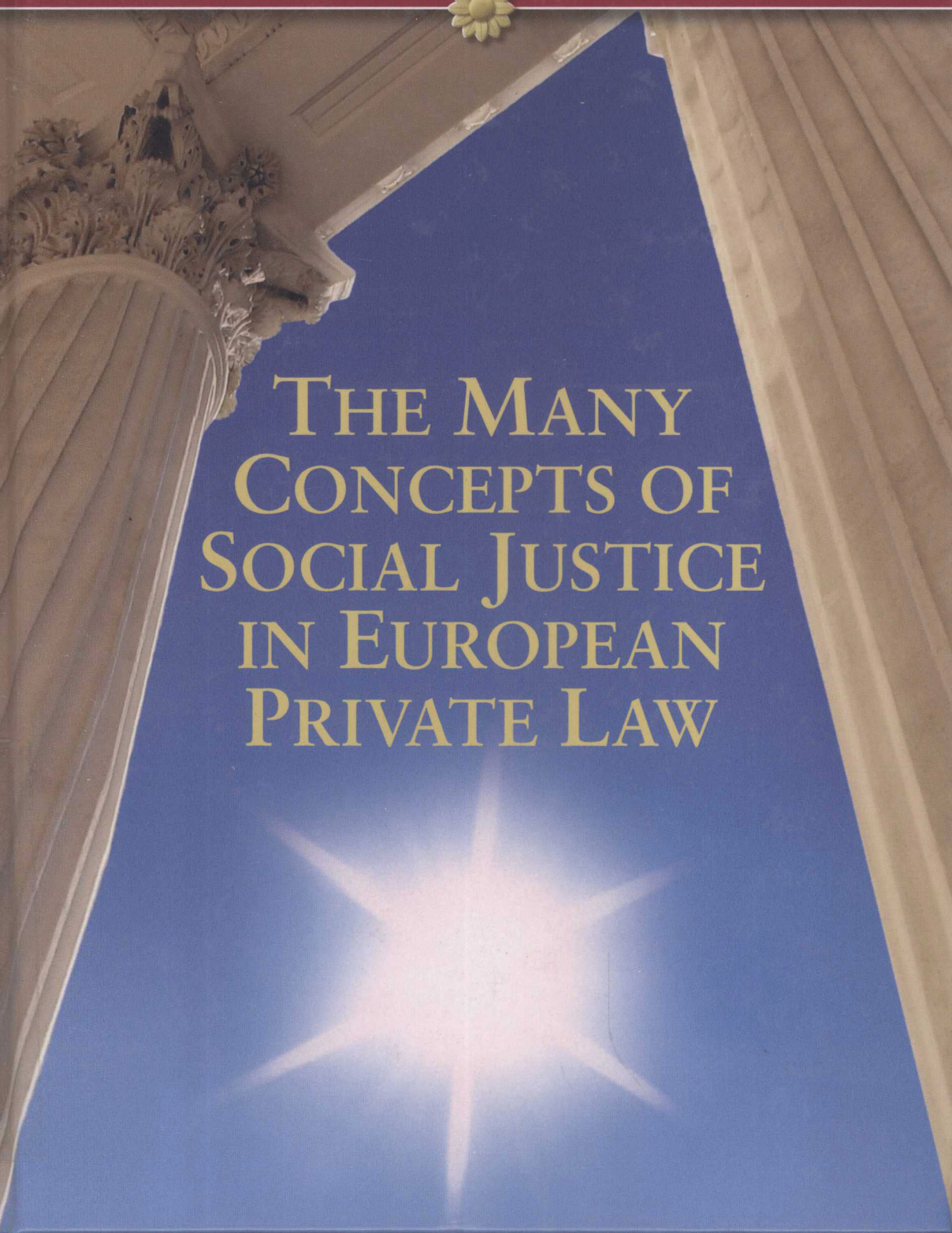

THE MANY CONCEPTS OF SOCIAL JUSTICE IN EUROPEAN PRIVATE LAW

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Edited by

Hans-W. Micklitz

European University Institute, Italy

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Contributors

Christine Chwaszcza
Professor of Social and Political Philosophy, University of Cologne

Hugh Collins
Professor of English Law, London School of Economics

K.J. Cseres
Associate Professor, Amsterdam Centre for European Law and Governance, Amsterdam Center for Law & Economics, University of Amsterdam

Arthur Dyevre
Senior Research Fellow, Centro de Estudios Politicos y Constitucionales (CEPC), Madrid

Pia Letto-Vanamo
Professor, University of Helsinki

Ugo Mattei
Professor, Hastings College of Law, University of California, and University of Turin

Hans-W. Micklitz
Professor of Economic Law, European University Institute, Florence

Marie-Ange Moreau
Professor of Labour Law, European University Institute, Florence

Ernst-Ulrich Petersmann
Professor of International and European Law, European University Institute, Florence

Hannes Rösler
Senior Research Fellow, Max Planck Institute for Comparative and International Private Law, Hamburg

Wojciech Sadurski
Professor in Law, University of Sydney

Bastian Schüller
Researcher, Dept. of Private Law, University of Oslo

Ruth Sefton-Green
Maître de conférences, Ecole de droit de la Sorbonne (Université Paris 1-Panthéon-Sorbonne) UMR de droit comparé de Paris

Alessandro Somma
Professor of Comparative Law, University of Ferrara

Cornelius Torp
Marie-Curie Fellow, European University Institute, Florence

Chris Willett
Professor in Law, De Montfort University, Leicester

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The Many Concepts of Social Justice in European Private Law

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PART I

Introduction – social justice and access justice in private law

1. Introduction

Hans-W. Micklitz[1]

1 HOW THE ARGUMENT GOES

During the 20th century, the Member States of the European Union developed their own models of social justice in private law. Each model is inherently linked to national culture and tradition. However, all models have a common thread, which is the use of the law by the (social welfare) state as a means to protect the weaker party against the stronger party, the employee against the employer, the tenant against the landlord and the consumer against the supplier. Therefore, social justice is bound to the idea of the redistribution of wealth from the richer to the poorer part of the society, individually and collectively. That is where the idea of the social welfare state is located.[2]

The integration of social justice into private law and the rise of the welfare state were made possible by way of the grand transformation process that shook Europe between the 17th and 19th centuries and that freed private law from feudal and corporative (*ständische*) barriers.[3] This transformation process is very much bound to the specificities of any given particular country, its economic and social conditions and also timing. Social justice itself is a product of the late 19th /early 20th century, a result of the socialist labour movement. Member States responded to this new challenge in various ways, mostly by transforming their private law systems through the '*protective*' welfare state in the late 19th/early 20th century. The second wave of social justice began after the Second World War with the rise of the consumer society. Again Member States' private law systems were confronted with the call

[1] I would like to thank R. Sefton-Green, H. Muir Watt, N. Reich, T. Roethe, C. Torp and K. Purnhagen for extremely helpful comments and B. Schüller not only for his support in my research but also for interesting discussions over a couple of months. The responsibility for all errors and misconceptions, however, remains mine.

[2] I do not want to claim that social justice can be equated with the social welfare state. In fact, it is necessary to distinguish between the protective welfare state of the late 19th century and the regulatory welfare state which emerged in the second half of the 20th century. I would like to thank C. Torp for this clarification.

[3] See Wieacker, F. (1967), *Privatrechtsgeschichte der Neuzeit,* 2nd edn, Göttingen: Vandenhoeck.

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for social justice. This time the response came from the '*regulatory*' welfare state. Social justice in private law cannot be understood in isolation from its origins, first in labour and then in consumer law. Labour law became a subject of its own and emigrated from the private law system into a separate area of law. Its ideological flavour along with its conceptual ideas did not abstain from touching the growing consumer law field. For a complete understanding of the different patterns of social justice in national private law, therefore, we must look at both labour and consumer law.

The European Economic Community as construed in the 1950s was built on a clear separation of responsibilities between the EEC, which was to establish the Common Market, and the Member States, which were to engage in social matters. However, the construction of the EEC changed considerably over time. Since the adoption of the Single European Act (SEA) in 1986, the European Union has assumed a social outlook, which has gradually developed over time, eventually taking shape in the Lisbon Treaty and the Charter of Fundamental Rights. There is even an ongoing discussion on an existing or emerging European social model.[4] What matters in our context are the particularities under which social issues found their way into the European Union.

Member States had developed their national labour laws long before the European Union turned into a political, economic and social actor. Therefore, right from the beginning, European interest in gaining competence in social matters clashed with the settled interests in the Member States, which tended to defend the already achieved status quo. The timid transfer of powers from the Member States to the European Union over the last 25 years is largely due to these tensions. Where the European Union succeeded in gaining competence, not least due to globalisation pressure, the matters were either genuinely European in that they concerned transborder issues or the competence transfer was – often – instrumentalised by the Member States on the basis of 'modernising'[5] their national welfare systems, which had become unaffordable.

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[4] See Rödl, F. (2011), 'The Labour Constitution', in A. von Bogdandy and Jürgen Bast, *Principles of European Constitutional Law*, 2nd edn, Oxford: Hart Publishing; Scharpf, F.W. (1991), *Crisis and Choice in European Social Democracy*, Ithaca, NY: Cornell University Press; Countouris, N. (2010), 'European Social Law as an Autonomous Legal Discipline', in P. Eeckhout and T. Tridimas (eds), *Yearbook of European Law 2009*, **28**, Oxford: Oxford University Press; Haar, B. and P. Copeland (2010), 'What are the Future Prospects for the European Social Model?', *European Law Journal*, **16** (3), 273–91.

[5] Eichengreen, B. (2007), *The European Economy since 1945: Co-ordinated Capitalism and Beyond,* Princeton: Princeton University Press, pp. 335–41; Weatherill, S. (2009), 'Competence and Legitimacy', in C. Barnard and O. Odusu, *The Outer Limits of European Union Law*, Oxford: Hart Publishing, p. 17, who stresses the potential of EU law to overcome nationalism and protectionism in Member States.

The situation in consumer law is different. Consumer law had not yet been settled in the Member States when the European Union assumed a leading role.[6] For this reason, consumer law is of particular interest for analysing the different concepts of justice, that is that followed by the Member States on the one hand and Europe on the other, which clashed already in the process of making and shaping consumer law. However, the European Union at the beginning of the debate introduced a third vein of development. Art. 119 EEC Treaty on equal pay of men and women, already enshrined in the Treaty of Rome, set the tone for the development of a European anti-discrimination law, which reaches far beyond existing national concepts of equal treatment, thereby steadily intruding into ever wider realms of labour and nowadays private law. This third domain has no precedence in the Member States' laws.

Since the adoption of the SEA, more particularly the White Paper on Completing the Internal Market,[7] the European Union has adopted a set of secondary law means which influence private law matters either directly (consumer, labour, anti-discrimination and business law directives) or indirectly (directives meant to liberalise markets, for example, telecommunication, postal services, energy (electricity and gas), transport, health care). This new regulatory private law is governed by a different philosophy, one which cannot be brought into line with the understanding of social justice as enshrined in labour movement and consumer movement and one which is challenging national models of social justice in private law.

I call the EU model of justice *access justice/Zugangsgerechtigkeit* (justice through access, *not* access to justice); that is, that it is for the European Union to grant access justice to those who are excluded from the market or to those who face difficulties in making use of the market freedoms. European private law rules have to make sure that the weaker parties have and maintain access to the market – and to the European society insofar as this exists. Access justice/*Zugangsgerechtigkeit* is not to be equated with social justice and the meaning it has developed over the 19th and 20th centuries in nation states.

The European model of justice does not exclude a co-existence with differing national models of social justice. Where the European Union claims ultimate responsibility, technically speaking via exclusive competence as realised through the maximum harmonisation doctrine, where market integration prevails over social regulation, social justice re-emerges – as it has always

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[6] Micklitz, H.-W. (2010), 'The Visible Hand of European Regulatory Private Law', in P. Eeckhout and T. Tridimas (eds), *Yearbook of European Law 2009*, **28**, 3–60.

[7] 'Completing the Internal Market', White Paper from the Commission to the European Council (Milan, 28–29 June 1985), COM (85) 310 final, 14 June 1985.

been since Roman times in the *ius aequum*[8] – in traditional fields of labour and consumer law via 'front-stage' regulation, in the new fields of anti-discrimination law and in the private law that governs the liberalisation policy of regulated markets (energy, telecommunication, postal services, transport) via 'back-stage' regulation.

The analysis is split into two parts – an investigation of the different models of social justice in a selected number of Member States in Section 2 followed by an analysis of the emerging European model of access justice in Section 3. Section 2 serves a hermeneutic purpose in order to demonstrate the European way in dealing with matters of social justice. I start from the premise that the different models of social justice in France, Germany and England can only be understood by identifying the respective socio-economic and political backgrounds. These considerations serve as a bridge and a starting point for contrasting my findings with the ongoing development of what is ambitiously called the European social model. I will reconstruct the evolving character of the European legal order which gave way to the rise of 'the social'. The unbalanced legal order – economics prevail over 'the social' – shaped the integration logic, facilitated the transformation of the national social welfare state and also yielded access justice but also led to the reappearance of 'social justice' in new forms. Section 4 is devoted to shaping access justice/ *Zugangsgerechtigkeit* and seeking a balance between the different national concepts of social justice and the European model on access justice/ *Zugangsgerechtigkeit*.

2 THE SOCIO-ECONOMIC AND POLITICAL BACKGROUND OF SOCIAL JUSTICE (IN PRIVATE LAW) IN FRANCE, GERMANY AND ENGLAND

An investigation into the socio-economic and political background of social justice in private law cannot be conducted without a look into the past. Following Berman,[9] the starting point of such an analysis should be the 11th/ 12th century, the conflict between the Catholic Church (the spiritual power) and the emperor (the temporal power) which culminated in the conflict between Pope Gregor VII and Emperor Henry IV over the independency of the church from temporal power. Berman argues that the separation of spiritual

[8] In the same direction, see Calliess, G.-P. and M. Renner (2009), 'Between Law and Social Norms: The Evolution of Global Governance', *Ratio Juris*, **22** (2), 260–80.

[9] Berman, 1991, p. 144 et seq.

and temporal power did not only initiate early state building, first of the church and then the emperor, but also the scholastic school of law.[10] The crusades requested by Gregor VII led *inter alia* to a much stronger exchange between the Western world and the Eastern world and paved the way for the reinvigoration of the old Greek and Roman philosophies. One might equally argue that the starting point of my undertaking should be the discovery of America and the growing conflicts between the Spanish and English empires. This would lead us to the 15th/16th century.

My approach however is more modest. In line with the emerging issue of social justice in the 19th century, I will limit my considerations to the last two centuries. My initial idea – perhaps due to the fact that I presented the first version of this chapter at a conference which took place in Paris in January 2007 – was to investigate the interlink between constitution building and codification. Whilst such a starting point offers hopefully interesting perspectives in comparing France and Germany, it falls short in taking the United Kingdom into account. If anything, a parallel may be drawn between the French Revolution of the late 18th century and German state building of the 19th century on the one hand and the Civil War and the conflict between the English Crown and Oliver Cromwell in the 17th century on the other. This is roughly the period I proceed to investigate in attempting to explain where the different patterns of justice derive from.

A look into the past will contribute to a deeper understanding of social justice in private law. I must therefore equally explain how I understand and use history. History as a science has long been dominated by social, cultural and economic history. In my context, such an approach would mean analysing the interplay of constitution building and codification in the common law and the continental legal system. The mainstream approach in history, however, has changed. Today, research focuses on the reconstruction on consciousness and mentality.[11] More and more, this is done in a comparative perspective, comparative history is therefore gaining ground.[12] This is also true with regard to legal theory. D. Kennedy[13] uses such an approach in his path-breaking

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[10] Berman, 1991, pp. 146 and 215.

[11] See Raulff, U. (ed.) (1987), *Mentalitätengeschichte: Zur historischen Rekonstruktion geistiger Prozesse*, Berlin; Schulze, H. (1985), 'Mentalitätsgeschichte – Chancen und Risiken eines Paradigmas der französischen Geschichtswissenschaft', *Geschichte in Wissenschaft und Unterricht*, **36**, 247–70.

[12] Since 1993, there exists a particular review which is devoted to this task: *European Review of History*.

[13] Kennedy, D. (2003), 'Two Globalizations of Law & Legal Thought: 1850-1968', *Suffolk University Law Review*, **36** (3), 631–79; Kennedy, D. (2006), 'Three Globalizations of Law and Legal Thought: 1850–2000', in D. Kennedy, *The New Law and Economic Development*, Cambridge: Cambridge University Press, p. 19.

analysis of the 'Two (or Three) Globalizations of Law and Legal Thought' in the last two centuries.

In taking a general approach, we can assume that the French Constitution and the French Civil Code are 200 years old, the German Constitution is that of 1871 and the Civil Code approximately 100 to 150 years old and that the English Bill of Rights and the development of the common law preceded the two.

2.1 The English Model – a Liberal and Pragmatic Design Fit for Commercial Use

On the surface, the challenge is that in English history there is no comparable event to the adoption of the Civil Code in France or in Germany. The Civil War took place in the 17th century and led to major changes in society and in the parliamentarian system. But, it yielded neither a constitution nor a coherent codified body of civil law; rather, it paved the way for the Bill of Rights in 1689. The French and the German legal systems, seen through the eyes of a common law lawyer (I dare to suggest that this is possible for me, a civil law lawyer), share a relatively homogenous view on the role and function of social justice in society. They are united in the idea of universal values that infiltrate legal principles and concepts. This is exactly where common law lawyers run into difficulties.

So the true difference between continental law and common law must be deeper and the reasons must date further back than the French Revolution. We have to identify the break-even point from which the continental legal and the common law system diverged in following different paths. I will tie my considerations to the clash between different philosophies, to the remaining influence of the *scholastic* in continental Europe and to its growing critique through *nominalism* in the UK. This was also around the time when the relative cultural unity of Europe broke into pieces.[14] I think it is *empiricism* which is responsible for the deep differences between continental and common law legal systems. Empiricism paved the way for utilitarianism – and here we have the key to understanding the English reservations against the realisation of social justice through law.

2.1.1 English pragmatism and two explanatory hypotheses

My view on the English legal system is stamped by empirical research that was undertaken some ten years ago on the management of emergency situations with regard to unsafe consumer goods.[15]

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[14] Berman, H.J. (1991), *Recht und Revolution: Die Bildung der westlichen Rechtstradition*, Frankfurt: Suhrkamp, p. 265.

[15] Micklitz, H.-W., T. Roethe and S. Weatherill (eds) (1994), *Federalism and*

> We [the authors of the book] compared the handling of the emergency management of the very same accidents that occurred in France, Germany and the United Kingdom i.e. exploding office chairs in public buildings (due to a breakage-prone gas cylinders) and the so-called glycol wine accident. We analysed the law in the books and the law in action. Our findings can be summed up in the following way: The French engineers and lawyers in the country asked themselves what Paris was doing, the German administrators were seeking the appropriate rules and the English administrators asked where the problem was. As far as Germany is concerned, we found our findings confirmed in a recent empirical study on product safety management in the Baltic Economic Area.[16]

It is English *pragmatism* that is characteristic for the handling of the legal system. Two issues arise whenever one attempts to define the differences between the civil law and the common law: first, the use of case law in preference to legal principles; and, second, the use of purposive interpretation.[17] Civil law lawyers reason *downwards* from abstract principles embodied in a code, whereas common law lawyers reason *upwards* from the facts, moving gradually from case to case. Civil law lawyers search for the *Zweck im Recht*, the purpose and objective behind the legal ruling, if the wording of the rule to be applied, its position in the broader framework of the code in which the rule is embedded or the history of the rule do not provide guidance. Common law lawyers view purposive interpretation as an alien element.[18] Lord Goff sums up these differences as follows:[19]

Responsibility – A Study on Product Safety Law and Practice in the European Community, London: Graham & Trotmann.

[16] Micklitz H.-W. and T. Roethe (2008), 'Produktsicherheit und Marktüberwachung im Ostseeraum – Rechtsrahmen und Vollzugspraxis', *VIEW Schriftenreihe*, **26**.

[17] Goff, Lord R. (1997), 'The Future of the Common Law', *International and Comparative Law Quarterly*, **46** (4), 745; Markesinis, B.S. (1994), 'Learning from Europe and Learning in Europe', in B.S. Markesinis (ed.), *The Gradual Convergence: Foreign Ideas, Foreign Influences and English Law on the Eve of the 21st Century*, p. 1; Koopmans, T. (1991), 'The Birth of European Law at the Cross Roads of Legal Traditions', *The American Journal of Comparative Law*, **39** (3), 493.

[18] See, *inter alia*, Judge Bingham in *Customs and Excise Commissioners v. ApS Samex* (1983) 1 All ER 1042, at 1056. However, this is less true in the United States, where lawyers and judges often seek to provide functional public explanations for legal rules.

[19] Goff, Lord R. (1997), 'The Future of the Common Law', *International and Comparative Law Quarterly*, **46** (4), 745; see also Goode, R. (2001), 'Insularity or Leadership? The Role of the United Kingdom in the Harmonisation of Commercial Law', *International and Comparative Law Quarterly*, **50** (4), 751, quoting Lord Wilberforce: 'The elegance, style and analytical powers of the British legal community have survived the decline of the British Empire intact.'

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