Constitutionalization of European Private Law

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Introduction

Hans-W. Micklitz

I will first place the debate on constitutionalization of private law in the overall context of the increased role of fundamental rights and human rights not only in private law but in the overall interpretation of legal rules at the member states level. Constitutionalization suggests the process which is inherent in the transformation of private law; constitutionalization instead of constituent power, *demos* and the magical constitutional moment. In a second step I will introduce the seven contributions, link them to the broader framework of constitutionalization of European private law via human and fundamental rights, before I return in a third step to identifiable common denominators and under-discussed issues which deserve closer inspection.

1. Framing the Debate on European Human and Fundamental Rights in European Private Law

In the last five to ten years the impact of human rights and fundamental rights on private law has gained increasing prominence and has led to a whole series of in-depth studies.[1] 'Constitutionalization of private law' is the flag under which this literature sails. Most of the research undertaken so far focuses on the increasing impact of national constitutional rights on national private legal orders. That is where the constitutionalization rhetoric comes from. It means that national private legal orders cannot be conceived of (any longer) as self-standing legal orders but are rather embedded in a higher legal order, the national constitution, against which the values underpinning private law can be measured. There is an undercurrent in the debate. Submitting private law to a constitutional test is tied to the idea that new values have to be integrated into private law in order to make it more 'just'.[2] Constitutionalization of private law presupposes the existence of a constitution, which is not the case in the United Kingdom, at least not in the meaning given to the term in light of the French and the American Constitutions. However, the differences between the continental legal order and UK common law has lost importance

[1] This is the list of major monographs and edited selections to which H. Collins refers: D. Oliver and J. Fedtke (eds), *Human Rights and the Private Sphere: A Comparative Study* (2007); C. Mak, *Fundamental Rights in European Contract Law: A Comparison of the Impact of Fundamental Rights on Contractual Relationships in Germany, the Netherlands, Italy and England* (2008); S. Grundmann (ed), *Constitutional Values and European Contract Law* (2008); G. Brüggemeier, A. Colombi Ciacchi, and G. Comandé (eds), *Fundamental Rights and Private Law in the European Union. Volume 1: A Comparative Overview* (2010); O. O. Cherednychenko, *Fundamental Rights, Contract Law and the Protection of the Weaker Party* (2007); D. Hoffman (ed), *The Impact of the UK Human Rights Act on Private Law* (2011); C. Busch and H. Schulte-Nölke (eds), *Fundamental Rights and Private Law* (2011).

[2] Collins, 'The Constitutionalisation of Private Law: a Path to Social Justice', in H.-W. Micklitz (ed), *The Many Faces of Social Justice in Private Law* (2011) 133.

since the UK Parliament adopted the Human Rights Act which grants standing to UK citizens to invoke the European Convention on Human Rights before UK courts. Since 2000, the date of the coming into force of the Human Rights Act, the common law has had to face the same challenges as the member states on the continent.

What has been the subject of much less research is the link between European human rights and the European Charter of Fundamental Rights (EUCFR) and European private law. The European Union has no constitution, leaving aside the question whether the long discussed and failed European Constitution, even in its most ambitious form, could meet the standards of a 'constitution'. However, the Lisbon Treaty gave the Charter of Fundamental Rights the same legal standing as the Treaty and paved the way for the European Union to join the European Convention on Human Rights (ECHR). This process is still pending and its outcome is hard to predict. The key question in our context is the following: will the ECHR be given a higher standing than the Treaty and the Charter of Fundamental Rights or will the two legal orders, the ECHR and the EU legal order (the Treaties and the Charter of Fundamental Rights), be put on a par?[3] Before the integration of the Charter of Fundamental Rights into the European legal order, the Court of Justice (CJEU) had different options to initiate constitutionalization through (a) reference to the 'constitutional traditions common to the Member States'—in reaction to the *Solange* judgment of the German Constitutional Court;[4] (b) reference, or perhaps better, integration of the ECHR into the common principles; and (c) reference to the Charter of Fundamental Rights after its declaration but before its formal integration into the EU legal system. The reasons why the CJEU uses one option or the other are not always clear in its judgments. This might be why we do not find a clear distinction between human rights (the European Convention on Human Rights), the common constitutional principles, and the Charter of Fundamental Rights in the discussion around the constitutionalization of private law. Membership of the EU in the ECHR will not necessarily contribute to a clear distinction between the two areas: not in institutional terms—the CJEU tends to refer here and there to the ECHR, nor in substantive terms—there is an overlap between the two sets of rules. For the purpose of this contribution the distinction is of limited importance. That is why I speak of European Human and Fundamental Rights, in order to make clear that I am looking at substance.[5]

In the meantime, the European Court of Justice is entitled to and makes ever stronger use of the Charter of Fundamental Rights. Whether human rights/fundamental rights and the EU legal order should be understood as two separate legal orders underpins the discourse initiated by this book. The hopes and expectations of human and fundamental rights activists mirror the development of constitutionalization at the member states level. They argue that human rights and fundamental rights shall contribute to 'improving' the European legal order, which is regarded as biased towards and driven by a liberal market ideology. It is not so much the lack of the 'political'[6] but the contended

[3] For a strong view on a monist legal system, where the ECHR and the ECtHR would rank on top, see Zucca, 'Monism and Fundamental Rights', in J. Dickson and P. Eleftheriadis (eds), *Philosophical Foundations of European Union Law* (2012) 331 arguing a possible membership of the EU would decide the question who has the last word—the ECtHR; but see for the opposite position—nobody has the last word because there is no last word to give on moral values—Letsas, 'Harmonic Law: the Case Against Pluralism', in J. Dickson and P. Eleftheriadis (eds), *The Philosophical Foundations of European Union Law* (2012) 91.

[4] ECJ Case C-44/79, *Hauer* [1979] ECR I-3727, at 15 and GCC, *Solange I*, BVerfGE 37, 271.

[5] The next step is to analyse the impact of the ECtHR on private law and the relationship between the case law of the two courts.

[6] Dehousse, 'Constitutional Reform in the EC', in J. Hayward (ed), *The Crisis of Representation in Europe* (1995) 124.

'social deficit' which lies at the forefront of concern of human and fundamental rights activists. According to this view, Human Rights and Fundamental Rights shall serve as a substitute for the non-(never?) existent European 'Social' Constitution.[7] The European Court of Justice in Luxembourg together with the European Court of Human Rights in Strasbourg shall compensate for the unwillingness or the incapacity of the EU member states to take political decisions, which balance the market bias through giving shape to 'the Social'.[8] Whilst the various Treaty amendments have strengthened 'the Social' in the EU and have even led to a certain detachment of the 'the Social' from the 'market',[9] it is clear that the Lisbon Treaty has not established a European variant of a welfare state. It should be reiterated, however, that the European Constitution project did not go much further with regard to 'the Social' than the Treaty of Lisbon.

In light of the extant political and social constitutional deficit in the EU Treaties, the two transnational courts are expected to 'take over'. They should turn into the social engineers of the EU. The consequence could/would be an ever stronger juristocracy[10] at the expense of democratic politics. Courts would become the forum for fighting out controversies over conflicting values. Keleman identifies an already emerging 'eurolegalism'.[11] In a way, the various contributions in this book provide evidence for such an argument. Most of the litigation at stake bears a strong social outlook. Reference to the CJEU is seen as a measure of last resort to invoke European human and fundamental rights, in order to remedy suggested social deficits in the national private law systems. So there is this element of 'making our world better through human and fundamental rights'. The risk of euro-juristocracy and eurolegalism not only lies in the shift in the institutional forum, from parliaments to courts, but also in the strong individualization which goes hand in hand with the rise of fundamental and human rights.[12] The public good inherent in the fight over social values which govern a national or an emerging European society is compartmentalized, broken down into fragments, and put into the hands of 'elite' individuals who have the resources to improve not necessarily the public good but at least their personal situation. Durkheim's observation of the 'cult of the individual'[13] finds confirmation in the twentieth and even the twenty-first century.

However, a considerable number of the cases that come under scrutiny bear a collective dimension. The individual at the European courts often represents a conflict which reaches far beyond his or her individual concerns. Digging deeper into the facts of the cases brought to the European courts via the preliminary reference procedure reveals what I would term, in line with Joel Handler,[14] 'public interest litigation'. Contrary to class action in the United States, the European variant of public interest litigation cannot extend res judicata.[15] Decisions of the CJEU aim to interpret EU law, not to

[7] K. Tuori and S. Sankari (eds), *The Many Constitutions of Europe* (2010).

[8] Kennedy, 'Three Globalizations of Law and Legal Thought: 1850–2000', in D. Trubek and A. Santos (eds), *The New Law and Economic Development: A Critical Appraisal* (2006) 19.

[9] Damjanovic and De Witte, 'Welfare Integration through EU Law: The Overall Picture in the Light of the Lisbon Treaty', in U. Neergaard, R. Nielsen, and L. M. Roseberry (eds), *Integrating Welfare Functions into EU-Law? From Rome to Lisbon* (2009) 53.

[10] R. Hirschl, *Towards Juristocracy: The Origins and Consequences of the New Constitutionalism* (2007).

[11] D. Keleman, *Eurolegalism: The Transformation of Law and Regulation in the European Union* (2011).

[12] A. Somek, *Individualism: An Essay on the Authority of the European Union* (2008).

[13] See Marske, 'Durkheim's "Cult of the Individual" and the Moral Reconstitution of Society', 5 *Sociological Theory* (1987) 1.

[14] J. Handler, *Social Movements and the Legal System: A Theory of Law Reform and Social Change* (1978).

[15] With the exception of Directive 93/13/EEC, OJ 1993 L 95/29, on unfair terms in consumer contracts, see ECJ Case C-472/10, *Invitel*, judgment of 26 April 2012, not yet published.

decide conflicts between parties. So far the final result of strategic litigation before European courts aimed at improving private law, prior to the adoption of the Charter of Fundamental Rights, is rather mixed. It suffices to recall the attempts of the UK Equal Opportunities Commission to increase the social dimension during the Thatcher era,[16] or of the German consumers and their organizations to use the CJEU as a forum of last resort to grant remedies against failed investments, which the German Supreme Court denied.[17] Whether or not Spanish consumers succeed in using the CJEU with reference to the Charter in their fight against unjustified evictions due to the unaffordable rise of mortgage interest rates after the Eurocrisis, remains to be seen.[18]

We can, however, easily identify the potential of human and fundamental rights litigation to improve 'the Social' not only to the benefit of certain individuals, but, within limits, to establish a genuine 'European public good'. This may be said safely at least with regard to the equality and anti-discrimination principle, which was developed by the CJEU but then clarified into a series of secondary community legislative acts and later even Treaty amendments.[19] At the other end are the risks that eurolegalism, euro-juristocracy, and European public interest litigation entail for the national and European political institutions and for the building of a transnational democratic order. Put this way, judicial activism, as positive as it might be for the development of the European Union's social dimension, forms an integral part of the 'political problem'. Courts might be pushed into action by the litigation and might feel legitimated by political inaction. Politically speaking, they are part of the problem.[20] The contributions in this volume move between the two poles – promoting judicial activism via human and fundamental rights and sounding warnings against the political institutional implications.

Where is the solution, is there a solution and what can private law do to overcome the tension? Can it do anything at all? Before I try to give some tentative answers, I have to go back to the specificities of private law. The human and fundamental rights rhetoric implies the assumption that private legal orders suffer from the same social deficit. They are presumed to show the same market bias as the European legal order, translated into private law language, promoting freedom of contract and private autonomy at the expense of social justice. The entire 20th century could be read as an attempt by the European nation states to remedy social deficits through legislative intervention in the fields of labour law, tenant law, and consumer law. All three fields are at the forefront of the contributions in this book. Collins[21] goes as far as to argue that employment law in the UK has lost its origin in freedom of contract and has turned into social regulation.

[16] Kilpatrick, 'Gender Equality: A Fundamental Dialogue', in S. Sciarra (ed), *Labour Law in the Courts: National Judges and the ECJ* (2001) 31; H.-W. Micklitz, *The Politics of Judicial Co-operation in the EU: Sunday Trading, Equal Treatment and Good Faith* (2005).

[17] The story of the *Schrottimmobilien*: pulled into mortgage credit financed investments via direct selling at the doorsteps, consumers lost their property as they could not find a tenant who was able and willing to pay a rent that would have allowed to cover the costs of the mortgage. This conflict led to more than five references to the CJEU. Only a few were compensated.

[18] This is the story behind ECJ Case C-415/11, *Aziz*, judgment of 14 March 2013, not yet published, but discussed by O. Cherednychenko and C. Mak in this volume.

[19] For the role and function of the equality principle in the building of a European society, R. Münch, *European Governmentality: The Liberal Drift of Multi-Level Governance* (2010).

[20] Weiler, 'Deciphering the Political and Legal DNA of European Integration: An Exploratory Essay', in J. Dickson and P. Eleftheriadis (eds), *Philosophical Foundations of European Union Law* (2012) 137.

[21] Collins, 'Justifications and Techniques of Legal Regulation of the Employment Relation', in H. Collins, P. Davies, and R. Rideout (eds), *Legal Regulation of the Employment Relation* (2000) 6.

A similar assessment could certainly be made in relation to tenancy[22] and consumer law.[23] The concern expressed by private lawyers is not so much directed against the integration of social values or even social justice into private law.[24] The concern results from the fear that private law is being swallowed not by democratic social regulation, but by a 'higher legal order'. Human rights and fundamental rights understood as constitutional rights might tend to absorb genuine private law values such as freedom of contract. Private law would lose its character as a self-standing legal order, separate and distinct from any form of a higher legal order.

What are the stakes in the conflicting arguments? In essence, the claim is that there is something special about private law, which justifies its separation from the regime of a national constitution and from a regime of universal human rights or the European Charter of Fundamental Rights. There are different strands of discussions to be distinguished. The origins of private law are older than constitutions and human/fundamental rights. Continental and common law find its roots in the *ius commune* of the old Roman law.[25] This is the historical argument. The counterarguments are that even the older private law embodied many of the values now found in human and fundamental rights.[26] Ordo-liberalism promotes an economic constitution which is based on two pillars, the so-called *Privatrechtsgesellschaft* (the liberal element—private autonomy) and competition law (the 'ordo' element), eliminating private power via competition. The European economic constitution is said to have been based exactly on this premise, but the Single European Act and the Maastricht Treaty amended the European economic constitution at the expense of the *Privatrechtsgesellschaft*.[27] The third strand of arguments points to the differences between the role and function that human and fundamental rights fulfil in state–citizen or in citizen–citizen relations. This last argument dominates the discourse on the impact of human and fundamental rights, enshrined in the distinction between vertical/horizontal and direct/indirect effect. This is certainly not the place to go deeper into the added value of the third series of arguments. Elsewhere I have argued that this distinction does not take the changing role of the state into account and that the public/private divide is gradually fading away.[28] None of the different strands provides satisfactory answers to the question of the particular character of private law. I will leave this for another contribution.[29]

[22] See <http://ec.europa.eu/research/social-sciences/projects/522_en.html>, responsible C. Schmidt, ZERP, University of Bremen.

[23] S. Weatherill, *European Consumer Law and Policy* (2nd ed.; 2014, forthcoming); H.-W. Micklitz et al., *Understanding EU Consumer Law* (2nd ed.; 2013).

[24] There are differences, but setting 'hard core' law and economics aside, there is agreement that private law cannot be built on private autonomy or freedom of contract alone.

[25] R. Zimmermann, *The Law of Obligations: Roman Foundations of the Civilian Tradition* (1996).

[26] Collins in this volume refers to Barak, 'Constitutional Human Rights and Private Law', in D. Friedmann and D. Barak-Erez (eds), *Human Rights in Private Law* (2001) 13, at 21–22; Smits, 'Private Law and Fundamental Rights: A Sceptical View', in T. Barkhuysen and S. Lindenbergh (eds), *Constitutionalisation of Private Law* (2006) 9; R. Stevens, *Torts and Rights* (2007).

[27] Joerges, 'A Renaissance of the European Economic Constitution?', in U. Neergaard, R. Nielsen, and L. M. Roseberry (eds), *Integrating Welfare Functions into EU Law: From Rome to Lisbon* (2009) 29.

[28] Micklitz, 'Rethinking the public/private divide', in M. Maduro, K. Tuori, and S. Sankari (eds), *Transnational Law: Rethinking European Law and Legal Thinking* (forthcoming).

[29] I would like to thank my colleague Loïc Azoulai for drawing attention to the question whether and to what extent private law can be regarded as different from constitutional and public law. This yields the need to go even deeper into system theory (Luhmann) and discourse theory (Habermas), which both promote the existence of 'private autonomy' enshrined in society distinct from the state order. See Renner, 'Grand Theories of Private Law', in S Grundmann, H.-W. Micklitz, and M. Renner (forthcoming).

Both H. Collins and G. Comandé explicitly address the relationship between private law and human/fundamental rights in this volume, though in very different ways. Collins uses the metaphor of a semi-detached house to catch the relationship between private law and a higher legal order. Translated into constitutional language, he identifies potential for the improvement of private law via human and fundamental rights,[30] but he wants to keep basic value decisions in the hands of democratic institutions. The way to keep the two systems separated is through the instrument of indirect effect, which is due to the difference between vertical citizen-state and the horizontal citizen-citizen relations. In such a perspective the impact of human and fundamental rights on the development of a genuine European social model and on compensating for the deficiencies in the Treaty via judicial activism remains limited. His vision of European private law, which enshrines social justice, is not a European top-down codification, not even through a fully democratized European Union, but is a bottom-up process through the economic and social actors as well as their organizations.[31] This goes along quite well with the common law case-law tradition. It also stresses the role and function of civil society and the separateness of private law from public/constitutional law at whatever level, national or European.

Comandé, on the contrary, understands private law as a tool to build a European society, a European identity, if not a European democracy. His contribution is therefore not so much linked to the social dimension, although this plays a role, but to the 'political' dimension of private law. Contrary to the critiques raised against juristocracy and the problematic shift from parliament to the judiciary, he understands courts and the cases they have to decide in the triangle of citizenship—the fifth European Union freedom—, economic freedoms/fundamental rights, and private law, as the appropriate addressees to contribute to the building of a European society, even a European identity, and beyond to a European democracy. The preliminary reference procedure then appears as a means of European democracy building.[32] The key is the link between private law and citizenship. His argument is that the seemingly neutral character of private law allows for the transport of (social) values, which allow for the building of a shadow citizenship different from the European Union citizenship. In fact, in Comandé's argument, the deeper political character of the private legal order comes to the fore. The connection to Collins and his bottom-up approach is evident, although Comandé understands private law and public law (fundamental rights, economic freedoms, citizenship) not as semi-detached houses, but as one house, perhaps not with two storeys, but at least as one single house.

So far, I have assumed that there is a common easily agreeable understanding of what might and should be understood by private law generally, and more particularly what European private law stands for. For a number of years, I have argued that there is a difference between nation state private legal orders, be they codified or not, and European private law. This has to do with my rejection of an understanding of the EU as a federal state in the making. Instead I put emphasis on the transformation of the nation state, thereby comprehending the European Union as the prototype of an emerging market state, following Bobbitt[33] and Patterson and Afilalo.[34] The European Union understood

[30] With regard to what the House of Lords could and should do: Collins, 'Lord Hoffmann and the Common Law of Contract', 5 *European Review of Contract Law (ERCL)* (2009) 474.

[31] H. Collins, *The European Civil Code: The Way Forward* (2008).

[32] Micklitz, *supra* note 16, at 165.

[33] P. Bobbitt, *The Shield of Achilles: War, Peace and the Course of History* (2002).

[34] D. Patterson and A. Afilalo, *The New Global Trading Order: The Evolving State and the Future of Trade* (2010).

as a market state does not allow for a connection between European state-building via a European Constitution and a parallel plan for the development of a European Civil Code. If this argument is correct, European private law must look different, as its task is to serve the completion of the Internal Market which allows for realizing (some) social values in a pick and pack procedure.

European private law is regulatory in nature. It serves the opening of markets by establishing opportunities for the market participants and the embedding of market opportunities in a tight legal framework. From a more traditional private law perspective, the strongest links to national private laws can be found in the Brussels Regulation, the Rome I and II Regulations, in international private law, regulating jurisdiction, the applicable law, and execution of judgments. National private law systems remain unaffected as the EU limits itself to harmonizing the legal mechanisms which tie the different legal orders of the member states together. The more intrusive impact of European private law-making results from the comprehensive set of rulings on consumer contract law. In the so-called Acquis Group, which was mandated by the European Commission to identify and formulate the European private law acquis, consumer law directives and their interpretation through the CJEU play a crucial role. What has been neglected here as well as in the overall project on a European Civil Code is the regulatory dimension of European private law rules that do not fit into traditional categories of contract and tort and that do not start from the premise of freedom of contract, private autonomy or *liberté de la volonté*.[35] It is this rather messy field of opening and closing, of granting and restricting party autonomy, which I call regulatory private law, which forms the core of European private law. Consumer law and anti-discrimination is simply the most visible sign of the change, but the two areas in no way exhaust the reach of regulatory private law.

Over the last decades, the European Union has developed a dense net of rules, covering a broad field of economic activities, which deeply affect private law, although quite often the potential effect is only discovered on a second and closer look. The following summary account is taken from earlier writings. I have updated the content without adding references.[36]

(1) Anti-discrimination. The European Community modernized and extended anti-discrimination law by way of a whole series of Directives (2000/43/EC, 2000/78/EC, 2002/73/EC, 2004/113/EC and 2006/54/EC) to private law, i.e. beyond labour law. Anti-discrimination law introduces new values into the private law system—these values are not bound to particular areas of the visible law, they govern private law relations per se.

(2) Regulated markets. The privatization (liberalization) of former state monopolies in the sector of telecommunication, energy and transport has raised the importance of contract law. The regulatory role of contract law as a device between the regulated markets to serve the overall purpose of liberalization and privatization is largely neglected. The network law develops within the boundaries of universal services whose reach have to be tested with regard to its potential for being generalized beyond the narrow subject matter.

[35] Each of the three has a different meaning resulting from the different socio-economic and cultural context.

[36] Micklitz, 'The Visible Hand of European Private Law', 28 *Yearbook of European Law* (2009) 3. In Italian, in G. Alpa and R. Mazzei (eds), *Studi storici e guiridici* (2010) 125; in Finnish, 3 *Lakimies* (2010) 330; in Japanese, 12 *Hokkaido Journal of New Global Law and Policy* (2011); in French, *Revue Internationale de Droit Economique* (2013, forthcoming).

Insurance law (which is usually regarded as a subject of its own) and capital market law (investor protection law). EC Directive 2004/39/EC on Markets in Financial Instruments—the so-called MIFID—lays down a broad framework within level 1 of the Lamfalussy approach, completed by two level 2 pieces, Directive 2006/73/EC on organizational requirements and operating conditions for investment firms and the implementing Regulation 2006/1287/EC. They establish a dense network of rules which contain strong links to the contractual relations in which a professional or a private investor engages with his or her investment firm.

(3) Commercial practices. The most important elements are Directive 2005/29/EC on unfair commercial practices dealing with b2c relations, and Directive 2006/114/EC on misleading and comparative advertising in b2b relations. The e-commerce Directive 2000/31/EC has to be taken into account as well. Directive 99/44/EC on consumer sales links contract law and advertising in that third party advertising may affect contractual duties. EC commercial practices law affects the modalities under which a contract is concluded.

Intellectual property rights. EC policy is intended to extend existing intellectual property rights law and give it a European outlook coupled with appropriate legal redress mechanisms to sanction violations of property rights (Directive 2004/48/EC). The significant expansion of intellectual property rights at the same time restricts users' rights. These restrictions are often found in standard terms which form part of the licence contract that the consumer concludes, often via the internet.

(4) Private competition law (*Kartellprivatrecht*). The diverse regulations on exclusive and selective distribution, the umbrella Regulation 330/2010, Regulation 461/2010 on the car sector, and Regulation 772/2004 on technology transfer (under revision), intervene indirectly in contract making. The content of the rights and duties in vertical agreements is determined to a large extent by block exemptions. The parties will often literally copy the articles in the block exemptions into their contracts to avoid discrepancies between the EC rules and contractual rights.

The new economic approach to state aid has led to the adoption of the *de minimis* Regulation 1998/2006. European state aid law may be divided into a substantive and a procedural part. Illegal state aid, that is to say, the question of repayment of unlawful state aid and the possible remedies of third parties, are key questions in private law. Similar effects can be reported from Directive 2009/81/EC amending Directive 2004/17/EC dealing with procurement procedures for entities operating in the water, energy, transport and postal services, and Directive 2004/18/EC on the coordination for the procurement procedure on public works contracts, public supply contracts and public services contracts. Whilst the purpose of these directives is to enhance competition and strengthen the market freedoms, at the same time they shape contractual relations. This is particularly true with regard to appropriate remedies.

(5) Product safety and food safety law. In Directive 2001/95/EC on product safety there are new devices that enhance the role of contract law as a means to shape contractual relations. Liability rules may be found in the Feed Hygiene Regulation 183/2005, the Food Hygiene Regulation 852/2004; the Regulation on Official Feed and Food Controls 882/2004 and Regulation 178/2002 on Food Law.

The so-called Services Directive 2006/123/EC enhances the elaboration of 'technical standards' by the European standard bodies, CEN/CENELEC, as well as by National Standards Bodies that come near to some sort of standard contract conditions which might be subject to control under Directive 93/13/EEC on unfair contract terms.

The conception of the Law of the European Union summer school of the Academy of European Law held in 2011, which underlies this book and the design of the different subject-related contributions, reflects this understanding of European private law. To be sure, the contributions do not cover the full range of the regulatory private law, but they deal with representative parts of it. The contributions analyse European private law

and national law in tandem, partly because of a lack of case law at the European level, and in a deeper sense because national and European private law are viewed as one integrated field of research. They do not draw a distinction between different concepts of national and private law. In a way, the ideology is that private law remains private law in a deeper sense, no matter what is behind it, no codification, a codification, or fragmented regulations.

2. The Contributions

The present book does not explore the constitutional values of the Draft Common Frame of Reference, the Common Frame of Reference, or the Optional Code. Hesselink has discussed the guiding constitutional principles and its changing outlook.[37] This book focuses on European private law in action. Colombi Ciacchi looks into European contract law rules, mainly in consumer law. Her contribution can be read as a horizontal analysis of constitutionalized private law across the relevant fields. Bell focuses on employment law, where constitutionalization via human and fundamental rights is by far the most advanced. Cherednychenko has chosen, out of the range of regulated markets, financial services. In consumer surveys, finance always ranks at the top of consumer concern.[38] Her interest lies in the search for the impact of fundamental and human rights on consumer law in financial services. Godt stretches the boundaries towards the relationship between IP rights, human, and fundamental rights, and their radiating impact on private law. In the future this field, now being discussed under the concept of 'digital contracts', might be of great significance.[39] Last but not least, Mak stresses the impact of the principle of judicial protection in Article 47 EUCFR on substance, procedure, and remedies in private law across the different fields, testing the importance of the stand-alone article disconnected from substance.

A. Human Rights/Fundamental Rights vs Private Law—a Semi-Detached House? (H. Collins)

In his contribution 'On the (In)compatibility of Human Rights Discourse and Private law', Collins sharpens his concept of the structural relationship between constitutional law and private law. He advocates the model of a semi-detached house: independent homes, but joined by a common wall against the concept of constitutional laws or at least the basic constitutional principles such as fundamental rights, which provide the common foundations for what is ultimately a single structure. This is a distinction which goes very deep and claims in essence that private law cannot be reconstructed in constitutional terms alone, as argued by M. Kumm.[40] It implies that private law exists or existed

[37] Hesselink, 'If you don't like our principles we have others: on core values and underlying principles in European private law. A critical discussion of the new "Principles" section in the draft Common Frame of Reference', in R. Brownsword et al. (eds), *Foundations of European Private Law* (2011) 59.

[38] See the Consumer Scoreboard: <http://ec.europa.eu/consumers/consumer_research/editions/cms7_en.htm>.

[39] The most advanced proposal is to be found in the CESL, for a discussion: Micklitz and Reich in H.-W. Micklitz et al. (eds), *Understanding European Union Consumer Law* (2nd ed.; 2013, forthcoming).

[40] Kumm, 'Who is Afraid of the Total Constitution? Constitutional Rights as Principles and the Constitutionalization of Private Law', 7 *German Law Journal* (2006) 341.

prior to its public institution via nation state legal orders. Against this clarification, Collins refers to O. Gerstenberg,[41] who spelt out clearly the three reasons (though not accepting them) against an unreflecting opening of the floodgates to human rights and fundamental rights in order to reshape private law: (1) the threat to private law's libertarian core of private autonomy; (2) sweeping usurpation of legislative prerogatives in determining the boundaries of spheres of private autonomy; and (3) the shifting of authority to interpret private law's core concept from ordinary to constitutional and/or generalist courts. Collins' focus is directed towards what he calls the 'puzzle of horizontality'—the distinction between vertical and horizontal direct effect of human/constitutional rights. He uses case law of the European Court of Human Rights, mainly with an impact on private law, to demonstrate his concerns.

Whilst Collins admits that there is a thin line between the potential effects of indirect and direct horizontality, he insists on the different embeddedness of private versus public law. A simple transfer to public law values as enshrined in human rights could lead to severe distortions at all three levels. Collins' intention is not to discredit the potential impact of human rights on private law; he agrees that human rights may initiate a rethinking and an adjustment of private law concepts, provided courts stick to what he calls the 'double proportionality test'. Contrary to the proportionality test in a state–citizen relation, in private relations the court has to start from the presumptive (human/fundamental) parity of the parties' rights, which have to be balanced against each other.[42] The competition between the right to freedom of expression and the right to respect of privacy demonstrates the tension. Neither right has precedence over or trumps the other. The proportionality test must be applied in scope, reach and justifiability to both rights, similar to Mak's analysis.[43] There is a difference between a relationship of power and dependence between the citizen and state where the normal proportionality test applies and the weighing of autonomy and consent in relations between individuals. This distinction cannot be overcome by drawing parallels between public power (the state) and economic power (transnational companies). Private parties cannot become the direct addressees and bearers of human rights. Collins obviously rejects the idea of CJEU case law as a way not only to make private parties direct beneficiaries of fundamental freedoms, but also of fundamental rights,[44] or to apply the US Alien Tort Act to multinationals.[45]

Collins' conclusion is to strengthen a positive conception of liberty, where human rights and fundamental rights may have a radiating impact. Civil law remedies, if properly applied, suffice to tame a one-sided, unrestricted use of economic power.[46] This is very much in line with what the Bremen School of Law[47] called materialized private

[41] Gerstenberg, 'Private Law and the New European Constitutional Settlement', 10 *European Law Journal (ELJ)* (2004) 766, at 769.

[42] Referring to Sir Mark Potter in *A Local Authority v W* (2005) EWHC 1564 (Fam).

[43] C. Mak, *Fundamental Rights in European Contract Law: A Comparison of the Impact of Fundamental Rights on Contractual Relationships in Germany, the Netherlands, Italy and England* (2008), at 54. See also Chantal Mak in this volume.

[44] L. Azoulai, 'The Court of Justice and the Social Market Economy: The Emergence of an Ideal and the Conditions for its Realization', 45 *Common Market Law Review* (2008) 1335.

[45] See, in that context, C. Godt in this volume and the abundant literature on the *Kiobel* case (569 US).

[46] In very much the same direction, Douglas-Scott, 'The Problem of Justice in the European Union: Values, Pluralism and Critical Legal Justice', in J. Dickson and P. Eleftheriadis (eds), *Philosophical Foundations of European Union Law* (2012) 412, at 447.

[47] Most prominent are H. D. Assmann et al. (eds), *Wirtschaftsrecht als Kritik des Privatrechts; Beiträge zur Privat- und Wirtschaftsrechtstheorie* (1980); N. Reich, *Markt und Recht* (1976).

autonomy (*materialisierte Privatautonomie*), just like in the sense that the German Constitutional Court (GCC) did in the *Bürgschafts* judgment.

B. Building Shadow Citizenship via Private Law—the Political Dimension (G. Comandé)

In 'The Fifth Union Freedom: Aggregating Citizenship . . . around Private Law', Comandé formulates the hypothesis that European citizenship has to be understood as being composed of two different strains: the official language of citizenship in the Treaty on the Functioning of the European Union (TFEU) and what he calls 'shadow citizenship'. Shadow citizenship is said to technically operate as an economic freedom; it expands and redefines the scope of fundamental rights by aggregating new bundles of rights. The going together of economic freedoms and fundamental rights in an open process necessitates an interplay with all constituencies involved at the national and the European level. Private law is the tool to aggregate shadow citizenship in the everyday lives of EU citizens. The potential outcome is the building of a European polity and a European identity bottom up via the CJEU. This hypothesis shifts the perspective of the overall case law of the CJEU around economic freedoms, fundamental rights, and citizenship to its deeper connection to private law relations. Market participants appear as citizens who participate in the building of shadow citizenship. There is a connection to Collins' plea for building a European Civil Code bottom-up via the private actors and associations involved.[48] However, contrary to Collins, Comandé argues that such a process is already under way and that the CJEU is the key actor. Both are united in their resistance to any idea of using legislation for society and identity building.[49] Comandé's truly innovative argument is the connection between citizenship and private law, a link which seems to run counter to any conception of private law which does not distinguish between nationals, at least not as long as they are operating under the same legal order.

Comandé develops his argument in four steps. He begins with the perceived role of human and fundamental rights in modern societies. The tension provoked by the insertion of human and fundamental rights into private law allows for the building of new equilibria. Unstable ambiguity is claimed to offer a fertile ground upon which shadow citizenship can flourish. The shift from the universal claim of human rights to the EU language of fundamental rights is claimed to offer more room for the protection of individual dignity and a corresponding strengthening of the democracy. Shadow citizenship is more than mere constitutionalization through the integration of values. The path can only be successful—he stresses this argument with varying degrees of emphasis throughout the text—if it occurs in a 'disguised' form, using the economic freedoms as the vehicle. Human rights and fundamental rights are perceived as 'an opportunity of sharing' a common project—of European society and identity—rather than an actual sharing of rights. The next step then is the identity-shaping role of human rights within the boundaries of the multilevel structure of the EU. Differences and tensions between and over values are understood as opportunities for dialogue and political participation. The failure of the European Civil Code project can be explained by the open 'tampering' with the different values underpinning the various national private legal orders. The success of the EU depends on avoiding systematic solutions, thereby benefiting from the legitimizing role of seemingly 'neutral' private law regulation. Linking EU citizenship to

[48] Collins, *supra* note 31.

[49] This, however, happened in the 1990s in the new member states.

private law binds individuals to a political community protected by fundamental rights, beyond their function as mere factors of economic production.

'Aggregating European Citizenship from the Internal Market Building Process' operates along two strata: first it gives more weight to EU citizens' rights outside their own nation/member state, initially by way of economic freedoms and subsequently via citizenship; secondly the process attributes significance to citizens' rights in their own nation/member state by redefining the rights citizens enjoy in their own nation/member state. Comandé relies on the case law resulting from areas that are not necessarily considered as traditional fields of private law, mainly fundamental rights cases and citizenship cases with a private law background. In a last step, he defines the contours of shadow citizenship. He is aware that shadow citizenship driven by economic freedoms may be biased, in promoting individualism at the expense of solidarity. But he insists that the concept of shadow citizenship, of discussing and merging values from the bottom up, allows for a development of a European polity which is not based on economic freedom alone. Echoes of the fifth freedom in the case law, not only mirrored in civil status and family law but also in civil and commercial law, serve to drive his argument home. Building on Collins,[50] he argues that 'business associations, social networks, technical standards bodies and scientific associations, together with long term family relations and more transient transactions such as package holidays, are the building blocks of a transnational civil society in Europe'.

In his conclusion, Comandé goes as far as saying that a restrictive reading of Article 6 TFEU is more promising for the 'muffled rising of a citizenship coupled with private law, the principles of which are forming in the metaphorical cauldron with an eventual view to developing a sort of transnational civil society'. To be sure, his argument raises questions on the deeper link between shadow citizenship and private law beyond family law, on society and democracy building via case law, on the prominent position of fundamental freedoms as a placeholder for social and fundamental rights, on the degree to which the case law of the CJEU, as referred to, underpins his argument.

C. Common Fact Patterns of Constitutionalized Contract and Tort Law (A. Colombi Ciacchi)

Whilst Collins and Comandé problematize the relationship between human rights/fundamental rights on the one hand, and private law on the other, the former in drawing a dividing line between the two, the latter in using the transformation of private law via human and fundamental rights through the CJEU as a trigger for building a European society and a European identity, Colombi Ciacchi digs deeper into the intricacies of the horizontal/vertical, direct/indirect relationship between public and private law in order to structure the discourse around 'fact patterns' in 'general contract and tort law' to be identified in the national and European litigation.

Her conceptual starting point is the distinction between direct/indirect horizontal and vertical direct effect, which she takes for granted, highlighting typical classical constellations in the relationship between the private and the public and the private towards another private party.[51] This fits well with Collins, who equally insists that a basic difference

[50] Collins, *supra* note 31, at 7.

[51] See for a thorough analysis of the horizontal vs the vertical in the case law of the CJEU: Van Leeuwen, 'An Illusion of Protection and an Assumption of Responsibility: The Possibility of Swedish State Liability after *Laval*', 14 *Cambridge Yearbook of European Legal Studies* (2011–2012) 453.

between the vertical and horizontal remains. Throughout her contribution, Colombi Ciacchi distinguishes between the national and the European level in the application of human rights, fundamental rights, and constitutional rights. This approach allows her to fine-tune the differences between the national and the European transformation processes. There are remarkable differences in the degree to which member state courts use either national fundamental rights as a yardstick or European human rights, or the Charter of Fundamental Rights or international conventions. These may result from *institutional* deviations, but also from whether the European and international conventions on human rights are self-executing within the respective national system or not.

The *substantive* dimension aims at developing common fact patterns of horizontal direct/indirect application at the national and the European level within more traditional fields of (consumer) contract law, tenant law and to some extent tort law. At the member state level, these amount to nine different situations around which the case law is grouped together: (1) freedom of speech, freedom of information and privacy rights; (2) unauthorized publication of photographs; (3) the landlord's obligation to cease emissions constituting intolerable nuisance; (4) the landlord's obligation to tolerate the installation of a satellite; (5) the protection of tenants from termination of tenancy contracts; (6) adjustment of imbalanced contracts through general principles; (7) invalidity of employment or agency contracts; (8) protection of freedom of religion in employment contracts; and (9) equal treatment of men and women. At the EU level, there are not yet enough cases, which would allow for an equally sophisticated fact pattern. However, she claims that 'liberty rights' prevail in number and concern over 'social-economic rights' in the case law of the CJEU. Colombi Ciacchi looks into what she calls 'the double horizontal effect' of EU fundamental rights. Rights and duties of the parties to a private relationship are shaped by EU fundamental rights through two different layers, first through the CJEU, later through the interpretation of national courts. Links to the double proportionality test as promoted by Collins and Mak can easily be made.

National and European courts, in Colombi Ciacchi's argument, are engaged in judicial governance.[52] The identifiable policy patterns are said to correlate to the existing case law. National courts manage the protection of the weaker party in contract law, the reduction of discrimination, the economic upgrade of the interests of the individual and social equality in tort law, the control of media power, exercise of political rights in privately managed spaces, and environmental protection. The CJEU is involved in the reduction of discrimination on the ground of gender or age, reduction of discrimination on the ground of nationality, protection of freedom of establishment and freedom to provide services, protection of privacy, freedom of information, and freedom to conduct business. Courts thereby use a normative individualistic understanding of human rights and fundamental rights in the meaning of von der Pforten,[53] which allows for giving voice to underprivileged and less powerful private parties towards their counterpart. In so doing, courts re-establish private autonomy. The dark side is the strong individualization of public goods through a process of decollectivization.[54]

This latter statement runs counter to Comandé, who understands shadow citizenship as a way to build not only 'public goods' but a European society and a European identity.

[52] S. Frerichs, *Judicial Governance in der europäischen Rechtsgemeinschaft: Integration durch Recht jenseits des Staates* [Judicial Governance in the European Community of Law: Integration Through Law Beyond the State] (2006).

[53] Von der Pforten, 'Normativer Individualismus und das Recht', *Juristen Zeitung* (*JZ*) (2005) 1069.

[54] Somek, 'Das Europäische Sozialmodell und Diskriminierungsschutz', *Juridikum* 2 (2008) 118.

However, the case law he uses is taken mainly from citizenship and family law. Colombi Ciacchi's 'fact patterns' are much nearer to a traditional understanding of private law, where she underpins the overall hypothesis that the intrusion of human rights and fundamental rights contribute to making the contracts more 'just'. Judicial governance would then lead to social engineering via courts. Constitutionalization increases individual justice at the expense of justice for all. Comandé includes in private law what I would call 'access rights'[55] to shadow citizenship. The 'marketization' of citizenship would go along with fundamental freedoms carrying the cargo of citizen and family rights. Contrary to Colombi Ciacchi, it builds on individual rights as a 'tool' to achieve at least access justice.[56]

D. Constitutionalized Equality and a Fundamental Right to be Treated as a Worker (M. Bell)

The first concrete field of private law to be examined is 'Constitutionalization and EU Employment Law'. Bell starts from the idea that constitutionalization means attributing 'higher status' to certain legal norms. This implies a distinction between ordinary norms where regulatory standards apply and norms which are shielded against legislative amendments and against private misconduct that might affect these higher rights. Although employment belongs in essence to contract law, to the idea of mutual freedom of contract for both parties, labour law regulation long served to establish what could be called, with Sinzheimer and Kahn-Freund, 'industrial constitution' (*Arbeitsverfassung*). The industrial constitutions set a frame for collective actions of both employers and employees, allowing them to freely define the substantive outcome in terms of pay and working conditions. National legislators and later the EU regulator have ever more densely intruded into the direct shaping of contractual relations, without meeting too much resistance from the addressees. The constitutionalization of employment law through 'rights' is then just a further step towards restricting freedom of contract. However, there is a difference. Constitutionalization via rights empowers workers to seek the enforcement of their rights before courts. They take over the societal role of collective organizations, a process which the EU has considerably augmented despite its rhetoric on dialogue in industrial relations. In line with Colombi Ciacchi's observations, courts are turning into societal engineers, outbalancing the effects of the transformation of the industrial constitution.

Constitutionalization takes two forms, first via courts through the use of the general principles of equal treatment and respect for human rights, and secondly via the codification of labour and social rights through charters and treaties. Bell uses equality law and the personal scope of employment rights to assess the impact of constitutionalization; the former because it is here that constitutionalization is most visible, the latter because the shaping of the personal scope is much more difficult to catch via constitutionalization. The CJEU had developed a number of key characteristics: the uncoupling of equality legislation from market regulation objectives, the trend towards direct applicability of the general principle of equality in private relations, thereby

[55] Micklitz, 'Do Consumers and Business Need a New Architecture for Consumer Law? A Thought Provoking Impulse', *Yearbook of European Law* (2013/2014, forthcoming) German version: Micklitz, 'Brauchen Konsumenten und Unternehmen eine neue Architektur des Verbraucherrechts?' *Gutachten A zum 69. Juristentag* (2012).

[56] H.-W. Micklitz (ed), *The Many Faces of Social Justice in Private Law* (2011).

relegating secondary Union law to a 'residual role'. These phenomena, however, cannot be condensed in a general rule. Bell underlines that the Court invokes the Charter and or the general principles *on occasion* only, being 'cognizant of the polemical debate that surrounds such cases'.

The growing outsourcing of working relations leads to quadrilateral relations yielding the need to define the scope and reach of the different pieces of EU law. Bell's investigation into 'whether there is any fundamental right to be treated as a worker' resembles Comandé's attempt to reconceptualize marketized citizenship.[57] Bell identifies a gap between Equality Law and Working Time Law (though to a lesser extent) on the one hand and the Acquired Rights Directive on the other. The 'worker' enjoys a certain constitutionalization whenever there is a connection to (particular) fundamental rights in EU and international law, a link which is easier to identify in Equality Law and Working Time Law. It seems difficult to make sense out of this difference. I tend to argue that in the former category the protective outlook gains supremacy over the market-based deconstruction of the worker; the opposite is true for mergers and takeovers. Here the worker cannot maintain her status, she keeps her job but has to accept the competition pressure on her working conditions.

Bell claims that the expansion of fundamental social rights 'risks swallowing up the whole of employment law'. Contract law in employment relations would then be more or less substituted by a body of fundamental rights which shapes the content of the working relations. Drawing together the bits and pieces of the CJEU case law, and maybe national case law on fundamental rights, the emergence of a 'constitutionalized' employment contract law could be imagined. The question remains, however, whether a constitutionalized employment law would dilute the meaning and significance of what 'a fundament right' entails, as Bell puts it.

E. Gateways to the Constitutionalization of Access, Substance, and Procedure of Financial Services (O. Cherednychenko)

In her contribution on 'Fundamental Rights, European Private Law, and Financial Services', Cherednychenko deals with European and national private law rules. Her focus on the legal position of the consumer in financial transactions goes along with the assumption inherent in the contribution of Colombi Ciacchi that the consumer is the weaker party in financial transactions and that consumer financial services are (or might be?) a prominent field for constitutionalization.

Cherednychenko starts by defining four 'gateways to constitutionalization of European private law': (1) requirements of conformity in rule-making, broadly understood legislators, and public authorities; (2) requirements on the interpretation and application by legislators and public authorities; (3) requirements on implementing EU fundamental rights in private law relations by taking positive action—in contrast to negative action, by not interfering with such rights; and (4) the distinction between horizontal and vertical direct effect of fundamental rights. The shift in focus from the analysis of the case law to the analysis of the impact on human rights and fundamental rights on rule drafting and administrative decisions might be due to two reasons: first, case law is scarce and, secondly, the existing law on financial services lacks the fundamental rights dimension.

[57] The so-called citizen-consumer. See M. Everson and Ch. Joerges, 'Consumer Citizenship in Postnational Constellations' (2006). Available on SSRN: <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=964187>; See also J. Davies, *The European Consumer Citizen in Law and Policy* (2011).

With regard to gateway (1), Cherednychenko finds no consistency in the degree to which the relevant directives refer to fundamental rights or not in the recitals. Why do the Markets in Financial Instruments Directive and the Consumer Credit Directive have such a reference, but not the Directive on Payment Services?[58] Interpretation and application, gateway (2), lies mainly in the hands of the national courts. There are only a few decisions in which the CJEU explicitly refers to fundamental rights, but they do not originate from financial services. Whether or not the EU and the member states are under a positive obligation, gateway (3), to protect fundamental rights by taking positive action through legislative or administrative measures, is subject to controversy.[59] The German Constitutional Court and the European Court of Human Rights (ECtHR) are said to be at the forefront of the development of imposing a positive duty to legislate, although *Commission v France*[60] and *Promusicae*[61] demonstrate a certain preparedness of the CJEU to follow suit. (4) With some sympathy, the author refers to Advocate General Trstenjak, who does not exclude 'the direct application of fundamental rights in the form of general principles in relationships between private individuals'.[62] As is well known, the CJEU has referred in a series of judgments to 'general principles of civil law'. In *Messner*[63] the CJEU found that 'good faith and unjust enrichment' can be added to the 'principles', a conclusion which was not welcomed in the common law countries, where good faith as a general standard for fairness does not exist.[64]

Whereas the first part of Cherednychenko's contribution applies to all fields of (private) law, the second part analyses the potential impact of the gateways on financial services. She discusses the actual (*de lege lata*) and the potential (*de lege ferenda*) impact of fundamental rights in relation to three major issues: consumer access to financial services, substantive consumer protection in financial services, and procedural consumer protection in financial services. First, Cherednychenko explains the consumer problem behind the three issues, she then looks at the negative (confiscatory) side of fundamental rights as contrasted with a potential positive obligation to legislate, and last but not least she examines horizontal direct effect. Fictitious examples are introduced to illustrate the potential impact of fundamental rights in reshaping European financial services law. *Mohamed Aziz*[65] is one of the few cases which demonstrates a potential for a fundamental rights analysis both at the substantive and the procedural level. However, neither the Advocate General nor the CJEU refer to fundamental rights, even though the fundamental rights dimension is all too obvious. This judgment correlates perfectly well with Comaroff's concept of 'shadow citizenship', in that the political dimension of the judgment through reference to fundamental rights remains obscure.

[58] See for a deeper discussion on the policy of the European Commission, V. Kosta, 'Fundamental Rights in Internal Market Legislation' (PhD thesis on file at the EUI, Florence 2013).

[59] Zucca, 'Monism and Fundamental Rights', in J. Dickson and P. Eleftheriadis (eds), *Philosophical Foundations of European Union Law* (2012) 331.

[60] ECJ Case C-265/95, *Commission v France* [1997] ECR I-6959, Recs 30–32.

[61] ECJ Case C-275/06, *Promusicae* [2008] ECR I-271, Rec. 70.

[62] But see AG Trstenjak in Case C-282/10, *Dominguez*, at para. 71.

[63] ECJ Case C-89/07, *Messner* [2009] ECR I-7315; Opinion of AG Trstenjak, at 91 and 108, and Rec. 29 of the judgment.

[64] Weatherill, 'The principles of civil law as a basis for interpreting the legislative acquis', 6 *ERCL* (2010) 74.

[65] ECJ Case C-415/11, *Mohamed Aziz*, judgment of 14 March, not yet published. Comment by Micklitz, 'Unfair Contract Terms—Public Interest Litigation before European Courts—Case C-415/11 Mohamed Aziz', in E. Terryn, G. Straetmans, and V. Colaert (eds), *Landmark Cases of EU Consumer Law: in Honour of Jules Stuyck* (2013) 615.

In her conclusion, Cherednychenko expresses support for integrating fundamental rights in the making and application of European private law. However, she equally warns against an unbridled constitutionalization, which moves sensitive political and socio-economic issues away from the legislative process. I am rather sceptical of the hope that the EU legislator will establish deeper consumer rights in financial services. None of the EU directives dealing with financial services for consumers has established effective EU rights and remedies. *Mohamed Aziz* was decided under Directive 93/13/EEC on unfair terms. The majority of references to the CJEU—normally without a visible fundamental rights dimension—is based on directives with a broad scope of application.[66]

F. The Impact of Constitutionalization of IP Controversies on the Substance, the Remedies, and the Procedure of Private Law (C. Godt)

Godt's topic is the constitutionalization of intellectual property (IP) rights. The link to private law is not immediately visible. Already, the relationship between IP rights and fundamental rights is a difficult one and not yet widely discussed, at least not in the European context.[67] Integrating the private law dimension into the discourse looks like an opening for a new book. It takes Godt two steps to build the bridge, first via the growing but to a large extent potential impact of the Charter of Fundamental Rights on the way in which conflicts around IP rights are shaped and debated—the reconstruction in 'a democratic and deliberative debate on modern European IP conflicts which arise from the societal transformation towards information societies embedded in global markets'; and secondly, by transferring these findings to private law relations.

Constitutionalization of IP rights, this is Godt's credo, means first and foremost a readjustment of the deeper foundations of property rights, from the idea that restrictions to IP rights are the exception to the rule to the modern approach promoted but not yet really cemented in *Promusicae*,[68] *Scarlet*,[69] and *Oracle*[70]—where the CJEU grants the exceptions fundamental rights status and puts them on a par with IP rights. However, there is said to be a notable difference between IP rights and the pillars of private law, private autonomy, and contractual freedom. She writes: 'IP is in essence regulatory. The right only comes into existence when regulatory requirements are met.' This suggests that freedom of contract and private autonomy are not constituted through regulation, at least a debatable consequence, as Collins made clear.[71]

With reference to Van Overwalle, Godt asks: 'do IP and Human Rights "collide" or do they co-exist and further each other'? This question is the subject of discussion at the international level, but not yet at the European level. The difference between the international and the European discourse on human rights results from the Charter of Fundamental Rights, which is meant to constitute individually enforceable rights, independent from state action, either directly or indirectly, if the diverse principles are concretized via secondary community law so as to make them enforceable.

[66] Kas and Micklitz, 'Rechtsprechungsübersicht zum Europäischen Vertrags- und Deliktsrecht (2008–2013)', *Europäisches wirtschafts und steuerrecht* (*EWS*) (2013) issues 9 and 10.

[67] See the contributions in F. W. Grosheide (ed), *Intellectual Property and Human Rights: a Paradox* (2010).

[68] ECJ Case C-275/06, *Promusicae* [2008] ECR I-271.

[69] ECJ Case C-70/10, *Scarlet*, judgment of 24 November 2011, not yet published.

[70] ECJ Case C-128/11, *UsedSoft v Oracle*, judgment of 3 July 2012, not yet published.

[71] In a similar vein, H. Collins in this volume.

Seven factual IP controversies stand out because of their relevance: (1) Articles 16, 11, and 8 EUCFR and enforcement measures against providers—the trilateral balance of copyright, freedom to operate business, data protection, freedom of information in *Scarlet* and *Netlog*;[72] (2) Article 1 and 2 EUCFR and embryonic stem cells—the human embryo cannot be less protected in research than in a commercial setting, which implies recognition of the German definition of life as beginning with the merging of the germ cells;[73] (3) Article 3(2) EUCFR and diagnostics—the *Myriad* case, access of patients and public hospitals to a test kit which indicates a statistical predetermination for breast cancer; (4) Article 3(2) EUCFR and tissue banks—the question of whether the donating individual has the power to veto the filing of patents based on her material; (5) Article 35 EUCFR and compulsory licensing—access to drugs against AIDS; (6) food security/food quality—the right to choose between genetically modified and unmodified products, the right to security; and (7) cultural autonomy and community rights to their medicinal and plant knowledge, their drawings, and their music.

In each of the seven factual controversies, Godt demonstrates how the reconstruction of the conflicts in fundamental rights language opens the discourse from a bilateral conflict between the holder and the user to a societal and public conflict about competing legal positions and values. In line with G. Resta, she observes a bipolar regime: 'intangible aspects of identity are increasingly protected against commercialization of property rules, whereas the corporate elements are protected through liability rules'.[74] It is worth noting the difference between Colombi Ciacchi's fact patterns and Godt's groups' factual controversies. Colombi Ciacchi identifies a critical mass of cases, which allows for a tentative structuring, whilst Godt has just a set of concrete problems at hand.

In her concluding remarks on the interplay between IP rights and fundamental rights, Godt focuses on the novel public/private interface via 'the access challenge' (access to information or technology which lies in the hands of the property rights holder) and preceding entitlements (e.g. homeowners hold a right to their home's façade and pictures thereof which are to be respected by Google Street View). This could be understood as a first attempt to move from controversies to fact patterns, at least in the relationship between IP rights and human rights/fundamental rights.

In a second step, Godt transfers her findings on reconceptualized and fundamental rights loaded IP rights to European private law. Constitutionalization of IP rights, this is the message, might serve as just another example to conceive of European private law not as modelled by freedom of contract but as a body of law embedded in regulatory policies. The seven factual controversies can be associated with what I have termed elsewhere as 'European regulatory private law'.[75] They all bear a particular regulatory dimension and they all show that there is a link between IP rights and private law, a link which is all too often forgotten and which has not yet gained much attention in the analysis of the relationship between EU law and private law.[76]

Godt distinguishes four different layers of constitutionalization: (1) the impact on *substantive* private law via scope, patentability, exceptions, and limitations—examples 2, 3, 7; (2) the emergence of new *remedies*—example 1; and (3) new forms

[72] ECJ Case C-360/10, *Netlog*, judgment of, 16 February 2012, not yet published.

[73] ECJ Case C-34/10, *Brüstle*, judgment of 18 October 2011, not yet published.

[74] Resta, 'The New Frontiers of Personality Rights and the Problem of Commodification: European and Comparative Perspectives', 26 *Tulane European and Civil Law Forum* (2011) 33, at 54.

[75] H.-W. Micklitz and Y. Svetiev (eds), *A Self-Sufficient European Private Law—A Viable Concept*, EUI Working Paper Law 2012/31.

[76] E. Steindorff, *EG-Vertrag und Privatrecht* (1996).

of *standing*—examples 2, 3, 5; (4) a new institutional design of how and by whom upcoming conflicts are decided, by the CJEU and/or by a Unitary Patent Court—example 7. The Charter, she notes, will 'presumably become the central reference for IP conflicts'.

The links to more traditional forms of constitutionalized private law are easy to demonstrate. The scope of EU law decides over the applicability of the fundamental rights. When IP holders are made the addressees of fundamental rights, which happens when IP and fundamental rights are put on a par with each other, the distinction between the public and the private, on which Collins insists, becomes blurred. It equally shows that private power approved through the official recognition of the EU legislator might be balanced against fundamental rights. One might even wonder whether and to what extent a fundamental rights bound property rights holder forms an integral part of Comandé's shadow citizenship.

G. The Implications of Article 47 EUCFR as a Self-Standing Remedy (C. Mak)

Mak looks into 'Rights and Remedies: Article 47 EUCFR and Effective Judicial Protection in European Private Law Matters'. This contribution shifts the focus entirely to the enforcement side. Whereas rights, remedies, and procedures—to use the terminology coined by W. van Gerven[77]—are already discussed in connection with the substance of European private law, contract law, labour law, financial services, and IP law, Mak asks what is added by Article 47 EUCFR to the effective judicial protection of private law interests. Her assumption is that the hotly debated distinction between vertical and horizontal direct effect is of little value as Article 47 EUCFR is said to integrate the horizontal relationship into the vertical institutional framework. This consequence questions the positions taken by Collins, Colombi Ciacchi, Bell, and Cherednychenko.

Article 47 EUCFR may even impose a positive duty on courts, provided an appropriate methodology can be found which respects the reach of the *Schutzgebotsfunktion* (protective function) (Canaris).[78] Inspiration for the shaping of remedies and procedures under Article 47 EUCFR can be drawn from *Alassini*[79] and the *ex officio* case law in consumer contract law[80] as well as, and maybe even more so, from *Kadi*[81] (with regard to procedure) and *Fuss v Stadt Halle*[82] (with regard to remedies). *Kadi* and *Fuss v Stadt Halle* demonstrate the potential of cross-fertilization between different fields of EU law; transferring Article 47 EUCFR reasoning from the outside—*Kadi* and *Fuss v Stadt Halle*—into private law relations.

In the potential search for a judge-made 'European Law on Remedies',[83] Mak identifies six dimensions of Article 47 EUCFR where a clarification is needed: (1) its place

[77] Van Gerven, 'Of Rights, Remedies and Procedure', 37 *Common Market Law Review (CMLRev)* (2001) 501.

[78] Following Calliess, 'Die Leistungsfähigkeit des Untermaßverbotes als Kontrollmaßstab grundrechtlicher Schutzpflichten', in R. Grote et al. (eds), *Die Ordnung der Freiheit: Festschrift für Christian Starck zum siebzigsten Geburtstag* (2007) 204.

[79] ECJ Joined Cases C-317-320/08, *Alassini* [2010] ECR I-2213.

[80] See Kas and Micklitz, *supra* note 66.

[81] ECJ Joined Cases C-402/05 P and 415/05, *Kadi* [2008] ECR I-6351.

[82] ECJ Case C-243/09, *Fuss v Stadt Halle* [2005] ECR I-2579.

[83] Mak, 'The ECJ between the individual citizen and the Member States—A plea for a judge-made European law on remedies', in B. de Witte and H.-W. Micklitz (eds), *The ECJ and the Autonomy of the Member States* (2012) 349.

between the older means of effective judicial protection via the ECHR and the new remedies enshrined in the EUCFR; (2) its relation to the division of labour between national and EU institutions—EU remedies vs national remedies; (3) the procedure guaranteeing effective judicial protection itself—what happens if the CJEU does not offer effective judicial protection?; (4) the relationship between the CJEU and the ECtHR—whether EU citizens have standing before the ECtHR against judgments of the CJEU; (5) the constitutionalizing effects on European private law adjudication—who has the last say?—and (6) the relationship between the regimes of collective and individual rights.

Whilst Mak sees some potential for Article 47 to be used to shape effective judicial protection, she is equally concerned about the limits on the production of the public good through litigation and not through democratic opinion building.[84] *Viking* and *Mangold* stand out as controversial examples from the area of fundamental freedoms; *Alassini*, which was based on Article 47 EUCFR, raised the expectation that the Charter might provide access to justice not only via alternative dispute resolution (ADR).

3. Preliminary Considerations on the Future of Constitutionalized Private Law

The various contributions in this volume clearly demonstrate that a change has taken place, at the national and at the European level. Private law is no longer immune to the intrusion of fundamental and human rights—it ever was. Whilst member states and the EU are driving the process by adopting ever more concrete and more comprehensive lists of human and fundamental rights, at the national, the European, and international level with overlapping content, the true and key players in this development are the national and European courts. This is why I will first paint a scenario of judicial activism versus judicial restraint. Where should a constitutionalized private law be located in the overall system of the European legal order? This is my second point of concern. Last but not least, I will try to outline—based on the seven contributions—five key elements around which a constitutionalized European private law seems to be built. These are preliminary considerations, which deserve further research and further development.

A. Private Law and Human/Fundamental Rights—Courts as Substitutes

Constitutionalization of private law at the EU level serves two purposes, a political function—identity/society building—and a social function—making the EU 'better', 'more just'. The ECHR and the Charter of Fundamental Rights bring the ECtHR and the CJEU to a prominent position. The effects will be redoubled once the EU has joined the ECHR. By now the focus is directed towards the role and function of the CJEU.

Again, it might well be that the CJEU could become the victim of its own success, again because the judicial activism in the building of the European legal order, even in the building of the European constitutional charter, cannot compensate for the

[84] Mak, 'Europe-Building through Private Law. Lessons from Constitutional Theory', 8 *ERCL* (2012) 326.

democratic deficit or, in more cautions terms, the lack of the 'Political' in the middle of the European discourse. There are visible signs that the CJEU is more ready than ever to embark on an unknown journey—compensating not only for the social deficit of the EU but also for the political deficit. However, the CJEU runs a high risk. It can only succeed in promoting a European identity and a European society if it accepts a role similar to the GCC, which served the German citizens as a substitute for politically incorrect patriotism. Habermas[85] coined the term *Verfassungspatriotismus*—constitutional patriotism.

Are we observing a similar move by the CJEU or at least a move in that direction? This is what some of the contributions tell us—Comandé with regard to the compensation of the political deficit, Colombi Ciacchi, Bell, Cherednychenko, and Mak with regard to the compensation of the social deficit. They all emphasize the downside of the development. But let us assume for a moment that the findings and the predictions confirm a general trend. It would mean that the CJEU is becoming ever more intrusive and would narrow considerably the leeway granted to national courts in applying the authoritative interpretation of EU law to the facts of the case. So far, the CJEU has stayed away, in the aftermath of *Barber* and *Heininger*, from 'solving' the social problems presented to it via the preliminary reference procedure by way of a European top-down decision. *Barber* had a clear human rights dimension—violation of the equality principle; this was less visible in *Heininger*, although one could easily build bridges to the famous *Bürgschafts* judgment of the GCC. *Mohamed Aziz* could turn into a litmus test for the CJEU. Its judgment raised high expectations by those Spanish citizens who lost their homes in the aftermath of the crisis. What if the Spanish courts and the Spanish authorities, the national government and the national Parliament are unwilling to accept the guidance provided by the CJEU on how the respective EU rules should be interpreted—to remedy unjustified evictions? What if it comes to nothing in the end? In *Barber*, as in *Heininger*, a forceful and—seen through the eyes of the victims—powerful support for their position vanished in the haze of follow-up references that tried to receive judicial confirmation from the CJEU, which looked all too promising. In the end, high hopes ended in deep disappointment and disillusionment. At least the Equal Opportunities Commission in the UK learnt its lesson. In *Heininger*, only a few consumers were compensated by the German courts. The majority ended in a deadlock—a nice looking European remedy which could not be enforced nationally, or, if enforced, would put them in an even worse situation.

If the CJEU were to give up its reluctance and intrude ever deeper into Spanish procedural law and not only this, if it also provided ever stronger guidance on what the Spanish government, or even broader the Spanish state, would be obliged to do in light of the (quasi-)constitutionalized private law rules—quasi because so far neither the Advocate General nor the CJEU refer directly to the Charter on Fundamental Rights—, the political implications of such a judicial success would be more than ambiguous. If the evictions were revoked, if the evicted could return to their homes, the CJEU would certainly be regarded by those who benefit from such judicial activism as having rescued their belief in a just society. What a wonderful result for European identity and society building! But at what a price! Not an authoritative but an authoritarian judgment would have struck down all the careful boundaries that the Treaties of Rome until Lisbon had erected, endlessly confirmed and defended in the national political fora. Crossing these boundaries would endanger the whole architecture of the EU Treaties. Justice would

[85] D. Sternberger and J. Habermas, *Verfassungspatriotismus. Eine vergleichende Darstellung der Begriffsbestimmung* (2010).

be achieved through a non-democratic authoritarian court which claims to be just and more legitimate than the national parliaments and governments.

It is hard to imagine that the CJEU would overstep these boundaries in a hard case like *Mohamed Aziz*, where the unheard voices of those who suffer most from the economic and Euro crisis have found a forum. There is no alternative to a political process, however difficult, burdensome, and slow it might be. This conclusion, if it is correct, has far-reaching consequences on the role and function of the constitutionalization of private law via human rights and fundamental rights, via national and European courts, operating in tandem or even side by side in the building of a European identity and in developing a social Europe. The CJEU may take strong positions, but the prime addressees of judgments are and should be the member states, their courts and their competent bodies in charge of 'applying' the European rules to the case at issue. Even the best and most promising 'just' constitutionalized rulings require the national enforcement authorities and courts to awaken the European rulings to life.[86] This might not be a very satisfying result, at least not for those who identify courts as the appropriate rule-makers in the multilevel structure of the EU. However, if the 'political' should not be sacrificed to the benefit of the judicial, there is no other way out of the dilemma.

B. Merging Constitutional Traditions and General Principles of Civil Law

It is tempting to strive for a kind of structure in the constitutionalized European private law, either horizontally cutting across the various fields or by designing a constitutionalized employment contract, consumer contract, or financial services contract. The key question would remain the same: What should be place be for such a constitutionalized private law in the overall edifice of European Union Law?

The CJEU has referred in a number of cases to the '(general) principles of civil law' (not private law), a development which has led to a real flood of publications.[87] Whether the CJEU will continue down this path is still open. After a series of decisions with varying references to the 'general principles of civil law',[88] it seems as if the CJEU has become more reluctant to utilize this technique, and may even be rethinking how to position the 'general principles of civil law'. A possible way out might be to line up the 'constitutional traditions common to the Member States'[89] with the 'general principles of civil law' in the search for a common denominator in the ongoing constitutionalization of private law. What if only those principles of civil law which enjoy a quasi-constitutional status via their upgrading through human rights and fundamental rights could be termed 'general' principles or even 'principles' at all?

[86] See De Witte, 'The Nature of the Legal Order', in P. Craig and G. de Burca (eds), *The Evolution of EU Law* (1999) 177, at 209.

[87] Hesselink, 'The General Principles of Civil Law: Their Nature, Roles and Legitimacy', in D. Leczykiewicz and S. Weatherill (eds), *The Involvement of EU Law in Private Law Relationships* (2013) 131.

[88] In ECJ, 10 April 2008, Case C-412/06, *Hamilton* [2008] ECR I-2382, Rec. 42: 'general principles of civil law'; Case C-489/07, *Messner* [2009] ECR I-7315, Rec. 29: 'general rules of civil law'; also opinion of AG Trstenjak, at paras 91 and 108; C-101/08, *Audiolux* [2009] ECR I-9823, Rec. 52: 'general principle of equal treatment of minority shareholders'; opinion of the AG: 'general principles of equal treatment of shareholders'.

[89] ECJ Case 44/79, *Hauer* [1979] ECR I-3727, at 15.

Such an understanding could, if feasible, solve two problems: (a) clarifying the *role and function* of the general principles of civil law in the overall structure of European private law as a safety net for the already existing European private law acquis and (b) concretizing the *substance* of the 'general' 'principles'. The 'merger' would allow for reducing possible elements of the 'general principles', thereby implicitly upgrading their importance. Giving the 'general principles of civil law' a constitutional twist could build a barrier against attempts to turn each and every open question in European private law into a matter of 'general principle' and/or into a constitutional, i.e. human and fundamental rights, issue. Such an approach could equally avoid the awkward debate around the different positioning of 'the general principles' in continental codified law and common law.[90]

C. Key Elements of a Constitutionalized European Private Law

On the basis of the different contributions in this volume it seems feasible to outline a set of elements which deserve to be studied in greater depth.[91] The intention, however, is not to try to show the potential in using fundamental rights with regard to certain identifiable key constitutional elements of private law in the future but to describe the state of the art—the development as it stands at present. These key elements might form the basis of concretizing 'constitutional principles of European private law'.

1. *Status*—in private law, there is usually no connection between the legal subject and his citizenship. As long as the parties to a contract are operating within the same legal order, nationality does not matter. If it is a cross-border transaction, the well-settled mechanisms of international private law come into play. EU law prohibits any discrimination in private law transactions based on nationality.[92] Bell has raised the question whether there is a human/fundamental right *to be treated as a worker*. This would imply the feasibility to design key constitutional elements of how a worker can be distinguished from a self-employed entrepreneur. This question could easily be extended to whether there is a right *to be treated as a consumer*, in particular if European Union law imposes obligations on the consumer which she realistically cannot fulfil. Can the consumer argue under reference to fundamental rights that the status of a consumer implies a structural weakness in the sense that the GCC did in the famous *Bürgschafts* judgment? The same logic must apply to questions on the constitutional characteristics *of an employer, a company or a supplier, an SME*? Comandé adds an additional layer to the discussion by taking all the rhetoric of the consumer citizen—and in parallel the worker citizen, the employer citizen, and the supplier citizen—seriously.[93] Tying the economic activity in employment or consumer relations to what he calls *shadow citizenship* grants the status of the parties to a contract of whatever type a constitutional dimension, as they are part of the identity and society building.

In hard legal terms, the problems usually show up when legal rights are bound to a particular predefined status—the personal scope of application. This is a typical approach of secondary EU law, which finds its deeper reasons in the doctrine of enumerated powers. In employment law, the findings are mixed. The CJEU seems ready to use fundamental

[90] More generally Lord Goff, 'The Future of the Common Law', 46 *International and Comparative Law Quarterly (ICLQ)* (1997) 745.
[91] See Reich, 'General Principles of European Union Civil Law' (2013, forthcoming).
[92] See ECJ Case C-281/98, *Agnonese* [2000] ECR I-4139.
[93] Everson and Joerges, *supra* note 57; Davies, *supra* note 57.

rights to broaden the notion of the worker when she is in need of protection because the principle of equal treatment has been violated. In consumer law, the CJEU, quite to the contrary, starts from a rather narrow concept, which might make sense in the Brussels Regulation but not necessarily in substantive consumer law.[94] One reason might be that EU law leaves the decision on the personal scope of consumer protection either implicitly, via minimum protection rules, or explicitly, as in the Consumer Rights Directive,[95] to the member states. The strange consequence then is that only full harmonization of the personal scope of application of consumer law allows the CJEU to infer fundamental rights as a means of extending the scope of application.

2. *Access to services*—in a more traditional understanding of private law, accessibility is a matter for public or administrative legislation. In the EU context, access to services gains a more prominent position. Access is a necessary precondition in order to be able to participate in the benefits of the Internal Market. *Access* to *shadow citizenship* for persons not bearing the correct name—access to the labour market for women, handicapped workers, students, *access* to financial consumer services, to a bank account, to consumer credit, *access* to universal services more broadly, *access* to information barred via intellectual property rights, *access* to justice if one understands justice as a service which has to be delivered by practising lawyers or by out-of-court settlement bodies—all these 'access issues' can easily be identified as a strong common denominator throughout the contributions. In *Sky Austria*[96] the CJEU upgraded access to information to the constitutional level.

3. *Information, transparency, accountability*—European private law has heavily promoted the ideology that information serves as an appropriate means to compensate for the asymmetry between the parties to a contract, less so in labour law, much more in consumer law and financial services. So far, however, it seems that setting access to services aside where information might be needed to participate in the Internal Market, there is no evidence in the case law of the CJEU to upgrade information or at least a certain type of information to a higher constitutional level. Law and economics, behavioural economics, and bounded rationality could be used to distinguish relevant from irrelevant information. Some information might be so relevant for the contracting parties that it could be reconstructed in fundamental rights language.

Transparency, quite to the contrary, has gained importance in the CJEU case law not only but in particular in the field of contract terms.[97] Transparency, however, has remained so far at the 'normal' level of private law. The CJEU limits itself to taking transparency seriously so that it provides valuable information to the parties to the contract, which allows them to make effective use of their rights and remedies built into the contract. Similar to the information paradigm, clarification would be needed as to what kind of transparency we are talking about—competition or contractual transparency[98]—and once we are clear, whether transparency can be graded. Disclosure of information has thin borderlines.

[94] See, on the case law of the CJEU, N. Reich, *supra* note 39.

[95] Directive 2011/83/EU, OJ 2011 L 304/64, Rec. 13.

[96] Reich, 'Consumer/Citizen Access to Information—A new Fundamental Right under the EU Charter Case C-283/11 Österreich v. Österreichischer Rundfunk, Judgment of the Grand Chamber of 22.11.2013', in E. Terryn, G. Straetmans, and V. Colaert (eds), *Landmark Cases of EU Consumer Law: in Honour of Jules Stuyck* (2013) 35.

[97] ECJ Case C-92/11, *RWE Vertrieb v Verbraucherzentrale NRW*, judgment of 21 March 2013, not yet published.

[98] Micklitz, *supra* note 39, at 3.18.

Accountability would affect the making of the law, in particular when it comes to rules, which are developed by private or semi-private bodies[99] in the field of health and safety or in the fields of financial transactions. However, such cases have not yet reached the CJEU, at least not from the angle of accountability.

4. *Anti-discrimination and basic needs*—the principle of anti-discrimination or the principle of equality has found a well-settled place in employment law and employment contracts. Its transfer from employment contracts to insurance contracts in *Test-Achats*[100] and maybe to consumer law in fighting economic discrimination of the most vulnerable consumers raises much deeper questions on the relationship between contract law—where discrimination might lead to highly doubtful results—and competition law—which presupposes the legality and the legitimacy of economic discrimination.[101] Lifting anti-discrimination to the status of a general principle via human and fundamental rights inevitably leads to the question of what the economic constitution of the EU should look like. This then is indeed a constitutional issue of a higher level.

In *Messner*, the CJEU referred to 'good faith' as one of the general principles of civil law. It is hard to imagine that good faith could be given a constitutional standing in bridging the gap between the 'general principles of civil law' and 'the constitutional traditions common to the Member States'. What remains, however, can be observed in *Mohamed Aziz*,[102] where the CJEU did not refer explicitly to the Charter of Fundamental Rights, but used the 'right to housing' in the Charter as a means to interpret the fairness of standard terms in mortgage contracts. This is an elegant way to instrumentalize fundamental rights without explicitly granting supremacy of the Charter over contract law.

5. *Remedies*—a far-reaching consequence of the CFR would be to link the violation of a human or fundamental right to a right to claim compensation, as the Italian Constitutional Court has done.[103] The question then would be what kind of fundamental right in private law relations exists which could trigger such a claim for compensation. The well-known *Kadi* judgment, the freezing of financial resources of individuals and entities associated with Al-Qaeda, also touches upon private law matters.[104] Does an eventual violation of the right to be heard lead to a claim for compensation if Mr. Kadi is barred from making use of his—in so far illegally frozen—assets? What about Mr. Alassini, if he were barred from going to court? The CJEU recognized in that judgment the right of access to the court. In *Aziz*, the CJEU invented the right to injunctive relief, which obliges the Spanish state to make remedies available that allow for connecting enforcement and declaratory proceedings. Can Mr. Aziz claim compensation because that right did not exist and therefore he had to leave his house? Who is the addressee of such a claim, if it exists—is it always the public authority, the state or can it be that an eventual remedy could also address the wrongdoer directly, if as in the case of Spain the Caixa bank belongs de facto to the Spanish state?

[99] ECJ Case C-171/11, *Frabo*, judgment of 31 December 2012, not yet published.
[100] ECJ Case C-236/09, *Test-Achats* [2011] ECR I-773.
[101] Inaugural lecture by H. Schweitzer, 'Diskriminierungsverbote im Privat- und Wettbewerbsrecht' (25 February 2011), inaugural lecture at the University of Mannheim (*Antrittsvorlesung an der Universität Mannheim*), unpublished.
[102] ECJ Case C-415/11, *Aziz*, judgment of 14 March 2013, not yet published.
[103] See the reference in the contribution of A. Colombi Ciacchi in this volume.
[104] This is an important observation by C. Mak in her contribution.