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# JUSTICE THROUGH EUROPEAN PRIVATE LAW

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## **Justice through European Private Law**

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## 1 Judicial dilemmas

What laws govern the comedies and tragedies of everyday life? Should the law, for example, determine whether someone had to tell her partner that she had been cheating on him? According to the Dutch Supreme Court, in certain circumstances, the answer to this question is in the affirmative. In its judgment of 21 February 2014, the Hoge Raad held that it was possible for a man to avoid a cohabitation agreement on the ground that he had been mistaken about his partner having ended her relationship with another man.<sup>1</sup> Had he known that she had still been seeing the other man, he would never have concluded the agreement, which put her in a very favourable financial position. The woman, who knew or could have known about the man's mistake, should have informed him of her having briefly resumed her relationship with the other man before the conclusion of the cohabitation contract, thus the Supreme Court ruled.

Has justice been done in this case? A lawyer would probably say that this depends on the right application of the law to all circumstances of the case; she would assess whether the conclusion was justified that the man had had a wrong impression of the situation and could therefore avoid the contract on the basis of the Dutch Civil Code. A philosopher would most likely add that it also matters in light of what theory of justice the case is regarded; she would explore whether the outcome of the case could be justified on the basis of, for instance, a utilitarian, communitarian or liberal view. A legal philosopher, or a legal scholar with an interest in philosophy, at this point, may be expected to question the relationship between law and justice itself: To what extent should judges in civil cases take into account prevailing moral views in society? And what does that mean for cases governed by rules deriving not only from national law, but also from the European Union?

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<sup>1</sup> Hoge Raad 21 February 2014, ECLI:NL:HR:2014:416, *Nederlandse Jurisprudentie* 2014/265.

In this lecture, I will address the question of how conceptions of justice shape private law in Europe, in particular through adjudication. Private law concerns the relationships between people, as opposed to the relation of an individual to the State, which is governed by public law. My claim will be that, while judges should in principle not interfere with questions of personal morality, they may be required to acknowledge the implications of a society's political morality for a specific private legal dispute. Starting with the Dutch case described here, a tour of several European jurisdictions will serve to illustrate the point. It will also clarify why justice in the EU is not only of national importance, but should be considered through the lens of European private law, that is: the interplay of national and European law.

Our guide on this tour will be the late American legal philosopher Ronald Dworkin, whose work on the relations between law, morality and justice continues to inspire debate.<sup>2</sup> Following his lead, we will set out to explore the relationship between justice and private law in Europe. First, I will look into the task of the judiciary in the light of two views on the theoretical relation between law and morality, using the judgments in the Dutch case by way of illustration (section 2). Subsequently, I will examine why these views are of particular relevance to private legal cases, extending the investigation to the common law of England (section 3). Then, the perspective will be shifted to the interaction of national judges and the Court of Justice of the EU, finding arguments for a pronounced moral awareness of judges in private legal disputes that engage with different conceptions of justice (section 4). I will conclude with a word on fundamental rights (section 5).

## 2 Law and morality – of hedgehogs and foxes

In Ronald Dworkin's universe,<sup>3</sup> law is about the use of state force. 'Law is a matter of which supposed rights supply a justification for using or withholding the collective force of the state because they are included in or implied by actual political decisions of the past,' he held.<sup>4</sup> Legislation should, accordingly, be grounded in the scheme of principles endorsed by society and, thus, be morally coherent.<sup>5</sup> A judge, as representative of the state, furthermore, has to interpret the law in a coherent manner in so far as possible, assuming that legal rights and duties fit with the views of justice and fairness in society.<sup>6</sup>

'Justice', according to Dworkin, 'is a matter of the correct or best theory of moral and political rights.'<sup>7</sup> Each person will hold his or her own view, based on their personal

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<sup>2</sup> E.g. J. Waldron, 'Jurisprudence for Hedgehogs', *New York University Public Law and Legal Theory Working Papers*, paper 417, [http://lsr.nellco.org/nyu\\_plltwp/417](http://lsr.nellco.org/nyu_plltwp/417) (last consulted 23 December 2015); and the conference papers collected in the *Boston University Law Review*, <http://www.bu.edu/bulawreview/archives/volume-90-number-2-april-2010/> (last consulted 28 January 2016). J. Marías, *Dark Back of Time* (London: Chatto & Windus, Vintage, 2003), p. 301; Dante, *Divina Commedia*, 'Inferno', Canto I.

<sup>3</sup> R. Dworkin, *Religion without God* (Cambridge, Massachusetts: Harvard University Press, 2013), Chapter 2.

<sup>4</sup> R. Dworkin, *Law's Empire* (Cambridge, Massachusetts: Harvard University Press, 1986), p. 97.

<sup>5</sup> R. Dworkin, *Law's Empire* (Cambridge, Massachusetts: Harvard University Press, 1986), p. 176.

<sup>6</sup> R. Dworkin, *Taking Rights Seriously* (Duckworth, London 1977; fourth impression with a Reply to Critics, Duckworth, London 1984), p. 105; R. Dworkin, *Law's Empire* (Cambridge, Massachusetts: Harvard University Press, 1986), p. 225.

<sup>7</sup> R. Dworkin, *Law's Empire* (Cambridge, Massachusetts: Harvard University Press, 1986), p. 97.

convictions, of what these rights are. Some of you might disapprove of the woman's conduct in the cohabitation case, while others may not. Still, to what extent should moral convictions influence the legal assessment of the case?

To Dworkin, justice meant that, so far as possible, coherence should be aspired in the organisation of a society: Legal rules cannot be seen as separable from moral judgments. In his penultimate book *Justice for Hedgehogs*, he used the metaphor of the hedgehog and the fox to explain this. The metaphor goes back to a line of the ancient Greek poet Archilochus, made famous by Isaiah Berlin:<sup>8</sup> 'The fox knows many things, but the hedgehog knows one big thing.' While a fox has many tricks, the hedgehog's only defence is to curl up into a ball. Berlin related this metaphor to people's different ways of thinking and perceiving the world:

'For there exists a great chasm between those, on one side, who relate everything to a single central vision, one system, less or more coherent or articulate, in terms of which they understand, think and feel – a single, universal, organising principle in terms of which alone all that they are and say has significance – and, on the other side, those who pursue many ends, often unrelated and even contradictory, connected, if at all, only in some *de facto* way, for some psychological or physiological cause, related by no moral or aesthetic principle. (...) The first kind of intellectual and artistic personality belongs to the hedgehogs, the second to the foxes (...).'<sup>9</sup>

Placing himself with the hedgehogs, Dworkin challenged the (positivist) thesis of separability of law and morality, which held that it could be determined what the law was in a certain field without making any statements as to what would be morally just and right in that area.<sup>10</sup> In Dworkin's opinion, legal reasoning could never be considered separable from moral argument. In *Justice for Hedgehogs*, he even went as far as stating that the two were united; law should be seen as a branch of political morality.<sup>11</sup>

This one-system approach to law and morality is not uncontroversial. A closer look at the Dutch case on the avoidance of a cohabitation agreement demonstrates why. The facts were as follows: The man and woman involved in the dispute had been a couple for almost thirty years, had been living together for almost twenty, and had three children.<sup>12</sup> After the woman had had an affair with another man in 2003, the couple had several serious conversations on their future and decided to go on together. They concluded a cohabitation agreement on 3 August 2004 and renewed it in April 2005. Their relationship ended in 2007. In legal proceedings, the man then claimed for avoidance of the cohabitation agreements,

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<sup>8</sup> I. Berlin, *The Hedgehog and the Fox. An Essay on Tolstoy's View of History* (1953, reprinted London: Phoenix, 2009).

<sup>9</sup> I. Berlin, *The Hedgehog and the Fox. An Essay on Tolstoy's View of History* (1953, reprinted London: Phoenix, 2009), p. 3.

<sup>10</sup> H.L.A. Hart, *The Concept of Law* (Oxford: Oxford University Press, 2012), p. 185 ff. See, for a discussion of Dworkin's challenge to this thesis, J. Waldron, 'Jurisprudence for Hedgehogs', *New York University Public Law and Legal Theory Working Papers*, paper 417, [http://lsr.nellco.org/nyu\\_plltwp/417](http://lsr.nellco.org/nyu_plltwp/417) (last consulted 23 December 2015).

<sup>11</sup> R. Dworkin, *Justice for Hedgehogs* (Cambridge, Massachusetts: Harvard University Press, 2011), p. 405. See also R. Dworkin, *Justice in Robes* (Cambridge, Massachusetts: Harvard University Press, 2006), p. 34.

<sup>12</sup> The facts of the case are summarised in para. 3.1 and 3.2 of the Hoge Raad's judgment.

which were mostly beneficial to the woman, on the ground of mistake. He submitted that he had found out in 2007 that his partner had resumed her relationship with the other man for a short period just before entering into the first agreement in August 2004. This was why he felt the agreement had been concluded on a mistaken assumption and should be annulled. Even though his partner had been fully aware of the importance he attached to her affair having ended, she had kept silent on her having resumed (and ended) relations with the other man when she entered into the cohabitation agreement.

In light of these facts, it might to some not seem unjust to hold the woman's failure to inform her partner against her, not only morally but also legally. Both the Court of Appeal and Supreme Court, indeed, ruled that the man could be allowed to avoid the contract, since his partner had failed to disclose her unfaithfulness.

To others, however, this application of the doctrine of mistake is problematic. In fact, both the court of first instance and Advocate-General Wissink, who advised the Hoge Raad in this case,<sup>13</sup> were hesitant to mix law with morality. The court of first instance had rejected the man's claim to avoid the cohabitation contract, considering that it could not be validly determined that the agreement had been concluded under a wrong impression of the situation.<sup>14</sup> Since a cohabitation contract did not only govern the financial arrangements between the parties, but also had emotional and moral dimensions, avoidance on the basis of mistake or fraud should only happen in exceptional cases, thus the court held. Looking into this line of reasoning as well as the subsequent reversal by the Court of Appeal, Advocate-General Wissink leant towards the court of first instance's views.<sup>15</sup> He observed:

'Whether one partner has to confess unfaithfulness to the other partner, is in my opinion first of all a matter of conscience (...). The moral judgment of this matter does not regard the judge, as Dutch law does not express a general view on the question of whether unfaithfulness should be disclosed. For several legal judgments, unfaithfulness in a relationship is of no relevance, as is, accordingly, its disclosure. Where it can be relevant, the law should in my opinion be cautious in attaching consequences to a partner's choice to either or not disclose [the unfaithful conduct].'<sup>16</sup>

These diverging views attest of two different convictions on how judges should deal with moral dilemmas in private legal disputes. The first understands the judicial task as a moral assignment. As the word 'dilemma' indicates, the judge has to choose the lesser evil in a situation in which a choice has to be made between two undesirable alternatives. In this

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<sup>13</sup> In procedures before the Dutch Supreme Court, the Hoge Raad, the court receives a non-binding advice by an Advocate-General, which explains the state of the art of law and legal scholarship on the legal questions presented to the court as well as an opinion on how these questions should be answered.

<sup>14</sup> Rechtbank Arnhem 16 December 2009, para. 4.4 and 4.5, as cited by Advocate-General Wissink, para. 2.2.

<sup>15</sup> AG Wissink, para. 3.35-3.37.

<sup>16</sup> AG Wissink, para. 3.35: 'Of de ene partner de andere partner ontrouw moet opbiechten, is m.i. in de eerste plaats een gewetenskwestie (...). Het morele oordeel daarover regardeert de rechter niet nu het Nederlandse recht geen algemeen oordeel heeft over de vraag of ontrouw moet worden gemeld. Voor diverse juridische oordelen is relationele ontrouw niet relevant en dus ook niet of het is gemeld. Waar dit wel relevant kan zijn, moet het recht naar mijn mening voorzichtig zijn om consequenties te verbinden aan de keuze van de betrokken partner om hierover al dan niet een mededeling te doen.'

case, either the woman would have been able to benefit from the cohabitation agreement, despite her unfaithfulness, or the man would be released from his promises, even though the couple had been in a long relationship and the agreement had been intended to provide the woman with more financial security. Choosing between these two alternatives seems to be what the Court of Appeal and Supreme Court have done in this case. The second view, shining through in the court of first instance's judgment and the Advocate-General's opinion, on the other hand, holds that it is not the judge's task to assess the case on its moral merits. Rather, the dispute should first of all be resolved on the basis of legal rules (in this case the rules on avoidance of a contract on the ground of mistake<sup>17</sup>), which only cautiously may be read in light of morality.

Both the Court of Appeal and the Supreme Court seem to have adopted Dworkin's hedgehog perspective here, integrating the moral reading of legal rights in their judicial task. They *defined the legal question* that was at stake by considering the case in light of societal views on what behaviour may be expected from people in an affectionate relationship.

The court of first instance and the Advocate-General appear to have been hesitant to accept this type of unity of law and political morality. Rather, they emphasised the lack of consensus in Dutch society on whether one partner should confess her unfaithfulness to the other partner upon concluding a cohabitation agreement. This would imply that the moral dilemma of whether the woman should have informed her partner should in principle *not affect the answer to the legal question* of validity of the cohabitation agreement.<sup>18</sup> In a fox-like fashion, law and morality would not necessarily have to be related to one another.<sup>19</sup>

### 3 Justice in private law – two concepts of freedom

Why does it matter which theoretical view judges follow on the relation between justice and private law? Another example, from England this time, may serve as an illustration. In the English legal system, courts rather than legislatures typically develop rules of private law; there is no Civil Code. Yet, sometimes the question arises whether judges should be the ones to decide on a certain dilemma. This is illustrated particularly well by the case of the conjoined twins who became known to the general public as Jodie and Mary.<sup>20</sup>

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<sup>17</sup> Article 6:228 of the Dutch Civil Code.

<sup>18</sup> J. Rinkes and E. van Wechem, 'Kroniek van het vermogensrecht', *Nederlands Juristenblad* 2014/1826.

<sup>19</sup> Still, neither the first instance court nor the Advocate-General completely severed legal reasoning from moral argument. They explicitly considered that legal rules that determine which personal information parties have to share upon conclusion of a cohabitation agreement do not necessarily have to overlap with moral views prevalent in society on what partners owe to one another in an affectionate relationship; AG Wissink, para. 3.31.1. In other words, state force can, in those situations, not be relied upon to sanction the failure to live up to a moral duty. In reasoning thus, they sought to make the decision in this case 'fit' with the principles underlying the Dutch legal system. In a similar vein, the court of first instance in Arnhem in another case considered that a husband could not successfully claim for damages in tort law on the basis of his (ex-)wife's unfaithfulness. *Rechtbank Arnhem* 15 april 2009, ECLI:NL:RBARN:2009:BI2224, *Nederlandse Jurisprudentie* 2009/392, cited by AG Wissink, para. 3.25.3.

<sup>20</sup> *Re A (Children)*, [2000] EWCA Civ 254.

At the heart of the case was the question of whether medical intervention should or should not be allowed. The parents had travelled from the Maltese island of Gozo to seek treatment in Manchester, when they had found out during pregnancy that their twin daughters were conjoined. The twins were born in St. Mary's Hospital in Manchester on August 8<sup>th</sup> 2000 and it soon became clear what dilemma their parents, doctors, and eventually the courts were confronted with. The twins were joined at the lower abdomen and shared only one organ, the bladder. While Jodie was feeding and reacting normally, Mary's brain showed malformations and her heart was pumping very weakly. Through a common artery, Jodie was keeping her sister alive. Predictions were gloomy: As Jodie's heart was doing all the work for both, she was growing thinner, while Mary was gaining weight. Jodie's heart would not be able to keep this up for more than three to six months, after which both twins would die. The alternative, a separation of the twins, would offer Jodie a chance to develop and grow up normally, but would mean certain death to Mary. Their parents, who were devout Catholics, did not consent to an operation, as they believed it could not be God's will to kill one of their daughters in order to enable the other one to survive – both girls had an equal right to life.<sup>21</sup> Since the doctors were convinced they could successfully separate the twins, thus giving Jodie a life that would be worthwhile, the hospital asked for a declaration that the operation could be lawfully carried out without the parents' consent. Permission was granted by the Family Division, after which the parents appealed. The Court of Appeal also granted permission and the twins were separated on November 7<sup>th</sup> 2000. As expected, Mary did not survive the operation. Jodie, whose real name is Rosie, is doing well, as one of the Court of Appeal judges reported at the occasion of the publication of Ian McEwan's book *The Children Act* in 2014.<sup>22</sup>

McEwan's novel vividly depicts the distress a judge may experience when having to decide a case presenting her with such a moral dilemma as that of the conjoined twins.<sup>23</sup> Lord Justice Ward in the actual case observed:

'There has been some public concern as to why the court is involved at all. We do not ask for work but we have a duty to decide what parties with a proper interest ask us to decide. Here sincere professionals could not allay a collective medical conscience and see children in their care die when they know one was capable of being saved. They could not proceed in the absence of parental consent. The only arbiter of that sincerely held difference of opinion is the court. Deciding disputed matters of life and death is surely and pre-eminently a matter for a court of law to judge. That is what courts are here for.'<sup>24</sup>

An explanation for the doubts that were raised as to the judiciary's involvement in the case may be found in the far-reaching interference with the parents' autonomy it entailed. Where parents as legal representatives safeguard the interests of their underage children, the

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<sup>21</sup> *Re A (Children)*, [2000] EWCA Civ 254, LJ Ward, para. II.13.

<sup>22</sup> <http://www.dailymail.co.uk/news/article-2780371/Separated-twin-living-life-says-judge-ordered-operation-killed-conjoined-sister.html> (last consulted 17 January 2016).

<sup>23</sup> I. McEwan, *The Children Act* (London: Jonathan Cape, 2014), p. 24-28.

<sup>24</sup> *Re A (Children)*, [2000] EWCA Civ 254, LJ Ward, para. II.14.

law at the same time puts limits on their freedom to choose how to best serve these interests. In particular, rules of family law give judges the power to overrule parents' choices in case they consider this to serve the child's welfare. Still, in the case of Jodie and Mary, it could hardly be said that their parents did not have their best interests in mind; they even travelled halfway across Europe to obtain the best possible medical care for their daughters. What was at stake here were different moral assessments of what would be best for the children: While the parents relied on their religious belief that both girls had an equal right to life and that intervention could, thus, not be justified, their doctors wished to separate the twins so as to give one a chance to live. The courts' decision to permit separation implied a severe limitation of the parents' freedom to choose what they considered best for their children.

Justice in private law adjudication, accordingly, concerns the assessment of different moral views within the legal framework that demarcates a case. Furthermore, it regards judges' awareness of the role they have in determining private parties' rights against the backdrop of a society's morality. As Lord Justice Walker observed with regard to the tragic choice<sup>25</sup> to be made in this case:

'The feelings of the twins' parents are entitled to great respect, especially so far as they are based on religious convictions. But as the matter has been referred to the court the court cannot escape the responsibility of deciding the matter to the best of its judgment as to the twins' best interests.'<sup>26</sup>

Walker here seemed to situate the court's responsibility on the intersection of two concepts of freedom, a negative and a positive one. In his *Four Essays on Liberty*,<sup>27</sup> Isaiah Berlin defined freedom in a negative sense as concerning the question of '[w]hat is the area within which (...) a person (...) is or should be left to do or be what he is able to do or be, without interference by other persons'.<sup>28</sup> The notion of positive freedom then involves the question by whom a person is ruled or who is to say what a person is, and she is not, to be or do; it derives from an individual's wish to be her own master.<sup>29</sup> As Berlin observed, the two concepts may conflict with one another: An individual's negative freedom from interference may become subject to the 'tyranny of the majority' in a democratic society pursuing positive freedom of collective self-direction.<sup>30</sup> Reading the Court of Appeal's judgment in the case of Jodie and Mary in this light provides a clear example of how societal moral views may, on the basis of the ideal of a society's positive freedom, overrule the views of the parents who freely subjected themselves to the rules of English law.<sup>31</sup>

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<sup>25</sup> I. van Domselaar, *The Fragility of Rightness* (PhD thesis Amsterdam UvA, 2014), p. 284-286.

<sup>26</sup> *Re A (Children)*, [2000] EWCA Civ 254, LJ Walker, 'Conclusions'.

<sup>27</sup> I. Berlin, *Liberty* (1969; edited by H. Hardy, Oxford: Oxford University Press, 2002).

<sup>28</sup> I. Berlin, *Liberty* (1969; edited by H. Hardy, Oxford: Oxford University Press, 2002), p. 169.

<sup>29</sup> I. Berlin, *Liberty* (1969; edited by H. Hardy, Oxford: Oxford University Press, 2002), p. 177-178.

<sup>30</sup> I. Berlin, *Liberty* (1969; edited by H. Hardy, Oxford: Oxford University Press, 2002), p. 208-210.

<sup>31</sup> Parents' views, as cited by LJ Ward, para. 13: 'We do not understand why we as parents are not able to make decisions about our children although we respect what the doctors say to us and *understand that we have to be governed by the law of England*. We do know that everyone has the best interests of our daughters at heart and this is a very difficult situation not only for us as their parents but also for all of the medical and nursing staff involved in Mary's and Jodie's treatment.' (emphasis added by LJ Ward)

Summarising, this judgment assumes a relationship between law and morality for the adjudication of private legal cases. Courts are called upon to decide on disputes between private parties, *in spite of* the fact that they may impose a moral view on individuals, but also *because of* the fact that they may do so.<sup>32</sup> A court's assessment of the interests of private parties in light of societal morality may overrule moral convictions of individuals who have freely subjected themselves to the rules of the legal system. The court, therefore, was allowed to set aside religious principles in deciding on what treatment would be best for the children, thus overruling the moral convictions of the parents, who as legal representatives had refused consent for the treatment.<sup>33</sup> Accordingly, the remaining question does not seem to be whether moral argument should be taken into account by judges in civil cases, but rather to what extent and in what manner.

In a Dworkinian scheme, then, the Court of Appeal's reasoning may still be considered to build on a coherent set of principles defined in English law.<sup>34</sup> Poet Laureate Andrew Motion evoked a similar image of the British legal system as a whole in the poem he wrote at the occasion of the inauguration of the Supreme Court in 2009:<sup>35</sup>

'Here Justice sits and lifts her steady scales  
Within the Abbey's sight and Parliament's  
But independent of them both. And bound  
By truth of principle and argument.

A thousand years of judgment stretch behind –  
The weight of rights and freedoms balancing  
With fairness and with duty to the world:  
The clarity time-honoured thinking brings.'

#### **4 Judges in Utopia – or, Europe for hedgehogs**

'With fairness and with duty to the world' – does this mean that judges in civil cases have to consider legal questions from a moral perspective from the outset? Broadening our view to the multi-level order of European private law, it becomes clear why this question continues to raise as much controversy as it did in the Dutch and English cases, and a partial answer may be found.

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<sup>32</sup> Cf. a liberal principle of political legitimacy; I. van Domselaar, *The Fragility of Rightness* (PhD thesis Amsterdam UvA, 2014), p. 64.

<sup>33</sup> Note, once more, that the fact that the case was assessed under English law is of relevance here. The outcome might have been different had the case been adjudicated under the law of the family's home country, Malta, since religious principles are explicitly included in Article 2 of the Maltese Constitution: '(1) The religion of Malta is the Roman Catholic Apostolic Religion. (2) The authorities of the Roman Catholic Apostolic Church have the duty and the right to teach which principles are right and which are wrong. (3) Religious teaching of the Roman Catholic Apostolic Faith shall be provided in all State schools as part of compulsory education.'

<sup>34</sup> In which the 'best interest of the children' determined which party (parents or hospital) had the strongest case.

<sup>35</sup> <https://www.supremecourt.uk/visiting/new-artwork.html> (last visited 25 January 2016).

Europe by nature complicates a unitary understanding of law, morality and justice in private law. The reasons for this are manifold. First, rules of private law do not only derive from national law, but also from the European Union. For example, rules in the Dutch Civil Code concerning the information that parties have to provide to one another when concluding a contract are complemented by European rules on specific information that sellers have to give to consumers – there is a plurality of legal sources that apply to private legal disputes. Second, different institutions may be involved in the adjudication of a case. A national judge may ask the Court of Justice of the EU for guidance regarding the interpretation of European rules – there is a plurality of institutions. Third, different systems of private law reflect different conceptions of justice. This is illustrated, for instance, by the distinction between the English Common Law tradition and the continental Civil Law tradition and the distinction between ideas of justice expressed in national laws and the EU’s market-oriented laws – there is a plurality of conceptions of justice in European private law. In light of this plurality of sources, institutions and values in the EU, answering the question to what extent and how judges should integrate moral arguments in their reasoning becomes even more complex.

Hedgehogs do not have an easy task here. Since no ‘community of values’ is as yet considered to strengthen the European integration project,<sup>36</sup> monist theories such as Dworkin’s justice for hedgehogs do not seem to be able to fully explain the dynamics of a multi-level private legal order. Theories on value pluralism, such as those developed by Berlin, a ‘fox par excellence’,<sup>37</sup> might be more successful in clarifying conflicting approaches to private legal disputes.<sup>38</sup>

An example can be found in the case law of the Court of Justice of the EU. The Court’s *Aziz* judgment of 2013<sup>39</sup> formed the starting point of a series of decisions on Spanish mortgages in the aftermath of the economic crisis. The facts were the following: Mr Aziz had concluded a loan agreement with the CatalunyaCaixa Bank in Barcelona, which was secured by a mortgage on his family home.<sup>40</sup> A number of general terms and conditions that strongly favoured the bank were attached to the contract.<sup>41</sup> The severe consequences of this contract came to light when the economic crisis hit the Spanish economy. Mr Aziz lost his job and was not able to pay the instalments of the mortgage anymore. The bank then invoked its standard terms to claim back the entire amount of the loan in accelerated enforcement proceedings

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<sup>36</sup> As opposed to the personified community that is the ‘author of all laws’ in Dworkin’s law as integrity; R. Dworkin, *Law’s Empire* (Cambridge, Massachusetts: Harvard University Press, 1986), p.225.

<sup>37</sup> J. Waldron, ‘Jurisprudence for Hedgehogs’, *New York University Public Law and Legal Theory Working Papers*, paper 417, [http://lsr.nellco.org/nyu\\_plltwp/417](http://lsr.nellco.org/nyu_plltwp/417) (last consulted 23 December 2015), p. 5.

<sup>38</sup> Cf. M. Minow and J.W. Singer, ‘In Favor of Foxes: Pluralism as Fact and Aid to the Pursuit of Justice’, *Boston University Law Review* 2010, p. 903-920. See also Dworkin’s ‘Response’, *Boston University Law Review* 2010, p. 1080-1081, in which he underscores the distinction between uncertainty and indeterminacy: ‘They demonstrate, in their illuminating review of dram shop cases, the great variety of available strategies of legal argument. But they do not provide, so far as I see, any reason to think that one of these is not overall best even if we cannot be confident which is – any reason to suppose that professors and judges must just choose, perhaps by throwing a dart.’

<sup>39</sup> Case C-415/11 *Aziz v CatalunyaCaixa*, CJEU 14 March 2013, ECLI:EU:C:2013:164.

<sup>40</sup> The facts are summarised in CJEU *Aziz*, para. 18 ff.

<sup>41</sup> These included (i) a default interest of 18.75% in case of late payment; (ii) the possibility to claim the totality of the loan in accelerated enforcement proceedings in case Aziz failed to pay any part of the loan or interest; and (iii) a possibility for the bank to unilaterally determine the value of the house in such enforcement proceedings.

against Aziz. Spanish law provided only very limited possibilities to object, none of which applied in this case. As a result, the bank managed to obtain the property of the house in a public auction that attracted no other bidders and did so for only 50% of the house's contractually established value. Aziz was left with a remaining debt of 40,000 euro and he and his family were evicted from their home.

This was, however, not the end of the story. Just before the eviction, Aziz had started proceedings in another court, claiming that the general terms and conditions were unfair. They should be held void and the enforcement proceedings brought to a halt.<sup>42</sup> The judge handling the case was sympathetic to Aziz's claim, in particular since it represented a much bigger social problem in the Spanish housing market. Banks had been able to benefit from one-sided mortgage contracts for a long time, and consumers hardly had a chance to restructure their debts.<sup>43</sup> Nevertheless, the judge found that the Spanish law of civil procedure presented an obstacle: Since the assessment of the fairness of the contract terms took place in parallel proceedings, the judge's findings would not have any effect on the ongoing enforcement proceedings. The rules of civil procedure did not give him any possibilities to stop the eviction from taking place.

Yet, the story did not end there either. The rules on unfair terms in contracts between businesses and consumers derive from a European Directive.<sup>44</sup> The judge in Barcelona, therefore, could bring the problem to the attention of the Court of Justice of the EU, which advises national judges on the interpretation of Union law. In a groundbreaking judgment, the Court held that Spanish procedural law did not comply with the level of consumer protection required by the EU Directive, since it did not allow the judge who assessed the contract terms to stay the enforcement proceedings while his judgment was pending.<sup>45</sup> The Court of Justice's decision, eventually, inspired a reform of Spanish law.<sup>46</sup>

The dynamics of the *Aziz* case can be explained on the basis of value pluralism, insofar as the case highlighted the consequences of linking substantive EU law to national procedural law.<sup>47</sup> The separation of mortgage enforcement proceedings and unfair terms control in Spain strongly favoured banks, which had been able to dominate contractual relationships with home-owners. EU consumer law offered an effective, but highly interventionist counterpoint by forcing a change in the rules of civil procedure. A monist theorist might be able to explain this interference with Spanish law on the basis of the supremacy of Union law. A pluralist account would, however, arguably paint a truer picture of the tension between EU law and national procedural autonomy.<sup>48</sup>

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<sup>42</sup> CJEU *Aziz*, para. 27.

<sup>43</sup> 'Más de 300 reclamaciones por las cláusulas abusivas hipotecarias', *El País – Cataluña* 5 May 2013, <[http://ccaa.elpais.com/ccaa/2013/05/05/catalunya/1367767343\\_786819.html](http://ccaa.elpais.com/ccaa/2013/05/05/catalunya/1367767343_786819.html)> (last consulted 9 February 2016).

<sup>44</sup> Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts, *Official Journal L* 095, 21/04/1993, p. 29-34.

<sup>45</sup> CJEU *Aziz*, para. 59. Specific attention was drawn to the fact that Spanish law could not prevent Aziz from losing his family home. He would be left with only a right to financial compensation in case the contract terms were deemed to be unfair; para. 61.

<sup>46</sup> Ley 1/2013, *BOE* No 116, of 15 May 2013, p. 36373-36398.

<sup>47</sup> Article 19(1) Treaty on European Union.

<sup>48</sup> C. Mak, 'The One and the Many. Translating Insights from Constitutional Pluralism to European Contract Law Theory', *European Review of Private Law* 2013, p. 1208-1209.

European constitutional theorists have, indeed, developed several models of pluralism to explain the interaction between the Union and its Member States.<sup>49</sup> European private lawyers have in recent years joined this debate.<sup>50</sup> In both fields, nevertheless, a central question has as yet remained unanswered: If pluralism offers a convincing *explanation* for the interaction between national and EU laws, can it also provide *normative* guidance? Should pluralism not only be recognised, but also be embraced as the best model?

This brings me to the claim I stated at the beginning of this lecture: While judges should not interfere in questions of personal morality, they may be required to acknowledge the implications of a society's political morality for a specific private legal dispute. This claim is not so much based on the idea that judges should establish which areas of morality fall within the scope of legally enforceable rights – although this may be part of their task, as we have seen in the Dutch and English cases. Rather, it underlines the importance of the consideration of value pluralism in the dialogue between European courts.<sup>51</sup> By defining which different moral views, deriving from different levels of governance, affect a case's outcome, European private law adjudication creates a space within which ideas of freedom and justice can be made explicit. This allows for public debate on the extent to which moral views overlap, which, in turn, could inspire the further development of rules of private law by legislatures and judiciaries.<sup>52</sup>

This type of pluralist model for European private law does not on principle take a stand on whether it should be possible for a judge to eventually reconcile diverging values in a monist way. It merely advises not to reason away potential conflicts too easily, but rather make them the topic of debate.

Any hedgehogs in the audience, though, may find some hope for the future of the European project here. To the extent that shared values emerge from the discourse, a commitment may arise that unites European citizens.<sup>53</sup>

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<sup>49</sup> N. Walker, 'The Idea of Constitutional Pluralism' *Modern Law Review* 2002, p. 317-359; M. Poyares Maduro, 'Contrapunctual Law: Europe's Constitutional Pluralism in Action' in N. Walker (ed.), *Sovereignty in Action* (Oxford: Hart Publishing, 2003), p. 501-537; M. Kumm, 'Who is the Final Arbiter of Constitutionality in Europe? Three Conceptions of the Relationship between the German Federal Constitutional Court and the European Court of Justice', *Common Market Law Review* 1999, p. 351-386.

<sup>50</sup> H.-W. Micklitz, 'Monistic Ideology versus Pluralistic Reality – Towards a Normative Design for European Private Law' in L. Niglia (ed), *Pluralism and European Private Law* (Oxford, Hart publishing, 2013), p. 29-51; M.W. Hesselink, 'How Many Systems of Private Law are there in Europe?', in L. Niglia (ed), *Pluralism and European Private Law* (Oxford, Hart publishing, 2013), p. 199-247; V. Mak, 'The Character of European Private Law' (inaugural lecture Tilburg, 19 June 2015).

<sup>51</sup> On the extent to which this assumes a shared vision on the judiciary's task, see E. Mak, 'The Possibility of a European Judicial Culture' (inaugural lecture Rotterdam, 21 November 2014).

<sup>52</sup> C. Mak, 'Judges in Utopia. Fundamental Rights as Constitutive Principles of a European Private Legal Culture', in K.P. Purnhagen and G. Helleringer (eds), *Towards a European Legal Culture* (Oxford/Baden-Baden/München: Hart/Nomos/Beck, 2014), p. 375-395. Inspired by J. Habermas's discourse theory, *Between Facts and Norms* (Cambridge: Polity Press, 1996), though taking a different view on the role of the division of tasks between judiciary and legislature.

<sup>53</sup> J. Habermas, 'The Crisis of the European Union in Light of a Constitutionalization of International Law – An Essay on the Constitution for Europe', in *The Crisis of the European Union. A Response* (Cambridge: Polity Press, 2012), p. 29, 36-37. For a critical evaluation, see G. Comparato, *Nationalism and Private Law in Europe* (Oxford: Hart Publishing, 2014), p. 242-247.

## 5 Constitutional imagination

Finally, the normative questions inherent in European private law explain why fundamental rights figure prominently in the discussion on what unites and divides the EU. Fundamental rights are rights that have been given special protection in national constitutional documents and international human rights treaties – as diverse as the right to life and that of effective consumer protection. Fundamental rights bridge the gap between the EU and its Member States, between negative and positive freedom, and between law and morality. The German philosopher Jürgen Habermas observed that human rights in this respect ‘exhibit a Janus face turned simultaneously to morality and to law. Notwithstanding their exclusively moral *content*, they have the *form* of positive, enforceable subjective rights (...).’<sup>54</sup>

European judges in civil cases that touch upon moral questions, therefore, are in the position to address ideas of justice in particular when fundamental rights colour their reasoning. They open up a space for a continuing debate on the foundations of our societies. The role of judges I propose here in this respect calls for ‘utopian thinking’ in the sense described by Martin Loughlin in his article on ‘The Constitutional Imagination’. Loughlin defines ‘Utopia’ as the ‘view from nowhere’, which role is to question established views by offering a vision of what might be:

‘But a utopia is not a mere dream. Although its determining characteristic is not its “realisability” but “the preservation of *opposition*”, it still aspires to be a scheme that seeks actualisation. Crucially, it is only through this imaginative aspect of discourse that we are able to extract what seems implicit in an inherited constitution. Utopia is to constitution what invention is to science.’<sup>55</sup>

In times of crisis, this is something to keep in mind. Law and institutions, in particular when they regard the rules of private law that govern the internal market, allow us to explore the possibilities and limitations for freedom’s counterpart to emerge: European solidarity.<sup>56</sup>

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<sup>54</sup> J. Habermas, ‘The Concept of Human Dignity and the Realistic Utopia of Human Rights’, in *The Crisis of the European Union. A Response* (Cambridge: Polity Press, 2012), p. 82.

<sup>55</sup> M. Loughlin, ‘The Constitutional Imagination’, *The Modern Law Review* 2015, p. 13.

<sup>56</sup> Cf. S. Rodotà, *Solidarietà. Un’utopia necessaria* (Roma/Bari: Gius. Laterza & Figli, 2014).