Article

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Progress in EU Contract Law

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Abstract: This article aims to contribute to the elucidation of the philosophical foundations of EU contract law through a critical discussion of different understandings of progress and their respective implications. Claims about progress and regress invariably refer to a normative or evaluative standard. Such standards, it is usually understood, allow us – backward-looking – to take stock and to determine how much progress (in our case) EU contract law has made, and provide us – forward-looking – with a sense of where (in our case) EU contract law should be going. Therefore, the core normative question in this contribution is: what if anything should count as progress in EU contract law? The article, first, examines understandings of progress that are immanent to EU contract law or to EU constitutional law, in particular the specific aims of directives and the various more general constitutionalised objectives. It, then, moves on to consider external standards for progress that have been suggested in the literature. These standards typically rely either on a teleological conception of the common or individual private law good, such as efficiency and self-authorship, or on a deontological conception of private law right, notably interpersonal and social justice. Subsequently, the article confronts recent post- and decolonial critiques of the very idea of progress and their implications for EU contract law and its study. Finally, it argues for a self-critical reflexive stance towards progress in EU contract law, grounded in a strong commitment to moral and epistemic equality, which requires overcoming unilateral universalisms.

Keywords: progress, functionalism, values, interpersonal justice, social justice, decolonial critique

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Résumé: Cet article vise à contribuer à l'élucidation des fondements philosophiques du droit européen des contrats par une discussion critique des différentes conceptions du progrès et de leurs implications respectives. Les revendications concernant le progrès et la régression se réfèrent invariablement à un standard normatif ou évaluatif. Ces standards, comme on l'entend généralement, nous permettent – en étant rétrospectifs – de déterminer les progrès réalisés (ici) par le droit européen des contrats, et nous donnent – en étant prospectifs – une idée de la direction que devrait prendre (ici) le droit européen des contrats. Par conséquent, la question normative centrale de cette contribution est la suivante: qu'est-ce qui, le cas échéant, devrait être considéré comme un progrès dans le droit européen des contrats ? L'article examine tout d'abord les conceptions du progrès qui sont inhérentes au droit européen des contrats ou au droit constitutionnel européen, en particulier les objectifs spécifiques des directives et les divers objectifs constitutionnalisés généraux. Il se penche ensuite sur les standards externes du progrès qui ont été suggérés dans la littérature. Ces standards s'appuient généralement soit sur une conception téléologique du bien commun ou individuel de droit privé, comme l'efficacité et l'autonomie, soit sur une conception déontologique du droit privé, notamment la justice interpersonnelle et sociale. Ensuite, l'article confronte les récentes critiques post-et décoloniales de l'idée même de progrès et leurs implications pour le droit européen des contrats et son étude. Enfin, il plaide en faveur d'une position réflexive autocritique à l'égard du progrès dans le droit européen des contrats, fondée sur un engagement fort en faveur de l'égalité morale et épistémique, ce qui nécessite de dépasser les universalismes unilatéraux.

Zusammenfassung: Diese Studie will zur Klärung der philosophischen Grundlagen des Vertragsrechts beitragen und zwar dadurch, dass verschiedene Konzepte von "Fortschritt" beleuchtet werden und zugleich, wie sie sich auswirken. Eine Qualifikation als Fortschritt (oder aber als Rückschritt) legt implizit und zwangsläufig, jedenfalls implizit, einen normativen Wertungsstandard zugrunde. Ein solcher, so die gängige Annahme, erlaubt uns – in die Vergangenheit gewendet – eine Bestandaufnahme und dabei eine Klärung der Frage, wie viel Fortschritt beispielsweise das EU Vertragsrecht (so im vorliegenden Beitrag) gemacht hat, sowie – in die Zukunft gerichtet – wo EU Vertragsrecht sich hineinentwickeln sollte. Daher stellt sich die normative Frage im vorliegenden Beitrag in folgender Weise: Was – wenn überhaupt – soll im EU Vertragsrecht als Fortschritt gesehen werden? Der Beitrag untersucht, erstens, Behauptungen von Fortschritt, die dem EU Vertragsrecht oder dem EU Verfassungsrecht selbst immanent sind, namentlich den verschiedenen Richtlinienzielen und allgemeineren Verfassungszielen. Fortgefahren wird, zweitens, mit externen

Standards von Fortschritt, wie sie im Schrifttum vorgeschlagen wurden. Diese gründen typischerweise entweder in einem teleologischen Verständnis von Gemeinnutz-oder Privatnutzgütern im Vertragsrecht, etwa Effizienz oder Selbstbestimmung, oder aber in einem deontologischen Konzept von privatrechtlichen Rechtspositionen, namentlich zu interpersonaler oder sozialer Gerechtigkeit. Danach wendet sich der Beitrag jüngeren Post-und Dekolonialisierungs-Kritiken zu, die das Konzept von Fortschritt selbst in Frage stellen, und den Implikationen solch einer Kritik für das EU Vertragsrecht und seine Erforschung, Der Beitrag schließt mit einer selbstkritischen Positionsbestimmung zum Thema Fortschritt im EU Vertragsrecht. Diese gründet in einem starken Bekenntnis zu moralischer und epistemischer Gleichheit – und hieraus folgend der Notwendigkeit, einseitigen Universalismen eine Absage zu erteilen.

1 Introduction

This article aims to contribute to the elucidation of the philosophical foundations of EU contract law through a critical discussion of different understandings of progress and their respective implications. Claims about progress and regress invariably refer to a normative or evaluative standard. Such standards, it is usually understood, allow us – backward-looking – to take stock and determine how much progress (in our case) EU contract law has made, and provide us – forward-looking – with a sense of where – in our case – EU contract law should be going. Therefore, the core normative question in this contribution is: what if anything should count as progress in EU contract law?

The article starts by examining understandings of progress that are immanent to EU contract law, in particular the specific aims of directives and the various more general constitutionalised objectives (Sections 2–5). It, then, moves on to consider external standards for progress that have been suggested in the literature (Sections 6 and 7). These standards typically rely either on a teleological conception of the common or individual private law good, such as efficiency and self-authorship, or on deontological conceptions of private law right, notably interpersonal and social justice. Finally, it confronts recent critiques of the very idea of progress and its implications for EU contract law and its study, and argues, in response, for a self-critical reflexive stance towards progress in EU contract law, grounded in a strong commitment to moral and epistemic equality, which requires overcoming unilateral universalisms (Sections 8 and 9).

Throughout, the main focus will be on consumer contracts because consumer contract law is still the core of the EU contract law acquis. However, much of the analysis applies also to other contracts governed by EU law.

2 The Aims of EU Directives

One way to understand progress in EU contract law, perhaps the most obvious but also the narrowest one, is in terms of achieving the aims set by EU directives on contract law.

2.1 Purposive Directives

The main part of EU contract law consists of directives. EU directives are intrinsically purposive. Pursuant to Article 288 TFEU, they are binding upon the member states as to the result to be achieved. Beyond the general internal market objective (on which below, Section 3.1), each directive formulates its own specific objective.[1] Therefore, a very straightforward standard for progress in EU contract law would be the achievement of the specific respective objectives set by each of the EU contract law directives.

2.2 Fitness for Purpose

As it happens, the European Commission actively evaluates whether EU contract law directives deliver on their objectives, and insofar whether they achieve the envisioned progress. In 2016–2017, the Commission undertook a 'Fitness Check' of consumer contract law.[2] The check was part of the Commission's wider Regulatory Fitness and Performance (REFIT) programme, which aimed 'to ensure that EU

1 As a typical example, see Directive 2019/770 of 20 May 2019 on certain aspects concerning contracts for the supply of digital content and digital services, art 1 (Subject matter and purpose): 'The purpose of this Directive is to contribute to the proper functioning of the internal market while providing for a high level of consumer protection, by laying down common rules on certain requirements concerning contracts between traders and consumers for the supply of digital content or digital services, in particular, rules on: the conformity of digital content or a digital service with the contract, remedies in the event of a lack of such conformity or a failure to supply, and the modalities for the exercise of those remedies, and the modification of digital content or a digital service.'

2 As a follow-up, the Commission recently launched a 'Fitness Check of EU consumer law on digital fairness. Cf https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/13413-Digital-fairness-fitness-check-on-EU-consumer-law_en.

laws deliver on their objectives at a minimum cost for the benefit of citizens and businesses',[3] and which, in turn, was part of the EU's Better Regulation agenda. The check focused on six directives, concerned with core contract law issues such as unfair terms, unfair commercial practices, and sales remedies.[4] The Commission adopted five evaluation criteria for determining whether the directives were still fit for purpose, i.e. effectiveness, efficiency, coherence, relevance and EU added value.[5] The Fitness Check concluded that the directives were overall fit for purpose,[6] but it also found that the further improvement of the overall effectiveness, efficiency and coherence of the six directives required new action.[7] In other words, the Fitness Check found room for further progress in the EU law concerned with the entire life cycle of consumer contracts, and the Commission immediately proposed new measures to achieve those ends ('a new deal for consumers').[8]

2.3 Effectiveness

Thus, the EU legal order, including its system of private law, is inherently dynamic.[9] It aims at change, more specifically at change in the direction of the aims it has set itself. However, for the achievement of these aims the EU is dependent on the member states.

For EU private law this means, in the first place, that the progress envisaged by EU law will not be made unless the member states properly transpose the

3 See the Commission's website 'REFIT – making EU law simpler, less costly and future proof' (https://ec.europa.eu/info/law/law-making-process/evaluating-and-improving-existing-laws/refit-making-eu-law-simpler-less-costly-and-future-proof_en).

4 These six directives were: the Unfair Commercial Practices Directive 2005/29/EC (the 'UCPD'), the Unfair Contract Terms Directive 93/13/EEC (the 'UCTD'), the Price Indication Directive 98/6/EC (the 'PID'), the Consumer Sales and Guarantees Directive 1999/44/EC (the 'CSGD'), the Injunctions Directive 2009/22/EC (the 'ID'), and the Misleading and Comparative Advertising Directive 2006/114/EC (the 'MCAD').

5 *Report of the Fitness Check*, 5, 12.

6 *Ibidem*, 76.

7 *Ibidem*, 85.

8 Cf Communication 'A new deal for consumers', Brussels, 11 April 2018 COM(2018) 183 final. This led to Directive 2019/2161 of 27 November 2019 on the better enforcement and modernisation of Union consumer protection rules, which introduced contract remedies for unfair commercial practices.

9 See further, M.W. Hesselink, 'Contract theory and EU contract law', in C.W. Twigg-Flesner (ed), *Research handbook on EU consumer and contract law* (Cheltenham: Edward Elgar, 2016) 508–534, and *idem*, 'The ideal of codification and the dynamics of Europeanisation: the Dutch experience' 12 *European Law Journal* (2006) 279–305.

EU directives. In order to enhance the effectiveness of directives, the Court of Justice of the European Union (CJEU) has developed the principle of harmonious (or consistent) interpretation, pursuant to which, in the case of late or incomplete transposition of a directive into national law, national courts must interpret national law in such a way that the result pursued by the directive is achieved as far as possible,[10] thus ensuring the full effectiveness of EU law,[11] in our case EU contract law.

Secondly, because of the principle of the procedural autonomy of the member states, it is for the member states to decide how to ensure the protection of rights (including private law rights) granted by EU law.[12] That principle, however, is limited by two other principles: EU rights must not be treated less favourably than rights of national origin (principles of equivalence), and the exercise of EU rights is not rendered impossible or excessively difficult (principle of effectiveness).[13] On the basis of that latter principle, the Court of Justice, in a long line of cases starting from *Océano*, has held that in order to achieve the result sought by Article 6 of the Unfair Terms Directive (1993), i.e. preventing individual consumers from being bound by an unfair contract term, national courts must have the power to determine of their own motion whether a term is unfair.[14] Thus, the principle of effectiveness became the basis for a developing judge-made EU law of civil procedure – a striking instance of the spill-over effect predicted by the neo-functionalist account of European integration.[15]

It is important to note that the aims pursued by EU directives should be understood as public objectives, even in the case of consumer protection in contractual relationships. In the same *Mostaza Claro* case, for example, the CJEU justified the judicial power of *ex officio* assessment of the unfairness of terms in private contracts explicitly with reference to the 'nature and importance of the *public interest* underlying the protection which the Directive confers on consumers'.[16] By contrast, the right to effective judicial protection enshrined in Article 47 of the Charter of Fundamental Right of the EU (CFREU) is not concerned with

10 CJEU, 19 January 2010, C-555/07 (*Kücükdeveci*), ECLI:EU:C:2010:21, para 48.

11 CJEU, 5 October 2004 (*Pfeiffer and others*), joined cases C-397/01 to C-403/01, ECLI:EU:C:2004:584, 114.

12 CJEU, 26 October 2006 (*Mostaza Claro*), C-168/05, ECLI:EU:C:2006:675, para 24.

13 *Ibidem*.

14 *Ibidem*, para 27.

15 E.B. Haas, *The uniting of Europe: political, social and economic forces 1950–1957* [1958] (Notre Dame: University of Notre Dame Press, 2004) 291.

16 CJEU, *Mostaza Claro*, para 38 (emphasis added).

public objectives but with subjective rights, including private rights. And as Anna van Duin has pointed out,[17] the teleology of public interests (effectiveness) and the deontology of fundamental rights (right to an effective remedy) may well come apart, also in contract cases.[18]

In sum, by the standards immanent to EU directives, which are the main source of EU contract law, progress occurs when the specific respective aims of these directives are effectively achieved.

3 Constitutional Objectives

3.1 The Establishment and Functioning of the Internal Market

Virtually all EU directives on contract law have Article 114 TFEU as their legal basis. This means that to be valid directives must aim at the approximation of the laws of the member states with a view to ensuring the establishment and functioning of the internal market.[19] By the same token, the internal market – and most recently, specifically the 'digital single market' – has been the constitutional objective underlying virtually all the EU law in the area of contracts. In other words, in addition to the specific aims of the individual directives, discussed in Section 2.1, the EU contract law *acquis communautaire* shares the general aim of building an internal market and ensuring its proper functioning. And during the period when most

17 A. van Duin, *Effective judicial protection in consumer litigation: article 47 of the EU Charter in practice* (Cambridge: Intersentia, 2022). Contrast N. Reich, 'The principle of effectiveness and EU contract law', in J. Rutgers and P. Sirena (eds), *Rules and principles in European contract law* (Cambridge: Cambridge University Press, 2015) 54–67.

18 Just like consumer protection in general can be seen either teleologically, as an objective good, or deontologically, as a subjective right, so too can 'sustainable consumption' be understood either teleologically, as making consumers become better persons, or the world a better place (or the EU economy clean and green), or deontologically, in terms of what we owe to persons at the other end of the global value chains (in the case of dangerous and exploitative production) or to current and future generations (in the case of environmental impact). The recent *Proposal for a directive amending Directives 2005/29/EC and 2011/83/EU as regards empowering consumers for the green transition through better protection against unfair practices and better information*, Brussels, 30 March 2022 COM(2022) 143 final, seems ambivalent in this regard. While aiming to empower consumers, this is made instrumental to the objective of the green transition. Cf *ibidem*, 1 (explanatory memorandum): 'the proposal aims to contribute to a circular, clean and green EU economy by enabling consumers to take informed purchasing decisions and therefore contribute to more sustainable consumption. … Empowering consumers and providing them with cost-saving opportunities is a key building block of the sustainable product policy framework.'

19 Art 114, para 1 TFEU.

of these directives were enacted, this aim of a functioning internal market was narrowed down, in the understanding of the European Commission, to a growing market. Thus, EU contract law explicitly came to be at the service of economic growth ('justice for growth'). See for example, the opening lines of the preliminary recital to the 2019 Directive on contracts for the supply of digital content and digital services, which introduced consumer remedies for the failure to supply the digital content or service, and for their lack of conformity:[20] 'The growth potential of e-commerce in the Union has not yet been fully exploited. The Digital Single Market Strategy for Europe tackles in a holistic manner the major obstacles to the development of cross-border e-commerce in the Union in order to unleash this potential. Ensuring better access for consumers to digital content and digital services and making it easier for businesses to supply digital content and digital services, can contribute to boosting the Union's digital economy and stimulating overall growth.'

The instrumentalisation of private law rights and remedies for the collective aims of market building and economic growth has been severely criticised. Some observers have rejected these specific objectives as neoliberal and have denounced the Union for heading in the wrong direction – the opposite of progress.[21] Others have questioned more generally the instrumentalisation of private law for collectivist objectives.[22] Still others have criticised the effective removal from democratic politics, through the constitutionalisation of certain specific policy objectives by enshrining them in the Treaties, of the choice of the kind of political objectives which in most countries would simply belong to the realm of ordinary democratic legislation.[23] While functionalism understands progress in terms of outcomes, democratic critique argues that there is no progress without political agency concerning the choice of objectives.[24]

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20 Directive 2019/770 of 20 May 2019 on certain aspects concerning contracts for the supply of digital content and digital services, Recital 1.

21 M. Bartl, 'Internal market rationality, private law and the direction of the Union: resuscitating the market as the object of the political' 21 *European Law Journal* (2015) 572–598.

22 Ch.U. Schmid, 'The thesis of the instrumentalisation of private law by the EU in a nutshell', in C. Joerges and T. Ralli (eds), *European constitutionalism without private law. Private law without democracy* (Oslo: Arena, 2011) 17–35.

23 See S. Garben, 'Confronting the competence conundrum: democratising the European Union through an expansion of its legislative powers' 35 *Oxford Journal of Legal Studies* (2015) 55–89; G. Davies, 'Democracy and legitimacy in the shadow of purposive competence' 21 *European Law Journal* (2015) 2–22; D. Grimm, 'The democratic costs of constitutionalisation: the European case' 21 *European Law Journal* (2015) 460–473; M. Dawson and F. de Witte, 'From balance to conflict: a new constitution for the EU' 22 *European Law Journal* (2016) 204–224.

24 Cf A. Follesdal and S. Hix, 'Why there is a democratic deficit in the EU: a response to Majone and Moravcsik' 44 *Journal of Common Market Studies* (2006) 533–562.

However, the reality of EU private law's internal market instrumentalism has also been called into question.[25] Not only do directives spell out contractual rights, obligations, and remedies, in a way quite similar to national civil codes. So too, and most importantly, does the CJEU almost never interpret them (teleologically) in light of their primary stated purpose, i.e. market integration. Much rather does the Court focus (deontologically) on relational justice between the contracting parties. As a typical example, ever since *Mostaza Claro* (2006) the Court has understood the UCTD as concerned with substantive contractual equality, aiming as it does 'to replace the formal balance which the [contract] establishes between the rights and obligations of the parties with an effective balance which re-establishes equality between them'.[26] From this point of view, progress in EU contract law is achieved to the extent that substantive equality is established between the rights and obligations of the parties to consumer contracts.

It should be noted, in this regard, that while specific directives may aim at consumer protection, as we saw above,[27] consumer protection is not a self-standing EU constitutional objective. The harmonisation of consumer protection in member state laws can of course be a means to the end of market integration.[28] However, constitutionally speaking, otherwise it is merely a side-constraint to the pursuit of other objectives (Article 12 TFEU). In particular, a high level of consumer protection must be taken as a base in Commission proposals concerning the internal market (Article 114, Para 3 TFEU). In other words, in terms of the EU's constitutionalised objectives, an increase in consumer protection means progress only when it is instrumental to market integration.

3.2 Balancing Fundamental Rights

Note also that the constitutional constraint, laid down in Article 114 Para 3 TFEU – and now also in Article 38 Charter of Fundamental Rights of the European

25 See C. Leone, *The missing stone in the cathedral: of unfair terms in employment contracts and coexisting rationalities in European contract law* (doctoral thesis University of Amsterdam, 2020); G. Bacharis and S. Osmola, 'Rethinking the instrumentality of European private law' 30 *European Review of Private Law* (2022) 457–480.

26 CJEU, *Mostaza Claro*, para 36. More recently, see e.g. CJEU, 17 May 2022, *Impuls Leasing România*, C-725/19, ECLI:EU:C:2022:396, para 40.

27 See, for example, explicitly regarding the UCTD, the Court of Justice in CJEU, 29 April 2021 (*Bank BPH*), C-19/20, ECLI:EU:C:2021:341, para 72: 'the objective pursued by that directive consists in protecting the consumer and restoring the balance between the parties'.

28 See explicitly in this sense, for example, art 1 Consumer Rights Directive 2011: 'The purpose of this Directive is, through the achievement of a high level of consumer protection, to contribute to the proper functioning of the internal market'.

Union –, to ensure a high level of consumer protection, should not be understood as a maximising principle (the higher the better). Indeed, in recent years the Court has held consistently that 'it is necessary to ensure the right balance between a high level of consumer protection and the competitiveness of undertakings, while respecting the undertaking's freedom to conduct a business, as set out in Article 16 of the Charter'.[29] While Article 16 CFREU (freedom to conduct a business) is situated in the title on 'Freedoms' (Title II), Article 36 (consumer protection) is located in the title on 'Solidarity' (Title IV) of the Charter of Fundamental Right of the EU. In other words, it seems that, within the EU's fundamental rights framework, the (horizontal) constitutional clash between the freedom to conduct a business and consumer protection is to be understood as a specific instance of the more general exercise of balancing the constitutional values of freedom and solidarity.[30] Thus, ensuring the right balance between the conflicting constitutionally protected interests of the parties to a contract, in a context (typically) of structural power imbalance, constitutes yet another EU constitutional objective for – and, hence, another understanding of progress in – EU contract law. As said, this objective is not a primary one but rather one that constrains the market integration objective, given that the CFEU is applicable only in the context of EU law, which for EU contract law means in most cases, in the context of the application and interpretation of secondary EU legislation whose aim is market integration based on Article 114 TFEU.

3.3 Promoting EU Values

Beyond the objectives for which the Treaty has conferred legislative competences to the EU, progress brought through the EU's actions and omissions could also be evaluated in terms of the EU's wider constitutional commitments. For example, the EU is engaged in 'the process of creating an ever-closer union among the peoples of Europe' (Article 1 TEU). Moreover, pursuant to Article 3 TEU, the Union's aim is 'to promote peace, its values, and the well-being of its peoples'. These objectives could also be relevant for our understanding of progress and regress in European contract law. For example, if the EU's core mission is peace,[31] then it cannot jeopardise peace by pushing the Europeanisation of contract law in

29 CJEU, 10 July 2019, *Amazon EU*, C-649/17, ECLI:EU:C:2019:576, para 44. In the same sense, e.g. CJEU, 5 May 2022, *Victorinox*, C-179/21, ECLI:EU:C:2022:353, para 39.

30 Cf CJEU, 7 April 2022, *Fuhrmann-2*, C-249/21, ECLI:EU:C:2022:269, para 31: 'balancing exercise'.

31 In this sense e.g. Á. Heller, *Paradox Europa* (Vienna: Edition Konturen, 2019) 20.

a direction or at a speed that risks undermining that core objective.[32] As to the promotion of the EU's values, pursuant to Article 2 TEU the EU is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. In the recent conditionality cases against Hungary and Poland, the CJEU held that these values 'define the very identity of the European Union as a common legal order',[33] thus turning the EU legal order effectively into an objective value order. This ruling is also likely to have significant spill-over effects on EU private law, where EU values could easily obtain horizontal effect, thus turning EU private law also into an objective value order too.[34] Thus, the promotion of EU values, which 'define the very identity of the European Union as a common legal order', could become another benchmark for evaluating progress in EU contract law beyond functionalism.

4 Towards a European Contract Law

Unlike internal market building (Article 26 TFEU), the establishment of an EU contract law is not an objective the EU has set itself. Yet, much of European private law scholarship of the first generation saw a more European and less national private law as an aim in itself, not merely as a means to achieve other aims. From that point of view, the Europeanisation of private law as such meant progress.[35] Similarly, while contract law as such was never the focus of the EU legislature, European private law scholarship soon took it as its main focus.[36] From this point of view, a shift from the 'vertical' economic-sector-by-sector oriented approach of the EU legislature towards a focus on more 'horizontal' issues (across market sectors) of general contract law would have meant progress.

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32 See M.W. Hesselink, *Justifying contract in Europe; political philosophies of European contract law* (Oxford: Oxford University Press, 2021) 194–195.

33 See CJEU, 16 February 2022, C-156/21, *Hungary* v *Parliament and Council*, ECLI:EU:C:2022:97, para 127, and CJEU, 16 February 2022, C-157/21, *Poland* v *Parliament and Council*, ECLI:EU:C:2022:98, para 145.

34 Cf M.W. Hesselink, 'Private law and the European constiutionalisation of values' *Amsterdam Law School Research Paper No 2016-26*, available at https://ssrn.com/abstract=2785536.

35 See e.g. A.S. Hartkamp *et al.* (eds), *Towards a European civil code* (4th ed, Alphen aan den Rijn, Kluwer Law International, 2010); H. Collins, *The European civil code: the way forward* (Cambridge: Cambridge University Press, 2008).

36 See for example, the *Principles of European contract law* (2002) and the *European review of contract law* (since 2005).

In response, the European Commission decided to focus its legislative attention squarely on European contract law.[37] This led to a series of Commission communications,[38] including an Action Plan, and the setting up of an expert group on European contract law, which proposed a draft legislative text,[39] which became the basis for the Commission's proposal for a regulation on a Common European Sales Law.[40] However, that proposal was withdrawn in 2014 for lack of political support in the Council (the Parliament had voted overwhelmingly in favour). This led to the demise of the movement that had been the embodiment of a certain ideal of progress, i.e. the movement towards a European code of contract law. At the same time, victory in the European civil code debate was welcomed as progress by private law nationalists, i.e. all those who believed that general private law should remain national. But not only by them: many European private law scholars regard the very idea of a general (or, as they would put it, 'traditional')[41] contract law as regressive.

5 Market Access

Beyond the EU's explicit normative commitments, it has been argued that a distinct EU conception of justice can be reconstructed from its private law, i.e. 'access justice'.[42] As Hans Micklitz defines it, 'access justice materialises the

37 At her confirmation hearing in the European Parliament in 2010 the incoming Vice-President of the European Commission Viviane Reding even stated as a core ambition for her mandate, 'the move from the first building blocks of European contract law to a European Civil Code'. See Notice to Members, Hearing with Viviane Reding, Commissioner-designate for Justice, Fundamental Rights and Citizenship, 7 January 2010 (CM\800797EN.doc; PE431.139v02-00).

38 See, in particular, the three Commission communications *On European contract law*, Brussels, 11 July 2001 COM(2001) 398 final; *A more coherent European contract law: an action plan*, Brussels, 12 February 2003, COM(2003) 68 final; and *European contract law and the revision of the acquis: the way forward*, Brussels, 11 October 2004, COM(2004) 651 final.

39 Commission Expert Group on European Contract Law, *Feasibility study for a future instrument in European contract law*, 3 May 2011.

40 Proposal for a regulation on a Common European Sales Law, Brussels, 11 October 2011 COM(2011) 635 final.

41 See e.g. H.-W. Micklitz, 'Do consumers and businesses need a new architecture of consumer law? A thought provoking impulse' 32 *Yearbook of European law* (2013) 266–367; K.H. Eller, 'Is "global value chain" a legal concept? Situating contract law in discourses around global production' 16 *European Review of Contract Law* (2020) 3–24; R. Ravalli, *Externalities of production in GVCs: an EU consumer perspective* (doctoral thesis EUI, 2021); R. Vallejo, *The idea of a private administrative law* (doctoral thesis EUI, 2021).

42 See H.-W. Micklitz, *The politics of justice in European private law: social justice, access justice, societal justice* (Cambridge: Cambridge University Press, 2018).

theoretical chance of EU citizens to participate in the market so as to make it a realistic opportunity'.[43] Access justice constitutes a thin version of distributive justice,[44] which is not meant to replace national patterns of justice,[45] but should be understood as complementary to the conceptions and practices of social justice in the member states.[46] It is normatively ambivalent in that it is both teleological, understanding market access as a collective good, and deontological, considering market access an individual right.[47]

The idea is that access justice is immanent to EU private law and expressed in it. This means, on the one hand, that access justice can be distilled from positive EU private law and be traced in the private law acquis. On the other hand, given its normative character as a conception of justice, EU private law could be held responsible whenever it fails to achieve access justice.[48] In other words, the idea of access justice as the EU's conception of justice for private law also implies a conception of progress in European private law. Whenever access justice is increased there is progress. Presumably, this would be the case both when more citizens (and non-citizens) gain access to a certain market as well as when there are more markets for them to enter.

The idea of access justice has been welcomed as a form of opportunity egalitarianism. Specifically, it has been associated to Rawlsian justice as fairness, in particular the first principle of justice, in its first part, which demands fair equality of opportunity.[49] However, it should be noted that access justice is concerned specifically with market access, in particular access to the consumer and the labour markets. It is indifferent towards any inequalities (re)produced by those markets.[50] Moreover, it has been argued that policies based on access justice may even backfire, and thus turn out to be distributively regressive rather than progressive.[51]

43 *Ibidem*, 2.

44 *Ibidem*.

45 *Ibidem*, 12.

46 *Ibidem*, 27.

47 On the tensions between these two sides of access justices, see M.W. Hesselink, 'Private law, regulation, and justice' 22 *European Law Journal* (2016) 681–695.

48 Micklitz, n 42 above, 24.

49 See J. Klijnsma, 'Contract law as fairness' 28 *Ratio Juris* (2015) 68–88. Cf J. Rawls, *Justice as fairness: a restatement* (Cambridge/Mass: Belknap Press, 2001) § 13.

50 As A. Somek, 'The preoccupation with rights and the embrace of inclusion: a critique', in D. Kochenov, G. de Búrca and A. Williams (eds), *Europe's justice deficit?* (London: Hart Publishing, 2015) 295–310, points out, policies ensuring equal access are insensitive to the demands of the Rawlsian difference principle, which requires that the institutions leading to structural inequalities in society benefit also the least well-off.

51 O. Ben-Shahar, 'The paradox of access justice, and its application to mandatory arbitration' 83 *University of Chicago Law Review* (2016) 1755–1817.

6 Private Law Goods (Ethical Progress)

So far, the discussion in this contribution has been relatively positivistic in that the analysis tried to track understandings of progress in EU contract law on its own terms. The idea was to unearth conceptions of progress in EU contract law that can plausibly be attributed to the EU, in terms of objectives that the EU either has explicitly committed to or that can plausibly be distilled from the overall structure of EU private law.

However, it is also possible to evaluate EU contract law in terms of an external standard. Theories assessing private law in terms of a certain good are usually referred to as teleological theories, while theories assessing the law in terms of the right (principles of justice, moral rights and duties) are called deontological. This section discusses the former, the next section the latter.

Goods to be promoted by contract law can be individual or collective, and subjective or objective.

Normative law-and-economics adopts a subjective understanding of a collective good when it claims that (in our case) EU contract law should promote social welfare, or overall efficiency, understood as aggregate preference satisfaction, where people's lives go better in their own estimation. There have been many contributions to the European contract law debate arguing (or implying) that the contract law of the EU should promote efficiency.[52] In their strongest form they claim that efficiency should be EU contract law's only aim. On such views a fully efficient EU contract law would be optimal. Thus, full efficiency would be the end point of possible progress.

A familiar example of theories holding that contract law's aim is to promote the individual good are ethical autonomy theories. (In the next section, we will see moral autonomy theories.) In their 'choice theory' of contracts, which has been influential also within the EU contract law debate despite its primary focus on the common law,[53] Dagan and Heller present autonomy, understood as self-authorship ('writing the story of your own life'), as contract law's 'telos'.[54] While

52 See, for example, with reference to mandatory withdrawal rights, G. Wagner, 'Mandatory contract law: functions and principles in light of the proposal for a directive on consumer rights' 3 *Erasmus Law Review* (2010) 47–70; O. Ben-Shahar and E.A. Posner, 'The right to withdraw in contract law' 40 *Journal of legal studies* (2011) 115–148; H. Eidenmüller, 'Party autonomy, distributive justice and the conclusion of contracts in the DCFR' 5 *European Review of Contract Law* (2009) 109–131.

53 For Dagan's own engagement with the European contract law debate, see H. Dagan, 'Between regulatory and autonomy-based private law' 22 *European Law Journal* (2016) 644–658.

54 H. Dagan and M. Heller, *The choice theory of contracts* (Cambridge: Cambridge University Press, 2017) 39.

this would seem to suggest a metaphysical (ontological) conception of contract law's essence, they also claim that contract law ought to promote autonomy, which suggests that autonomy should be understood as a normative standard by which we can assess progress.[55]

As we saw, teleological understandings of EU contract law, as being at the service of some collective or common good (market integration, economic growth, Europeanisation as such, market access, green transition), are pervasive among EU contract law makers. From such teleological viewpoints, EU contract law is instrumental to progress (potential or actual) understood in terms of the aims we have set ourselves as a European society. Insofar, EU contract law has internalised certain external teleological standards, especially conceptions of the collective or common good.

7 Private Law Right (Moral Progress)

In addition to teleological theories, which understand contract law as aiming at promoting some good (better lives, better people, a better EU), there are also deontological theories adopting as a standard a certain conception of what is right. These theories are normative in the narrower sense of what contract law ought to do (as opposed to what it would be merely good for contract law to do), as a matter of what we owe to each other, to use the Scanlonian phrase.[56]

Thus, EU contract law can be understood as a matter of what contracting parties morally owe to each other. The moral rights and obligations of contracting parties, in turn, can be conceived in a formal or in a substantive sense. On the formal view, such rights and obligations exist independently of the specific characteristics of the parties or the specific circumstances in which they find themselves during the conclusion and performance of the contract.[57] On a more substantive view, certain specific characteristics of the parties as well as the nature and context of their contractual relationship (notably power imbalances) should be considered in determining the demands of interpersonal justice. Both types of

55 Autonomy theories are called perfectionist when they claim that the reason why the state should promote private autonomy is that an autonomous life is a better life. While originally presenting his view as Razian liberal-perfectionist, Dagan now sees it as a (Dworkinian) non-perfectionist comprehensive-liberal theory.

56 T.M. Scanlon, *What we owe to each other* (Cambridge, Mass: Belknap Press, 1998).

57 See E.J. Weinrib, *The idea of private law* (Cambridge: Harvard University Press, 1995); A. Ripstein, *Force and freedom: Kant's legal and political philosophy* (Cambridge: Harvard University Press, 2009); T. Gutmann, 'Some preliminary remarks on a liberal theory of contract' 76 *Law and contemporary problems* (2013) 39–55.

conceptions, formal and substantive, allow for the determination of interpersonal justice in deontological terms of the right (as opposed to the private or public good). From the point of view of these deontological understandings, moral progress occurs when private law implements morality. At the same time, any instrumentalisation of private law for other aims than interpersonal justice is seen as regressive.

Such views, which understand private law as enforcing an autonomous, self-sufficient, and complete system of moral rights and obligations, should not be confused with libertarian views which reject social justice in the name of negative liberty. Rather, they are typically based on the idea of a division of labour. They presume that private law transactions take place against the background of social justice ensured by a sufficiently just basic structure of society.[58] Crucially, they assume that contract law is not part of that basic structure responsible for social justice.

This latter view has been rejected by several theorists,[59] some of them precisely in the context of the European contract law debate.[60] Similarly, a manifesto demanded social justice in European contract law.[61] On such views, there would be moral progress if EU contract law, understood as part of the basic structure of the EU, contributed to social justice in the Union. This would constitute progress in accordance with a standard (i.e. social justice) that so far has been kept entirely outside the official discourse of EU contract law makers (the EU legislature as well as the otherwise rather activist Court of Justice), and despite the European Union's commitment in its founding Treaty to social justice.[62]

58 See A. Ripstein, 'Private order and public justice: Kant and Rawls' 92 *Virginia Law Review* (2006) 1391–1438; P. Benson, *Justice in transactions: a theory of contract law* (Cambridge: Harvard University Press, 2019). For a sceptical view about the realism of such an ideal social-democratic society, based on a harmonious division of labour between the welfare state and private law, see F. Rödl, 'Justice in contract, no justice in the background' 17 *European Review of Contract Law* (2021) 157–169, arguing that in reality it is private law which constitutes 'the unbreakable background' for public regulation, because it provides the default rules.

59 K.A. Kordana and D.H. Tabachnick, 'Rawls and contract law' 73 *George Washington Law Review* (2005) 598–632; S. Scheffler, 'Distributive justice, the basic structure and the place of private law' *Oxford Journal of Legal Studies* (2015) 1–23.

60 L.K.L. Tjon Soei Len, *Minimum contract justice: a capabilities perspective on sweatshops and consumer contracts* (London: Hart Publishing, 2017); J. Klijnsma, *Contract law as fairness: a Rawlsian perspective on the position of SMEs in European contract law* (doctoral thesis, University of Amsterdam, 2014); M.W. Hesselink, 'Unjust conduct in the internal market. On the role of European private law in the division of moral responsibility between the EU, its member states and their citizens' 35 *Yearbook of European Law* (2016) 410–452.

61 Study Group on Social Justice in European Private Law, 'Social justice in European contract law: a manifesto' 16 *European Law Journal* (2004) 653–674.

62 See art 3 para 3 TEU: 'The Union … shall promote social justice.'

8 The Critique of Progress

So far, we have seen various conceptions of progress in EU contract law. While they offer different benchmarks for assessing progress, they have in common that they all understand EU contract law fundamentally as susceptible to progress.[63] However, the very idea of progress, which is rooted in modernity, has been rejected by post- and decolonial critique as being Eurocentric, bound up with problematic Enlightenment notions of reason, and essentially self-congratulatory. The point here is not the empirical one that progress, while possible, has not yet occurred, and that insofar Europeans are delusional. The idea is rather that it is misguided and harmful to understand societies as such as being capable of making progress in terms of some objective external – indeed universal – standard. The reason is that if some societies, their main structures, and institutions can be said to have made progress by a universal standard, then by the same token other societies, which have not made the same progress, can – and indeed must – be seen as backward. As Quijano points out, the eighteenth century brought 'the new mystified ideas of "progress"and of the state of nature in the human trajectory: the foundational myths of the Eurocentric version of modernity. … Thus, all non-Europeans could be considered as pre-European and at the same time displaced on a certain historical chain from the primitive to the civilized, from the rational to the irrational, from the traditional to the modern, from the magic-mythic to the scientific. In other words, from the non-European/pre-European to something that in time will be Europeanized or modernized'.[64] And as Chakrabarty explains, 'whenever we allow unreason and superstition to stand in for backwardness, that is to say, when reason colludes with the logic of historicist thought we see our "superstitious" contemporaries as examples of an "earlier type," as human embodiments of the principle of anachronism'.[65] It is therefore not surprising that postcolonial and decolonial critics have attacked the very idea of progress, the former denouncing historicism (where history is understood as linear unidirectional development),[66] and the latter (more

63 Of course, there have always been conservative and reactionary cases made against progressive legal thinking. As a recent example, see the attack on 'the liturgy of progressive constitutionalism' by A. Vermeule, *Common good constitutionalism: recovering the classical legal tradition* (Medford: Polity, 2022), ch 4.

64 A. Quijano, 'Coloniality of power, Eurocentrism, and Latin America' 1 *Nepantla: views from the South* (2000) 533–580, 556.

65 D. Chakrabarty, *Provincializing Europe: postcolonial thought and historical difference – new edition* (Princeton: Princeton University Press, 2007) 238.

66 E.W. Said, *Orientalism: Western conceptions of the Orient* [1978] (New York: Penguin Books, 1995); G. Chakravorty Spivak, 'Can the subaltern speak?' [1985], in P. Williams and L. Chrisman

epistemically and morally sceptical) by attacking the universalism of European conceptions of truth, reason, and morality.[67]

This critique is relevant also for EU contract law and its theory. If contract law can contribute to making societies become better in an objective sense, then societies that have made progress in and through contract law, or have substantive contract theories about what would constitute contract law progress, may want to offer their contract law systems as models to be transplanted into other societies, or their theories as blueprints to be implemented in those other societies, in order to allow those other societies to make similar progress. The seemingly benign ideas of legal families,[68] legal transplants,[69] and the Brussels effect,[70] have been familiar legal vectors for informal neo-imperialism, where European countries as well as the EU have operated as legal civilisers.[71] Note that the question here is not whether the contract law systems or the contract theories are offered explicitly by lawmakers or theorists in the global north as a model for countries in the Global South.

(eds), *Colonial discourse and post-colonial theory: a reader* (New York: Columbia University Press, 1994) 66–111.

67 A. Quijano, 'Coloniality and modernity/rationality' 21 *Cultural Studies* (2007) 168–178; W.D. Mignolo, 'Epistemic disobedience and the decolonial option: a manifesto' 1 *Transmodernity: Journal of Peripheral Cultural Production of the Luso-Hispanic World* (2011) 44–66; B. de Sousa Santos, *The end of the cognitive empire: the coming of age of epistemologies of the South* (Durham: Duke University Press, 2018).

68 See R. David, C. Jauffret-Spinosi and M. Goré, *Les grands systèmes de droit contemporains* [1964] (12th ed, Paris: Dalloz, 2016); K. Zweigert and H. Kötz, *Introduction to comparative law* [1969] (Oxford: Oxford University Press, 1998). For a critique, see D. Bonilla Maldonado, *The legal barbarians: identity, modern comparative law and the Global South* (Cambridge: Cambridge University Press, 2021) 20 *et seq*.

69 A. Watson, *Legal transplants: an approach to comparative law* (Athens: University of Georgia Press, 1974). Critical, K. Pistor, 'Coding capital: on the power and limits of (private) law: a rejoinder' 30 *Social & Legal Studies* (2021) 317–326, 320: 'Transplanting law from the core to the periphery has its origins in colonialism'.

70 A. Bradford, *The Brussels effect: how the European Union rules the world* (Oxford: Oxford University Press, 2020). Bradford believes that the neo-imperialism critique is 'unlikely to offer a fatal normative critique to the Brussels Effect'. She arrives at this conclusion by adopting the consequentialist normative frame of preference satisfaction, that focuses only on outcomes (which may indeed correspond to regulatory preferences in countries affected by the Brussels effect, even though these may well be adaptive preferences), and not also on the more deontological concern for political agency (being the co-authors, as a democratic public, of their own laws).

71 Cf e.g. European Parliament resolution of 26 May 1989 on action to bring into line the private law of the Member States (*OJ* C 158, 26 June 1989, p 400), requesting that 'a start be made on the necessary preparatory work on drawing up a common European Code of Private Law', based in part on the consideration that 'a modernized, common system of private law is a means of directly or indirectly broadening the Community's links with countries outside itself, with particular reference to the Latin-American countries'.

The point is rather whether these systems and theories are understood as universal substantive standards for legal progress – in our case in the field of contract law.

9 Progress through Self-reflexive Critique

If we take the post- and decolonial critique as seriously as we should, then does this mean that we should give up on the very idea of progress in EU contract law?

In this regard, we can distinguish, with Amy Allen, between backward- and forward-looking understandings of progress.[72] The former regards our society, our institutions, and our contract law as having made progress compared to the past (progress as a fact) while the latter sees progress as a normative goal, and therefore as a possibility, for the future (progress as an imperative). Adorno suggested that progress occurs where it ends.[73] Amy Allen argues that this entails, on the one hand, that if we want to make progress (in terms of the Enlightenment ideals of freedom, equality, and justice) then we must give up on the idea that our society and its institutional structures as such can be said to have made progress by some objective standard. In other words, the backward- and the forward-looking notions of progress must be disentangled. As she puts it, 'our politics cannot be truly progressive if our conception of progress as an imperative rests on a self-congratulatory, Eurocentric story about historical progress as a "fact."'[74] She further claims, combining ideas from Adorno and Foucault, that progress can occur (in terms of these very same Enlightenment ideals), when we become aware self-reflexively of how we are betraying the modern ideals of freedom, equality, and justice in our practices and institutions. This makes her propose radically contextual genealogical critique as the preferred method for political philosophy.[75]

On the one hand, I agree with Allen that the idea of progress of a society, its main institutions, and its private law system, by some universal substantive standard is deeply problematic, because it inevitably places all societies, their basic structures, and their private law systems, on a scale of different degrees of progress and development. This is all the more problematic if the universal standard is set by Europeans – what Kalypso Nicolaïdis aptly calls

72 A. Allen, *The end of progress: decolonizing the normative foundations of critical theory* (New York: Columbia University Press, 2017) 12.

73 T.W. Adorno, 'Progress', in T.W. Adorno, *Critical models: interventions and catchwords* (New York: Columbia University Press, 2005): 'it could be said that progress occurs where it ends'.

74 Allen, n 72 above, 226.

75 *Ibidem*, ch 6.

'EUniversalism'[76] –, and if that very same standard has been deeply intertwined historically with colonialism. And as post- and decolonial scholarship has convincingly shown, the entanglement between modern reason and colonial rule runs deep.[77] On the other hand, however, Allen's understanding of political philosophy, and her proposed radically contextual genealogical method, while obviously very important in its own right, leaves us with no answers to practical questions (not to be confused with pragmatic ones) about what to do. In particular, in our case, it does not tell us anything about what to do as a society here and now about EU contract law. But these practical questions are there, and they will not go away. Nor should justified appeals to make EU contract law become more legitimate, and less unjust, be ignored. Adorno, relying on a Marxist view of the capitalist market economy as fundamentally exploitative and alienating, contended that 'wrong life cannot be lived rightly'.[78] However, while the validity of this observation would seem fatal for ideal normative theories of private law, it still leaves open the question of what to do about – in our case – EU contract law under the indeed profoundly non-ideal circumstances in which we find ourselves.[79]

So, again, what to do? I agree with Allen that what we should retain from the Enlightenment's ideals is its self-critical reflexive stance,[80] or what Foucault calls 'the attitude of modernity', that is 'a philosophical ethos that could be described as a permanent critique of our historical era'.[81] However, I disagree that this should lead to moral-political abstinence in practical matters. Rather, the self-reflexive attitude of modernity means, in my view, that we should use our critical reason to trace and critique in our own society the many instances of injustice, unreasonableness, and unfreedom. In the most practical sense, for philosophical inquiries

76 K. Nicolaïdis, 'Southern barbarians? A post-colonial critique of EUniversalism', in K. Nicolaïdis, B. Sebe and G. Maas (eds), *Echoes of empire: memory, identity and colonial legacies* (London: Bloomsbury, 2014) 283–303.

77 For the view that they cannot be disentangled, see L. Salaymeh and R. Michaels, 'Decolonial comparative law: a conceptual beginning' 86 *RabelsZ* (2022) 166–188, 178.

78 T.W. Adorno, *Minima moralia: reflections from damaged life* [1951] (London: Verso, 2020) § 18 (p 43).

79 See Ch.W. Mills, 'Racial justice' *Aristotelian Society Supplementary Volume* 92, no 1 (2018) 69–89, 85, arguing that we need non-ideal theory to arrive at principles of corrective racial justice for our ill-ordered society. On the social justice tasks of private law under non-ideal circumstances, i.e. where social justice has not been achieved by other public institutions, see A. Bagchi, 'Distributive injustice and private law' 60 *Hastings Law Journal* (2008) 105–148.

80 Cf I. Kant, 'An answer to the question: what is Enlightenment?' [1784], in H.S. Reiss (ed), *Kant political writings* (2nd ed, Cambridge: Cambridge University Press, 1991).

81 M. Foucault, 'What is Enlightenment', in M. Foucault, *Ethics (Essential works 1954-84)* (New York: Penguin, 2020) 303–319, 309, 212.

into EU contract law it follows that rather than imagining an ideal contract law for the EU we should critique salient instances of injustice, inequality, unfreedom in the existing contract law of the EU,[82] and try to figure out what could and should be done about it.[83] That might mean progress.

This most definitely includes the prevention of regression,[84] but cannot be limited to it in light of the various struggles for emancipation. As Rainer Forst reminds us, progress is dialectical in nature.[85] While the worst atrocities have been committed in the name of progress, it seems difficult for anyone genuinely committed to human emancipation, understood as the liberation from oppression, domination, and exploitation, to dispense with the very notion of progress as a forward-looking deontological demand. Indeed, the various political struggles against neocolonial domination, against sexist, racist, ableist, homo- and transphobe oppression, and against capitalist exploitation and alienation would seem almost unintelligible if we did not understand them as demands for progress in the fight against injustice. We need to be able to say that various forms of European neo-imperialism constitute *wrong* for which Europeans ought to take responsibility, and make reparations, in which case we could be making some progress.[86] In sum, what we need, as Forst puts it, is 'a dereified, nonteleological, nondominating, emancipatory conception of progress'.[87] Crucially, however, progress is never something that 'we' can bring to 'them'. For, 'every process that deserves to be called progress should be one that those subjected to it initiate and control'.[88]

What does this entail more concretely for EU contract law? Internally, it means that the fight against domination, oppression, and exploitation in contractual relationships in the internal market ought to be the EU's main priority in contract law. And it is not clear that increasing the level consumer protection is the right

82 For a first attempt, see M.W. Hesselink, 'EU private law injustices' 41 *Yearbook of European Law* (2022) 1–47.

83 For one such proposal, see M.W. Hesselink, 'Reconstituting the code of capital: could a progressive European code of private law help us reduce inequality and regain democratic control?' 1 *European Law Open* (2022) 316–343.

84 R. Jaeggi, 'Die Fortschrittsidee in Zeiten der Regression', in Heinrich-Böll-Stiftung (ed), *Stichworte zur Zeit: Ein Glossar* (Bielefeld: Transcript Verlag, 2020) understands progress as the absence of regress.

85 R. Forst, 'The justification of progress and the progress of justification', in A. Allen and E. Mendieta (eds), *Justification and emancipation: the critical theory of Rainer Forst* (Pennsylvania: Pennsylvania State University Press, 2019) ch 2 (pp 15–37), 17.

86 G.K. Bhambra, 'A decolonial project for Europe' 60 *Journal of Common Market Studies* (2022) 1–16, understands reparation as what should replace ideas of progress.

87 Forst, n 85 above, 18.

88 *Ibidem*.

strategy in this regard. Not only does the very idea of consumer emancipation, that is human emancipation qua consumer, seem alienating. Also, a high level of consumer protection cannot plausibly serve as a proxy for progress in the fight against contractual injustice. Indeed, the current focus on consumer protection in EU contract law tends to distract from the real struggles for emancipation. In this regard, the anti-discrimination directives seem a better (albeit far from perfect) starting point. Externally, it means that EU institutions and European legal scholars should be radically self-critical about presenting EU contract law as a possible model for other countries.[89] The suggestion that if we don't do it other powerful countries will, may be realistic, but is beside the point. If the aim is genuine progress, in our case in contract law, then this cannot occur unless the initiative is taken – and control over it is kept throughout – by those subjected to it. Moreover, a self-critical reflexive stance and serious commitment to moral and epistemic equality require overcoming unilateral universalism, which cannot be done without humility, listening, and the willingness to learn from the experiences of others.

89 In the same sense, with regard to EU peace mediation, see S.M.H. Nouwen, 'Exporting peace? The EU mediator's normative backpack' 1 *European Law Open* (2022) 26–59.