



## Book Notes “Law” 1/2022

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*Peter Becker and Natasha Wheatley (Eds.): Remaking central Europe: The League of Nations and the former Habsburg Lands. Oxford University Press, 2020. ISBN 9780198854685. 416 pp., GBP 80.00.*

The book fits into the wider context of where to place consumer law and policy in the so-called New Member States and whether the new Member States, here the middle and Eastern European ones should be understood as being separate from the old western Member States and could be regarded as a “region.” Getting a deeper understanding not only on the single states, but also on the way in which they co-operate is not possible, without a deeper understanding of the history. The focus today is put on the interwar period, the “new international order” of 1919. With the League of Nations at its heart, the interwar settlement’s innovations in international organizations, international law, and many other areas shaped the world we know today. This book studies the relationship between this new international order and the new regional order in Central and Eastern Europe after the collapse of the Habsburg empire around four key scholarly interventions: understanding the legacies of empire in international organizations; examining regionalism in the work of interwar international institutions; creating an integrated history of the interwar order in Europe; and testing claims of the conceptual connection between nationalism and internationalism. There are chapters on international health, international financial oversight, human trafficking, minority rights, scientific networks, technical expertise, passports, commercial treaties, borders and citizenship, and international policing.

*Lukas Böker: Nudge im Spiegel des allgemeinen Persönlichkeitsrechts: Eine grundrechtliche Untersuchung des Regelungskonzeptes Nudge aus der Verhaltensökonomik (Nudge in the mirror of general personal rights: A fundamental legal investigation of the regulatory concept of nudge from the perspective of behavioral economics). Springer Gabler, 2021. ISBN 9783658334710. 310 pp., EUR 64.99.*

The potential of nudging strategies in the implementation of consumer law and policy has not yet really been explored. When lawyers join the debate, the focus is typically shifting as to whether and under what conditions, nudging complies with the law. In Germany the focus is led on the constitutional admissibility. The book starts from an examination of the constitutional permissibility of the use of nudges through the state. This quite necessarily leads to the debate on the criticism of the subconscious mode of action, with particular

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attention being paid to the accusations of manipulation and paternalism. The personality right is being understood as the individual-legal antithesis of nudges, which grants fundamental legal protection to the personal autonomy of the nudge addressees. On the basis of Joel Feinberg's concept of autonomy, an abstract model is developed that is used to assess the relevance of conflicts between nudges and personal autonomy in terms of fundamental rights. The author tests his model in different areas: the objection in post-mortem organ donation, regulations on the basic supply of energy, instructions on the handling of drinking water and warnings about the dangers of tobacco products. The transfer from the high level of constitutional admissibility down to very concrete examples makes the book a particular valuable contribution for the ongoing debate on the use of nudges.

*Roger Brownsword: Law 3.0: Rules, regulation, and technology, Routledge, 2021. ISBN 9780367516406. 136 pp., GBP 67.99.*

The author belongs to the main legal voices in getting to grips with the challenges digitization imposes on the economy and the society. Consumer policy issues are typically expressed in “concerns,” concerns about manipulation and the wide spread use of unfair market practices. The book requires the reader to look beyond concrete issues into the future of the legal landscape, Law 3.0. Technology, this is the argument, not only disrupts the traditional idea of what it is “to think like a lawyer,” as per Law 1.0; it presents major challenges to regulators who are reasoning in a Law 2.0 mode. The latest developments in technology offer regulators the possibility of employing a technical fix rather than just relying on rules—thus, we are introducing Law 3.0. Law 3.0 represents, so to speak, the state we are in and the conversation that we now need to have, and this book identifies some of the key points for discussion in that conversation. Thinking like a lawyer might continue to be associated with Law 1.0, but from 2020 onward, Law 3.0 is the conversation that we all need to join. And, as this book argues, law and the evolution of legal reasoning cannot be adequately understood unless we grasp the significance of technology in shaping both legal doctrine and our regulatory thinking.

*Federica Casarosa and Madalina Moraru: The practice of judicial interaction in the field of fundamental rights: The added value of the Charter of Fundamental Rights of the EU. Edward Elgar Publishing, 2022. ISBN 9781800371217. 448 pp., GBP 117.00.*

The overall move to the constitutionalization of private law issues is more than obvious. Courts are ever more prepared to use and test the reach of fundamental rights in private law relations, an observation which is also true in consumer law and even more so, when it comes to judicial interaction between national and European courts. This book provides a comparative assessment of selected legal issues emerging from the EU legal context which impact profoundly on the national legal systems. It argues that judicial interaction can answer complex legal questions relating to the implementation of the EU Charter. Featuring practical cases of judicial interactions between European and national courts, the contributions analyse the multi-dimensional impact of a wide array of judicial interaction techniques such as the preliminary reference procedure, consistent interpretation, comparative reasoning, mutual recognition and disapplication. One such area of research is the field of consumer law. The analysis stimulates debate and dialogue across the boundaries of practice and academia, featuring exchanges of expertise and knowledge between legal practitioners and leading scholars. It will also provide useful guidance for legal practitioners on the application of the EU Charter of Fundamental Rights in the jurisprudence of the Court of Justice of the European Union.

*Andrew S. Gold, John C. P. Goldberg, Daniel B. Kelly, Emily Sherwin and Henry E. Smith: The Oxford Handbook of the New Private Law, Oxford University Press, 2020. ISBN 9780190919665. 632 pp. GBP 115.00.*

Consumer law and policy concerns first and foremost the relationship between consumers and business. This field is governed by private law, broadly understood. Currently private law theory is on the rise. Consumer law and policy forms typically an integral part of the debate, due not only to its cross-cutting dimension, cross-cutting beyond all sectors of the economy but also in breaking down the boundaries between public and private law. *The Oxford Handbook of the New Private Law* embraces the traditional common law subjects (property, contracts, and torts), as well as adjacent, more statutory areas, such as intellectual property and commercial law. It also includes important areas such as unjust enrichment, restitution, equity, and remedies more generally. The New Private Law is an approach to these subjects that aims to bring a new outlook to the study of private law by moving beyond reductively instrumentalist policy evaluation and narrow, rule-by-rule, doctrine-by-doctrine analysis, so as to consider and capture how private law's various features fit and work together, as well as the normative underpinnings of these larger structures. This movement has begun resuscitating the notion of private law not only in the USA but also in Europe as a whole and has brought an interdisciplinary perspective to the more traditional, doctrinal approach still prevalent in common and continental law countries. The *Handbook* embraces a broad range of perspectives to private law—including philosophical, economic, historical, and psychological, to name a few—yet it offers a unifying theme of seriousness about the structure and content of private law.

*Ewoud Hondius, Marta Santos Silva, Andreas Nicolussi, Pablo Salvador Coderch, Christiane Wendehorst and Fryderyk Zoo (Eds.): Coronavirus and the Law in Europe. Intersentia, 2021. ISBN 9781839700828. 1,151 pp., EUR 145.00.*

The volume tends to explore the relationship between the Coronavirus and the Law. Consumers were confronted *inter alia* with cancelled flights and package tours and with the legal challenge whether they could get their prepaid money back. The book contains 58 contributions and a reprint of the ELI (European Law Institute) principles for the COVID-19 crisis. It is broken down into seven parts and reaches far beyond consumer law, although consumer law forms an integral part of it—I COVID-19 and Fundamental Rights, II States against the Pandemic, III Compensation for COVID-19-related Damage, IV Contract Law, V Consumer Law, VI Labour and Social Law, and VII Coronavirus and Changing Europe. The seven parts indicate that the Coronavirus affects all areas of the legal system and cannot be bound to a particular field. Many of the contributions are written in a foreword looking spirit—understanding the Coronavirus not only as a problem but also as an opportunity which has to be seized so as to promote particular policy objectives, such as data protection, consumer protection, and climate change.

*Hans-Wolfgang Micklitz (Ed.): The making of Consumer Law and policy in Europe. Bloomsbury Publishing, 2021. ISBN 9781509944842. 432 pp., GBP 68.40.*

The beginning of consumer law and policy is traditionally linked to the famous message of President John F. Kennedy in 1962. This book analyses the founding years of consumer law and consumer policy in Europe 60 years after. It combines two dimensions: the making of national consumer law and the making of European consumer law, and how both are intertwined. The chapters on Germany, Italy, the Nordic countries and the UK serve to explain the economic and the political background which led to different legal and policy approaches in the then old Member States from the 1960s onwards. The chapter on Poland adds a different layer, the one of a former socialist country with its own consumer law and how joining the EU affected consumer law at the national level. The making of European consumer law started in the 1970s rather cautiously, but gradually the European Commission took an ever stronger position in promoting not only European consumer law but also in supporting the building of the European Consumer Organization (BEUC), the umbrella

organization of the national consumer bodies. The book unites the early protagonists, who were involved in the making of consumer law in Europe: Guido Alpa, Ludwig Krämer, Ewa Letowska, Hans-W. Micklitz, Klaus Tonner, Iain Ramsay, and Thomas Wilhelmsson, supported by the younger generation Aneta Wiewiórska Domagalska, Mateusz Grochowski, who analyse Polish consumer law, and Koen Docter, who reconstructs the history of BEUC. Niklas Olsen and Thomas Roethe analyse the construction of this policy field from a historical and sociological perspective.

*Päivi Leino-Sandberg: The politics of legal expertise in EU policy-making. Cambridge University Press, 2021. ISBN 9781108908757. 332 pp., GBP 85.00.*

The use of “legal experts” and “legal expertise” in EU policy-making is striking and obvious to all those who are familiar with the Brussels machinery. Consumer law and policy belongs to one of the most prominent areas in which the EU has left a deep footprint far beyond Europe. This book looks more broadly into the role and function of legal advisers working in the institutions of the European Union and exercise significant power. By and large, legal advice remains invisible in EU policy making. For more than 10 years, the author was a part of the invisible community of EU legal advisers and participated in the exercise of their power. In this book, she shares her insights about how law and lawyers work in the EU institutions, and what their role and impact is on EU decisions from within the decision-making structure. She draws on interviews with over 60 EU lawyers and policymakers: legal experts who interpret the Treaties within the Institutions, draft legislation, and defend the Institutions before the EU Court.

*Oreste Pollicino: Judicial protection of fundamental rights on the internet: A road towards digital constitutionalism? Bloomsbury Publishing, 2021. ISBN 9781509912711. 320 pp., GBP 61.20.*

When it comes to the potential risks of the internet for the citizens and the consumers, lawyers tend to invoke the constitution and constitutional rights to the benefit of citizens and consumers. The growing preparedness of courts to refer to fundamental rights in all kinds of disputes has led to a mushrooming of litigation in which the injured party refers to fundamental rights. The book explores how the Internet impacts on the protection of fundamental rights, particularly with regard to freedom of speech and privacy. In doing so, it seeks to bridge the gap between Internet Law and European and Constitutional Law. The book aims to inject a European and constitutional “soul” into the topic. This requires engaging in the dialogue between national and European courts. However, the book does not stop here. The thorough analysis of the forms, models, and styles of judicial protection of fundamental rights in the digital era also compares the European vision to that of the USA. The thereby developed (judicial) frame, borrowed from linguistic and cognitive studies, is systematically applied to the theories of interpretation and argumentation.

*Marijn Sax: Between empowerment and manipulation. The ethics and regulation of for-profit health apps. Kluwer Law International B.W., 2021. ISBN 9789493184787.*

Where to draw the line between empowerment and manipulation in for profit (freemium) health apps that are supposed to support the customer and at the same time runs the risk of being misled or pressured into an unwanted direction? The author, a philosopher, searches for ethical standards against which the regulation and the practices of health apps can be measured. The book is broken down into five chapters following a stringent structure and methodology. The first explains how (freemium) health apps are designed and why they serve commercial purposes. The second dives into the transformation, monetization, and economization of health through health apps that are designed so as to make people happier and healthier. The third lays down the key concept for the ethical evaluation of for profit health apps, giving each of the basic elements a digital twist: autonomy, trust,

and manipulation. The fourth applies the elements' ethical concepts to health apps in the search for drawing a line between support and manipulative digital health environments. In the fifth chapter, the findings are used in order to test whether and to what degree the Unfair Commercial Practices Directive is fit to provide satisfactory results for giving shape to the red line, in particular with regard to both sides of manipulation, the structural and the individual.

*Jan Trzaskowski: Your privacy is important to us!: Restoring human dignity in data-driven marketing, Ex Tuto, 2021. ISBN 9788742000427. 352 pp., DKK 395.00.*

The title tells the message "Your Privacy Is Important to Us!" The "s" in the "us" is written in the sign of the dollar. The key message known to us all is exposed as a mere marketing strategy. The book explores the application of EU consumer law—including data protection law and other fundamental rights—to data-driven business models that infringe on human agency, social cohesion, and democratic debate. In its most illuminating part, the book investigates how our current legal framework can be informed by psychological, technological, and societal perspectives to curb predatory business models of surveillance capitalism. The potential for cross-fertilization between data protection law and marketing law may corroborate these legal disciplines. The author argues that "paying with personal data" is a misleading framing when, in fact, we pay with attention and agency—which are both scarcer and more precious than personal data and are also important in social and societal contexts. A three-tiered model of information asymmetry is introduced to illustrate why information does not ensure transparency, which is a prerequisite for user empowerment. The book paves the ground for the development of a new consumer protection orientated legal doctrine.

*Michael Wilkinson: Authoritarian liberalism and the transformation of modern Europe. Oxford University Press, 2021. ISBN 9780191888946. 352 pp., GBP 80.00.*

It seems a long way down from consumer law and policy to authoritarian liberalism. However, the appearances might be misleading. Consumer law started as consumer protection law emphasis on protection. With the decline of the welfare state the EU took over consumer law and gradually transformed it. The EU has gradually deprived consumer law from its protective outlook, very much in line with the move to "neo-liberalism" in whatever shade. The book recounts the transformation of Europe from the post-war era until the Euro-crisis, using the tools of constitutional analysis and critical theory. The central claim is twofold: Europe has been gradually reconstituted in a manner that combines political authoritarianism with economic liberalism and that this order is now in a critical condition. Authoritarian liberalism is constructed supranationally, through a taming of inter-state relations in the project of European integration; at the domestic level, through the depoliticization of state-society relations; and socially, through the emergence of a new constitutional imaginary based on liberal individualism. In the language of constitutional theory, this transformation can be captured by the substitution of supranationalism for internationalism, technocracy for democracy, and economic for political freedom. Sovereignty is restrained, democracy curtailed, and class struggle repressed. This constitutional trajectory takes time to unfold and develop, and it presents continuities and discontinuities. Looking at the transformation of consumer law through the lenses of this analysis, helps to understand that there is a price to pay for an EU law which substitutes national consumer protection laws and which governs the EU consumption society—more than 50% of the EU's gross income result from consumption.

*Peer Zumbansen: The many lives of transnational law: Critical engagements with Jes-sup's bold proposal. Cambridge University Press, 2020. ISBN 9781108490269. 536 pp., GBP 110.00.*

Consumer law and policy is usually analysed in the national and maybe in the regional context (the EU, Latin America, Asia, Africa). The internationalization of consumer law and policy has long been neglected. This is all the more amazing as many consumer issues have been empirically and theoretically analysed in what ICJ judge Philip Jessup coined transnational law, highlighting the gaps between private and public international law and the need to adapt the law to border-crossing problems. Today, 60 years later, we still ask what role transnational law can play in a deeply divided, post-colonial world, where multinationals hold more power and more assets than many nation states. In searching for suitable answers to pressing legal problems such as climate change law, security, poverty and inequality, questions of representation, enforcement, accountability, and legitimacy become newly entangled. As public and private, domestic and international actors compete for regulatory authority, spaces for political legitimacy have become fragmented, and the state's exclusivist claim to be the law's harbinger and place of origin is under attack. Against this background, transnational law emerges as a conceptual framework and method laboratory for a critical reflection on the forms, fora, and processes of law making and law contestation today. Consumer law and policy reappears in all sorts of variations in the vast literature on transnational law. Bringing the two fields of legal research together helps to understand much better what internationalization of consumer law and policy might entail.

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