

## Editorial

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On 28 March 2003 the Amsterdam Institute for Private Law organized a conference named 'European Constitutionalization of Private Law'. The aim of this conference was to discuss the influence of European constitutional public law on (national) private legal systems. To do so, speakers from the area of private law and European public law were invited.

Although, there is no formal European Constitution, the European Court of Justice (ECJ) considers the European Treaties the 'constitutional charter' of the European Communities in its *Les verts*-decision. The heart of this substantive constitution is the internal market and the core thereof are competition rules and the free movement of goods, services, capital and persons. The ECJ has guaranteed the application of these European rules by the development of the doctrines of direct effect and supremacy of European law.

Harmonization by means of directives is usually the focus of private lawyers when discussing the affect of European law on private law and then in particular the content of these rules. Stephen Weatherill deals with the issue of harmonization of private law. However, he approaches it from a different angle. He discusses objections to harmonization of private law from a constitutional, cultural and economic perspective and to what extent they are reflected in the policy papers of the European Commission concerning a future contract law in Europe. He argues that when the constitutional, cultural and economic objection to harmonization are considered seriously, both private and European lawyers can work together to indicate the directions for European private law.

The doctrine of direct effect provides that justiciables may invoke provisions of EC law before national courts when certain conditions are fulfilled. This doctrine raises procedural issues such as to what extent a court must apply of its own motion provisions of EC law or is it left to the parties. Sacha Prechal and Natalya Shelkopyas argue in their paper that national courts should not be required to apply certain Community law provisions if the Luxembourg judiciary does not do so themselves. They come to that conclusion after having discussed the doctrines of effective judicial protection and procedural autonomy in the case of civil proceedings and the procedural implications of the ECJ's finding that Article 81 EC is a matter of public policy.

Also Harm Schepel discusses the enforcement of EC law in a private law context. However, he approaches the issue from a different angle. He restricts himself to the enforcement of European law in contractual relations. In this respect he distinguishes two instances of constitutionalization of private law: i.e. (i) the imposition of public law values on private law, and (ii) the substitution of traditionally public law regulatory functions by private law. In his view the present case law of

the ECJ concerning the enforcement of EC law in contracts results in ‘massive legal uncertainty and the wholly unnecessary violation and fragmentation of national private law structures’. He argues that the imposition of public law values on private law ought to be restricted to those cases, where parties can derive rights from EC-law. In addition, the substitution of public law regulatory functions should only be taken over by private law in those cases, where the private parties against whom these rights can be enforced are responsible for the implementation of EC law.

The effect of European law on private law is not restricted to areas which usually are associated with the internal market, such as contract law. It also affects areas such as family law as Mark Bell discusses. He explains that family law is not just an exclusive competence of the Member States. Thus, the European Union may affect family law. Bell elaborates on the concept of family in the Free Movement of EU Citizens Directive of 2004 and to what extent this concept includes same sex couples. According to Bell the concept of family in the free movement of EU citizens Directive does not reflect the present relationships within European society.

Finally, I would like to thank the editorial board of the ERPL for providing the possibility of publishing the papers presented during the conference in March 2003 in this journal.