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Editorial

Principles and the Law

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1. In this issue of the European Review of Private Law (ERPL), we publish the papers of a conference on 'Principles and the Law' organized on 25 May 2011 by the University of Utrecht. The papers were written by Carla Sieburgh on *Principles in Private Law: From Luxury to Necessity*, Patrick Morvan on *What's a Principle?*, Chantal Mak on *Hedgehogs in Luxembourg? A Dworkinian Reading of the CJEU's Case Law on Principles of Private Law and Some Doubts of the Fox*, Michiel Luchtman on Principles of European Criminal Law, and Rob Widdershoven and Milan Remac on *General Principles of Law in – Dutch – Administrative Law under European Influence*. The papers are followed by a conference report written by Nik de Boer, Sarah van Kampen, and Arne Mombers, three students in Utrecht University's Legal Research Master.

Not all conference papers are included. The paper by Annekatrien Lenaerts on 'The General Principle of the Prohibition of Abuse of Rights' has already been published in *ERPL* 2010, 1121–1154. Two speakers at the conference, Axel Metzger and Takis Tridimas, could for various reasons not hand in their written reports in time: We hope to publish these papers in a later issue. On the other hand, this issue does include a paper that was not given at the conference but inspired by it: the paper by Bas de Gaay Fortman on *Human Rights as Regulae Iuris: An Inquiry into the Dialectics of Legality versus Legitimacy*. In his paper, with regard to human rights, the author advocates a shift in emphasis from quasi-legal international procedures in semi-judicial bodies lacking any power to enforce to human rights as general principles guiding both political processes of emancipation and judicial decision-making.

2. Principles are on the increase it seems. A generation ago, they were invoked to get rid of some legitimate aim. Now they are *en vogue*. This in particular is due to the European Court of Human Rights, but the ECJ is increasing its use of this instrument.[1] The authors to this special issue demonstrate this. This Editorial will take a brief look around at some of the established EU Member States.

3. What do Germans mean when they discuss the notion of principles? Not always is this made explicit; witness the vague description in the *Jahrbuch Junger Zivilrechtswissenschaftler* 2000, which is devoted to 'Prinzipien des Privatrechts und Rechtsvereinheitlichung':

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1 T. TRIDIMAS, *The General Principles of EU Law*, Oxford University Press, Oxford 2006.

> Die Ermittlung von Prinzipien und Grundsätzen ermöglicht eine bessere Orientierung im Privatrecht und schafft eine Basis für die Rechtsvergleichung.[2]

Fortunately, there is the *Habilitationsschrift* by Axel Metzger on the importance of principles in European private law.[3] The author first quotes Dworkin and Alexy, who oppose 'principles' and 'rules':

> Die Regel habe im Gegensatz zum Prinzip eine Alles-oder-Nichts-Wirkung (…). Prinzipien seien dagegen Gründe für eine Entscheidung, ohne dass sie eine bestimmte Entscheidung erzwingen würden.[4]

Metzger himself defines principles:

> Ein allgemeiner Rechtsgrundsatz ist eine Rechtsnorm, welche nicht oder nicht vollständig von den Rechtsregeln der betreffenden Rechtsordnung anerkannt ist und welche von internen, 'externen' (insbesondere ausländischen) und/oder historischen Rechtsregeln im Wege der Induktion abgeleitet wird.[5]

How does one legitimate their validity?

> Allgemeine Rechtsgrundsätze lassen sich nur schwer in die herkömmliche Rechtsquellenlehre integrieren.[6]

4. In the English language, the author who has contributed the most to our subject world is Ronald Dworkin. In his 'Taking Rights Seriously', he uses the American case of *Henningsen* v. *Bloomfield Motors, Inc.*, a landmark case on product liability,[7] as example:

> [W]e must keep in mind the general principle that, in the absence of fraud, one who does not choose to read a contract before signing it cannot later relieve himself of its burdens. In applying that principle, the basic tenet of freedom of competent parties to contract is a factor of importance. Freedom of contract is

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2 B. JUD & T. BACHNER, 'Vorwort', in *Prinzipien des Privatrechts und der Rechtsvereinheitlichung, Jahrbuch Junger Zivilrechtswissenschaftler 2000*, Boorberg, Stuttgart 2001, p. 5.

3 A. METZGER, *Extra legem, intra ius: Allgemeine Rechtsgrundsätze im Europäischen Privatrecht*, Mohr, Tübingen 2008.

4 *Ibid.*, p. 14.

5 *Ibid.*, p. 26.

6 *Ibid.*, p. 107.

7 *Henningsen* v. *Bloomfield Motors, Inc.*, 32 *NJ* 358, 161 *A*2d 69 [1960].

not such an immutable doctrine as to admit of no qualification in the area in which we are concerned. In a society such as ours, where the automobile is a common and necessary adjunct of daily life, and where its use is so fraught with danger to the driver, passengers and the public, the manufacturer is under a special obligation in connection with the construction, promotion and sale of his cars. Consequently, the courts must examine purchase agreements closely to see if consumer and public interests are treated fairly. [I]s there any principle which is more familiar or more firmly embedded in the history of Anglo-American law than the basic doctrine that the courts will not permit themselves to be used as instruments of inequity and injustice? More specifically the courts generally refuse to lend themselves to the enforcement of a bargain in which one party has unjustly taken advantage of the economic necessities of other.[8]

His recent *Justice for Hedghogs*[9] is dealt with in the paper by Mak.

5. In France, Jean-Pierre Gridel gives the following definition:

> les principes généraux du droit sont des axiomes à prétention normative, assis sur ces sources matérielles du droit que sont tantôt la tradition ou l'ordre social, tantôt la raison ou l'équité, sans lien nécessaire avec un texte précis, et fertile en virtualités d'applications.[10]

Patrick Morvan discusses principles in his *Le principe de droit privé*[11] and below.

6. The Italian *Codice civile* of 1942 is the only modern Civil Code to use principles explicitly. Article 12 paragraph 2 reads:

> Se una controversia non può essere decisa con una precisa disposizione, si ha riguardo alle disposizioni che regolano casi simili o materie analoghe; se il caso rimane ancora dubbio, si decide secondo i principi generali dell'ordinamento giuridico dello Stato.

In his *I principi generali* from 1993, Alpa distinguishes:

> principi provenienti dalla tradizione, e non codificati (*nemo transferre potest; pacta sunt servanda; rebus sic stantibus*); principi creati dal giudice, come il

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8 R. DWORKIN, *Taking Rights Seriously*, Duckworth, London 1977, p. 24.

9 R. DWORKIN, *Justice for Hedgehogs*, Belknap Press, Cambridge, Massachusetts 2011, in particular, pp. 1–19, 327–339, 400–415.

10 J.-P. GRIDEL, La Cour de cassation française et les principes généraux du droit privé, *Dalloz* 2002, Chron., pp. 228, 229.

11 P. MORVAN, *Le principe de droit privé*, Presses Panthéon-Assas, Paris 1999.

> principio della occupazione acquisitiva (…); principi codificati dal legislatore (…) come il principe *alterum non laedere* (…).[12]

7. In Belgium and the Netherlands, two authors of the leading civil law commentary, the 'Asser-series', have written on the notion of principles in private law. In his General part, Jan Vranken makes a plea for the use of general principles.[13]

In his 'Vermogensrecht algemeen/Europees recht en Nederlands vermogensrecht', Hartkamp focusses on the principles developed by the European Court of Justice (ECJ).[14] In Belgium, Dirix writes:

> Bepaalde fundamentele beginselen van ons rechtssysteem worden, ongeacht of ze in een wettekst uitdrukkelijk zijn verwoord, door de rechtspraak erkend als formele bron van ons positief recht. Deze 'algemene rechtsbeginselen' zijn geen creatie van de rechtspraak; zij worden enkel door de rechtspraak als zodanig aanvaard.[15]

These are different principles from the ones recognized by François Laurent in his *Principes de droit civil*.[16]

8. What about the Principles of European Contract Law?

I would rather advocate the use of model law than principles here.

9. Conclusion: What is the use of principles in private law? This short inventory shows that there are – at least – three questions as to principles. The first is what they are. Is Metzger's procedural theory of any use? Second, there is the question of their function. In some jurisdictions principles do legitimate, but in others they also fill in or derogate from the law. Third, there is the question whether principles should be made explicit, for instance, in legislation.

10. Lawyers do not live by principles alone, and therefore this issue of ERPL encompasses a number of articles on specific issues as well, scattered issues even, such as the paper on *scattered damages* based on the author's master thesis for

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12 G. ALPA, *I principi generali*, Giuffrè, Milano 1993, pp. 48–49.

13 J.B.M. VRANKEN, *Mr. C. Asser's Handleiding tot de beoefening van het Nederlands burgerlijk recht, Algemeen deel, een vervolg*, Kluwer, Deventer 2005, p. 86: 'Het gaat hier om noties als het waarborgen van de menselijke vrijheid, respect voor de ander, rechtszekerheid, evenredigheid, bescherming van opgewekt vertrouwen, gelijkheid en doelmatigheid'.

14 A.S. HARTKAMP, *Mr. C. Assers handleiding tot de beoefening van het Nederlands burgerlijk recht, 3-I*, Vermogensrecht algemeen, Europees recht en Nederlands vermogensrecht*, 2nd edn, Kluwer, Deventer 2011, who observes: 'Doorgaans zijn deze van constitutionele, institutionele of administratiefrechtelijke aard'.

15 E. DIRIX, 'Inleiding', in R. Dekkers (ed.), *Handboek burgerlijk recht, I. Personen- en familierecht*, 3rd edn. by A. Wylleman, Intersentia, Antwerpen 2009, pp. 1, 34.

16 F. LAURENT, *Principes de droit civil*, 1878, 33 volumes.

Maastricht University's European Law School. In his paper, Basil Cupa examines private enforcement mechanisms of low-valued damages and their reasonableness from a comparative point of view. He is of the opinion that the European Union is quite active but lacks the competence to enact a directive in the field. On the Member State level, he advises to address scattered damages in two different ways. Minor damages call for private enforcement, whereas trifle damages should be left to the cartel authorities or other public enforcement agencies. Before that, the influence of Ronald Dworkin once again shows, although this time in the paper's title only – *Data Processing Consent through the Re-conceptualisation of European Data Protection's Looking Glass after the Lisbon Treaty: Taking Rights Seriously.*In this paper, Brunel University's Federico Ferretti aims at re-conceptualizing data protection in the EU in light of the Lisbon Treaty. His final suggestion is that the EU should take rights seriously and should not be seduced by conflicting economic interests. The range of articles closes with an analysis by Leicester University's Christopher Bisping of a further sign of the domination of the legal world by the English language. A decade ago, the District Court (*Rechtbank*) of Rotterdam already considered introducing English as an optional language. The idea of a pilot project was rejected for practical reasons: what to do with the joining of parties, appeal, and so forth. More recently, French and German courts are considering the same. The author doubts whether these initiatives will meet with success, however, because as he suggests language is not the only ground to opt for a court.

The first two articles in this issue after the Special Part come from the Far East of the European Union. Karin Sein (University of Tartu) analyses the transposition of the consumer credit directive in Estonia. Janno Lahe and Karmen Turk (both also from the University of Tartu) look into the possibility of claiming compensation from operators of public commentary rooms. They seek to strike a fair balance between the interests of the authors of comments, the victims, and the operators.

11. This issue's case note concerns an Austrian award of mental harm suffered because of frustrated visiting rights. After a divorce, a twelve-year old boy refuses visits by his father. May he claim non-pecuniary damage from the mother because of her manipulation of the son? It is interesting to see whether other jurisdictions in Europe share the Austrian court's positive response. We are very grateful to Barbara Steininger and her European Centre of Tort and Insurance Law (ECTIL) in Vienna for coordinating this case, which solicited comments from Austria (by Barbara Steininger), England (by Colm McGrath), France (by Julien Dubarry), Germany (by Thomas Thiede), Norway (by Anne Marie Frøseth Anfinsen), Poland (by Katarzyna Ludwichowska-Redo), and Spain (by Jordi Ribot).

12 Two *Erfahrungsberichte* and book announcements complete this voluminous issue. The two conference reports both bear on sales law. The first one concerns a conference on the Vienna Sales Convention held in Florida. According to our reporter, Alexandra Seifert (to whom we also owe gratitude for helping us out with

translations into German), the conference was attended only by 'believers in the church of the CISG', who however feared that 'our fragile child of the CISG is in the rough hands of national courts'. The second is about one of the first conferences organized about the recent EU proposal for an Optional Instrument on a Common European Sales Law. The conference took place at the Brussels campus of Maastricht University, and our reporter is Maastricht University's William Bull.

13. The book announcements are on *The Foundations of European Private Law* and a number of commentaries on the Optional Instrument mentioned above.

14. In 2011, the Austrian *Allgemeines Bürgerliches Gesetzbuch* (ABGB) celebrated its bicentenary. It is perhaps not widely known that this Code once was valid law in large parts of Europe. In our next issue, we hope to publish a number of papers on the historical development of this Code in the various parts of the Austrian-Hungarian Empire and on its present-day status.