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CONSTITUTIONALISATION OF PRIVATE LAW: THE EUROPEAN CONVENTION ON HUMAN RIGHTS PERSPECTIVE

Tom Barkhuysen & Michiel van Emmerik¹

1 INTRODUCTION

Some say that human rights are not relevant to private law because these rights are effective only in the relationship between a state and its citizens. Others might say that human rights do not affect the right of private parties to enter into contracts or to draw up wills that are entirely arbitrary and contrary to human rights.

This article need not be written if these statements turn out to be correct. After all, we are supposed to discuss the role of the European Convention on Human Rights – a human rights convention to which all European states are parties – in the development termed the constitutionalisation of private law.

But are these statements correct, or should we conclude rather that human rights are increasingly relevant to private law, as others say? The answer to this question is not evident and it is interesting to examine the role played in private law by human rights.

The focus of this article therefore is the question whether and if so, and to what extent, human rights influence private law (not considering procedural law) and thus contribute to the constitutionalisation of this area of law. We confine ourselves to the European Convention on Human Rights (ECHR or

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Convention), because the rights contained therein apply to all European states. Moreover, we will only examine to what extent the Convention finds – directly or indirectly – application in private law, without considering whether the standards of the Convention are a material addition to the effective national private law standards. As practitioners of constitutional and administrative law as well as European law we are not equipped to answer this last question. This we would like to leave to civil law practitioners.

To come straight to the point: the conclusion of this article will be that the ECHR definitely plays a role in private law. Partly for that reason it can no longer be said that private individuals are entitled to arbitrariness. Although this role of the ECHR should not be overestimated, it should certainly not be underestimated.²

Below we will explain this statement step by step. For a good understanding we will first make some general comments about the extension of the human rights concept (paragraph 2). This will be followed by a general discussion of the different ways in which human rights affect private law relations (paragraph 3). More specifically, the ECHR will be discussed, in which context first the status of this Convention in the national legal system will be considered (paragraph 4), with a focus on the significance of the ECHR for private law (paragraphs 5 – 8). We will end with some concluding remarks (paragraph 9).

2 EXTENSION OF THE HUMAN RIGHTS CONCEPT

First some general comments about the development of the human rights concept.

Anchored in national, European and international documents, human rights have gained importance over the past few decades. Human rights are invoked increasingly in legal practice and the interpretation of human rights standards become ever more refined. Parties hope to reinforce their position in legal proceedings by invoking human rights. They think – in Dworkin's words – of human rights as trumps.³ Judges in turn are forced to pronounce a judgment

2 This article is partly based on our consultative report for the Dutch Civil Law Society, *De eigendomsbescherming van artikel 1 van het Eerste Protocol bij het EVRM en het Nederlandse burgerlijk recht: het Straatsburgse perspectief*, Deventer 2005, p. 1-101 (with many detailed references to case law and literature).

3 R. Dworkin, *Rights as trumps*, in: J. Waldron (ed.), *Theories of rights*, Oxford 1992 (1984), p. 153-168.

about the alleged violation of human rights. As a result more and more rights and interests acquire a human rights aspect.

Part of this development results in the application of human rights outside the context for which they were originally intended. Human rights are invoked not only in the – classic – relations between state and citizens but more and more in the relations between private individuals. Judges then appear prepared, whether or not because they feel compelled, to apply human rights, directly or indirectly, to the legal relations between citizens. In addition, through his laws the legislator, too, declares human right standards applicable to these legal relations. An example is anti-discrimination legislation.

This outline shows already in a general sense how human rights can contribute to the constitutionalisation of private law. By the way this development could also be qualified as the ‘privatisation of human rights’.⁴ It should be noted that the influence of EU law can also be regarded as a form of constitutionalisation of private law. This will not be discussed here.

3 EFFECT OF HUMAN RIGHTS ON PRIVATE LAW: SOME BASIC MODELS

It would be wise to consider first the effect of human rights on private law, in a general sense, in order to fully fathom the significance of the ECHR on private law –this article’s central theme.

A lot has been written about the effect of human rights on private law and a full report would exceed the scope of this article. It is relevant, however, that several basic models for this effect can be distilled from the literature available.⁵ These models are as follows:

4 See S.D. Lindenbergh, *Constitutionalisering van contractenrecht, Over de werking van fundamentele rechten in contractuele verhoudingen*, WPNR 2004, p. 977-986 (p. 977).

5 K. Rimanque (ed.), *De toepasselijkheid van de grondrechten in de private verhoudingen*, Antwerp 1982 (with several relevant contributions); A.K. Koekkoek, *De betekenis van grondrechten voor het privaatrecht*, WPNR 1985, p. 385-389 (volume 1), p. 405-412 (volume 2) and p. 425-434 (volume 3); L.F.M. Verhey, *Horizontale werking van grondrechten, in het bijzonder van het recht op privacy* (diss. Utrecht), Zwolle 1992, p. 135-145; J. Mestre, *L’influence de la Convention européenne des droits de l’homme sur le droit français des obligations*, ERPL 1994, p. 31-45; E.A. Alkema, *De reikwijdte van fundamentele rechten – de nationale en internationale dimensies*, consultative report NJV, Zwolle 1995, p. 22-32 and p. 115-122; D. Spielmann, *L’effet potentiel de la Convention européenne des droits de l’homme entre personnes privées*, Bruxelles 1995; A. Barak, *Constitutional Human Rights and Private Law*, in: D. Friedmann & D. Barak-Eretz (eds.), *Human Rights in Private Law*, Oxford/Portland 2001, p. 13-42; J.M. Smits,

- Direct effect of human rights on private – horizontal – relations, also called direct effect on third parties. This means that human rights affect private relations as directly applicable standards in exactly the same manner as classical vertical relations. For instance, the same conditions apply to the lawful restriction of human rights as arises from limitation clauses. The rationale behind this is primarily that public and private law cannot be strictly separated, that human rights standards are of such consequence that they should be binding on private actors as well, while it is at the same time conceivable that these latter actors do not always observe these standards.
- Indirect effect of human rights on private relations through the interpretation of applicable general open legal standards such as good faith, reasonableness and fairness and due care, for instance in the context of tort. Here the rationale is acceptance of the principle that human rights are intended only for the relationship between the state and citizens. As, however, these human rights also reflect certain values in society that might be relevant to private relations, this view implies a certain effect of the applicable standards.⁶
- Indirect effect through legislation that implements human rights that apply in private relations. These may be standards of a various nature that result in a specific application of human rights in private relations, such as the protection of ownership, privacy and the principle of equality.
- Indirect effect of human rights by reading these in, as it were, a generally applicable (personal) right, which affects overall law including private legal relations.⁷
- A certain effect of human rights through the involvement of the (state) court in disputes between private parties. The basic principle is that human rights as such are valid between private parties neither directly nor indirectly but that if these parties in a dispute turn to the court the latter will be bound

Constitutionalisering van het vermogensrecht, consultative report NVvR, Deventer 2003, p. 14-64 (with detailed references).

- 6 This idea that might imply that private law must be confronted constantly with civil rights can be found also, in: J.M. Polak, Dient de wet bijzondere regelen te bevatten ten aanzien van de civielrechtelijke werking van de grondrechten, en zo ja, welke? Consultative report NJV, Zwolle, 1969. Cf. H. Drion, Civielrechtelijke werking van de grondrechten, NJB 1969, p. 585-594.
- 7 Cf. R. Nehmelman, Het algemeen persoonlijkheidsrecht, Een rechtsvergelijkende studie naar het algemeen persoonlijkheidsrecht in Duitsland en Nederland (diss. Utrecht), Deventer 2002; Lindenbergh 2004 (WPNR), p. 979.

by human rights. This may have repercussions on the measures the court may take in the dispute.

No effect at all of human rights on private relations. In this model the effect of human rights is reserved strictly for the relationship between the state and citizens and there is no question of any form of bearing on private legal relations.

Siewert Lindenberg is right in pointing out that indirect effect does not necessarily result in fundamental rights having ‘less bearing’ than the direct effect also referred to above. He further sets out that different forms of application may well co-exist and that human rights – even where strictly speaking their application is not required – may contribute to the articulation of parties’ interests and an adequate weighing of these interests.⁸ In the above outline of the basic models it should be noted that the position of the state, as a participant in legal transactions under private law, is not clear. The different models are based on the assumption that the parties in private law are not governmental authorities. Still, they frequently are. The basic principle is that – at any rate in the Dutch legal system – the state in private law transactions is fully bound by public law standards and thus also – directly – by human rights.⁹

4 THE STATUS OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS

Before the significance of the ECHR for private law is discussed, it would be wise to first sketch a more precise – but still general – image of the status of this Convention.

The ECHR has established a human rights system that is essential to all European countries. The member states of the Council of Europe – which includes all EU members – are under obligation to respect the rights contained in the Convention.¹⁰ This goes for all government powers: judge, legislator and administration. They will be liable under international law if they fail to comply with this obligation to guarantee the result. Citizens who, after national rectifications have been exhausted, hold the view that in their case the ECHR has been violated can file a complaint against the state (thus not against

⁸ Lindenberg 2004 (WPNR), p. 979-986.

⁹ With regard to civil rights see, for instance, the ruling of the Dutch Supreme Court of 26 April 1996, NJ 1996, 728, annot. EAA (Rasti Rostelli).

¹⁰ The Council of Europe consists of 46 member states (January 2006).

citizens!) with the European Court of Human Rights in Strasbourg. States are then required to comply with this Court's binding rulings, which may imply that the violation should be discontinued and/or that damages should be paid. National legal systems should follow the European Court of Human Rights' case law. Today the EHRC the leading European human rights document that is relevant to all European countries. It is the intention that the EU, too, will eventually become a party and subject itself to the jurisdiction of the European Court of Human Rights, although this has become a little unsettled by the rejection of several EU member states to the European Constitution, which provided for this possibility. The EC Court of Justice, however, already follows the Court in Strasbourg as far as the interpretation and application of human rights are concerned.

5 THE INFLUENCE OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS ON PRIVATE LAW

Now on to the specific influence that the ECHR has on private law. Research into the ECHR and the case law of the Strasbourg Court shows that this Convention gives rise to an obligatory and a non-obligatory influence on relations governed by private law. Before discussing this in more detail, we should like to emphasise that even in situations where the ECHR requires incorporation into national law, it does not prescribe how the rights contained in the Convention should be implemented. The sole purpose, after all, is to attain a result that conforms with the ECHR. That means that these rights may be applied directly, but that indirect application through the interpretation of open standards like good faith and reasonableness and fairness or the interpretation of generally applicable rights and principles could be sufficient as well.

Below, two situations will be considered in which the ECHR has obligatory influence on private law, i.e. if the state uses private law, and in which positive obligations arise from the ECHR. This will be followed by a consideration of the non-obligatory application of the Convention.

5.1 The State Using Private Law

It follows from the ECHR and the case law of the Strasbourg Court first of all that the state (whether legislator, judge or administration), under public or private law, is bound, in its actions, by the standards set by the ECHR. In this

context it should be noted that the state regularly uses private law. This means, for instance, that if the state sells land, it may not act contrary to the ECHR. As a result, the standards contained in the Convention are applied in – vertical – private law relations between the government and citizens.

The ruling in *Stretch v. United Kingdom*, in which the Court concluded that the property right of Article 1 of the First Protocol to the ECHR (FP) had been violated, is extremely interesting to civil law practitioners in this context.¹¹ In this case, the Court brings within the scope of protection of property rights a private individual's legitimate expectation based on an option in a building lease with a local authority to renew the lease for a specific period. The Court ruled that in this concrete case it did not matter that in the meantime it had been established that the local authority did not have the statutory power to include such an option in the lease. The applicant, however, was entitled to expect that the option would be honoured, for he had made the necessary investments on this basis. Moreover, neither public interest nor the interests of third parties oppose such renewal *contra legem*. The Court therefore assumed a violation of Article 1 of the First Protocol.

5.2 Positive Obligations and Effective National Legal Protection

In addition, within private law the rights contained in the ECHR may have a certain effect on – horizontal – legal relations between citizens through the concept developed by case law of positive obligations and the requirement based on Article 13 of the Convention of effective national legal protection. These positive obligations are assumed with respect to several rights contained in the Convention and imply that the government has the obligation not only to refrain from violating such rights, but also has the obligation to protect citizens against infringements of these rights by other citizens. Again these positive obligations apply to legislator, administration and judiciary. In the Netherlands, for example, the right to family life contained in Article 8 of the Convention, in connection with the prohibition of discrimination contained in Article 14, has had a major impact on the updating of Dutch laws on persons and family law. For instance, the right of unmarried parents to joint parental authority has been recognised. The judge has the responsibility to offer legal protection pursuant to Article

¹¹ European Court of Human Rights, 24 June 2003.

13 of the ECHR when legislator and administration fail to adequately protect the human right in question in legal relations between citizens.

An example of a case showing that positive obligations under the Convention even allow the assumption of a restriction of property rights is *Appleby v. the United Kingdom*.¹² This case shows that the ECHR does not exclude that the freedom of expression contained in Article 10 of the Convention gives rise to a positive obligation for the state to ensure that an owner should tolerate certain statements on his private property. This case concerned the private owner of a shopping mall who did not give permission to hand out flyers with a public message. In this case the Court did not assume a violation of Article 10 of the Convention as the applicants had had sufficient alternative means of communicating their views in publicly owned property.

Further to these positive obligations national courts may be required even to interpret private law rights and obligations between private individuals in conformity with the Convention. This, in turn, could have a reflex effect on agreements made by private individuals among themselves in the sense that they only make agreements that are enforceable in a court of law.

This is also illustrated by a case against Andorra (*Pla and Puncernau*) in which the majority of the European Court of Human Rights assumed a violation of Article 8 (respect for family life) in conjunction with Article 14 (prohibition of discrimination) of the ECHR. In the view of the Court the national court had wrongly interpreted a will that children 'born out of wedlock' and thus adopted children were deprived from their inheritance rights.¹³ A minority within the European Court, including the English judge Bratza, opposed this view and argued that private individuals, unlike the government, do have some latitude to discriminate in the context of legal acts under private law. It was this minority's view that the judge should cooperate in enforcing this, unless the most fundamental core of the Convention would be at risk. At this point we will have to wait and see whether the ruling of the Andorran court will be reconsidered on appeal by the Grand Chamber of the European Court. The majority's opinion, however, appears to fit in with a general line of judgments that have already been made final.

The viewpoint of the majority of the European Court in the Andorran case seems to allow the conclusion that the national judge is bound by similar obligations under the ECHR in disputes about the execution of multilateral legal acts such as an agreement. The argument that parties have thus waived their

¹² European Court of Human Rights, 6 May 2003.

¹³ European Court of Human Rights, 13 July 2004.

rights does not appear to exclude such an evaluation in advance. This will be discussed below in more detail.

If no positive obligations are at stake and private parties turn to the courts, for instance to enforce an agreement between them, these courts do not seem required to test this agreement for conformity with the ECHR, although the courts may, at their own discretion, use the Convention as an additional source of law. Case law, however, is not yet entirely clear on this point. Be this as it may, the involvement of a court in private disputes at any rate creates the possibility of filing a complaint in Strasbourg, which would bring such a dispute within the scope of the ECHR.

5.3 Non-Obligatory Execution

Even where execution is not strictly legally required, judge, legislator and administration may have themselves led, or inspired by the Convention when setting standards in private law. The rights laid down in the ECHR after all reflect certain values in society that can and perhaps should be relevant in a general sense. In that context it might be significant that in some cases the question presents itself whether a strict distinction between government parties and private parties is justified with regard to the binding force of the rights contained in the Convention or similar standards. Why for instance should the government, when issuing land, not be allowed to discriminate, when major private property developers are allowed to do so?

6 WHAT ROOM DOES THE FRAMEWORK SET BY THE EUROPEAN CONVENTION ON HUMAN RIGHTS LEAVE PRIVATE INDIVIDUALS TO VIOLATE HUMAN RIGHTS?

To get an even better impression of the effect of ECHR standards on private – horizontal – relations, it is important to dwell on the question whether and if so, to what extent, private individuals may violate these standards when entering into relations under private law.

Jan Smits believes that citizens in private law relations are ‘entitled to arbitrariness’: in principle they may make contracts and last wills as they deem fit and in doing so, for instance, violate the prohibition of discrimination. Jan Smits rightly qualifies his argument by pointing to the incorporation of human rights in, for instance, the Dutch Civil Code (such as the principle of equality

in Article 7:646), which of course should be obeyed by private parties as well.¹⁴ Still, Jan Smits skirts the concept of positive obligations set out above that may require the national courts to let the ECHR have bearing on horizontal relations, for instance in the interpretation of agreements and testamentary dispositions.

To put it in a more particular way, with regard to the latter point, reference is made to the Andorran inheritance case *Pla & Puncernau*, which is illustrative and in which the European Court of Human Rights put forth some noteworthy considerations on this topic. First the case. In 1939 Carolina Pujol Oller drew up a will stipulating that her son and heir, Fransesc-Xavier Pla Pujol, was to pass on his inheritance to a son or grandson from a legitimate and canonical marriage. In the event of failure to satisfy these conditions, the estate was to pass to the testatrix's other children and grandchildren, if they were born from such a marriage. Her son married Roser Puncernau Pedro in a legitimate and canonical marriage. The couple adopted two children. In 1995 Fransesc-Xavier bequeathed the property he had inherited from his mother in 1949 to his wife and upon her death to his adopted son Antoni. When Fransesc-Xavier Pla Pujol died in 1996, two great grandchildren of Caroline Pujol Oller initiated civil proceedings before the *Tribunal des Battles*. They argued that the adopted grandson could not inherit under the will made by the testatrix in 1939. The *Tribunal des Battles* dismissed their claim, which was honored on appeal. The judges on appeal interpreted the testatrix's will in the light of the legal traditions and the society in Andorra in 1939. According to these judges adoption was a rare phenomenon in Andorran society at the time when the will was drawn up (1939) and at the time of devolution of the estate (1949). The children who had been adopted at that time were seen outside the family context, both legally and socially, and were thus considered illegitimate. Appeal (*empara*) against this decision was dismissed by the Andorran Constitutional Court. The adopted son and his mother then filed a complaint with the European Court of Human Rights, invoking Article 8 (right to respect for family life) in conjunction with Article 14 (prohibition of discrimination) of the ECHR. In their opinion the Andorran court was wrong to interpret the will by making a distinction between adopted children and other (legitimate) children, contrary to the articles referred to above. The European Court of Human Rights concluded – although not unanimously – that the interpretation and application by the Andorran court of the will constituted a *forbidden* discrimination of an adopted child contrary

¹⁴ Smits 2003, p. 21-23.

to Articles 8 and 14 of the ECHR. According to the Court the will does not contain any indication that the testatrix intended excluding adopted grandsons from her estate. The Court reasoned that, in theory, it does not concern itself with settling disputes between private individuals. However, the European Court of Human Rights is entrusted with the European enforcement of human rights and cannot take a passive stance when the interpretation by a national court of a legal act, like a clause in a will, an agreement under private law, a public document, a statutory provision or an administrative practice appears unreasonable or arbitrary or, as in this case, clearly in breach of the prohibition of discrimination contained in Article 14 of the ECHR and in a broader sense of the principles on which the Convention is based. The Court reiterated that the ECHR is a dynamic instrument that carries with it positive obligations. The Court called the Convention ‘a living instrument’ to be interpreted in the light of present-day conditions and mentioned that great importance was currently attached in the member states of the Council of Europe to the question of equality between children born in and out of wedlock regarding their human rights. In view of these developments the Andorran judges, in interpreting the will, should consider not only the social conditions that existed when the will was made and when the estate passed to the heirs in 1939 and 1949 respectively. With five votes against two the Court decided that Article 14 in conjunction with Article 8 of the ECHR had been breached. In a dissenting opinion Judge Bratza emphasized that private individuals – unlike the government – are free to discriminate, for instance when disposing of their property (in a will). He agreed with Judge Garlicki, another dissenter, that this freedom of the testator is precisely protected by Article 8 of the ECHR (it is likely that they refer to the right to private life as contained in that Article) and Article 1 of the First Protocol (right to peaceful enjoyment of one’s possessions). Judge Bratza held that pursuant to these articles the state should implement, in principle, through its judicial bodies such a discriminatory provision in private relations. If the national court effects such a discriminatory obligation, it does not act in breach of the ECHR. In Judge Bratza’s view this is different only under exceptional circumstances in which the implementation of the discriminatory provision would be in breach of the Convention’s fundamental ideals or if its object were to ‘destroy’ the rights and freedoms laid down in the Convention, which does not apply here.

As mentioned earlier, the ruling of the Court’s Chamber is not yet final and the case may be reviewed by the Grand Chamber in the context of an internal appeal. It is hard to say what the outcome will be. If the Grand Chamber, however, were to adopt the Chamber’s view that a positive obligation of

the state is at stake with regard to the prohibition of discrimination and the right to respect for family life – which could be assumed given earlier case law – adoption of the Chamber’s opinion seems obvious. The dissenters are wrong in assuming that positive obligations should be fulfilled by the legislator and administration only and that they would not lie with the judge as well – in full and therefore not only where very serious breaches of the most important fundamental rights are concerned – when confronted with agreements between private individuals or wills. Article 13 of the ECHR also speaks against the dissenters’ opinion that requires that a legal remedy be provided precisely at a national level if the legislator or administration fails on this point to prevent this type of cases from being submitted to Strasbourg directly. It should be emphasized, however, that the dissenters do not wish either to grant unlimited options to private individuals to violate rights contained in the Convention and in extreme cases even deem intervention by the European Court of Human Rights desirable.

Jan Smits is right that from the viewpoint of the ECHR private individuals are strictly speaking confronted with standards arising from positive obligations only if the legislator, in the implementation of the Convention, sets rules that apply to private relations or if a dispute arises between private individuals about an agreement or will and they must submit that dispute to the court. It is also conceivable that the administration becomes aware of private arrangements that are contrary to the standards contained in the ECHR from which positive obligations arise and *ex officio* takes action to protect the rights concerned. The result is, however, that the relevant standards in a sense cast their shadow on private relations and thus may actually affect these relations even though no government body is involved yet. In view of disputes that may arise, it is very conceivable that private individuals only lay down arrangements that are legally enforceable. In this context Spielmann has used the phrase ‘secondary positive obligations’.¹⁵

7 WAIVER OF RIGHTS IN PRIVATE RELATIONS?

The above consideration should include the question whether private individuals can waive rights arising from the standards contained in the ECHR and what the relevance of such a waiver would be to the state’s positive obligations

¹⁵ Spielmann 1995, p. 88.

related to these standards. It should be noted that Strasbourg case law shows that, in principle, the waiver of rights under the Convention is allowed in relations with governmental authorities, but that a strict test applies regarding the voluntariness and unambiguousness of such a waiver.¹⁶ The freedom to set restrictions on human rights is, in principle, greater in relations between private parties. However, limitations may be imposed by the concept of positive obligations referred to earlier, as has become apparent in the Andorran inheritance case mentioned before. Although this case concerned a unilateral legal act under private law (i.e. a will), the European Court of Human Rights explicitly mentioned that in the context of its responsibility to the European enforcement of human rights it is also entrusted with testing the national courts' interpretations of various legal acts, which could be understood to include multilateral acts such as an agreement under private law. Where positive obligations arising from the ECHR are concerned (such as the prohibition of discrimination in connection with the right to respect for family life), the European Court therefore deems itself competent to call the state in question to order, even if it concerns arrangements that were made originally in a relationship governed solely by private law. Of course the opinion of the European Court of Human Rights is relevant only if the matter concerns, in any way whatsoever, a government body at a national level. Usually this will be the judge who becomes involved in a dispute between private individuals in which, for instance, one of the contractual parties doubts the voluntariness of the waiver of his human rights or reconsiders this waiver. In evaluating the voluntariness of this waiver the judge will probably consider to what extent a very fundamental right is at issue that could be regarded as a vital principle on which the Convention is based, such as the prohibition of discrimination between legitimate and illegitimate children that was at issue in the Andorran case. If such a right is at issue, it would be natural for the European Court to have a tendency to break the arrangements originally made between private individuals in favor of the fundamental right concerned. Positive obligations are usually at stake with such fundamental rights, although Strasbourg case law has not yet taken definite shape on this point. In that respect the positive obligations could indirectly affect private relations and thus seem to show some similarity to the standard contained in the Dutch Civil Code, i.e. a legal act that by its contents and purport is contrary to good morals or public order is null and void (Article

16 See, for instance, E.A. Alkema, *Contractvrijheid als grondrecht; de vrijheid om over grond- en mensenrechten te contracteren of er afstand van te doen*, in: T. Hartlief & C.J.J.M. Stolker (ed.), *Contractvrijheid*, Deventer 1999, p. 33-46.

3:40). In this context there is a parallel with the lease cases from the forties and fifties of the 20th century discussed in detail by Jan Smits. The arrangement that the lease agreement could be dissolved if the leaseholder changed religion was held to be null and void because of the freedom of religion and thus was contrary to good morals or public order.¹⁷

8 ARTICLE 1 OF THE FIRST PROTOCOL AS DEFENCE SHIELD: THE CONSTITUTIONALISATION PARADOX

To complete the picture the fact should be mentioned that the property right of Article 1 of the First Protocol, in particular, also protects contractual and testamentary freedom. Thus it can be regarded as a shield against the application of public law standards in legal relations between private individuals and thus against the constitutionalisation of private law.

This could be characterised as the ‘constitutionalisation paradox’. On the one hand, the standards of the ECHR and Article 1 of the First Protocol may be applied in private legal relations through the concept of positive obligations (like in the Andorran inheritance case). On the other hand, such an application can be prevented by reliance, in particular, on Article 1 of the First Protocol.

9 CONCLUSION

The conclusion is that the ECHR definitely plays a role in private law, as the state is required to comply with this Convention in private law relations. At the same time the state may be required to safeguard rights contained in the Convention in relations between citizens. This, in a sense, implies supervision from Strasbourg on private law, also when legal relations between citizens are concerned. This means that the case law of the European Court of Human Rights should also be closely monitored by civil law practitioners, because of its potential implications for private law.

The ECHR thus finds application in private law and contributes to its constitutionalisation. The Convention after all defines certain boundaries within which private law can develop. The boundaries are there but it is up to civil law practitioners to decide for each country whether or not these boundaries

¹⁷ Smits 2003, p. 34-35.

are exceeded and what the ECHR means to national private law. This area comprises many important research questions. Let us hope that this article contributes to crucial further research into this area.