

THE EUROPEAN PUBLIC ORDER, CONSTITUTIONAL PRINCIPLES AND FUNDAMENTAL RIGHTS

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Abstract

How is the notion of European public order/*ordre public* dealt with in the case law of various European courts? What does it refer to? Does it include fundamental values, and if so, are fundamental rights a part of these fundamental values? The author discusses a large number of cases in order to discern the content of public order/*ordre public* as a contested notion that has a variety of broad connotations. It refers to normal and peaceful situations in the public sphere, but also in a much broader sense to patterns of values that are important in a community of citizens. This second meaning of the concept is related to norms that are so fundamental for the legal order that they have to be respected, regardless of procedural obstacles. The author argues that comparative legal research is becoming increasingly important and necessary to help answer the type of questions discussed in this article.

1 Introduction: the problem

On 24 October 2001, the German Federal Administrative Court gave judgment in a case concerning a game that was to be played in a ‘laserdrome’ in Bonn. Although the acts of the participants in this game, the aim of which is to ‘kill’ the other players, have a virtual and therefore

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fictitious character, the Mayor of the city of Bonn and the municipal administration found that the game was incompatible with the fundamental values of society. Therefore the police issued a prohibition order. The Federal Administrative Court opined that the game has a tendency to both affirm and minimise the gravity of violence. The court considered this tendency to be incompatible with the constitutional guarantee of human dignity because of its possible effects ‘on the general values and social behaviour’. The court concluded that the game, therefore, might lawfully be prohibited in Bonn (and probably should not be allowed anywhere in Germany). The court, however, was uncertain whether such a prohibition would be compatible with European Community (EC) law. Therefore, a preliminary ruling was requested from the European Court of Justice (ECJ). The precise question presented to the ECJ was whether it is compatible with the EC Treaty that such a game be prohibited in one member state on the ground that it violates the ‘constitutional value decisions’ (*verfassungsrechtliche Wertentscheidungen*) of that state, while in other member states of the European Union no equivalent legally relevant convictions exist.

This question lies at the heart of many legal debates concerning European integration, fundamental rights and fundamental values. It raises several questions with regard to the relationship between economic activities and fundamental rights. How much weight should be attached to the interests of the company that exploits the game? What weight should be attributed to the feelings of the general public? Who constitute the relevant public: the potential customers/participants only, or a wider group, and if so, which group? It also raises a number of questions with regard to the general values that have found expression in the German Constitution (*Grundgesetz*); human dignity is relevant in this case, but it is also worth mentioning that the German constitution protects the freedom of profession.¹

In this particular case, the Higher Administrative Court (*Oberverwaltungsgericht*) had already found that the game violated public order. Moreover, the court had established that public order is an indeterminate legal concept. Following an early decision by the German Constitutional Court,² the court found that public order has to be regarded as a ‘general clause which needs to be filled with values’, and with respect to which the legal meaning and significance is ‘influenced by fundamental rights standards’. According to the Higher Administrative Court, the constitutional values considered by the German Constitutional Court are

¹ Art. 12, Grundgesetz. The freedom of profession is also protected by article 15 of the legally non-binding Charter of Fundamental Rights of the European Union.

² Bundesverfassungsgericht *Entscheidungen* Band 7, 198 (215/216).

human dignity, right to life and physical integrity, and the state monopoly of violence.³

On 14 October 2004, the ECJ delivered a preliminary ruling in the case.⁴ Even before that ruling, commentators had raised the question of whether there should be a common conviction in Europe with regard to these types of issues.⁵ The court in this case acknowledged Germany's right to forbid such a game on the ground that it violated human dignity. It held that EC law provided no obstacle for such a decision based on 'local' values. The ECJ thereby recognised that even on the fundamental level of the protection of human dignity, it is possible that various member states have different standards and different views as to what is required to protect that dignity.

The systems for the protection of fundamental rights both in the European Union and in the Council of Europe recognise that states may vary in the standards they use for the enhancement and protection of human rights. In addition, local and national values may justify certain limitations to the exercise of fundamental rights. The lack of European consensus on values thus may have as a consequence that certain rights are protected in some states but not in others. This situation of course by no means implies that fundamental rights are always better protected at a local level when there is a large margin of discretion for the state concerned. The *Grant* decision of the ECJ provides a clear example that the absence of a European consensus regarding the recognition of same-sex relationships does not always work in favour of the protection of equality.⁶ In the case law of the European Court of Human Rights (ECHR), the lack of consensus between European states also results in states having a large 'margin of appreciation' with regard to limitations that may be imposed on fundamental rights.⁷ This situation of course raises another question related to fundamental rights and values: that of the maximum standard.⁸ This topic, however, will not be addressed in this contribution.

³ The considerations of both the *Oberverwaltungsgericht* and the *Bundesverwaltungsgericht* can be found in the decision of the *Bundesverwaltungsgericht* of 24 Oktober 2001, *Entscheidungen des Bundesverwaltungsgerichts* 115, 189.

⁴ Case C-36/02 *Omega Spielhallen- und Automatenaufstellungs-gmbH v. Oberbürgermeisterin der Bundesstadt Bonn* [2004] ECR, I-9609.

⁵ S. Heselhaus, 'Rechtfertigung unmittelbar diskriminierender Eingriffe in die Warenverkehrsfreiheit - Nationaler Umweltschutz in einem unvollkommenen Binnenmarkt' (2001) 21 *Europäische Zeitschrift für Wirtschaftsrecht*, 645 at 648.

⁶ Case C-249/96 *Grant* [1998] ECR, I-621.

⁷ *Evans v. UK*, ECHR (2007) Appl No. 6339/05, 77.

⁸ J.H.H. Weiler, *The Constitution of Europe* (New York: Cambridge University Press 1999) 108 ff. Weiler writes (at 109): 'After all, it is often asserted in the

The *Omega Spielhallen* case seemingly concerns the relationship between the EC Treaty and national administrative and constitutional law. However, in the background the European Convention on Human Rights (ECvHR) and the Charter of Fundamental Rights of the European Union, a legally non-binding document, play a role as well. The charter explicitly mentions human dignity in article 1. Germany as a member state of both the Council of Europe and the European Union is legally bound to apply the standards of the ECvHR, albeit not precisely in the same way. The EU Treaty in article 6(1) and (2) provides that the European Union is based on fundamental rights and shall take the ECvHR into account. The fundamental values incorporated in the ECvHR thus can be considered an expression of the fundamental constitutional principles of the member states of the European Union. Therefore, it is no surprise that the ECJ explicitly refers to the case law of the ECHR, and *vice versa*.

It is, furthermore, plausible that there is an overlap between the values expressed in the ECvHR and the fundamental constitutional principles applicable in the European Union.⁹ The Charter of Fundamental Rights of the European Union,¹⁰ although not directly mentioned by the courts, should not be forgotten either. It contains provisions that guarantee human dignity as well as the freedom of profession. The questions and mechanisms at play in the *Omega* case thus may be of a more general significance for fundamental rights protection in Europe. Research into these problems, and into the relationships between economic rights (e.g. the freedom of profession or the free movement of goods) and political rights as well as fundamental freedoms (e.g. the freedom of expression), is particularly urgent in the light of the present constitutional development of the two Europes and their mutual relationship.

The concept of *ordre public* is one of the focal points in this discussion. What precisely does it refer to, and how does it relate to other fundamental concepts? Our primary hypothesis will be that *ordre public* is used in the case law of the ECJ (not in the case law of the ECHR) to construct a hierarchy among the rights in the EC Treaty: namely, to put them into some sort of order. Is this the expression of a fundamental value decision? And if so, whose decision is it: the court's or the treaty-maker's? Is there a relationship, and if so what is it, between the legal *ordre public* and

regulatory area that European political decision-making creates the danger of a "race to the bottom," of lowest common-denominator choices. Why, then, not have in the field of human rights a "race to the top"?; See also L.F.M. Besselink, 'Entrapped by the Maximum Standard', (1989) 35 *Common Market Law Review*, 629; A. von Bogdandy, 'Zweierlei Verfassungsrecht' (2000) 39 *Der Staat*, 163 at 178.

⁹ W.M.E. Thomassen, *Fundamentele waarden in het recht* (Fundamental values in law) (Den Haag: Boom Juridische Uitgevers 2007).

¹⁰ Official Journal 18.12.2000, C 2000/364/01.

patterns of fundamental values in Europe?¹¹ Is there any role to play for comparative law in this context: namely, in the study of fundamental rights and value patterns in Europe? What is the role of courts in the development of common standards with regard to fundamental values? Can courts learn from each other in finding common standards? Or should this issue be a matter of political debate, to be decided by national and European legislatures and treaty makers? Can there be a transnational dialogue between courts? If so, how should such a dialogue between courts be shaped in institutional terms?¹² Can such a dialogue be formalised, or should the courts rely on informal mechanisms of co-ordination?

Not all of these questions will be addressed in this essay. The focus here is firstly on the relationships between EC law and the rights contained in the ECvHR, and secondly on mechanisms of co-ordination between courts, learning processes to which academic lawyers may provide significant contributions.

Certain mechanisms of co-ordination that are relevant for mutual learning processes and transnational dialogues may have to do with the interpretation of treaty provisions and the way in which international law affects domestic law. This is not only a matter of constitutional doctrines pertaining to the formal status of treaty law in national law but also a matter of interpretation doctrines. As we will see below, ‘harmonising’ interpretation (i.e. interpretation of national law in conformity with treaty law) is worthy of closer inspection.

2 Public order and *ordre public*

In the context of the *Omega* case, the concept of public order was used by the Bonn municipal authorities. The administrative court found that this concept has to be further developed in the light of fundamental values in order to be operational in a court decision. At first sight, there is a similarity here to the way in which in EC law the notion of *ordre public* is used. However, on closer examination it would seem that although the terms look very much alike, there is a difference in meaning. *Ordre public* is a multi-faceted concept. In France the term would seem to refer to ‘the basic structure of a state governed by the rule of law, or in other words, a proper

¹¹ As the anonymous reviewer for the *Erasmus Law Review* remarked, this question is also interesting on the level of international relations worldwide, as is demonstrated by debates on terrorism and counter-terrorism measures.

¹² E. Hey, R. de Lange, P.A.M. Mevis, ‘De transnationale dialoog tussen rechters inzake afstemming van Europese en nationale grondrechten’, (Transnational dialogue between courts regarding harmonisation of European and national fundamental rights) (2005) 80 *Nederlands Juristenblad*, 1734.

democratic republic.’¹³ That is quite different from ‘public policy’, the concept that is used in English language versions of the case law of the ECJ for the French term *ordre public*. Public policy considerations may be extremely important, but they would not include the basic structure of the republic, nor necessarily the fundamental rights of citizens. On the contrary, in the case law on fundamental rights it is a common phenomenon both on a national and on a European level that public policy considerations are ‘trumped’ by fundamental rights.¹⁴ In addition, in treaty provisions regarding the exercise of fundamental rights, public policy generally features as the basis for limitations of those rights rather than as their foundation.

In EC law the concept of *ordre public* is sometimes used to denote the status of some fundamental provisions in the EC Treaty.¹⁵ Although the terms look very much alike, this usage has to be distinguished sharply from the concept of public order in the sense of public security: that is, normal and undisturbed life in the public sphere. The French call it *Défense de l'ordre* in, for instance, the wording of the authentic French text of the ECvHR.¹⁶ In the case law of the ECHR on freedom of movement, the French and English versions of the texts are – uniquely – similar, since the English text speaks of the ‘maintenance of *ordre public*’. Rian de Jong simply states that this wording refers to the meaning that the concept of *ordre public* ‘usually has on the continent. It refers to maintenance of the values and interests that are considered essential in a certain society or legal system.’¹⁷ Jeroen Schokkenbroek states that *ordre public* in this sense ‘refers to the principles of a system of positive law, which in the context of that system have to be

¹³ W. Veraart and L. Winkel, ‘Time, Restitution and the Law’, in: R. de Lange (ed.), *Aspects of Transitional Justice, Proceedings of the 2006 Annual Conference of the Dutch School of Human Rights Research* (forthcoming).

¹⁴ The metaphor of ‘trumping’ was of course made famous by Ronald Dworkin, *Taking Rights Seriously* (Cambridge: Harvard University Press 1977).

¹⁵ Case C-295/04 *Manfredi* [2006] ECR, I-6619 par. 31: ‘Moreover, it should be recalled that Articles 81 EC and 82 EC are a matter of public policy which must be automatically applied by national courts’.

¹⁶ For instance, in articles 8(2) and 10(2). Article 9(2), however, refers to ‘*la protection de l'ordre*’. However, the other authentic text of the ECvHR, the English text, uses the terms ‘prevention of disorder’ in articles 8 and 10, and ‘protection of order’ in article 9. Interestingly, article 2(3) of the 4th Protocol to the ECvHR in French uses ‘*maintien de l'ordre public*’, and in English ‘the maintenance of *ordre public*’! Note that the concept of ‘public policy’ is not used here.

¹⁷ M.A.D.W. de Jong, *Orde in beweging* (Order in movement) (Deventer: Kluwer 2000), at 204 (this author’s translation).

considered of special value'.¹⁸ Gerhard Van der Schyff refers to the work of Alexandre Kiss to argue that the concept of *ordre public*/public order

is a concept that is not absolute or precise, and cannot be reduced to a rigid formula but must remain a function of time, place and circumstances. In both civil and common law systems it requires someone of independence and authority to apply it by evaluating the different interests in each case.¹⁹

A preliminary and cautious conclusion from this brief overview might be that although terms are similar, there seem to be different issues at stake under the heading of public order/*ordre public*. There is a very wide sense in which public order would be synonymous with general or common welfare.²⁰ That would be the sense in which in French legal language the notion of *ordre public* is used in both public and private law.

There is, however, also a narrower meaning in which public order would be synonymous with public security and an orderly way of life in the public sphere. That sense comes closer to 'prevention of disorder' as referred to in the limitation clauses of articles 8 and 10 ECvHR. It would also seem to be close to the concept of public order/public policy in articles 30 and 39 of the EC Treaty, used in the context of permissible limitations on the fundamental economic freedoms underlying the common European market. However, discussion of these limitations is beyond the scope of this contribution.

It is important to note, nevertheless, that in the context of EC law the notion of public order/public policy/*ordre public* also has a broader use. This is related to the fact that some articles in the EC Treaty, although not referring textually to a special status, are considered by the ECJ as particularly important for EC law. Articles 81 and 82 have been the object of case law in which this issue was at stake. As is apparent from the *Manfredi* decision of the ECJ, some provisions of EC law may be considered so fundamental that they have a special status, that of *ordre public* provisions.²¹ Having been awarded this status, these provisions might require application by national courts even if they are not invoked by the parties to the dispute that is brought before the national court. Whether this is a necessary and

¹⁸ J.G.C. Schokkenbroek, 'De openbare orde als beperkingsgrond voor de vrijheid van meningsuiting' (Public order as a ground for limiting the freedom of expression) (1986) 11 *NJCM-bulletin*, 3 at 4-5, 7.

¹⁹ G. Van der Schyff, *Limitation of Rights* (Nijmegen: Wolf Legal Publishers 2005), at 149-150, referring to A.C. Kiss, 'Permissible Limitations on Rights', in Louis Henkin (ed.), *The International Bill of Rights* (New York: Columbia University Press 1981), 290.

²⁰ Van der Schyff, above n. 19.

²¹ Case C-295/04 *Manfredi*, [2006] *ECR*, I-6619.

inevitable consequence is a matter of controversy.²² However, this issue raises a whole series of new and difficult questions. Firstly, which provisions would enjoy this special status? Secondly, is there or there should be any relationship with the values that are fundamental for the project of European integration, both in the Council of Europe and in the European Union? Thirdly, what would the consequences be for fundamental rights in both Europes? And fourthly, what mechanisms can serve to protect such *ordre public* provisions?

The question as to which provisions – or which kind of provisions – would have the status of *ordre public* provisions, and what the consequences of that status might be, arose even if not in these terms in the *Van der Weerd* case.²³ The national court requested a preliminary ruling on a procedural matter, essentially wanting to know whether it would be obliged to apply certain EC law provisions *ex officio* ('of its own motion' in the terminology of the ECJ), whereas according to the national rules of procedural law it would not be entitled to do so.²⁴ The ECJ considered that the provisions of Directive 85/511 cannot be considered to have the same public order/public policy/*ordre public* status as articles 81 and 82 of the EC Treaty. The court held that these

provisions cannot therefore be considered as being equivalent to the national rules of public policy referred to above. As a result, the application of the principle of equivalence does not mean, as regards the present cases, that the national court is obliged to conduct of its own motion an examination of the validity of the administrative measures in question by having regard to criteria based on Directive 85/511. [...] Moreover, were those provisions to form part of public health policy, they would have been put forward in the main proceedings essentially in order to

²² J.H. Jans, R. de Lange, S. Prechal, and R.J.G.M. Widdershoven, *Europeanisation of Public Law* (Groningen: Europa Law Publishing 2007), at 308 ff.

²³ Case C-222/05–225/05, *Van der Weerd and others v. Minister van Landbouw, Natuur en Voedselkwaliteit* [2007] ECR I-10421; Opinion by Advocate General M. Poiares Maduro of 1 March 2007.

²⁴ The whole issue of the *ex officio* application of Community law is controversial, as is apparent from the *Eco Swiss* (Case C-126/97, *Eco Swiss China Time Ltd v Benetton International NV*, [1999] ECR I-3055) and *Manfredi* cases before the ECJ. In the Netherlands, particular attention has been devoted to this issue, see e.g. J.H. Jans, R. de Lange, S. Prechal, R.J.G.M. Widdershoven, *Inleiding tot het Europees bestuursrecht* (Introduction to European administrative law) (Nijmegen: Ars Aequi Libri 2002, 2nd ed.). Widdershoven, one of the authors of this book, is a deputy judge in the College van beroep voor het bedrijfsleven, the referring court in *Van der Weerd*. Note that Advocate General Maduro makes the observation that the referring court seems to request this particular preliminary ruling against the background of a general interest in the refinement of the ECJ's case law on this issue (Opinion Maduro, above n. 23, par. 3). See also J.H. Jans *et al.*, above n. 22.

take account of the private interests of individuals who had been the object of measures to control foot-and-mouth disease.²⁵

Below we will attempt not to be led into confusion by these terms. *Ordre public* will refer to the fundamental norms in a legal system: namely, to that part of law that is not at the free disposition of private individuals and that provides the limit to, rather than the object of, contracts. In *Eco Swiss* the ECJ had already recognised that parts of the law may be so fundamental that compliance may not be hindered by obstacles of a procedural nature.²⁶ Moreover,, some articles of the EC Treaty may be so fundamental that contracts that violate them are null and void.²⁷ Apart from the complications already mentioned, it would seem that the *ordre public* status of certain provisions has not yet been clarified completely. It is unclear whether its application is limited to situations of arbitration or other mechanisms of private dispute-settlement, or to contracts in general, and it is unclear what its implications would be in the sphere of public law. On the principle of equivalence, would an obligation to apply certain provisions *ex officio* exist only if the courts have such an obligation under their domestic law? Or would EC law be able to introduce this particular status even in national legal systems that, on the principle of effectiveness, do not entitle their courts to engage in such *ex officio* application? In this contribution, we shall leave this more technical problem aside and will consider some aspects of the broader issues related to the protection of fundamental rights in the two Europes, with special attention being devoted to the dialogue between courts.

The approach in the *Manfredi* case is not foreign to European human rights law. In its case law, the ECHR has on some occasions referred to the ECvHR as a constitutional instrument of European public order. This expression was used for the first time in the *Loizidou* case,²⁸ thereafter in the important *Bosphorus* case,²⁹ and more recently in the cases of *Behrami* and *Saramati* concerning the jurisdiction of the court with regard to events in Kosovo.³⁰ In *Loizidou*, the court found the following on limitations as regards obligations of the ECvHR:

²⁵ *Van der Weerd*, above n. 23, paras. 31 and 32.

²⁶ *Eco Swiss*, above n. 24, paras. 37 ff.

²⁷ For instance, article 81(2), EC Treaty, see *Eco Swiss*, above n. 24, para. 36.

²⁸ *Loizidou v. Turkey* (Preliminary Objections) ECHR (1995) Series A. No. 310, para. 75.

²⁹ *Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v. Ireland* (GC) ECHR (2005) Appl. No. 45036/98.

³⁰ *Behrami & Behrami v. France*, ECHR (2007) Appl. No. 71412/01, *Saramati v. France, Germany and Norway*, (GC) ECHR (2007) Appl. Nr. 78166/01, para. 145.

Such a system, which would enable States to qualify their consent under the optional clauses, would not only seriously weaken the role of the Commission and Court in the discharge of their functions but would also diminish the effectiveness of the Convention as a constitutional instrument of European public order (*ordre public*).³¹

Then, in *Bosphorus*, the ECHR referred to *Loizidou*, and in *Behrami and Saramati* it referred to *Bosphorus*. What these cases have in common is that all of them consider the jurisdiction of the ECHR. Issues such as in *Manfredi* and other ECJ cases (e.g. whether the courts should apply provisions with an *ordre public* status *ex officio*) do not seem to be at stake in the ECHR's case law. But the reference to the ECvHR as a constitutional instrument of European public order (*ordre public*) seems to imply that fundamental rights norms expressed in the ECvHR do have a special status in European law. A look into the history of the two Europes – the Council of Europe and the European Union – will indicate whether there is any pattern to be discerned in the development of fundamental values that both courts seem to have in mind.

3 The two Europes

In the history of European integration, there is a geopolitical as well as a legal 'lack of simultaneousness'. Two Europes have developed with a different purpose, a different structure and a different number of participants. The European Union and the Council of Europe both started as international organisations, each with its own constitutional structure, related to its respective purposes. In due course, the European Union – as is well known – transformed into a supranational organisation with a legal order that claims not to derive the validity of its legal norms from the validity of the norms of the member states.³² A multi-layered or multi-centred constitutional architecture³³ arose, first with a functional purpose – economic integration in a number of areas – and later with a more encompassing number of purposes including those in the area of education, social welfare and criminal policy. The relationship with the initial economic ambitions became increasingly vague. Correspondingly, the kinds of norms that were enacted became

³¹ *Loizidou v. Turkey*, above n. 28.

³² For the sake of clarity it needs to be added that the vexing question of the justification for this claim, and the related question of whether EU law has a different character from (other) international law, is not under discussion here.

³³ See L.F.M. Besselink, inaugural lecture, Utrecht University 10 January 2007 (forthcoming) for a discussion of the metaphor of a multi-layered constitution. Besselink argues for a paradigm shift to a way of conceptualising European constitutional law in terms of diversity and multi-centricity.

increasingly diverse. Constitutional structures, initially limited to the enactment of highly specific norms of economic law and the execution and judicial control of those norms, were broadened; procedures became more complicated as the number of participants increased. Starting with the Maastricht Treaty (1991) the constitutional nature of the structure of the European Union progressively emerged more clearly. The manner of its development, strongly supported by Germany, was related to events in Germany after the fall of the Berlin Wall. That is, the unification of Germany into the enlarged Federal Republic of Germany, which included the former German Democratic Republic, came at the price of further strengthening the constitution of Europe in order to ensure Germany's political encapsulation.³⁴

Simultaneously, the Council of Europe had evolved since 1950, with the ECvHR at its core.³⁵ Although initially it had seemed unlikely that the ECHR would evolve into a full-blown court, in the course of the 1970s the ECvHR was discovered in the member states of the Council of Europe and the number of cases brought before the then European Commission of Human Rights and the ECHR increased spectacularly.³⁶

³⁴ G. Schöllgen, *Der Auftritt. Die Rückkehr Deutschlands auf die Weltbühne* (München: Propyl Verlag 2003) at 42 ff. Alec Stone Sweet and Thomas Brunell suggest that the constitutionalisation of Europe is an 'unintended consequence' on the part of the member states. One might wonder whether that is true for all member states in all stages of the integration process, A. Stone Sweet and T. Brunell, 'Constructing a Supranational Constitution', in A. Stone Sweet (ed.), *The Judicial Construction of Europe* (Oxford: Oxford University Press 2004), 45 at 66.

³⁵ Although other activities of the Council of Europe should by no means be neglected, such as the Framework Convention on the Protection of National Minorities.

³⁶ T. Koopmans, *Courts and Political Institutions* (Cambridge: Cambridge University Press 2003), at 79 ff. discusses The Netherlands. In Germany, the decision by the *Bundesverfassungsgericht* of 26 March 1987, BVerfGE 74, 358 (presumption of innocence) is important, since it establishes the rule that all German law has to be interpreted in conformity with the ECvHR. It provides that 'the case law of the European Court of Human Rights also serves in this regard as an interpretational aid in defining the content and reach of the Basic Law's basic rights and principles of rule by law. Even laws [...] are to be interpreted and applied in harmony with the Federal Republic of Germany's commitments under international law [...] it cannot be assumed that the legislature, insofar as it has not clearly declared otherwise, wishes to deviate from the Federal Republic of Germany's international treaty commitments or to facilitate violation of such commitments' (English translation in: *Decisions of the Bundesverfassungsgericht*, Karlsruhe 1992, Vol. 1/II, 634 at 638. See also A. Zimmermann, 'Germany', in R. Blackburn and J. Polakiewicz (eds.), *Fundamental Rights in Europe* (Oxford: Oxford University Press 2001), 335, at 339.

Since the beginning of the 1970s the ECJ, partly in reaction to fundamental rights case law by national courts such as the *Bundesverfassungsgericht*, referred to fundamental rights as part of the general principles of the law of then European Communities. These references, by implication, constituted a reference to the common constitutional principles of the member states of the European Communities. It is plausible that this manner of proceeding was part of the ECJ's legitimating strategy, particularly aimed at convincing German courts – and more specifically the German Constitutional Court, the *Bundesverfassungsgericht* – that fundamental rights could not only be protected by the national constitution but also by European Community law.³⁷ In this initial stage, references to the ECHR and its case law were not part of the vocabulary of the ECJ. This has changed over time.³⁸

An example of the possibilities of the present situation, in which the ECJ has recourse to both EC law and the ECvHR, is offered by the *Austrian Broadcasting Corporation* case.³⁹ This case concerns the question of whether there should be openness about salaries paid by the broadcasting corporation. In its preliminary ruling, the ECJ considers Directive 95/46 (on the protection of data regarding natural persons) in the light of the fundamental rights, which are an integrated part of the general principles of EC law.⁴⁰ Here, the ECJ refers to the framework of article 8 of the ECvHR, which is relevant for the assessment of measures by national governments on the basis of Directive 95/46. Interestingly, the ECJ notes specifically with regard to article 13 of Directive 95/46 that this provision cannot be interpreted in such a way as to allow an infringement of privacy that would run contrary to article 8 of the ECvHR.⁴¹ The framework of article 8 ECvHR and article 13 Directive 95/46 thus is made to coincide, which makes for a double harmonizing interpretation: firstly, EC law is interpreted in conformity with the ECvHR; secondly, the ECJ requires the national court to interpret national law as far as possible in the light of the text and purpose of

³⁷ See K. Alter, *Establishing the Supremacy of European Law* (Oxford: Oxford University Press 2001), and M. Claes, *The National Courts' Mandate in the European Constitution* (Oxford: Hart Publishing 2006), at 399 ff.

³⁸ L.F.M. Besselink, 'Entrapped by the Maximum Standard' (1998) 35 *Common Market Law Review*, 629; R. Lawson, 'Over Laserguns, Rode Sterren en een ontluikende liefde tussen twee dames op leeftijd' (About laserguns, red stars and an emerging love between two ladies of age) (2006) 31 *NJCM – Bulletin*, 146.

³⁹ Cases C-465/00, C-138/01, C-139/01, *Österreichischer Rundfunk* (ÖRF), [2003] ECR, I-4989; See also Case C-327/02, *Panayotova and Others v Minister voor Vreemdelingenzaken en Integratie* [2004] ECR, para. 27.

⁴⁰ ÖRF, para. 68.

⁴¹ *Id.*, para. 91.

the applicable directive, in order to achieve the result envisaged by the directive.⁴²

Since the entry into effect of the Maastricht Treaty in 1993, the explicit reference to the ECvHR requires that the acts of the bodies of the European Union be in conformity with the ECvHR. However, even after the enactment of the Charter of Fundamental Rights of the European Union (2000), which, as mentioned above, is a legally non-binding document, the ECvHR has hardly lost any of its significance. The Charter of Fundamental Rights of the European Union explicitly provides that nothing in it should be applied in such a way as to diminish the scope of the ECvHR. Furthermore, to a large extent its rights are formulated in parallel to those of the ECvHR. Nonetheless, there are differences as well: some of the rights in the Charter of Fundamental Rights of the European Union do not occur in the ECvHR, and in some cases the scope of ‘Charter- rights’ is somewhat broader.⁴³

4 Constitutional principles

Von Bogdandy has argued that European integration can be furthered by the development of a doctrine of constitutional principles.⁴⁴ These principles regard the relationship between governments and citizens as well as the relationships between different levels of government. In the European context, this topic has been addressed mainly in terms of whether the developing polity is of a ‘federal’ nature. Rather than focus on this label, it seems more promising to pay attention to the content of rules and principles with regard to the relationship between national and European levels of government. As Von Bogdandy observes, some of those principles would protect unity and others diversity.⁴⁵ Such principles are basically of a dual nature: they involve the relationship between the institutions of the European Union and member states as well as between those institutions and the citizens. Constitutional principles in EC law have been developed since the

⁴² *Id.*, para. 93. The court here refers to its earlier decision in Case C-106/89 *Marleasing*, [1990] ECR I-4135, par. 8.

⁴³ This is the case with the provision regarding access to courts. The ECvHR limits this to ‘civil rights and obligations’ (art. 6 ECvHR); the parallel provision in the European Union Charter of Fundamental Rights does not provide this limitation (art. 47). *Vilho Eskelinen v. Finland* (GC) ECHR (2007) Appl. Nr. 63235/00, para. 30, where the ECHR refers to the ‘Explanations’ relating to the Charter of Fundamental Rights of the European Union, which was part of the Constitutional Treaty of 2004.

⁴⁴ A. von Bogdandy, ‘Constitutional Principles’, in A. von Bogdandy and J. Bast (eds.), *Principles of European Constitutional Law* (Oxford: Hart Publishing 2006), 3.

⁴⁵ *Ib.* at 36 ff.

earliest case law of the ECJ, and the principle of autonomy of the EC legal order is undoubtedly the most important. Most of the other principles derive their significance – and sometimes their validity – from the principle of autonomy. This principle crucially implies that the EC legal norms do not derive their validity – directly or indirectly – from the national constitutional orders. This fundamental break from the traditional doctrines of international law is still not generally accepted in all 27 member states of the European Union. The 2004 Constitutional Treaty lays down the supremacy of EU law,⁴⁶ not only of norms that have a direct effect (as was usual in the case law of the ECJ in which the principle of supremacy was established)⁴⁷ but of EU law generally. At the time of writing it is uncertain whether this provision will be accepted by all 27 member states.⁴⁸

5 Conformity between the constitutional principles

A general problem of European constitutional law is that the constitutional principles applicable in the member states and those of the European legal order do not necessarily point in the same direction. There is some consensus on the broadest principles, such as democracy and the rule of law, but not on their precise meaning or their relationship to each other. In *Ždanoka v. Latvia*, the ECHR recognised that there are different levels of democratic development in Europe.⁴⁹ Latvia being a member state of the European Union, this statement of the ECHR is significant not only in the context of the Council of Europe but also in the context of the European Union.⁵⁰ The ECHR first states that the preamble of the ECvHR refers to democracy, and that democracy is the only political model compatible with the ECvHR:

⁴⁶ Art. I-6, Constitutional Treaty.

⁴⁷ Case 106/77 *Simmenthal* [1978] ECR, 629.

⁴⁸ At the time of writing, 7 of the 27 member states have not ratified the Constitutional Treaty, and in referenda in 2005 the ratification was clearly rejected by the citizens of France and The Netherlands, followed by a decision to stop the ratification procedure. Negotiations over a new version of the constitutional treaty are still ongoing, and the outcome, as far as the supremacy clause is concerned, is unclear.

⁴⁹ *Ždanoka v. Latvia* (GC), ECHR (2006), Appl. Nr. 58278/00, para. 133.

⁵⁰ This point has its practical significance in the pre-accession procedure of the European Union. D. Kochenov, *The Failure of Conditionality. Pre-accession Conditionality in the Fields of Democracy and the Rule of Law: A Legal Appraisal of EU Enlargement* (Groningen: University of Groningen 2007), at 316, is highly critical of this development and refers to the latest pre-accession process as a ‘total standard chaos’.

The Preamble goes on to affirm that European countries have a common heritage of political traditions, ideals, freedom and the rule of law. This common heritage consists in the underlying values of the Convention; thus, the Court has pointed out on many occasions that the Convention was in fact designed to maintain and promote the ideals and values of a democratic society. In other words, democracy is the only political model contemplated by the Convention and, accordingly, the only one compatible with it.⁵¹

That being the case, each state must make its own evaluations and decisions in the light of specific historical circumstances.⁵² Decisions by the legislature with regard to elections and electoral systems ‘must be assessed in the light of the political evolution of the country concerned’.⁵³ This means that standards may vary across Europe.

While such a measure (sc. The contested Latvian electoral law – RdL) may scarcely be considered acceptable in the context of one political system – for example, in a country that has an established framework of democratic institutions going back many decades or centuries – it may nonetheless be considered acceptable in Latvia in view of the historico-political context that led to its adoption, and given the threat to the new democratic order posed by the resurgence of ideas which, if allowed to gain ground, might appear capable of restoring the former regime.⁵⁴

In the same vein, the prohibition of the Turkish Welfare Party was not found to violate the ECvHR,⁵⁵ whereas it is quite conceivable that such a prohibition would not be in conformity with the constitutional principles of some or even many of the member states of the Council of Europe.

6 Constitutional principles and fundamental rights

In EC and EU law, the position of fundamental rights is still unclear. The 2004 Constitutional Treaty provided for the accession of the European Union to the ECvHR. So far, there is the legally non-binding Charter of Fundamental Rights of the European Union to which the ECJ only very rarely refers.⁵⁶ And there is article 6 of the EU Treaty. But precisely how the relationship between the ‘Four Freedoms’ of the internal market and the

⁵¹ *Ždanoka v. Latvia*, above n. 49, para. 98.

⁵² *Id.*, paras. 100-101.

⁵³ *Id.*, para. 106.

⁵⁴ *Id.*, para. 133.

⁵⁵ *Refah Partisi v. Turkey(GC)* ECHR (2003) Appl. Nr. 41340/98, 41342/98, 41343/98 and 41344/98.

⁵⁶ *Family Reunion Directive* case C-540/03, *Parliament v. Council* [2006] ECR, I-5769.

political rights and freedoms must be conceived is not entirely clear – either on the EC/EU level or on a national level.

The ECHR and the courts of the European Union refer to each other's decisions and in this manner contribute to the articulation of constitutional norms and principles.⁵⁷ Rick Lawson has distinguished four types of those cross-references:

- a. Cases before the ECHR that concern acts of national bodies;
- b. Cases before the ECHR that concern acts of EU-bodies;
- c. Cases before the ECJ that concern acts of EU-bodies; and
- d. Cases before the ECJ that concern acts of national bodies.⁵⁸

It is clear that categories 'a' and 'd' are the *core business* of the respective courts. The ECHR was established to receive individual complaints about supposed violations of the ECvHR by the member states of the Council of Europe. The ECJ was established, amongst other reasons, to judge acts of the member states and to give preliminary rulings on the meaning of EC law.⁵⁹ It has never considered itself competent to give an interpretation of national law in the light of European Community law. That has always been and still is the province of the national courts.⁶⁰ Interestingly, some cases that are brought before the two courts do not seem to fit precisely into the matrix developed by Lawson. These are cases in which

- e. The ECHR judges, but EU rights are at stake. That is, the claim is based on a right protected by EC law, or the interpretation of the ECvHR is influenced by Community law; the *Dangeville* and *Mendizabal* cases exemplify this situation;
- f. The ECJ judges, but the basis of the judgment is an ECvHR right in combination with EC law. The *Austrian Broadcasting Corporation* case exemplifies this situation;
- g. The ECHR judges the case and uses EC/EU law as the inspiration for its decision. Examples are the *Pellegrin* (1999) and *Eskelinen* (2007) cases.

⁵⁷ Bogdandy, above n. 44, at 3 ff.

⁵⁸ Lawson, above n. 38. Compare with Case C-20/00 & C-64/00, *Booker Aquaculture* [2003] ECR, I-7411: in the implementation of Community measures the member states are bound to fundamental rights (point 88).

⁵⁹ Present art. 234 of the EC Treaty.

⁶⁰ Claes, above n. 37.

In the *Dangeville* case, an illustration of the situation described under ‘e’, a claim based on the Sixth VAT Directive constituted an ‘asset’ in the sense of article 1 of the First Protocol ECvHR. The ECHR found France to be in violation of article 1. In this case, the ECvHR protection system functioned as an additional remedy for the company concerned.⁶¹ In the *Mendizabal* case, the ECHR gives an interpretation of ECvHR law in conformity with the law of the European Community:

La Cour estime donc que l’article 8 doit être interprété en l’espèce à la lumière du droit communautaire et en particulier des obligations imposées aux Etats membres quant aux droits d’entrée et de séjour des ressortissants communautaires.⁶²

The ECHR also refers to earlier cases in which it has given a decision on the basis of an interpretation in conformity with Community law.⁶³

As mentioned above, in the case of the *Austrian Broadcasting Corporation*, an illustration of the situation under ‘f’, the ECJ performed a double harmonizing interpretation: firstly, it interpreted Community law in conformity with the ECvHR, then it stressed that the national courts are under an obligation to interpret their national law in conformity with Community law.⁶⁴

In the *Eskelinen* and *Pellegrin* cases, illustrations of the situation under ‘g’, the issue was the interpretation of the scope of article 6 ECvHR. The right to an independent and impartial tribunal is open to certain exceptions, since article 6 provides this right only for the determination of one’s civil rights and obligations. Traditionally, the ECHR has exempted some areas from the reach of article 6. In *Pellegrin*, the issue was whether civil servants could invoke article 6.⁶⁵ In that decision, the ECHR used the case law of the ECJ on the public service exception of article 39(4) EC Treaty as an inspiration for its own decision. Eight years later, confronted with the fact that the *Pellegrin* approach still left some issues unsolved or unclear, in the recent *Eskelinen* case the court decided to adjust its approach slightly, remaining within the parameters of the *Pellegrin* decision.⁶⁶

It is well known that the impact of ECvHR law on EU law is governed mainly by article 6(2) and (3) of the EU Treaty. Nevertheless, it is not entirely clear in the case law of the ECJ how precisely the rights of the

⁶¹ *Dangeville S.A. v. France*, ECHR (2002) Appl. nr. 36677/97, para. 48.

⁶² *Mendizbal*, ECHR, 4 January 2006, para. 69.

⁶³ *Piermont v. France*, ECHR (1995), Serial. A nr. 314; *Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v. Ireland* (GC) ECHR (2005) Appl. Nr. 45036/98; *Matthews v. United Kingdom* (GC) ECHR (1999) Appl. No. 24833/94.

⁶⁴ See above text at and following note 39.

⁶⁵ *Pellegrin v. France*, ECHR (1999) Appl. Nr. 28541/95.

⁶⁶ *Vilho Eskelinen v. Finland*, above n. 43.

ECvHR should be situated in EC and EU law. Firstly, in some cases the ECJ regards rights as part of primary EC law. Secondly, there are cases in which the ECvHR is used as a standard for review. Thirdly, the ECvHR may have 'special significance,' since it is mentioned in the EU Treaty, but it may not be the only instrument under international law that is relevant in a certain case.⁶⁷ In other cases, however, rights are mentioned without any reference to written law, let alone to the EC Treaty or to the ECvHR. The recent case of *Dokter v. Minister van Landbouw, Natuur en Voedselkwaliteit*⁶⁸ illustrates this manner of proceeding. There the ECJ mentions the right of defence as a part of the general principles of EC law, without referring to the EC Treaty, the ECvHR or any other document in which rights are guaranteed. In the *Family Reunion Directive* case mention was made of the Charter of Fundamental Rights of the European Union.⁶⁹ In this case as well it is not entirely clear what the implications of this reference are for the further development of Community fundamental rights.

7 The role of the courts

It follows from the above that much is still unclear as regards the relationship between the ECvHR and EU law. This situation has implications for the development of a European concept of *ordre public*. It remains unclear as to whether fundamental rights are a part of the *ordre public* or, for instance, whether the *ordre public* may be used as a basis for certain limitations on the exercise of fundamental rights. This uncertainty is partly due to the fact that in the relevant documents, the constitutional texts underlying the constitutional architecture of the two Europes, the concept of *ordre public*/public policy/public order is not always used in an unequivocal sense. It is also because the relationship between the case law of the European courts, and the relationship of that case law to the case law of national courts, has not entirely crystallised. Given the fact that there seems to be a general development towards a stronger position of courts in a process of 'judicialization of politics',⁷⁰ it seems relevant to await further research on the methods of co-ordination that are used by courts in order to contribute to clarification of these issues. Courts, however, often use co-ordinating techniques implicitly. National courts, furthermore, take notice of

⁶⁷ Opinion of Advocate General Mengozzi in Case C-341/05, *Laval un Partneri v. Svenska Byggnadsarbetareförbundet a.o.* [2007] ECR, para. 64 ff.

⁶⁸ Case C-28/05 [2006] ECR, I-5431.

⁶⁹ Case C-540/03, *Parliament vs. Council* [2006] ECR, I-5769.

⁷⁰ M. Shapiro and A. Stone Sweet, *On Law, Politics, & Judicialization* (Oxford : Oxford University Press 2002); compare Koopmans, above n. 36, 268 ff.

insights or arguments from other legal systems usually only if one of the parties draws their attention thereto.⁷¹

8 Transnational dialogue and harmonising interpretation

Interpretation in conformity with higher law plays a part in the homogenisation of law on the basis of the principles sketched above. This method of interpretation is by no means limited to European law. On the contrary, the first examples can be found in national legal systems, and there are well known cases in both the constitutional law of the United States and Germany. This situation can be related to the fact that interpretation in conformity in national law is based on the fundamental assumption that the legislature cannot have intended to go against the constitution. Therefore, it is rational to assume that if the text of a statutory provision allows different applications, the application that is closest to the constitution should be preferred. This line of reasoning also implies that if an application that is feasible is in conformity with the constitution, the issue of constitutional review of the statutory provision in question does not arise.⁷²

In the context of EC law, interpretation in conformity is primarily based on the principle of loyalty to the Community.⁷³ This principle bears close resemblance to the general principle of international law that treaty obligations should be fulfilled *bona fide*, and that all organs of the state should participate in complying with the state's treaty obligations.⁷⁴ In the *Marleasing* case the ECJ considered

that, in applying national law, the national court called upon to interpret it (sc. national law – RdL) is required to do so, as far as possible, in the light of the wording and the *purpose* of the directive in order to achieve the *result* pursued by the latter.⁷⁵

Nowhere in article 5 of the EEC Treaty, on which the ECJ bases this obligation, is mention made of this obligation resting upon member states. Instead, this obligation follows from the purpose of article 5, according to

⁷¹ Following M. Lasser's insight in *Judicial Deliberations* (Oxford: Oxford University Press 2004), it may very well be that there is a discursive bifurcation and that the arguments we are looking for are not found in a court's reasoning but rather in opinions of Advocates General or similar institutions.

⁷² Justice Brandeis in *Ashwander v. Tennessee Vally Authority*, 297 US 341 at 354.

⁷³ Advocate General Van Gerven, Opinion in the *Marleasing* case, above n. 42.

⁷⁴ Case C-105/03, *Pupino* [2005] ECR, I-5285.

⁷⁵ *Marleasing*, above n. 42, para. 8. (emphasis added).

the court. By implication, the court uses a purposive interpretation of the treaty to conclude that there rests an obligation upon member states to interpret national law in conformity with the purpose of a directive and the result it pursues. Lasser has referred to this as a ‘repeatedly purposive context’;⁷⁶ one might also be tempted to call it ‘double purposive interpretation’.⁷⁷ Be this as it may, harmonising the application of law has been established as a method of solving problems of co-ordination within hierarchies of norms. It is plausible that harmonising the interpretation and application of laws in a transnational context is best understood as a method of silent co-ordination between jurisdictions and thus contributes to the development of common constitutional principles and common value patterns.

9 Harmonising interpretation and comparative law

Following the line of reasoning sketched above, there is a new challenge for comparative law and academic legal science. Fundamental research in law is bound to be comparative, at least to a large extent. Unlike scientific disciplines in which objective truths can be discovered, legal research is determined by the discursive nature of its object, and therefore has a character that comes closer to the *Geisteswissenschaften*, historical and linguistic research. Matters of interpretation are fundamental to legal science, including those involving fundamental legal issues. Solutions proposed in legal research, however, may only work in certain contexts, and it belongs to the tasks of legal research to be as clear as possible about this context. It may refer to a national context, but European and/or local contexts are relevant as well. Applying multiple perspectives in legal research would mean that solutions are considered from different angles with a view to their application in different contexts. This makes legal research necessarily comparative by nature, be it with regard to the comparisons between different national contexts or with regard to the comparisons between legal and various social contexts. In that sense, although its methods are determined partly by the *Geisteswissenschaften*, the science of law is also part of the social sciences.

What does this imply for the study of judicial argumentation and the development of a European legal order with its accompanying concept of public order/*ordre public*? It would seem that at least a number of implications follow from the above. Firstly, it would appear that academic

⁷⁶ Lasser, above n. 71.

⁷⁷ On purposive interpretation, see A. Barak, *Purposive Interpretation in Law* (Princeton: Princeton University Press 2005).

research would be able to help the courts. The use of comparative law and comparative arguments in court cases is apparently infrequent. Moreover, it is difficult to discern how much use judges make of comparative arguments in chambers, given that none of them may transpire in their published decisions. Of course, this would differ between legal systems and court systems, especially since the culture of courts would play a role. Secondly, academic research on the potential use of comparative argument should be stimulated, especially since it is this kind of argument that could further develop the fundamental values and principles of the law of the two Europes. Thirdly, the interrelationship between interpretation and separation of powers, both in a national and in a transnational context, should be high on the research agenda of European public lawyers. This conclusion follows from the fact that the position of courts vis-à-vis the use of comparative argument is determined by matters of interpretation as well as applicable norms regarding the position of courts in the constitutional system ('separation of powers' issues).

10 Conclusion

Constitutional development in Europe is not a straightforward or linear process, and constitutional principles may develop in a variety of directions, impacting both public and private law. Generally speaking, public order/*ordre public* is a concept with broad and diverse meanings. It refers to normal and peaceful situations in the public sphere but also, in a much broader sense, to patterns of values that are important in a community of citizens. This second meaning of the concept is related to norms so fundamental for the legal order that they have to be respected, regardless of procedural obstacles. The ECJ in the *Manfredi* case and the ECHR in *Loizidou*, *Bosphorus*, and *Behrami* seem to refer to this broader sense of public order/*ordre public*. The *Omega* case also illustrates this broader understanding insofar as values in local, regional or national communities are concerned. The development of normative patterns on a European level is complex and increasingly so as the number of participating states grows. If the notion of public order/*ordre public* is to have any use at all in this context, it would seem to have to include fundamental rights. These rights as laid down in the ECvHR, and enforced by the ECHR and the Council of Europe organs, are a part of the pattern of fundamental values.⁷⁸ The ECHR has indicated that in cases in which moral or ethical issues of great sensitivity are at stake the system of the ECvHR leaves a wide margin of

⁷⁸ Thomassen, above n. 9.

appreciation for the states' party to the ECvHR.⁷⁹ Some homogenisation of law across the two Europes is certainly conceivable. The two highest courts, the ECJ and the ECHR, already contribute to this process. National courts, however, also play a part. Not only the way in which they deal with the decisions by the European courts is relevant here but also the way in which they deal with, and aspire to learn from, decisions delivered by national courts in other states.⁸⁰ Apart from informal mechanisms of discussion, exchange and dialogue, cross-references from one system to the other should be stimulated, although admittedly 'legal transplants' are not always possible. Room for diverging developments of national legal systems has to be allowed, and examples from the case law of the ECHR show that it is quite possible to learn from developments elsewhere. For legal science and legal theory, this implies the necessity of a comparative approach. Legal science can no longer be limited to the study of a national system. The argument of this essay points in the direction of research that is comparative in nature, but adds a dimension to the scope of traditional comparative legal research. That dimension is one of dialogue between various national as well as international legal systems, which are increasingly interrelating and cross-fertilizing. The future of legal research is in this type of comparative law.

⁷⁹ Recently, the ECHR has specified some of the parameters of the margin of appreciation in its Grand Chamber decision in *Evans v. UK*, above n. 7, para. 7, including a number of references to its earlier case law.

⁸⁰ Although in the case law of the *Hoge Raad* (the Dutch Supreme Court) no reference is ever made to foreign law as an inspiration for a particular decision, sometimes there is borrowing from other jurisdictions. The most well-known example is the invention of a general personality right inspired by the German Constitution, as a fundamental right underlying other fundamental rights, in *Hoge Raad* 18 April 1994, *Nederlandse Jurisprudentie* 1994, 608 (Valkenhorst).