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## THE CONSTITUTIONAL MOMENTUM OF EUROPEAN CONTRACT LAW (II)

THE DCFR  
AND THE EUROPEAN CONSTITUTIONAL ORDER

by

Chantal Mak

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# THE CONSTITUTIONAL MOMENTUM OF EUROPEAN CONTRACT LAW (II)

## THE DCFR AND THE EUROPEAN CONSTITUTIONAL ORDER

by

Chantal Mak<sup>♦</sup>

### **Abstract**

This paper analyses the potential impact of the recently published Draft Common Frame of Reference for European contract law (DCFR) on the European constitutional process. Looking at the combination of characteristics of codification and aspects of constitutionalism reflected in the DCFR, it is submitted that the further harmonisation of European contract law may contribute to the definition of the European constitutional order both on the institutional level (regarding the forms in which Europe's Constitution is expressed) and on a substantive level (concerning the values encompassed by a 'lasting constitutional settlement' for the EU).

*Key words:* DCFR, codification, fundamental rights, constitutionalisation of contract law

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## 1 Introduction

This paper analyses the potential impact of the recently published Draft Common Frame of Reference for European contract law (DCFR)<sup>1</sup> on the European constitutional process. Elsewhere, I have investigated the role of fundamental rights in the DCFR, arguing that choices will have to be made regarding the protection of these rights through European contract law.<sup>2</sup> Here, the background to this issue is further elaborated, looking into the extent to which the DCFR combines characteristics of private law codification with aspects of constitutionalism. On the basis of its position within the regulative framework for the Internal Market, could the DCFR contribute to the determination of a 'lasting constitutional settlement'<sup>3</sup> for Europe?

The structure of the paper is the following. First, the role of European contract law, and in particular the DCFR, for the regulation of the Internal Market is briefly described (section 2). In this context, emphasis lies on the gradual progression from minimum harmonisation to full harmonisation and, possibly, codification of European contract law. Subsequently, attention is paid to the effect given to fundamental rights in the DCFR, seen against the background of the ongoing constitutionalisation of contract law in many EU Member States (section 3). These two themes are then brought together in a final section on the influence of the DCFR on the definition and development of the European constitutional order (section 4). It is submitted that the further systematisation and constitutionalisation of European contract law may contribute to the reconciliation of the economic and social constitutions of the EU.

## 2 European contract law and the Internal Market

### 2.1 *The DCFR and the regulation of the Internal Market*

The publication of the DCFR is part of the European Commission's agenda for European contract law. Following the European Parliament's expression of the wish for a European Civil Code, the Commission embarked on an ambitious project for the enhancement of the coherence of European contract law in the early years of the new Millennium.<sup>4</sup> In its 2003 Action Plan,<sup>5</sup> the Commission proposed a mix of non-regulatory and regulatory measures meant to solve problems concerning the uniform application of contract law in the European Internal Market. Two main courses of action were presented for improving the quality of EC legislation in this field.<sup>6</sup> In the first place, the existing *acquis communautaire* in the area of (consumer) contract law was to be revised and improved. In the second place, a Common Frame of Reference (CFR) was to be drafted, in order to provide the European

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<sup>1</sup> C. von Bar, E. Clive and H. Schulte-Nölke (eds), *Principles, Definitions and Model Rules of European Private Law. Draft Common Frame of Reference (DCFR). Outline Edition* (Munich: Sellier, 2009).

<sup>2</sup> C. Mak, 'The Constitutional Momentum of European Contract Law. On the interpretation of the DCFR in light of fundamental rights', *European Review of Private Law* 2009 (forthcoming).

<sup>3</sup> Study Group on Social Justice in European Private Law, 'Social Justice in European Contract Law: a Manifesto', *European Law Journal* 2004, p. 667.

<sup>4</sup> Communication from the Commission to the Council and the European Parliament on European Contract Law, COM (2001) 398 final.

<sup>5</sup> Communication from the Commission to the European Parliament and the Council, 'A More Coherent European Contract Law: An Action Plan', COM (2003) 68 final.

<sup>6</sup> See the following documents issued by the European Commission: Communication from the Commission to the European Parliament and the Council, 'European Contract Law and the Revision of the Acquis: The Way Forward', COM (2004) 651 final; First annual progress report on European Contract Law and the Acquis Review, COM (2005) 456 final; Green Paper on the Review of the Consumer Acquis, COM (2006) 744 final; Second progress report on the Common Frame of Reference, COM (2007) 447 final.

and national legislatures and courts with a ‘toolbox’ for the development and application of contract law rules.

The results of this wide-ranging project are now taking shape. In October 2008, the revision of the consumer *acquis* was presented in the form of a proposal for a Directive on Consumer Rights.<sup>7</sup> Furthermore, at the beginning of 2009 the final Outline edition of the academic Draft for the CFR was published.<sup>8</sup>

These developments underline the importance the Commission awards to the regulation of contracts within the Internal Market.<sup>9</sup> As critics, most notably the scholars involved in the Study Group on Social Justice, have convincingly put forward, however, the Commission’s approach till now seems to have been of a rather technocratic nature. In their opinion, it should be made sure that this market-oriented approach is complemented by considerations of social justice.<sup>10</sup> The attention for European contract law may be welcomed in light of the significance of contract law for the functioning of the market, but also the effect of contract regulation on society should be evaluated. In this context,

‘[i]t is (...) important to appreciate that the regulation of markets is not only significant for its contribution to material wealth, but also it helps to structure access to basic needs of citizens and supplies them with essential protection of their interests. From this perspective, principles of social justice in European contract law need to be aligned with the constitutional principles already recognised in Europe.’<sup>11</sup>

This raises the question what could be the DCFR’s position in the European constitutional order, if it is adopted as a final, political CFR. An answer to this question seems to depend on several variables, among which in any case the intensity of the harmonisation of contract law that the DCFR reflects and, furthermore, the constitutional momentum of the ongoing developments in European contract law. These two variables will now be further elaborated.

## 2.2 *From harmonisation to codification?*

EU intervention in the field of contract law till now has mostly taken place through the enactment of Directives, imposing minimum standards on the Member States.<sup>12</sup> This leaves Member States the possibility to deviate from certain European minimum requirements and offer more protective measures. In Dutch consumer contract law, for instance, the conformity of goods is assessed on the basis of the expected period during which the product can be used (e.g. at least 10 to 15 years for a washing machine), whereas the Sales Directive prescribes a period of only 2 years as a minimum (which means that, in Member States that stick to the minimum rule, a consumer cannot base a claim on non-conformity anymore if, for example, the washing machine breaks down after 3 years).

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<sup>7</sup> Proposal for a Consumer Rights Directive, COM (2008) 614 final.

<sup>8</sup> See footnote 1. An earlier Interim Outline edition of the DCFR was officially presented and published in March 2008.

<sup>9</sup> On this topic, compare H. Collins, Transnational Private Law Regulation of Markets, in: *Il Codice Civile Europeo, Materiali dei seminari 1999-2000, raccolti da Guido Alpa e Emilio Nicola Buccico*, Giuffrè editore, 2001, p. 225-248.

<sup>10</sup> Social Justice Group 2004.

<sup>11</sup> Social Justice Group 2004, p. 667. See also H. Collins, *The European Civil Code. The Way Forward*, Cambridge: Cambridge University Press 2008, p. 103-105 and p. 252-255.

<sup>12</sup> E.g. the Directives on the sale of goods, unfair terms in consumer contracts, time-sharing, distance selling.

Both the revision of the consumer *acquis* and the DCFR now seem to lead towards a further-reaching European influence on contract law. The proposal for a Directive on Consumer Rights<sup>13</sup> foresees full harmonisation,<sup>14</sup> while the DCFR's structure and aims correspond to ideals of codification.

Focussing on the DCFR, several characteristics of codification meet the eye. As Hesselink has observed,<sup>15</sup> the idea of a CFR for European contract law is based on a *comprehensive* instrument, covering the whole of contract law. Moreover, the DCFR is *systematic*, insofar as it presents a coherent set of contract law rules, ordered on several levels of abstraction that range from general provisions to increasingly specific rules on the various aspects of economic transactions. It is likely that the Commission will adopt a similar systematic structure for the final CFR. Furthermore, the CFR will be situated on *one level of governance*, namely, the European one, and will be of a *static* nature, i.e. it will state the law rather than aim to change it. Thus, according to the characteristics that Hesselink enumerates, the DCFR and future CFR clearly break with earlier harmonising measures of contract law, which were *partial*, sector-specific measures, of an *unsystematic* and *dynamic* nature, and affected *two levels of governance*, namely both the national and the European ones.<sup>16</sup>

The question then is how this further-reaching European intervention in the field of contract law will affect the Internal Market. In particular, it may be asked what will be the effect of the unification of contract law (through full harmonisation and, possibly, codification) on the search for a 'lasting constitutional settlement' for the EU.

### **3 The constitutionalisation of European contract law**

#### *3.1 Contract law in the European constitutional order*

In order to be able to further analyse the place of the DCFR in the EU's constitutional order, at least a tentative definition has to be given of what this order encompasses. In particular, the role of European contract law in the constitutional process has to be identified.

Maduro names three normative theories of constitutionalism.<sup>17</sup> First, constitutionalism may regard the limits set to power through legal and political instruments. Second, it can be perceived as a 'repository of the notions of the common good prevalent in a certain

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<sup>13</sup> Which includes the revision of the Directives on doorstep selling, unfair terms, distance selling and the sale of goods. Article 4 of the proposed Directive provides that: 'Member States may not maintain or introduce, in their national law, provisions diverging from those laid down in this Directive, including more or less stringent provisions to ensure a different level of consumer protection.' For a commentary on the issues addressed in the consulting process leading up to the proposal, see M.B.M. Loos, *Review of the European Consumer Acquis*, Munich: Sellier 2008.

<sup>14</sup> On the choice for minimum or maximum harmonisation of contract law, see further V. Mak, *Review of the Consumer Acquis: Towards Maximum Harmonisation?*, *TICOM working paper 2009/01*, available on [www.ssrn.com](http://www.ssrn.com) and the same author, *The Degree of Harmonisation in the Proposed Consumer Rights Directive: A Review in Light of Liability for Products*, in: G. Howells and R. Schulze, *Modernising and Harmonising Consumer Contract Law*, Munich: Sellier 2009, p. 307-324.

<sup>15</sup> M.W. Hesselink, *The Ideal of Codification and the Dynamics of Europeanisation: The Dutch Experience*, *European Law Journal* 2006, p. 291-293.

<sup>16</sup> Hesselink 2006, p. 287. See also Collins 2008, p. 77-89. A more general overview of the codification of contract law in Europe is provided by S. Grundmann and M. Schauer (eds), *The Architecture of European Codes and Contract Law*, Alphen a/d Rijn: Kluwer Law International 2006.

<sup>17</sup> M. Poiares Maduro, *The Importance of Being Called a Constitution: Constitutional Authority and the Authority of Constitutionalism*, *International Journal of Constitutional Law* 2005, p. 332-333.

community' and a means for organising power so as to give effect to these notions of the common good. Third, an in-between position is taken by the theory of constitutionalism that seeks to create

'a deliberative framework in which competing notions of the common good can be made compatible or arbitrated in a manner acceptable to all, thereby balancing democratic concerns with the control of the political process by a few with the risk of a tyranny by the many.'<sup>18</sup>

In my opinion, the creation of a CFR for European contract law most closely corresponds to this third definition of constitutionalism. Referring to what has been said earlier about the need for contract law to regulate the Internal Market,<sup>19</sup> European contract law can be perceived as a reflection of shared fundamental values in the EU. A further harmonisation of the rules in this field should thus take into account the notion of social justice, including the 'common good', it wants to pursue. My thesis is that the DCFR, and future CFR, in principle form part of the deliberative framework for the reconciliation of different notions of social justice, as they provide the legislature and the judiciary with a 'toolbox' for the pursuit of fundamental values through contract law.

In the remainder of this paper, I will further elaborate this thesis. In this context, a distinction has to be made between the economic and the social constitutions of the EU.<sup>20</sup> The economic constitution of the EU may be described as the basic legal structure that shapes the market order.<sup>21</sup> Europe's legal order is, however, also a social order, in the sense that it is 'subject to constraints that steer its operations and outcomes'.<sup>22</sup> In regulating the Internal Market, contract law should therefore strike a balance between market-oriented goals and interests of social justice.

### 3.2 *Fundamental rights and the DCFR*

The notion of the 'common good' is often related to fundamental, constitutional or human rights, which express the values that are deemed worthy of protection in a society. In the context of this analysis, 'fundamental rights' are understood as the rights safeguarded by national Constitutions (both written and unwritten) and those laid down in international human rights treaties, such as the European Convention on Human Rights (ECHR), the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR). Although it may be doubted to what extent fundamental rights by themselves represent a system of social justice,<sup>23</sup> it cannot be denied that they reflect societal values that should be respected on all levels of the legal system.

Despite their origins in public law, as a means of protecting citizens against public power, it does from this perspective not seem surprising that fundamental rights have increasingly found application also in private relationships. An investigation of the law of various EU Member States shows that these types of rights have been applied in a variety of contract

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<sup>18</sup> Maduro 2005, p. 333.

<sup>19</sup> Section 2.1 above.

<sup>20</sup> See also K. Tuori, *The Many Constitutions of Europe* (forthcoming).

<sup>21</sup> Compare Collins 2008, p. 94. See also H. Collins, *The European Economic Constitution and the Constitutional Dimension of Private Law*, *European Review of Contract Law* 2009, p. 71-94.

<sup>22</sup> Collins 2008, p. 94.

<sup>23</sup> A. Sen, *Elements of a Theory of Human Rights*, *Philosophy & Public Affairs* 2004, p. 315-356.

cases, ranging from suretyships to employment relations and contracts on surrogate motherhood.<sup>24</sup>

The application of fundamental rights in contract law directly relates to the interaction between contract law and constitutional law, private interests and public values. As Kennedy has observed, these rights may be said to be of a double-headed nature: on the one hand, they are enacted rules of the legal system, while on the other hand, they represent political choices for the protection of certain values in society.<sup>25</sup> Their Janus-headed character makes it possible for fundamental rights to mediate between law and politics. What is more, in case law they may raise judicial awareness of political (social justice) issues underlying contractual disputes, whereas in the legislative process, they provide the societal constraints demarcating the boundaries of the market order. The increasing constitutionalisation of contract law in Europe, i.e. reading and applying contract law provisions in compliance with fundamental rights, thus places the initiatives taken towards further harmonisation of this field on the intersection of the economic and social constitutions of the EU.

The European Commission seems to adhere to the trend of constitutionalisation, or at least be aware of its significance, insofar as it explicitly addresses the role of fundamental rights in new legislation. No. 66 of the proposed Directive on Consumer Rights stipulates that:

‘This Directive respects the fundamental rights and observes the principles recognized in particular by the Charter of Fundamental Rights of the European Union.’<sup>26</sup>

The drafters of the DCFR have also given fundamental rights a prominent place in their model rules.<sup>27</sup> Article I.-1:102(2) DCFR stipulates that its rules ‘are to be read in the light of any applicable instruments guaranteeing human rights and fundamental freedoms and any applicable constitutional laws’. Specific provisions on non-discrimination have, furthermore, been included in Chapter II of Book 2 of the DCFR. Article II.-7:301 DCFR, last but not least, provides that ‘[a] contract is void to the extent that (a) it infringes a principles recognised as fundamental in the laws of the Member States of the European Union; and (b) nullity is required to give effect to that principle’.

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<sup>24</sup> C. Mak, *Fundamental Rights in European Contract Law. A Comparison of the Impact of Fundamental Rights on Contractual Relationships in Germany, the Netherlands, Italy and England*, Alphen a/d Rijn: Kluwer Law International 2008. See also G. Brüggemeier, A. Colombi Ciacchi and G. Comandé (eds), *Fundamental Rights and Private Law in the European Union. I. A Comparative Overview*, Cambridge: Cambridge University Press 2009 (forthcoming).

<sup>25</sup> D. Kennedy, *A Critique of Adjudication {fin de siècle}*, Cambridge, Massachusetts: Harvard University Press 1997, p. 308 ff.

<sup>26</sup> COM (2008) 614 final. See also Directive 97/7/EC on Distance selling, no. 17: ‘Whereas the principles set out in Articles 8 and 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950 apply; whereas the consumer's right to privacy, particularly as regards freedom from certain particularly intrusive means of communication, should be recognized; whereas specific limits on the use of such means should therefore be stipulated; whereas Member States should take appropriate measures to protect effectively those consumers, who do not wish to be contacted through certain means of communication, against such contacts, without prejudice to the particular safeguards available to the consumer under Community legislation concerning the protection of personal data and privacy.’

<sup>27</sup> See Mak 2009, with further references. For a more elaborate analysis of the constitutional aspects of the DCFR, see M.W. Hesselink, C. Mak and J.W. Rutgers, *Constitutional Aspects of European Private Law: Freedoms, Rights and Social Justice in the Draft Common Frame of Reference*, report for the CoPECL project, available on <http://ssrn.com/abstract=1413089>.

What still seems to be lacking, however, is a coherent view on the values that fall within the scope of the DCFR concepts of ‘fundamental freedoms’ and ‘fundamental principles’. Hopefully, the *Comments* to the DCFR will shed some light on this matter. If not, further discussion has to be awaited. Still, this question of substance does not stand in the way of further pursuing the idea of the DCFR as an instrument of deliberative constitutionalism – to what extent can it provide a framework for the democratic reconciliation of competing notions of the ‘common good’?

#### 4 The DCFR between Code and Constitution

Rodotà has made an interesting comparison between the EU’s current ‘constitutional process’ and the major 19<sup>th</sup> Century codifications of private law.<sup>28</sup> At the time of their enactment, the French *Civil Code* and the German *Bürgerliches Gesetzbuch* arguably held much stronger political positions than constitutional documents. They reflected the strong private legal relations that bound the citizens and thus represented, in Rodotà’s words, ‘the real Constitution[s] of civil society’. Only in the wake of the Wars of the 20<sup>th</sup> Century new constitutional documents took over this political role, implementing principles of private law.

Surveying the current developments in European contract law, we may discern a partial revival of the 19<sup>th</sup> Century ideal of codification. The imminent move from minimum to full harmonisation (Consumer Rights Directive) and, possibly, codification (on the basis of the (D)CFR) of European contract law recalls the legislative projects of that era. It coincides with the search for a constitutional settlement for the European society and thus today’s initiatives in the field of European contract law share a political feature with the 19<sup>th</sup> Century Codes: they provide a framework for the relationships that bring together private parties on the Internal Market.

In the absence of a clearly defined European Constitution,<sup>29</sup> it may thus be – arguably somewhat boldly<sup>30</sup> – submitted that contract regulation forms one of the cornerstones of the EU’s constitutional order. On the one hand, it facilitates economic integration and in that way contributes to the framework within which goals of wealth maximisation can be pursued.<sup>31</sup> At the same time, on the other hand, it has significant implications for the possibilities given to all European citizens to fulfil their basic needs.<sup>32</sup> Given the combination of elements of codification and constitutionalisation it embodies, European contract law could thus play an important role in defining Europe’s constitutional order.

At the current stage of developments, the DCFR provides a specific instrument for the further elaboration of this abstract debate. The assessment of its principles and model rules by experts in the fields of both contract law and constitutional law could form a basis for

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<sup>28</sup> S. Rodotà, ‘The Civil Code within the European ‘Constitutional Process’’, in: M.W. Hesselink (ed), *The Politics of a European Civil Code*, Alphen a/d Rijn: Kluwer Law International 2006, p. 115-124.

<sup>29</sup> For an overview of various perspectives on the question of how to define a European Constitution, see P. Eleftheriadis, ‘The Idea of a European Constitution’, *Oxford Journal of Legal Studies* 2007, p. 1-21.

<sup>30</sup> In this paper, the question of whether this should be a function of contract law is not discussed in depth. The focus is on the description of contract law’s role in the constitutional process rather than on a normative evaluation of that role. Nevertheless, it should be admitted that even such a description will to some extent be coloured by the author’s normative views.

<sup>31</sup> Support for this claim may be found in the debate about the European economic constitution. See, for instance, Collins 2009, with further references.

<sup>32</sup> Compare Social Justice Group 2004.

the definition of the values that constitute the EU and for the solution of questions regarding their institutional protection.

## **5 Conclusion**

The DCFR for European contract law reflects an interesting combination of characteristics of codification and aspects of constitutionalism. On the basis of the analysis of the DCFR's position between a Code and a Constitution, it may be submitted that the further harmonisation of European contract law can contribute to the definition of the European constitutional order both on the institutional level (regarding the forms in which Europe's Constitution is expressed) and on a substantive level (concerning the values encompassed by a 'lasting constitutional settlement' for the EU).