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Constitutionalisation of Private Law

Edited by Tom Barkhuysen
and Siewert D. Lindenbergh

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by

TOM BARKHUYSEN AND SIEWERT LINDENBERGH

Editors

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CONSTITUTIONALISATION OF PRIVATE LAW

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INTRODUCTION

The Editors
Tom Barkhuysen and Siewert Lindenbergh

Constitutionalisation of private law: an 'enrichment of legal discourse', or 'nonsense on stilts'? The issue of the influence of fundamental rights in private law can be localized in the middle of this friction. There appear to be passionate 'believers' as well as persistent 'sceptics'. Therefore, constitutionalisation of private law is, at least, of importance from an academic point of view. The influence of fundamental rights in private law is, however, not 'just' a matter of academic discourse.

This publication opens with two fundamental contributions, by representatives from both ends of the spectrum, Hans Nieuwenhuis and Jan Smits. Vino Timmerman illustrates that fundamental rights are already clearly influencing private law, even in the 'hard-core' area of company law.

The influence of fundamental rights in private law depends, partly at least, on the constitutional framework created by the legislator. When creating the Netherland's constitution (Grondwet) in 1983, the legislator took a rather reluctant position towards the horizontal effect of fundamental rights. Therefore, from a (national) constitutional point of view, the freedom of the judiciary to allow a horizontal effect to constitutional rights is substantially limited, as is set out by Wim Voermans. On the other hand, the reluctance towards the influence of the national constitution on private law, has – at least in the Netherlands – served as a strong incentive to invoke in private law issues the fundamental rights laid down in the European Convention on Human Rights. The difficult relationship between the ECHR and private law is explored and illustrated by Tom Barkhuysen and Michiel van Emmerik.

The issue of the influence of fundamental rights in private law is universal in the sense that it is recognized in most western jurisdictions. Therefore, it is inspiring to examine the development of this topic in different legal families. Since constitutionalisation of private law can be located on the verge of public and private law, it is not surprising that culture and history appear to be important parameters for the development of the concept within the German,

English and Dutch jurisdictions. The contributions of Gert Brüggemeier, Stathis Banakas and Siewert Lindenbergh illustrate that each country has its own history and habits in this respect. They also illustrate that constitutionalisation of private law is a fundamental issue of academic, systematic and practical importance in each of the jurisdictions. This is what justifies the choice of constitutionalisation of private law as the subject for this scholarly debate.

Although the many different viewpoints and developments that are illustrated in the various contributions make it difficult to draw general conclusions, two main features can be derived from the debate on constitutionalisation of private law. First, fundamental rights cannot simply be considered as public law concepts 'invading' private law: often they have their origins in concepts that precede this legal-conceptual distinction and articulate values which underlie the legal order as a whole. Second, fundamental rights, whether from a public or from a private law origin, can serve in private law as sources of inspiration and as warning signs that human dignity may be at risk. Both features support the conclusion that fundamental rights have substantial added value in private law, or perhaps better: private law has substantial added value in the realization of fundamental rights.

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Amsterdam/Leiden/Rotterdam, February 2006

TABLE OF CONTENTS

1

FUNDAMENTAL RIGHTS TALK

An enrichment of legal discourse in private law?

Hans Nieuwenhuis[1]

In her book RIGHTS TALK, *the impoverishment of Political Discourse*[2] Mary Ann Glendon attacks the predominance of the rhetoric of rights in American political discourse. What is conspicuously lacking, according to her, is the rhetoric of responsibility:

> Thus far, in our investigation of American rights talk, we have observed a tendency to formulate important issues in terms of rights; a bent for stating rights claims in a stark, simple, and absolute fashion; an image of the rights-bearer as radically free, self-determining and self-sufficient; and the absence of well-developed responsibility talk.[3]

In this paper I advocate an opposing view: FUNDAMENTAL RIGHTS TALK, an enrichment of legal discourse in private law.

With regard to the American preoccupation with rights Glendon complains:

> The new rhetoric of rights is less about human dignity and freedom than about insistent, unending desires.[4]

1 Professor of Civil Law, Faculty of Law, Leiden University.
2 Mary Ann Glendon, *Rights Talk, the impoverishment of Political Discourse*, New York 1991.
3 Rights Talk p. 107.
4 Rights Talk p. 171.

Tom Barkhuysen and Siewert Lindenbergh (Eds), *Constitutionalisation of Private Law*.

In private law the most insistent and unending desire is the desire for money; money to be collected by means of claims for damages. In the Netherlands this eagerness to claim compensation is commonly labeled 'The Claim Culture', or simply 'The American Way' (*Amerikaanse Toestanden*).

A woman gives birth to a child because an operation intended to sterilize her husband had failed. She claims the costs for bringing up the child from the doctor who has performed the operation. Isn't this a striking example of highly inflated rights talk? Rights talk completely lacking the rhetoric of responsibility towards the unwanted child? What if, growing up, the child discovers that his parents considered the costs of bringing him up as 'damage'? How are we to assess the language of the German *Bundesgerichtshof* awarding compensation for the cost of bringing up the child by explaining that 'the concept of damage as such is value-free' (*der Schadensbegriff als solcher is wertfrei*).[5] Can we improve our rights talk by transforming it into *fundamental* rights talk? Does invoking the European Convention on Human Rights improve the quality of the debate on how to apply our current Tort Law?

Mrs. G. lives in Edam (say: cheese). She receives state benefit. K., one of her neighbors, suspects her of deceiving the authorities by not telling them that she lives with a friend in a manner closely resembling married life. K. keeps her under close observation and informs the authorities that she walks with this man hand in hand in public places and that his car is parked all night in front of her house. Mrs. G. considers this relentless attention a violation of her right to privacy.

The judge in the summary proceedings agreed, but on appeal his decision was quashed by the Court of Appeal in Amsterdam. The sole fact that Mrs. G. felt spied upon after having discovered that she had been kept under close observation by her neighbor did not amount to a violation of her privacy, according to the Court of Appeal. Mrs. G. again appealed to a higher court and at the Supreme Court (*Hoge Raad*) she complained that the Court of Appeal had not given due consideration to Article 8 of the European Convention:

> (i) Everyone has the right to respect for his private and family life, his home and his correspondence.
> (ii) There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being

5 Bundesgerichtshof 27 June 1995, NJW 1995, p. 2407.

> of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

The *Hoge Raad* ruled that the existence of a right to respect for one's private life must be accepted. The content of this right is determined, at least in part, by Article 8 of the European Convention on Human Rights. This Article also applies to the relationships between citizens, according to the *Hoge Raad.* Violation of this right might justify a claim based on Tort Law. But this doesn't necessarily mean that K. has committed a tort. In connection with Article 8, section 2, a reason justifying K's actions may exist if the interference with the private life of G. was necessary in a democratic society in the interest of the economic well-being of the country. The *Hoge Raad* referred the case to the Court of Appeal in The Hague to decide whether the violation of G's right to respect for her private life was justified by the public interest that the authorities would have in knowing the facts concerning the private life of Mrs. G.[6]

Article 8 of the European Convention on Human Rights also applies to relations between citizens; a clear example of 'constitutionalisation' of private law by giving 'horizontal effect' (*Drittwirkung*) to constitutional rights conferred on citizens with regard to their relations with the public authorities. The verticality of the original structure of constitutional rights such as privacy (Article 8) is shown by the way in which the text of Article 8 section 2 addresses the State as the one who should respect these rights. 'There shall be no interference by *a public authority* with the exercise of this right except …'.

According to the *Hoge Raad*, the content of Mrs. G's right to respect for her privacy is determined, at least in part, by Article 8. By this the *Hoge Raad* cannot have had the *text* of Article 8 in mind, as this text contains no clue whatsoever to the meaning of the concept of private life. So it must be the way in which Article 8 has been interpreted by the European Court on Human Rights. But the Court can only deal with complaints against States. The way in which a State may interfere with the private lives of its citizens differs greatly from the interference allowed to private individuals. Even if I have a reasonable suspicion that my neighbor is growing several hundred cannabis plants in the cellar of his house, I am not allowed to break into his house and search it, but the public authorities certainly may. The benchmark for the success of the State's defense against a complaint that it breached the right to privacy is to be able to say that the interference was 'necessary in a democratic society in the interests of national security, public safety or the economic well-being of

6 HR 9 januari 1987, NJ 1987, 928.

the country (...)'. This is not a suitable test with regard to relations between citizens. A divorced husband trying to collect evidence that his ex-wife is cohabitating with a new partner, does not, in order to be discharged from his duty of providing maintenance, have to show that his spying on her was necessary in the interests of the economic well-being of the country.

One must conclude that simply transplanting the method of reasoning applicable to the vertical relationships (public authority – citizen) to the debate concerning horizontal relationships (citizen – citizen) is not very helpful when it comes to lending proper weight to the role of fundamental rights in private law disputes.

So, how should we handle fundamental rights in a horizontal setting? One could choose a different approach: fundamental rights contained in the Basic Law (*Grondwet, Grundgesetz*) or the European Convention constitute an objective system of values which offers insight in case one has to apply open ended private law norms like the 'unwritten' rules pertaining to proper social conduct, the most important criterion for liability in Dutch Tort Law (Article 6:162 DCC). This approach is very similar to the path followed by the German *Bundesverfassungsgericht* with regard to the horizontal effect of the fundamental rights in the *Grundgesetz*:

> Far from being a value-free system the Basic Law (Grundgesetz) erects an objective system of values in its section on basic rights (...) This system of values centering on the freedom of the human being to develop in society, must apply as a constitutional axiom throughout the whole legal system (Translated by Tony Weir).[7]

The German Grundgesetz of 1949 has erected an objective system of values, according to the Bundesverfassungsgericht. The Court does not say that the Grundgesetz *created* an objective system of values, but that it *set* it *upright* (*hat aufgerichtet*). The Court does not suggest that from 1933 to 1945 these values did not exist in Germany, but that they were trodden underfoot by the NS-regime. It is important to note that legal values such as human dignity, freedom of expression and privacy are not *created* by the Constitution but

7 Bundesverfassungsgericht 15 januari 1958, BverfGE, 1958, p.198: 'Das Grundgesetz, das keine wertneutrale Ordnung sein will, hat in seinem Grundrechtsabschnitt auch eine objektive Wertordnung aufgerichtet (...). Dieses Wertsystem, das sein Mittelpunkt in der innerhalb der sozialen Gemeinschaft sich frei entfaltenden menschlichen Persönlichkeit und ihrer Würde findet, muss als verfassungsrechtliche Grundentscheidung für alle Bereiche des Rechts gelten.'

recognized by it. This raises the question: what is fundamental about fundamental rights?

One answer could be that their fundamentality derives from their position in a fundamental document, such as the Grundgesetz or the European Convention, but a better answer would be that fundamental rights are fundamental because they articulate values which underlie the legal order in its entirety (both public and private law). Understood in this way, fundamental rights are fundamental since they *precede* the distinction between public and private law. Is the right to life, enshrined not only in Article 2 of the European Convention but also in Exodus 20:13: 'Thou shalt not kill' public or private law?

This precedence is a logical matter, and not chronological. Provisions concerning insults in private law (Article 6:106 Dutch Civil Code) and in criminal law (Article 261 Dutch Criminal Code) may be much older than a newly emerging right to human dignity (see Lord Millett, *infra*) but human dignity takes precedence because, in the words of the *travaux préparatoires* of the European Charter of Human Rights, human dignity 'is not only itself a fundamental right, it is also the foundation of all other fundamental rights.'

One might argue that this foundation rests on quicksand because the Charter is not, as yet, positive law. But on the other hand, the rights, freedoms and principles 'recognized' by the European Union in the Preamble to the Charter belong without doubt to the existing 'inner morality' of the law (Fuller):

> To embark on the enterprise of subjecting human conduct to the governance of rules involves of necessity a commitment to the view that man is, or can become, a responsible agent, capable of understanding and following rules, and answerable for his defaults. Every departure from the law's inner morality is an affront to man's dignity as a responsible agent.[8]

Human dignity serves as a framework within which competing claims based on more specific fundamental rights can be balanced. How do you weigh for instance the freedom of the press to publish photographs showing that the fashion model Naomi Campbell lied about her drug addiction against Miss Campbell's privacy and the right to 'informational autonomy'?[9] Lord Hoffmann on the nature of dignity and private information:

8 L.L., Fuller, *The Morality of Law*, New Haven 1969, p. 162.
9 Campbell v. MGN Ltd. [2004] UKHL 22.

> What human rights law has done is to identify private information as something worth protecting as an aspect of human autonomy and dignity (...) the new approach (...) focuses upon the right to control the dissemination of information about one's private life.

A recent decision by the *Hoge Raad* in a case concerning a *Wrongful Life* claim highlights this latter view of the proper role of fundamental rights in private law. Kelly, a girl, was born severely handicapped. If the obstetrician would have performed her prenatal diagnosis more diligently a hereditary genetic defect would have come to light and Kelly would not have been born at all, because the mother would have decided to have her aborted. The *Hoge Raad* awarded a whole range of damages, the most controversial being the compensation awarded to Kelly herself on the ground that the obstetrician had breached a duty of care towards the unborn child. Apart from the costs of bringing up Kelly, the *Hoge Raad* also awarded non-economic damages to the mother:

> The law recognizes within certain limits the right of the mother to terminate her pregnancy. This recognition rests on the fundamental right of the mother to self-determination. If, by the negligence of the obstetrician, the mother is deprived of her choice to prevent the birth of a severely handicapped child, this constitutes a serious violation of her right to self-determination.[10]

The *Hoge Raad* derives the right of the mother to choose whether or not to have a severely handicapped child from her fundamental right to self-determination. In the Dutch Constitution (*Grondwet*) one can look in vain for this 'fundamental right to self-determination'. It lacks a provision equal to Article 2 of the German Grundgesetz (*Jeder hat das Recht auf die freie Entfaltung seiner Persönlichkeit*).

What is the use of such an autonomous fundamental right that is not backed by an explicit provision in the Constitution? Could the *Hoge Raad* not have dispensed with invoking a fundamental right to self-determination by simply stating that the obstetrician had breached a duty of care towards the mother?

American *political* discourse may be lacking the rhetoric of responsibility, as Mary Ann Glendon insists, but European Tort Law certainly does not. Both the very central concepts of *faute* in French Tort Law and *duty of care,* the key element in *negligence*, the most prominent tort in English law, are embedded in the rhetoric of responsibility.

10 *Hoge Raad* 18 maart 2005, RvdW 2005, 42; Kelly.

To give just one example: The House of Lords in Donoghue v. Stevenson, *per* Lord Atkin:

> The rule that you are to love your neighbour becomes in law, you must not injure your neighbour; and the lawyer's question: who is my neighbour? receives a restricted reply. You must take reasonable care to avoid acts and omissions which you can reasonably foresee would be likely to injure your neighbour.[11]

A *duty* of care towards another person entails the other person's *right* to this care. On this point the law must join the forces with the rhetoric of responsibility and the rhetoric of rights. How can one determine the limits of the duty of care of a doctor towards a pregnant woman? Does he have a duty to find out whether there is any chance of her having a baby with a cleft lip, in order to enable her to decide to have it aborted? One cannot answer these questions without discussing the limits of the right to self-determination in matters like these. What modern Tort Law urgently needs is a larger share of high quality fundamental rights talk.

As we have seen, Mary Ann Glendon's main objection to 'the new rhetoric of rights' is that it is 'less about human dignity and freedom than about insistent, unending desires.' This is no longer true with regard to fundamental rights talk. An interesting development took place in the *Wrongful Birth* cases decided by the House of Lords. While denying the parents compensation for the cost of bringing up the child, the Lords award the mother non-economic damages. But the reasoning differs. Compare for instance Lord Slynn in *Macfarlane v. Tayside Health Board*, [2002] 2 AC 59:

> It seems to me that (...) the wife, if there was negligence, is entitled by way of general damages to be compensated for the pain and discomfort and inconvenience of the unwanted pregnancy and birth (...).

And Lord Millett:

> Unlike your Lordships, I consider that the same reasoning leads to the rejection of Mrs. McFarlane's claim in respect of the pain and distress of pregnancy and delivery. (...) It does not, however, follow that Mr. and Mrs. McFarlane should be sent away empty handed. (...) They have been denied an important aspect of their personal autonomy. Their decision to have no more children is one the law should respect and protect.

11 Donoghue v. Stevenson, (1932) A.C. 562, 580.

In *Rees v. Darlington Memorial Hospital* [2004] 1 AC 309 Lord Millet reiterated his view, intensifying his fundamental rights talk:

> I still regard the proper outcome in all these cases is to award the parents a modest conventional sum by way of general damages, not for the birth of the child, but for the denial of an important aspect of their personal autonomy, viz. the right to limit the size of their family. This is an important aspect of human dignity, which is increasingly being regarded as an important human right which should be protected by law.

In *Kelly*, the Dutch *Wrongful Life* case, the *Hoge Raad* emphasized its consideration that awarding the mother non-economic damages did not mean that Kelly's existence was a cause of discomfort and suffering for her, but that her right to compensation was based on the fact that her right to self-determination had been violated.

From pain and suffering to the violation of the right to self-determination as the reason for compensation; this certainly is an improvement of the legal discourse concerning wrongful birth and wrongful life cases. Even women who do not feel bound by Genesis 3:16 'In sorrow thou shalt bring forth children.' will concede that the real reason for claiming damages is not the amount of pain suffered during pregnancy and birth but the violation of their freedom of choice. In a Dutch case concerning medical malpractice resulting in an unwanted pregnancy and the birth of a healthy child, the woman told the press that the sole reason for claiming damages had been the fact that the doctor had said to her that she must not complain because she had a healthy child.

Fundamental rights talk, *an enrichment of legal discourse in private law?* It is time to replace the question mark by a full stop. Private law is, and ought to be, based on a set of ideas about fundamental rights. Property and contract can only be understood as concepts stemming from the fundamental right to self-determination (which is not the same as selfishness). Life, liberty, privacy and property focus our view of Tort Law. From this pivotal role of fundamental rights in private law it follows that the 'constitutionalisation' of private law by giving horizontal effect to vertical public law rights (citizen's rights against the State) cannot be but a transitional affair. For the time being it may be useful to borrow the concept of privacy from the European Convention, but at the end of the day private law must stand on its own two feet and must be able to articulate the fundamental right to privacy on its own terms. When the house is built the scaffolding must be removed.

2

PRIVATE LAW AND FUNDAMENTAL RIGHTS: A SCEPTICAL VIEW

Jan Smits[1]

1 INTRODUCTION

The applicability of fundamental rights to private law is a vexed question. Over the last decade or so, many countries have seen a growing influence of fundamental rights in contract, tort and property law. This development, sometimes referred to as the 'constitutionalisation' of private law,[2] is often regarded as highly beneficial. It seems after all to be a noble idea to allow fundamental rights to play a role in relationships between private persons. However, the application of universal standards of what is regarded as fair in the relationship between the State and the citizen – which is of course what fundamental rights were originally designed for – to private parties can also be looked at with suspicion. The aim of this contribution is to reflect on the desirableness of the constitutionalisation of private law and to show the adverse effects of this development. It is therefore not intended to describe the present state of affairs in this area; instead, the focus will be on the normative questions of the desir-

1 Professor of European Private Law, Faculty of Law, Maastricht University; in the academic year 2005-2006 also visiting professor, Louisiana State University

2 The term was used by, *e.g.*, Basil Markesinis, Comparative Law – A Subject in Search of an Audience, Modern Law Review 53 (1990), p. 10; Gabriela Shalev, Constitutionalisation of Contract Law, in: A. Gambaro and A.M. Rabello (eds.), Towards a New European Ius Commune, Jerusalem 1999, p. 205; Lord Reed, The Constitutionalisation of Private Law: Scotland, Electronic Journal of Comparative Law Vol. 5.2 (May 2001).

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