

Public Goals in the Regulation of Private Relationships: Human Rights as Private Law Norms

Aurelia Colombi Ciacchi

This paper starts from the assumption that the separation between private law and public law has become obsolete, and human rights are (not only indirectly but sometimes also directly) private law norms. This paper submits that under certain circumstances, human rights even bind private parties directly: Clear, precise and unconditional human rights provisions that are suitable by their content to operate in private relationships should be perceived as directly binding for private actors, at least for multinational corporations. This is because clear, precise and unconditional human rights provisions should be seen as perfect duties from the perspective of moral philosophy.

These theses are supported by at least seven arguments:

- Firstly, the regulation of private relationships is achieved through a mix of instruments, embracing traditional private law, public law (including criminal law), EU and international law, and self-regulation.
- Secondly, since law is an instrument of regulation and governance, public goals play a major role even in traditional private law (i.e. private law in the narrow sense: Civil Code rules etc.).
- Thirdly, the separation between public and private law stems from a specific historical legal culture: the old continental European legal culture with its journey from ancient Roman law until the national codifications of the 19th and early 20th century. This separation does not make much sense in Anglo-American law and EU law. Given the massive impact of EU law on contemporary private law, even in continental European private law the traditional separation between public interests and goals on the one hand, and private law on the other, is no longer defensible.
- Fourthly, as Hesselink (among others) convincingly pointed out, an autonomous, a-political private law does not exist. Legal realism and critical legal studies (i.a. Duncan Kennedy) have long demonstrated that even the most apparently technical rules of contract law are in fact political. Consequently, there is no categorical difference between private law and public law.
- Fifthly, in continental Europe, judicial governance and judicial activism play a huge role in the regulation of private relationships. In adjudicating private litigations, civil courts strongly contribute to the realization of public interests and goals (such as protecting the environment and combating climate change). The recent Dutch *Shell* judgment is a wonderful example of both the pursuit of public goals in the adjudication of private relationships, and the indirect horizontal effect of human rights. It is a typical example of how civil courts, adjudicating private litigations, invoke human rights or constitutionally protected fundamental rights to provide a higher-level justification of their judicial activism in contrast the (in)action of governments and parliaments. Arguably, the *Shell* judgment is not revolutionary: It is just the latest example of a widespread phenomenon that concerns continental Europe as a whole and goes back at least to World War II.

- Sixthly, at least in the transnational sphere, it does no longer make sense to conceive human rights as merely binding on State actors. As Teubner convincingly pointed out, state duties are insufficient, and human rights should be considered as negative bounds on private power. This paper, however, does not fully share Teubner's sociological system theory interpretation of human rights and their application in the adjudication of private relationships. This paper sees human rights as erga omnes rights, which operate as negative bounds on private power, but primarily as actual rights of individuals and groups (not primarily as communication / justification instruments to solve conflicts between different societal systems, as Teubner does).
- Seventhly, from a moral philosophy viewpoint, Hazenberg¹ convincingly pointed out that to be directly binding, human rights require bearers of perfect duties, that is duties which are justifiably assigned to a specific actor who can adequately perform the duty without discretion. Many human right provisions only lay down imperfect duties. These provisions can be made less indeterminate through legal mechanisms outside of human rights law, for example through classic national law. For example, national private law helps limit the discretion of transnational corporations in performing imperfect duties. The *Shell* case arguably confirms this.

¹¹ Hazenberg, Human Rights Review 2016...