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# Human Rights as *Regulae Iuris* : An Inquiry into the Dialectics of Legality versus Legitimacy

BAS DE GAAY FORTMAN*

**Abstract:** This article discusses the role of human rights as general principles of law guiding judicial decision-making. After an introduction into the dialectics of legality versus legitimacy, it focuses on the Courts' need for public-political constituency that carries their judgments. It is in that context that the old *regulae iuris* have always played their part. Based on the overriding principle of universal human dignity human rights are conceived as modern rules of justice throwing light upon concrete cases. Although in terms of sheer legality their impact is rather trivial, a focus on legitimacy evidently enhances their impact. This is illustrated in regard to human rights in private law. In conclusion, a shift in emphasis from quasi-legal international procedures in semi-judicial UN Charter and Treaty bodies lacking any power to enforce their 'resolutions' and 'concluding observations', to human rights as general principles guiding judicial decision-making appears to be worth consideration.

## 1. Introduction

*Legality* as an overriding *regula iuris* implies no more or less than that both public authority to enforce and private obligation to comply are grounded in formal law that is clear, accessible, and non-retrospective. The separation of the three powers of government is based on a simple division of tasks in this respect: the legislative creates the laws, the executive makes policies on that legal basis and takes decisions to carry these out, and the judiciary determines the meaning of law in cases arising out of conflicting interests. While theoretically this all looks rather simple, practice shows otherwise, as terms such as judicial law finding – or even law creation – illustrate. The point is that no matter the significance of legality as a prevailing principle of law, interpretation remains inevitable. However, even in the highest instance, judicial decisions establishing what legality in concrete disputes entails will remain confronted with *legitimacy* as a normative setting for the acceptability of public-political decisions.

*Legitimacy* is indeed a major requisite with regard to the formation and execution of (political) power. Both policies and concrete decisions are legitimate only when these are acceptable to those over whom power is being exercised.

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Although, naturally, the *right outcome* in the sense of political acceptability to those who are being governed remains a crucial standard, in processes of civilization through the ages, legitimacy acquired a substantial meaning too: conformity with the *right principles* – 'general principles of law recognised by civilised nations', to use the terminology of the Statute of the International Court of Justice (Article 38(c)) – and *the right procedures* in the sense of due process. These two objective foundations of legitimacy are expressed in constitutional requirements, as well as standards formulated in international law.

Democracy is meant to enhance the legitimacy of government through general procedures for public-political decision-making, implying that the majority decides, the minority acquiesces, and the majority respects minorities. The general principle involved here is that of representative government (government of the people), as safeguarded in processes guaranteeing the substitutability of public-political power. Yet, that is not enough. Participatory government (government by the people) functions as a second building stone of administrative legitimacy. It is the third principle of legitimate government – accountability (government for the people) – that is of particular relevance in respect of the judiciary. No matter how clearly grounded in positive law, the public acceptability of judicial decisions requires some solid attention to principles, institutions, and procedures that find their basis in generally acknowledged norms and values. Indeed, the judiciary too tends to be faced with a continuous need for public-political constituency.

It is in this context that international human rights play an increasingly significant part as these constitute much *more* than specific legal provisions. Actually, in terms of sheer legality, their impact is rather trivial. Where the norms that these rights embody function as conclusive rights in the national legal context, the international dimension just adds some non-enforceable supranational supervision, together with some external pressure towards further incorporation into the law of the land. Conversely, however, where these rights serve as mere declared rights, their nature of law without remedies may harm a country's legal culture too, with negative effects on the rule of law. Hence, a shift in emphasis from quasi-legal international procedures in semi-judicial bodies lacking any power to enforce their 'resolutions', 'general comments', and 'concluding observations' to human rights as general principles guiding both political processes of emancipation and judicial decision-making is worth consideration. This article then sets out to examine the meaning of human rights as modern 'regulae iuris' enlightening legal interpretation.

## 2. The Role of Legal Principles in Judicial Decision-Making

In cases requiring substantive legitimization, well-established principles of law finding have always played their part. Ronald Dworkin, in particular, constantly calls the attention of his fellow jurists, as well as a larger public-political audience to the inevitability of judicial law creation and, hence, the necessity for judges to

ground their decisions not only in their understanding of relevant legal systems but also in 'very abstract principles of political morality'. In *Justice in Robes*, he stated:

> My claim, to repeat, is that legal reasoning presupposes a vast domain of justification, including very abstract principles of political morality, that we tend to take that structure as much for granted as the engineer takes most of what she knows for granted, but that we might be forced to re-examine some part of the structure from time to time, though we can never be sure, in advance, when and how.[1]

Notably, that need to transcend purely formal legality is nothing new. Through the ages, substantial legitimization has been enhanced by applying the old principles of law finding: the *regulae iuris*. Those principles throw light upon concrete cases in which legal rules first have to be determined as applicable and then applied in line with a truthful interpretation. As *maximae propositiones*, these interpretive rules rest on everyday common sense; as concise declarations of the demands of justice (*generalia iuris principia*), they are rooted in morality.[2] Often the *regulae* combine elements of both logic and fairness, illustrated, for example, by the rule that who carries the burden should also be entitled to the benefits.[3] Generally, their form tends to be short and succinct while their authority rests on the rationality and morality from which they originate, as well as past experience in law finding. In the difficult task of attaching legal weight to the different interests involved, the *regulae* assist those charged with lawmaking, as well as those responsible for law finding in concrete cases.

The Dutch scholar Paul Scholten has typified such general principles of law as the desk light that may shine so unmistakably upon the case that what the ceiling light of statute book and precedent could not reveal suddenly becomes clearly visible.[4] Hence, Baldus already argued that a party in a court case who can invoke a *regula iuris* may be considered as being prima facie in the right.[5] While this could

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1 R. DWORKIN, *Justice in Robes*, Harvard University Press, Cambridge 2006, p. 56.

2 An example of legal common sense is the rule that everything that has come into being through certain causes can also be dissolved by the same causes (Omnis res, per quascunque causas nascitur, per easdem dissolvitur): X 5,41,1 (*Corpus Iuris Canonici*: DECRETAL. GREGOR. IX LIB. V, TIT. XLI., DE REGULIS IURIS, CAP. I). General principles of justice may be illustrated by the rule that without culpability there can be no punishment. (Sine culpa, nisi subsit causa, non est aliquis puniendus): VoI 5,12, reg. 23 (*Corpus Iuris Canonici*: SEXTI DECRETAL. LIB. V, TIT. XII., DE REGULIS IURIS, Bonifacius VIII, Regula XXIII).

3 *Qui sentit onus, sentire debet commodum, et e contra*: Vol 5,12, reg. 55 (*Corpus Iuris Canonici*: SEXTI DECRETAL. LIB. V, TIT. XII., DE REGULIS IURIS, Bonifacius VIII, Regula LV).

4 Compare P. SCHOLTEN, *Mr. C. Asser's Handleiding tot de beoefening van het Nederlandsch Burgerlijk Recht: Algemeen Deel*, Tjeenk Willink, Zwolle 1931.

5 P. STEIN, *Regulae Iuris: From Juristic Rules to Legal Maxims*, University Press, Edinburgh 1966.

apparently already be said in the fourteenth century, the *regulae* have maintained their validity throughout history. For example, the stipulation that policies cannot be changed to another person's unfair detriment has acquired a modern translation in the principle of good government, which demands that expectations that have been justifiably raised cannot be ignored.[6]

While most principles originate in Roman law, many have been incorporated in the *Corpus Iuris Canonici* as well. Yet, legal incorporation in recognized law books such as Dinus' treatise on the Rules of the Sext is not the essence of their legitimacy. What is important is not the formal source of a general rule of law but its immediate appeal to the legal mind and the moral heart. Above all, the role of the principles lies in the need for legitimacy rather than pure legality. It is that evident 'moral-political'[7] connection to formal and substantive justice that can play such a significant part in judicial and administrative decision-making. As 'the general principles of law recognised by civilised nations', the *regulae iuris* have been acknowledged as a source of law finding for the International Court of Justice (United Nations 1946, ICJ Statute: Article 38[1] [c]). Apart from this formalized role, however, they tend to serve as guidelines in adjudication in general, as well as in lawmaking and administration. In a Habermasean setting, they may be seen as a mode of resistance by the lifeworld to rules-driven systems of jurisprudence.[8] It is in this connection that the modern notion of the human being as *an individual with rights* may play its part.

Some *regulae* are quite precise, particularly those that pertain to due process, for example, the well-known rule that not just one party but both parties should be heard (*audi et alteram partem*) and the rule that people can not be judges in their own case (*nemo iudex in sua propria causa*). Also, a rule of an obvious moral-political nature, which is common to many legal questions beyond contract law, is the requirement of good faith (*bona fides*). Other *regulae* are of a highly general character: for example, the statement that where law prevails there is a

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6 *Papinianus libro tertio quaestionum*: 'Nemo potest mutare consilium suum in alterius iniuriam', *Corpus Iuris Civilis*, DE DIVERSIS REGULIS IURIS ANTIQUI, D. 50, 17, 75.In private law, a similar rule is 'Venire contra factum proprium'. From a comparative perspective, one might also refer here to the common law principle of *estoppel*.

7 'Law', Dworkin argues convincingly, 'is a branch, a subdivision, of political morality' (R. DWORKIN, *Justice for Hedgehogs*, The Belknap Press of Harvard University Press, Cambridge Mass. 2011, p. 405). 'Interpretivism', as he calls his approach, 'denies that law and morals are wholly independent systems. It argues that law includes not only the specific rules enacted in accordance with the community's accepted practices but also the principles that provide the best moral justification for those enacted rules. The law then also includes the rules that follow from those justifying principles, even though those further rules were never enacted' (*id.*, 2011, p. 402).

8 Compare J. HABERMAS, 'Law and Morality', in S.M. McMurrin (ed.), *The Tanner Lectures on Human Values*, University of Utah Press, Salt Lake City 1988, p. 8.

remedy (*ubi ius ibi remedium*). New principles follow particularly from the global human rights project. One could think here not only of the value of life *per se* but also of norms underlying rights of a collective nature such as the right to self-determination, the right to development, and the right to a healthy environment. In actual litigation, these 'rights' may function as modern principles of law, as shall be further explored below.

## 3. Human Dignity and Human Rights

Human rights reflect a determined effort to protect the dignity of each and every human being against abuse of power through fundamental rights. The spiritual source of this endeavour lies in the fundamental belief that the protection of universal human dignity is a responsibility of society at all its different layers and levels. This principle should generally limit and govern any use of power over human beings. Its starting point is the acknowledgement of every person's right to exist. People count, and in principle no individual counts more, or less, than any other. No one, in other words, is to be excluded from the typical human rights term *everyone*.

Notably, in the global political idea of human rights that emerged after World War II (hereinafter 'WW II'), two genealogies converged:

(1) the struggle for universal recognition and equal protection of the dignity of each and every human being; and
(2) the fight for inalienable basic rights as a way to protect citizens against abuse of power, in particular by their own sovereign (the state).

Strikingly, while the emergence of the basic rights idea as legal protection against abuse of power, particularly by one's own sovereign, may indeed be called a 'Western' history,[9] the narrative of universal recognition and protection of human dignity could just as well be termed 'anti-Western' history in the sense that equal dignity had to be vindicated in contravention of Western ideas and powers. As pointed out, the idea of legal principles was already part of Roman law (*generalia iuris principia*). One of these referred to freedom as something of inestimable value (*libertas inaestimabilis res est*);[10] yet the application of this principle excluded

9 For this narrative, see, for example, L. HUNT, *Inventing Human Rights: A History*, Norton, New York/London 2007. Notions of cultural imperialism vis-a-vis the imposition of 'Western' human rights norms on non-Western peoples often arise in relation to this narrative. See M. IGNATIEFF, *Whose Universal Values? The Crisis in Human Rights*, Praemium Erasmianum Essay, Amsterdam 1999, pp. 34–38, for a strong refutation.

10 *Paulus libro secundo ad edictum*, *Corpus Iuris Civilis*, DE DIVERSIS REGULIS IURIS ANTIQUI, D. 50, 17, 106.See also 122 –*Gaius libro quinto ad edictum provinciale*: 'Libertas omnibus rebus

subjugated peoples in general and slaves in particular. In fact, the whole story of the realization of universal human dignity must be understood as an ongoing political struggle.[11] Indeed, the struggles against colonization and conquest, and the historical efforts to fight racial and ethnic hierarchy, have shaped the idea of truly universal human rights. Notably, the abolitionists in the United States of America already manifested a deep apprehension that a country that at the time of independence had declared as 'self-evident' truths that 'all men are created equal, that they are endowed by their Creator with certain unalienable Rights, and that among these are Life, Liberty and the Pursuit of Happiness' nonetheless tolerated slavery.

Apparently then, the belief in universal human dignity, entailing such values as life, liberty, and equality, has to be reaffirmed time and again. After WW II, this found an impressive reflection in the United Nations Charter whose preamble uses the term faith in the sense of a universally shared moral conviction. Thus, '[w]e the peoples' express our determination:

> to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small.

The two historical lines reflected in this language – faith in the dignity of the human being as well as in fundamental rights – are reiterated in the preamble of the Universal Declaration of Human Rights (UDHR):

> Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world.

The two genealogies then unite in Article 1 of the UDHR:

> All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.[12]

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favorabilior est'. A modern source, related to the struggle for truly universal human dignity, is Ho Chi Minh: 'Rien n'est plus précieux que la Liberté et l'Independence'.

11 Compare P. GILROY, 'Race and the Right to Be Human', Inaugural address, delivered on accepting the Treaty of Utrecht Chair (Utrecht University, Faculty of Humanities, Utrecht 3 Dec. 2009).

12 Today we read 'sister and brotherhood' or *fellowship*. Obviously, the underlying principle is solidarity. In the global venture for human rights, this constitutes the basis for so-called solidarity rights such as the right to a healthy environment. Besides solidarity, one can also read here an urge

This global political confession (in legal terminology, *ius divinum*) reflects the two grand principles that underlie those paired but distinct genealogies, one of a substantive and the other of a procedural nature: *universal human dignity* and *inalienable fundamental rights*.

The first of these two primary principles, human dignity, refers to the inherent worth of each and every human being, simply as an innate consequence of human existence whether or not an individual person is herself convinced of that.[13] 'Inherent' is indeed the adjective used in the preamble of the UDHR, meaning that human dignity is a matter of being rather than having, and hence implying that it cannot be taken away. Thus, as argued by United States Supreme Court Justice William Brennan, 'even the vilest criminal remains a human being possessed of common human dignity'.[14] Yet, although inalienable, human dignity can be violated, by the individual himself – the drunkard, for example – as well as by others. In the vilest criminal's case, both occur at the same time; a rapist, for instance, violates the dignity of both his victim and himself.

In their recent decision in *Brown* v. *Plata*,[15] the United States Supreme Court cited *Atkins* v. *Virginia*,[16] which had stated that 'the Eighth Amendment should be interpreted in light of the evolving standards of decency that mark the progress of a maturing society' and that '[t]he basic concept underlying the Eighth Amendment is nothing less than the dignity of man'. It confirmed that statement, ruling that 'the law and the Constitution demand [that] . . . [p]risoners retain the essence of human dignity inherent in all persons. Respect for that dignity animates the Eighth Amendment prohibition against cruel and unusual punishment'. Evidently, in American jurisprudence too, principles may exert a decisive influence on legal interpretation.

In fact, the discourse of human dignity and human rights long predates the UDHR of 1948, as well as the famous eighteenth-century documents such as the French Declaration of the Rights of Man, and is much broader in its application than mere legal protection of interests. It is a discourse of incredible moral and political force. Nevertheless, while protection of the inherent dignity and worth of the human being is indeed crucial to the whole human rights venture, the implied public-political challenges involve more than just equal and inalienable rights on the

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not to engage in aggressive behaviour – endangering peace and stability – as the human rights instruments were adopted immediately after World War II.

13 Compare M. DE BLOIS, 'Self-Determination or Human Dignity: The Core Principle of Human Rights', in A. Hendriks & J. Smith (eds), *To Baehr in Our Minds: Essays on Human Rights from the Heart of the Netherlands*, Netherlands Institute of Human Rights, Utrecht 1998.

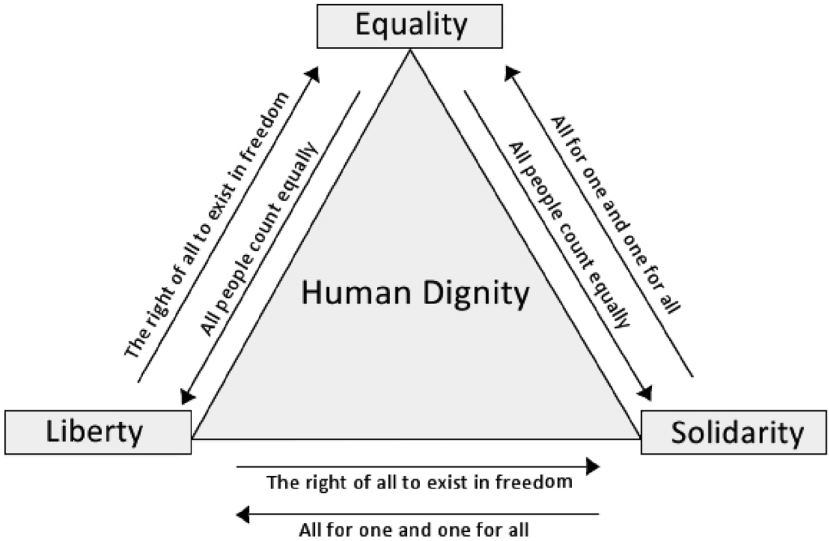
14 Quoted in S.J WERMIEL, 'Law and Human Dignity: The Judicial Soul of Justice Brennan', 7(1).*William & Mary Bill of Rights Journal* 1998, p. 232.

15 *Brown* v. *Plata* [2011] *United States Supreme Court*, 09 U.S. 1233.

16 *Atkins* v. *Virginia* [2002] *United States*, 536 U.S. 304.

basis of good government and the rule of law. Hence, this article looks at human dignity from an innovative and integrated perspective.

Human dignity then is to be seen as not so much an element of human rights but its core. This may be represented by a triangle, manifesting human dignity as the core value sustaining human rights, to which the three basic principles of Article 1 UDHR relate: liberty, equality, and solidarity (brotherhood):[17]




Firstly then, human dignity qualifies the three major human rights principles – liberty, equality, and solidarity – with the adjective *all*. Secondly, it connects these principles behind distinct human rights. Hence, it would be a mistake to see one specific right – freedom of expression, for example, as formulated in Article 19 of the UDHR – as linked to just one principle, such as liberty in this case. Equality requires in this respect that the environment in which press freedom is being exercised should be conducive to free speech for everyone, while solidarity means that such freedom is not absolute in the sense of a right disconnected from the community in which it is being enjoyed. Human dignity, in any case, is the core value to which the exercise of any human right must be tested. As Dworkin puts it: 'We must therefore insist that [people] . . . have a right to be treated as a human being whose dignity fundamentally matters'.[18] In judicial decision-making, this fundamental 'right' tends to manifest itself through general principles and open

17 From B. DE GAAY FORTMAN, *Political Economy of Human Rights: Rights, Realities and Realization*, Routledge, London/New York 2011, p. 8.

18 DWORKIN, 2011, *supra* n. 7, p. 335.

notions connected to the need for rooting legitimacy in shared convictions of a moral-political character.[19]

## 4. Human Rights in Private Law

Notably, private law is full of general notions meant to transcend pure legality in order to secure legitimacy in judicial decision-making: *bona fides*, *contra bonos mores*, undue influence, unjust enrichment, due care, and so forth. Hence, fundamental principles relating to universal human dignity fall within an already established normative setting. As Sieburgh puts it:

> Private law must contribute to the protection of human rights and human dignity. In contract law and pre-contractual relations, for instance, the rules on non-discrimination serve this purpose. The rules on non-contractual liability for damage also have a function of protecting human rights.[20]

Notable in respect of contract law are the general Principles of European Contract Law (PECL) 1999. While these are usually typified as non-binding instruments, or 'soft law', it is generally acknowledged that they are now, together with the Unidroit Principles of International Contracts (UPICC) 2004, an important part of a new *lex mercatoria*: 'Both UPICC and PECL have exercised considerable influence on recent national codes and statutes'.[21] Markedly, Article 15:101 PECL provides that 'a contract is of no effect to the extent that it is contrary to principles recognized as fundamental in the laws of the Member States of the European Union'. Lando has argued in this regard that a new Global Commercial Code should enforce 'such principles and other fundamental principles of law found across the world, such as those provided in the UN Treaties on Human Rights', submitting that 'the Code should lay down that a contract is of no effect to the extent that it is contrary to such principles as are recognized as fundamental in the World Community'.[22]

The major issue in respect of private law is the applicability of human rights as fundamental principles in the private legal sphere. In a recent doctoral thesis, Ferreira[23] argues:

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19 For a comparative analysis of judicial law development inspired by interpretation of human dignity as an overriding principle of law, see DE GAAY FORTMAN, 2011, *supra* n. 17, pp. 70 *et seq*.

20 C. SIEBURGH, paper at symposium, p. 17.

21 O. LANDO, 'A Vision of a Future World Contract Law: Impact of European and Unidroit Contract Principles', 37(2).*UCC L.J. (Uniform Commercial Code Law Journal)* Fall 2004, p. 3.

22 *Supra* 34.

23 N. FERREIRA, *Fundamental Rights and Private Law in Europe: The Case of Tort Law and Children*, Routledge, London/New York 2011.

> The link between private law and fundamental rights is undeniable: on the one hand, the fundamental rights discourse influences the shaping of private law, and on the other hand, private law itself also contributes to the way fundamental rights, and constitutional texts in general, are construed.[24] Furthermore, private law 'reflects a balancing of conflicting values' and determines 'the extent to which a person is entitled to realise his human rights without his actions violating the human rights of another'.[25] Moreover, it has been clearly acknowledged that private law institutions aim at protecting the position of individuals in society, the development of their personality, as well as their right to substantive equality and a free and dignifying life.[26] . . . The question to be answered is whether and how private parties may be bound by fundamental rights to which other private parties are entitled, and this takes different names within different legal systems: 'third-party effect', 'Drittwirkung', 'external effect', etc.

Another term often used in this respect is 'horizontal applicability'. However, the legal texts referred to in that connection tend to be insufficiently clear to speak of just *application* of positive law. Thus, Dworkin, justifiably, argues:[27]

> The preamble to the Universal Declaration begins with a reference to the 'inherent dignity . . . of all members of the human family', and many of the rights it specifies seem simply to restate that perfectly abstract idea. Even the relatively concrete provisions – about education, work, and equal pay, for instance – require interpretation aimed at limiting their scope before they become applicable in practice. We should understand these provisions and comparable provisions in other treaties and documents not as attempts to define human rights in any detail but rather as directions pointing to sensitive areas in which a nation's practices might well reveal the unacceptable attitude that violates the basic human right. They invite interpretive questions.

Notably for Ferreira too, fundamental rights also serve as guiding principles:[28]

> In sum, fundamental rights are no longer thought of as mere limits to public powers in protection of individual interests, but also as positive guiding

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24 With reference to S. PATTI,'La cultura del diritto civile e la Costituzione', 17(1–2).*Rivista critica del diritto privato* 1999, pp. 191–201.

25 With reference to A. BARAK,'Constitutional Human Rights and Private Law', in D. Friedmann & D. Barak-Erez (eds), *Human Rights in Private Law*, Hart Publishing, Oxford/Portland, OR 2001, pp. 13–42.

26 With reference to F. LUCARELLI, *Diritti civili e istituti privatistici*, CEDAM, Padova 1983, p. 34.

27 DWORKIN, 2011, *supra* n. 7, pp. 337–338.

28 FERREIRA, 2011, *supra* n. 23.

> principles to the action of the state. Simultaneously, fundamental rights contribute deeply and widely to the lines of the infra-constitutional legal order, since the state has to ensure respect for fundamental rights both by public and private entities. The exact nature and scope of the role of fundamental rights in private relationships is, thus, an object of continuous evolution and arguments.

Methodologically, this view on human rights as guiding principles in legal interpretation is substantiated through an 'an indirect horizontal effect theory':[29]

> According to the indirect horizontal effect theory, fundamental rights can act as objective principles which influence the interpretation of private law. This influence can take place either through the interpretation of private law norms in the light of fundamental rights, or through open or general clauses, that is, open-textured norms in need of judicial interpretation, such as good faith, good morals, reasonableness or public policy.

In practice then, there is no substantial difference between Dworkin's 'interpretivism' and indirect *Drittwirking*. Nevertheless, quite apart from such questions of juridical methodology, Ferreira's study manifests 'a passionate defence of the fundamental rights discourse in private law, placed in a context of legal pluralism, legal diversity, and policy orientation of law', as his supervisor has put it, arguing that the 'application of fundamental rights in private law should be welcomed and even maximised, because it leads in practice, in all legal systems, to a better and more effective consideration and balancing of all parties' interests at stake'.[30]

Cases illustrating this *desideratum* tend to concern not just contract law but tortious liability too, in Ferreira's case tortious liability of children. As a tort is customarily defined as a (civil) *wrong*, its susceptibility to general principles relating to universal human dignity is not surprising. Remarkable, though not surprising in view of their legal status as 'children', is that Ferreira analyses the application of such fundamental principles to not only the tort victims but also the tortfeasors.

Other areas contested in this connection include psychiatric injury (particularly in light of parental immunity),[31] non-discrimination,[32] and logistic

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29 BARAK,2001, *supra* n. 25, pp. 13–42.

30 A. COLOMBI CIACCHI, in Ferreira, *supra*, xliv.

31 Compare S. KERSHNER, 'Children v Parents: A New Tort Duty-Situation for Psychiatric Injury?', 35.*Isr L Rev (Israeli Law Review)* 2001, p. 79.

32 A recent case in the UK concerns a lesbian couple bringing proceedings against the Brunswick Square Hotel in Brighton on the grounds that they were discriminated against contrary to the Equality Act 2010. The Act forbids discrimination because of sexual orientation in the provision of

complicity to forced disappearances and arbitrary detention. In the latter type of cases, the US Alien Tort Claims Act, also known as the Alien Tort Statute, tends to be invoked in order to confront United States Courts with human rights norms and principles. Yet, restrictive interpretation by the Supreme Court in connection with state security greatly limits its application to private claims for compensation. In the case of *Binyam Hohamed et al.* v. *Jeppesen Dataplan, Inc*, for example, in which the private company had 'not only provided crucial flight planning and logistical support services to the aircraft and crew . . . but was also using its legitimacy as a well-known aviation services company to enable the CIA to disguise the true nature of these flights', the Court held that dismissal of the plaintiffs' complaint seeking compensation for Jeppesen's complicity in their unlawful abduction, arbitrary detention, and torture, alleging violations of the Alien Tort Statute, 28 U.S.C. section 1350, was 'nonetheless required . . . because there [was] no feasible way to litigate Jeppesen's alleged liability without creating an unjustified risk of divulging state secrets'.[33]

In respect of privacy protection, *tort privacy* tends to be seen as a rather limited remedy.[34] Hence, there is a search for principles derived from fundamental human dignity. In the English common law context, certain signs have been perceived that the law might be moving towards *de facto* recognition of a right to privacy 'through the incremental development of the action for breach of confidence'.[35] The decision of the Court of Appeal in *Douglas* v. *Hello Ltd*[36] is seen as confirmation in this respect 'that, as a result of the Human Rights Act, there is now an obligation on English courts to protect the right to privacy in English law'.[37]

Since in a civil law context there is no requirement to define each specific category of tort, infringement of another person's privacy may just fall under the broad norm of 'general standards of due care'.[38] Thus, a decision by the Dutch

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services, which includes hotel accommodation. See <www.liberty-human-rights.org.uk/media/press/2011/liberty-supports-lesbian-couple-in-brighton-hotel-discri.php>, accessed on 18 Jan. 2012.

33 *Binyam Hohamed et al.* v. *Jeppesen Dataplan, Inc*, United States Supreme Court [2011] 10–778 (denial of certiorari).

34 Compare N. RICHARDS, 'The Limits of Tort Privacy', 9. *Journal of Telecommunications and High Technology Law* 2011; Washington University in St. Louis Legal Studies Research Paper No. 11-06-06: 374.

35 Compare J. WRIGHT, *Tort Law and Human Rights: The Impact of the ECHR on English Law*, Hart Publishing, Oxford 2001, p. 166.

36 *Douglas and Another and Others* v. *Hello! Limited and Others* [2007] UKHL 21.

37 WRIGHT, 2001, *supra* n. 35.

38 In *Lindebaum* v. *Cohen* (HR, 31 Jan. 1919, NJ 1919/161, W. 10365), the Dutch Supreme Court extended its interpretation of a civil wrong (*iniuria*) as a basis for extra-contractual damage compensation beyond what had already been legally defined as unlawful conduct to 'general standards of due care'. Thus, the law of 'torts', within which each distinct tort had been legally defined, became a law of tort that could in principle be invoked by anyone affected by unfairly inflicted damage: a standard case of judge-created law.

Supreme Court to accept a claim by a child born in a Roman-Catholic institution for unmarried mothers against the institution for its refusal to disclose her father's identity (*Valkenbosch*: HR 15 April 1994, NJ 1994/608) derived from 'a general right to personality', a right that, in turn, 'lies at the roots of such human rights as the right to respect for someone's private life, the right of freedom of thought, conscience and religion and the right of freedom of expression'.[39] Nieuwenhuis has rightly argued in this respect that 'as there is a general principle of law, such as a general right to personality, which is common to both constitutional and private law, the whole argument about the direct and indirect effect of constitutional rights in private law is pointless'.[40]

A noteworthy new area of human rights application to private law is *development*,[41] currently predominantly interpreted as *human development*, as tuned towards each and everyone's 'freedom from want'. Human development means that life becomes more than a mere struggle to sustain daily livelihoods; it implies, in other words, that people acquire certain options in their lives: a socio-economic perspective. In the United Nations General Assembly Declaration on the Right to Development (1986), this has been elaborated in a text that – although commonly seen as 'soft law' – yet contains certain general principles, which may well play a decisive part in concrete cases of damages to private parties. Thus, Article 2(3) asserts:

> States have the right and the duty to formulate appropriate national development policies that aim at the constant improvement of the well-being of the entire population and of all individuals, on the basis of their active, free and meaningful participation in development and in the fair distribution of the benefits resulting therefrom.

Two fundamental principles are embodied in this text: participation[42] and equity. To illustrate the significance of these general principles in judicial interpretation, let

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39 O. CHEREDNYCHENKO, book review of *Human Rights in Private Law*, Hart Publishing, Oxford 2001, edited by D. Friedman & D. Barak - Erez, *Maastricht Journal of European and Comparative Law*, 10(3). December 2003, p. 313.

40 Quoted by CHEREDNYCHENKO, *ibid*.

41 L. MARTINS ZANITELLI, *Achieving Development and Human Rights Protection through Tort Law Suits: Pain-and-Suffering Damages in Brazil*, paper published by Centro Universitário Ritter dos Reis – UniRitter Mestrado em Direito, Porto Alegre, s.a.

42 *Vide* the old regula iuris *Quod omnes tanget, debet ab omnibus approbari* (What touches all has to be approved by all), as formulated in the *Corpus Iuris Canonicis* (SEXTI DECRETAL., LIB. V, TIT.XII., DE REGULIS IURIS, Bonifacius VII, Regula XXIX). On the background to this rule, see B. DE GAAY FORTMAN,'Quod Omnes Tangit', Inaugural Address on Accepting the Msgr Willy Onclin Chair 2003/2004 at the Catholic University of Louvain, in R. TORFS (ed.), *Canonical Testament*, Peeters, Louvain 2004, pp. 31–34.

us take, for example, the damages suffered by small fishermen when, in the name of development, big trawlers are introduced that go into the shallow waters, destroying the breeding grounds for the fish that form the basis of their livelihoods. Although in contentious action these people may fail to get recognition of claims based on a subjective 'right to development' as declared in the UN General Assembly resolution, the internationally acknowledged principles reflected in that text may well be invoked in order to determine responsibility for a tort. Tort law, Zanitelli argues, may indeed serve as an instrument to enforce human rights as it prevents the occurrence of harm and provides compensation to victims of devastating losses:

> Once human rights are deemed constitutive of – rather than merely instrumental and potentially conflicting with development – compensation and harm avoidance achieved through tort rules are also thinkable as ways to promote development. Moreover, by acknowledging the essential importance of human rights to development, normative analysis of tort liability tends to shift its emphasis from cost minimization to the enhancement of human freedom by means of compensation and harm prevention.[43]

A tort, to repeat, is a wrong, and 'by labelling a certain conduct as wrong, law would help people to perceive the decision about performing that conduct as an ethical decision. In so doing, the legal system could activate an internalized norm of right behaviour, thus leading individuals to perceive the situation of choice as one to which such norm is fitted'.[44] Thus, norm activation by definite abuse of power through a tort rule might be an effective way of preventing unwanted damages. Zanitelli mentions three crucial factors in this respect:

> First, reframing is to be expected only to the extent that tort rules and, particularly, courts decisions concerning the application of those rules are known by the public. Second, a cognitive impact as the one predicted by the norm activation hypothesis seems more likely when the sanctioned behavior is not yet a reason for social blame and the tort system then can contribute, in the long-run, to the development of a social norm having precisely that consequence . . . Third, it is plausible that, for norm activation to occur, it is indispensable that law in general, and tort law in particular, be seen as a legitimate behavioral guide.[45]

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43 *Supra*, p. 2.
44 *Ibid.*, p. 37
45 *Ibid.*, pp. 38–39.

A comparative analysis of judicial decision-making in disputes concerning development does indeed disclose a growing impact of human dignity as a paramount paradigm.[46]

## 5. Conclusion

Human rights then must be seen as not merely subjective rights – to be enforced through claims based on concrete freedoms and entitlements derived from them – but as general principles of justice too. In the latter meaning, they may also play their part in adjudication, not as a direct basis for the acceptance of certain claims but by throwing an often decisive light upon a concrete case. In judicial decision-making, it is particularly the need for legitimacy that drives the search for any argument that could sustain what is to be seen as *right*.[47]

Legal globalization has altered interpretations of legitimacy. Indeed, principles in regard to the use of power become more and more general in the sense of being shared in the whole *ius gentium*. In regard to human rights, this opens the way to more *inductive* approaches. To clarify: a deductive approach derives concrete rights from international treaties and other formal sources; an inductive approach starts from what people themselves recognize as the fundamental freedoms and entitlements that everyone should enjoy.

In such a setting, decisions affecting the lives of people are more and more confronted with universal standards of legitimacy, including the old *regulae iuris* and modern principles as embodied in human rights. While the international venture for the realization of human rights has been set up with particular emphasis on the role of the state, today there is evidence of a growing attention to human rights observance by non-state actors (*Drittwirkung*).[3] Since historically the

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46 Compare DE GAAY FORTMAN,*supra*, pp. 70 *et seq*.

47 The *Fairchild* case in the *United Kingdom* (*Fairchild* v. *Glenhaven Funeral Services Ltd and Others* [2002] UKHL22; [2003] 1 AC 32) is particularly remarkable as regards the ways and means in which the Law Lords struggled to find equity in a situation in which positive law impeded a remedy that would compensate victims of wrongful conduct. This was due to the established criterion of causation. The injustice that they wished to avoid had to do with workers who had contracted mesothelioma after being wrongfully exposed to significant quantities of asbestos dust at different times by more than one employer or occupier of premises. Consequently, the claimant of damage compensation for a worker who had contracted the disease could not establish 'on the balance of probabilities when it was he inhaled the asbestos fibre, or fibres, which caused a mesothelial cell in his pleura to become malignant', as the Court of Appeal had noted. The House of Lords overturned that decision, ruling that the worker or his relatives could sue any of those whose duty it had been to protect him notwithstanding that he could not prove which exposure had caused the disease. Considerations on the part of the Law Lords included terms such as 'recognising and righting wrongful conduct' and 'a broader view of causation'. 'Any other outcome', Lord Nicholls observed, 'would be deeply offensive to instinctive notions of what justice requires and fairness demands'. Yet, the right outcome had to be argued in terms of established rules, principles, and procedures.

applicability of rules of justice has never been confined to the state, such a development should not surprise. Moreover, in facing the major challenge of bridging the gap between functional legal systems and lifeworld morality, states and non-state actors need each other.

In concluding this review of human rights in struggles for protection of human dignity against abuse of power, it must be emphasized once more that human rights were conceptualized as not just subjective rights in the conventional sense but as general principles of justice that may play their part in adjudication in a way similar to that of the old *regulae iuris*. It is not only with regard to judicial decision-making but in respect of collective action for socio-political transformation too that this way of conceptualizing human rights may well open up new possibilities.

# EUROPEAN REVIEW OF PRIVATE LAW
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