

HUMAN RIGHTS AND PRIVATE CORPORATIONS A DUTCH LEGAL PERSPECTIVE

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1 Introduction

The applicability of human rights to private parties, including private corporations, is a theme of doctrinal constitutional interest. The basic question is whether standards which are meant to function in the relationship between the private individual and the state, and which guarantee the private individual rights vis-à-vis the state are also applicable in relationships between private individuals, and, if so, which legal techniques can be used to construe such an application. Of particular interests is how courts, confronted with these questions, contribute to the development of the law in this field. In the Netherlands, the doctrinal debate on these issues reached its height in the 1970s and 1980s. It coincided with the adoption of a new Constitution in 1983. This Constitution came into force after a process of general revision, the first proposals of which were introduced in Parliament in the second half of the 1970s. The revision was of particular importance in the field of human rights.

While these questions remain relevant, the social and legal contexts in which these questions appear have undergone a significant change in recent decades. One factor of importance is the changing role of the state in the development of law. Traditionally, in the Netherlands, the Legislature is the preeminent lawmaker. Not surprisingly, the Constitution of 1983 likewise attributes a strong role to the national (parliamentary) Legislature. Awareness of the limitations of the regulatory power of the state has, however, manifested itself and opened the door to alternative approaches. This also influences the debate on human rights and private corporations.

Another important factor is the increased role of international law within the national legal order. In terms of this study, it is of interest that in the formulation of international human rights standards, the relevance of private parties, notably corporate entities, is more evident than in national human rights guarantees. It is further reflected in the responsibility of the national state under international law to ensure human rights in private (corporate) contexts.

Third, the human rights discussion itself has progressed. This is particularly apparent in the manner in which the various actors, whether private groups or persons or public bodies, are involved in the human rights debate and the role they are perceived to play by others.

Fourth, not only has there been a natural shift in the interest in particular human rights in private corporations, the discussion is currently framed in a much broader context of that of corporate social responsibility and ethical entrepreneurship.

This essay analyses and discusses the developments in the legal debate on the applicability of human rights standards to private corporations in the Netherlands. Although the focus is on the Netherlands, it is not easy to isolate the topic from the broader discussion of human rights and multinational enterprises. General features

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of the latter discussion will, therefore, resonate throughout this essay as well.

2 Human Rights and Private Entities □ The Emergence of the Theme

The general revision of the Constitution in 1983 provided an important impetus for the debate on human rights and their application to private parties.¹ The revision, the run-up to which started in the 1950s with the establishment of an advisory committee in this field, was actually set in motion in the mid-1970s.

As became clear in an early stage, the Constitution would be of special importance for the protection of fundamental rights.² The changes introduced to the Constitution consisted of an update and reformulation of fundamental rights to meet modern demands, the introduction of new rights, and the systematic incorporation of social rights in the Constitution. Furthermore, the fundamental rights were regrouped and combined in one chapter, the first chapter of the Constitution.

Of paramount importance was also the elaboration of the theory and principles of the protection of constitutionally guaranteed fundamental rights. These principles and theories were agreed upon in the process of adoption between Parliament and government and were implicitly incorporated in the text. They were not actually explicated in the Constitution itself.

For the present purpose of identifying the significance of the Constitution for the applicability of fundamental rights standards to private entities, two specific dimensions of this doctrinal discussion are important.

First, the Constitution introduced a strict system for restricting fundamental rights, by specifying the competent body for the restriction of fundamental rights, by defining purposes to be met by the restriction and/or the introduction of specific procedures to be followed.³ The Legislature plays a crucial role in this respect. In some instances, the Constitution actually assigns the Legislature the task of regulation. Article 10, for instance, states:

□1. Everyone shall have the right to respect for his privacy, without prejudice to restrictions laid down by or pursuant to Act of Parliament.

2. Rules to protect privacy shall be laid down by Act of Parliament in connection with the recording and dissemination of personal data.

¹ More in general on the Dutch Constitution, see Sophie C. van Bijsterveld, □The Constitution in the Legal Order of the Netherlands□, in E.H. Hondius (Ed.), *Netherlands Report to the Fifteenth International Congress of Comparative Law, Bristol 1998*, Antwerpen: Intersentia Rechtswetenschappen 1998, p. 347□364.

² In this essay, the words □human rights□ and □fundamental rights□ are interchangeable. In line with (Dutch) usage, human rights will be used to refer to the international context. Fundamental rights will be used to refer to the rights guaranteed by the (Dutch) Constitution.

³ Generally speaking, the Legislature is the competent body for restricting fundamental rights. □Law□ refers to an Act of Parliament; the phrase □by or pursuant to law□, the verb □regulate□ the noun □rules□ refers to the competence of the Legislature to delegate its power to make restrictions to fundamental rights.

3. Rules concerning the rights of persons to be informed of data recorded concerning them and of the use that is made thereof, and to have such data corrected shall be laid down by Act of Parliament.□

The Act of Parliament implementing this provision, the Data Protection Act, applies to public authorities and private parties alike.⁴

Even if the Constitution does not contain an actual assignment to the Legislature, many areas of fundamental rights protection are inconceivable without the stabilising hand of the Legislature. The right to association, for instance, is not feasible without legislation on legal entities. Thus, the role of the Legislature is twofold: to set out and shape the fundamental rights concerned and to restrict them, in creating a legal structure and defining rights and duties for the constituting parties. In doing so, the third-party application comes to the fore. Moreover, even if the Constitution does not necessarily imply further regulation, the Legislature has turned to implementing the Constitution. Thus, as a sequel to Article 1 of the Constitution, which guarantees equal treatment and non-discrimination, a General Equal Treatment Act has been established.⁵ This Act is applicable to public and private parties as well, in particular corporate entities.

The role of the Legislature in this field is accentuated through such mechanisms as the ban on judicial review of parliamentary legislation on its constitutionality (Article 120 Const.). This means that the Legislature is the first and foremost authority with respect to the interpretation of constitutionally guaranteed fundamental rights. The stress on the Legislature as the competent authority has led to a flow of new and revised legislation. It must be said that increasingly these areas are gaining a European dimension as well in that, in whole or in part, these laws are also meant to implement European Directives.⁶

So far, we have mentioned only classic fundamental rights. Obviously, social

⁴. This was formerly the *Wet persoonsregistraties*; currently, the *Wet bescherming persoonsgegevens*. This topic has a European dimension as well in that the current Act also implements the European Data Protection Directive, a Directive that is aimed at setting privacy standards to public and private bodies as well.

⁵. Article 1 Constitution: □All persons in the Netherlands shall be treated equally in equal circumstances. Discrimination on the grounds of religion, belief, political opinion, race, or sex or on any other grounds whatsoever shall not be permitted.□

For the English text of the General Equal Treatment Act [*Algemene wet gelijke behandeling*], see the Website of the Equal Treatment Commission, an independent complaints body, set up under the Act, www.cgb.nl. Mention must be made of Article 13 EC, which contains an equal treatment provision, and has served as the legal basis for two Council Directives, to be implemented by the Member States.

⁶. Apart from the examples we have already mentioned, the EC is involved in the creation of a legal framework for the establishment of European legal entities. A European works councils Directive is established. A Directive concerning the information and consultation of workers is in the process of establishment. Furthermore, the EC is strongly involved in the field of social law and environmental law (see further below).

rights are of importance as well. Thus, Article 19(1) of the Constitution makes the promotion of sufficient employment a concern of the authorities. The second section states that "rules concerning the legal status and protection of working persons and concerning co-determination shall be laid down by Act of Parliament." The third section continues with the recognition of the right of every Dutch national to a free choice of work "without prejudice to the restrictions laid down by or pursuant to Act of Parliament." The Constitution makes it the "concern of the authorities to keep the country habitable and to protect and improve the environment" (Article 21) and requires the authorities to take steps "to promote the health of the population" (Article 22). These provisions clearly imply public authority activity also with respect to private corporations.

Second, the doctrinal debate on fundamental rights in the context of the revision of the Constitution also more directly concerned "Drittwirkung", the private-party application of fundamental rights. In short, private-party application was accepted and, in singling out how such an application could be legally construed, five options were distinguished. These ranged from the explication of rights and duties in a private (corporate) context through the explicit interference of the Legislature to application by the courts. This judicial application was seen to take place through the interpretation of general and vague concepts (for instance, that of a "good employer"). The courts could also conclude that the recognition that a fundamental right constituted an "independent legal interest" that needs to be taken into account in balancing private parties' interests. Such a right could also present itself as an interest that can only be departed from on the grounds of other weighty circumstances. Finally, a fundamental right could be perceived as a right that should directly be applied and for which the grounds for constitutional restriction need to be observed.⁷

Of course, this enumeration and the varying degrees of private-party application are rather theoretical. Nevertheless, it does give an idea of how the courts can, and, actually do, take into account fundamental rights in private-party relationships. Attention was also paid to the reasons underlying the desirability of private-party application of fundamental rights. Thus, we can mention social-economic developments in general, the emergence of powerful private conglomerates, technical developments, the fading of borders between classic legal spheres, and the general increase in attention to human rights after the Second World War.⁸

Long before the debate on third-party application of fundamental rights came to the fore, this application was a reality *avant-la-lettre* and by and large took place along the line of the five degrees mentioned above. In many fields of law, such as social law, especially working hours law and law on working conditions, concerns that we would now label "fundamental rights" were given legal recognition by the Legislature. Open notions in civil law such as "good employer" played a role. Thus,

⁷. *Naar een nieuwe Grondwet?* (Documentatiereeks, 's-Gravenhage 1968 ff.), Ia, p. 16.

⁸. See S.C. van Bijsterveld, "Inleiding Hoofdstuk 1", in A.K. Koekkoek (red.), *De Grondwet. Een systematisch en artikelsgewijs commentaar*, 3de druk, Deventer: W.E.J. Tjeenk Willink 2000, p. 60-61 (p. 45-62).

religious practices of employers, for instance, with respect to the observance of holy days are and were taken into account.

To illustrate this, the Supreme Court concluded in a 1984-ruling that the absence of a worker who was denied a day off to celebrate an Islamic holiday, although she had asked for this well in advance, did not constitute an "urgent reason" for dismissal on the spot.⁹ In reaching this conclusion, the court entered into a careful balancing of interests of both the worker and the employer. In so far as they are not regulated by law directly, these and other human rights related interests also find expression in collective labour agreements. Privacy concerns, concerns of conscientious objection, and freedom of opinion likewise feature in law. In part, they will be regulated, in other cases courts will step in.¹⁰ Thus, a company who had a television circuit installed to monitor the workplace was ordered by the court to remove this. The court, concluded that the employer did not act as a "good employer" by using the television-circuit for reasons that were not "more important" than those which he had brought forth.¹¹

The fact that corporations cannot act at will is also made clear in the General Equal Treatment Act. The Act prohibits direct and indirect discrimination "between persons on the grounds of religion, belief, political opinion, race, sex, heterosexual or homosexual orientation or civil status" in a wide field of societal relevant activities. It allows for making distinctions by way of exception (for instance, if an indirect discrimination is objectively justifiable, or if the corporation concerned is itself based on a religion or belief). If it is likely that indeed such a distinction has been made, the corporation must succeed in making plausible that the discrimination is objectively justifiable or that the exception is indeed applicable. Thus, allocating the burden of proof plays a role as well. This approach is also in line with that of the Court of Justice of the EC in these matters.

3 Centrifugal Forces: The Changing role of the State

The time in which the run-up to the revision of the Constitution took place was one of predominant belief in the steering capacity of the state and in the idea that society could be shaped through law. This found expression in the strong role for the Legislature in the Constitution, both with respect to shaping fundamental rights law and restricting fundamental rights. In so far as the "law" referred to in the Constitution was parliamentary law, the Constitution had a strong centralising effect as well.

As early as the 1980s, a widespread awareness had taken hold that classic regulation was not likely to change society. As a steering mechanism, legislation had only little

⁹. HR 30 maart 1984, AB 1984, 366.

¹⁰. For the role of the courts, see Fried van Hoof, "International Human Rights Obligations for Companies and Domestic Courts; an Unlikely Combination?", in Monique Castermans-Holleman, Fried van Hoof, Jacqueline Smith (ed.), *The Role of the Nation-State in the 21st century: Human Rights, International Organisations and Foreign Policy; Essays in Honour of Peter Baehr*, Kluwer Law International, Den Haag/Boston/London 1998, p. 47-59.

¹¹. Pr. Rb. Roermond, 12 September 1985, KG 1985, 299.

relevance. The complexity of society and the dynamics of social processes simply asked for other mechanisms of intervention. Deregulation became a focal point of attention. The limits of state intervention had been reached.

Budget cuts, less steering ambition, and the realisation that society could not be shaped by law caused the state to 'withdraw' from many policy fields, leaving more room for so-called self-regulation. At a cultural and philosophical level, attention was asked for the freedom of intermediary organisations in society to be able to operate according to their own parameters instead of detailed bureaucratic regulation by the state. These developments also left their mark in the field of fundamental rights law and third-party application of fundamental rights.¹²

These combined developments stimulated the search for steering mechanisms other than traditional command-and-control legislation. Legislation was no longer seen as the most obvious tool for bringing about change. Economic stimuli, covenants, and many other options were considered to be at least as good. Furthermore, if regulation was contemplated, it should be clear and focus on headlines. More room should be left to the 'self-regulatory' powers of society.

Self-regulation became a topic of interest. Such self-regulation could be completely voluntary. It could also be welcomed and stimulated by the state. Or it could be obligatory, conditioned. This also left its mark in the field of third-party application of human rights. Some of the great regulatory projects to implement the constitutionally guaranteed fundamental rights took to self-regulatory tools. The Data Protection Act was a first and foremost example of this. This Act introduced self-regulatory mechanisms at various levels. First, it required corporations falling into the category designated by law to establish a privacy regulation under the Act. Second, it referred to voluntary codes of conduct. Third, in establishing rights and duties, company policies, in the general sense of the word, are implicitly required as a justification of concrete actions. These can play a role in concrete cases in motivating one's actions, in a way analogous to what we have seen with regard to equal treatment law. In many other fields, self-regulatory mechanisms were introduced, often combined with low-threshold complaints mechanisms. This was the case, for instance, in the field of commercial advertising as well.

One step further was the liberalisation of policy areas. Thus, the field of social law, traditionally heavily and densely regulated, was liberalised. Working hours legislation was made more flexible. More generally, labour law was eased, enabling private corporations to conduct a more flexible human resource policy. Health and safety at work have remained important issues for public policy and regulation. The way, however, these concerns found legal expression changed as well. Instead of detailed regulation by the state, systems of certification were introduced in which other bodies than the state are involved in actual standard-setting and ensuring compliance and enforcement. In the field of social security law, the state withdrew. Partly for financial reasons (an overburdened system), partly for reasons of

¹². See for a discussion of the consequences and significance of 'self-regulation' for fundamental rights protection, H.R.B.M. Kummeling, S.C. van Bijsterveld (ed.), *Grondrechten en zelfregulering*, Deventer: W.E.J. Tjeenk Willink 1997.

promoting international competitiveness and allowing for dynamics and innovation, these and other regulatory changes were carried through. The limit of the state's regulatory and steering capacity in the classic sense manifested itself even stronger.

Environmental law, too, is relevant for our purpose. A fairly new policy field, it has undergone similar influences as the policy fields mentioned above. In the development of law, a debate has arisen about the role the state should have in standard-setting and ensuring compliance and enforcement. The question has also arisen in what way the state should retain responsibility.

The role of the EC in this respect is also important, as is the pursuit of greater flexibility to enhance competitiveness.

The second dimension of the centrifugal forces to which the national state was subject concerns the increased focus on international human rights and the increased relevance of international human rights in the domestic legal order.¹³ This is of special importance to the Dutch situation in view of the ban on judicial review of parliamentary legislation on its conformity with the Constitution.

Especially because of the constitutional ban on review, international fundamental rights, notably the European Convention on Human Rights, occupy an important position; some results have been produced in this area. Techniques of review at the European level thus find their way into Dutch rulings and probably also influence the way in which the courts on fundamental rights in general function.

From the Dutch point of view, there are a few ways in which internationally guaranteed human rights focus more on the role of corporations than does national law. First, the formulation of internationally guaranteed human rights is at first sight already clear in their relevance to enterprises. For instance, rights to strike, rights to establish trade unions, and social rights as guaranteed in the IVESC and ESC make clear that these find their elaboration in corporate contexts and contexts of employer-employee relationships. Also more modern developments, such as the collective complaints procedure of the ESC, in which NGOs and organisations of employers and employees have a right to initiate proceedings, immediately focus our attention on corporate contexts. The role of the ILO in the ESC and obligatory consultative procedures involving employers and employees in the regular reporting mechanisms make this all the more clear.

Second, also other provisions make clear that the rights have significance in horizontal relationships and that the State Parties have the duty to guarantee them. Article 1 of the ECHR is an example of this.

Third, case law of the ECHR has made clear in many instances that the state has a duty to see to it that fundamental rights standards are effectuated in third-party

¹³. Courts have the power to review legislation, including Acts of Parliament and even the Constitution, on its conformity with, *inter alia*, self-binding treaty provisions. Article 93 states: "Provisions of treaties and of resolutions by international institutions, which may be binding on all persons by virtue of their contents shall become binding after they have been published." Article 94 states: "Statutory regulations in force within the Kingdom shall not be applicable if such application is in conflict with provisions of treaties that are binding on all persons or of resolutions by international institutions."

relationships. Failure to do so may lead to the conclusion that the state has violated its obligations under the ECHR. The Lopez-Ostra-ruling of the ECHR provides a good example of this.¹⁴

In this case, a Spanish case, a neighbouring resident of a factory suffered from serious pollution. Public authorities had failed to take effective measures. The ECHR concluded that the right to privacy guaranteed by Article 8 ECHR had been violated.

Another interesting feature of the rulings of the ECHR must be mentioned in this respect. Many clauses allowing for the restriction of fundamental rights require, among other things, that the restriction is prescribed by "law". In its Barthold-ruling, the Court accepted that self-regulatory codes, such as that of the veterinary profession, could be qualified as such if they are recognisable and foreseeable.¹⁵

4 International developments at large

Until recently, national law and international law were separate fields of interest. This was true for the academic profession as well as legal practice. It was also noticeable in the field of human rights. Today, this has changed completely. International developments at large influence national legal systems, and such developments in a particular field of interest tend to be integrated in broader discussions and developments at the national level. This is also true for our area of interest, i.e., the application of fundamental rights standards to corporate entities.

From that point of view, the phenomenon of codes of conduct for multinational enterprises deserve our attention. The 1970s saw a burgeoning of such codes. In the context of the ILO, the ICC, and the OECD, such codes were established. Attempts to establish such codes in the UN-context were made but failed.

These codes of conduct were clearly focused on multinational enterprises, or transnational corporations. At least in the Netherlands, the movements leading to their adoption took place outside the focus of domestic human rights lawyers. At the particular time of their establishment, furthermore, the soft character of these codes, and their non-legally binding character did not stimulate an interest in these codes either.

The reason to establish these codes of conduct were not first and foremost to promote human rights. These codes were to a large extent established to facilitate economic activity. As multinational enterprises interested in foreign investments needed safeguards for security, stability, and financial reliability from host countries, guidelines were necessary to outline rights and obligations. The background of the codes of conduct agreed on within the OECD and debated upon within the UN are examples of this. Other codes, notably the ICC-code, was primarily a pre-emptive strike by enterprises, in view of a possible proposition of a labour-union-inspired code of conduct. Some codes never came into being (the UN-code and the UNCTAD-codes) as the ideological divide between countries and corporations

¹⁴. ECHR 9 December 1994, *JB* 1995, 67.

¹⁵. ECHR 25 March 1985, Series A, vol. 90.

(notably the divide between the Western world and decolonialised countries) hampered the process.

Nevertheless, the codes referred to are in many ways relevant to human rights. References to human rights are contained in preambles, and general references to the required respect of multinational enterprises for human rights are found in the articles themselves. Furthermore, even in the detailed prescriptions concerning fairly technical subjects, important human rights dimensions feature, with respect, for example, to ownership and management, to technology transfer, competition and trade practices. The codes also contain provisions pledging respect for national culture. The latter type of provisions, of course, maybe double-edged, as the cultures to be respected may themselves not be favourably disposed to human rights. Finally, the codes contain many provisions specifically dealing with human rights elements. This is especially true with respect to the ILO-code. The various codes have been updated and revised. This is particularly true with respect to the inclusion of environmental concerns, and the notion of "sustainable development". Very recently, new rounds of revisions have taken place.¹⁶

Although predominantly established outside the domestic limelight and often seen as primitive because of their non-binding force, their adoption cast a shadow ahead for the future. In the sphere of international law, the role and nature of law has always differed to some extent from national law. However, the popularity of codes of conduct and their place in law had not yet been discovered. In that, they were ahead of their time. They provided a mechanism for debate and discussion on the role of private corporations. They sometimes had soft-law complaints procedures (in case of the OECD Code of Conduct). In a way, they foreshadowed the non-confrontational approach.

These codes of conduct were also interesting because their content did not resemble international human rights treaties. The guarantees for human rights protection were much more embedded in a broader context of relationships between host countries and multinational enterprises.

In a very general way, the development of these codes of conduct is of interest to us for our present purpose. The codes stand on the edge of the use of techniques of soft regulation, which would shortly after also be used in national law. Furthermore, they are just prior to the time in which national and international developments would become much more connected.

Human rights incidents involving multinational enterprises caught international and national public attention. This increased the awareness of the role of private corporations with respect to human rights. Furthermore, the multinational enterprises involved were often household names, had branches in our own country, and often

¹⁶. See on the OECD code, S.C. van Eyk, *The OECD Declaration and Decisions concerning Multinational Enterprises. An attempt to Tame the Shrew*, Nijmegen 1995. See also Sophie van Bijsterveld, Willem van Genugten, "Gedragscodes voor het internationale bedrijfsleven: nuttig instrument of schild tegen bindende verantwoordelijkheid?" in H.R.B.M. Kummeling, S.C. van Bijsterveld (ed.), *Grondrechten en zelfregulering*, Deventer: W.E.J. Tjeenk Willink 1997, p. 105-125. See also Michael K. Addo (ed.), *Human Rights Standards and the Responsibility of Transnational Corporations*, The Hague: Kluwer Law International 1999.

enjoyed a day-to-day consumer attention. At the same time, the powerful role of consumers was being discovered. These developments brought the role of multinational enterprises in the field of human rights more strongly into focus. Perhaps this is also true for the use of corporate codes of conduct.¹⁷

5 The Changing Perception of the Roles

We are used to seeing the progressive development of national and international human rights protection in the perspective of various categories of human rights. Thus, we distinguish classic civil and political human rights; social, economic, and cultural human rights; and collective human rights. The first category of human rights is traditionally seen as guaranteeing a sphere of non-intervention for the private individual; the second, as obliging public authorities to take active measures, and the third as securing rights to collectivities, such as national minorities or rights to development or self-determination. It is clear that this categorisation is far from precise. Furthermore, it has become clear in doctrine as well as in the practice of courts that all rights elements of government non-interference as well as government interference are needed. Thus, the protection of privacy or the right to family life requires regulation and active measures; the right to a clean environment also requires abstention from activities as well as active measures.

For our present purpose of analysing the application of human rights standards to private corporations, another development is of great importance. This concerns not so much the categorisation of human rights, but the *roles* that the various actors play in the fields of human rights. Over the last few decades, a fascinating change has occurred in the way the roles of the various actors are perceived, nationally as well as internationally. This needs a brief explanation.¹⁸

In the first, classic, stage, the human rights debate was specifically focused on the relationship between government and private individual. It was entirely set in the dichotomy between state and citizen. Human rights guaranteed the individual freedom vis-à-vis the state or, in the case of social, economic, and cultural rights, vested claims to government activity. In this stage, the application of human rights standards to third parties was out of the picture, or at least regarded in itself as controversial.

In the second stage, society came into the picture. It was realised that other relevant actors played a role. These were first and foremost other power centres, such as private corporations. Other actors manifested themselves as well, with NGOs gaining a more conspicuous profile, both nationally and internationally. The

¹⁷. For a recent survey, see *Multinational Enterprises and Human Rights, a Report by The Dutch Sections of Amnesty International and Pax Christi International*, Amsterdam/Utrecht, November 1998. See also, S.P. Kaptein, H.K. Klammer, *Ethische bedrijfscodes in Nederlandse bedrijven*, 1991; *De integere organisatie; het nut van een bedrijfscode NCW*, Den Haag.

¹⁸. See Sophie C. van Bijsterveld, 'The Custodians of Human Rights' in a special issue, in Willem van Genugten, Ruud Lubbers (ed.), *De nieuwe rolverdeling in de zich ontwikkelende internationale economische en juridische orde*, Tilburg: Globus/KUB 2000, p. 53-60.

difference with the previous stage was, therefore, the awareness that other actors than the state were involved. The difference with the previous stage was that society was important. 'Society', however, were businesses and NGOs. It was a sharp confrontational setting. That is, the legal perspective heavily dominated. The debate was conducted in terms of 'private party' application of human rights standards. Furthermore, 'society' was divided into the bad (private corporations) and the good (NGOs). It coincided with third-party application discussions and the international awareness and role of multinational enterprises in the world. Also, the first international codes of conduct were adopted.

The third stage is also partly marked by continuity and partly by change. That is, society was still in the picture, except that the sharp, legal-confrontational approach faded into the background, or, at least, was enriched with another approach. Internationally, this coincided with the fall of the Berlin Wall and the collapse of the communist regimes. This was a time in which the international human rights debate was also seen in the perspective of stark contrasts. Globalisation and internationalisation became paramount and the role of the EU on the world stage increased. Regulatory problems manifested themselves ever more strongly. The role of the state and public authorities diminished, with the difference that the strong confrontational element faded away and made room for a more co-operative approach. It is this stage that we have now reached. The view taken of the role of (multinational) corporations is much more nuanced. It is the stage in which all actors have roles as guarantors and threats. This is true for public authorities that guarantee fundamental rights but can also be a threat to fundamental rights. The same is true for enterprises. Even the role of NGOs is criticised, especially after the Brent Spar debacle in which Green Peace afterwards acknowledged to have given inaccurate information. It is also the time in which information technology plays a considerable role, both in developing positive initiatives and in monitoring wrongs.

This stage is marked by co-operation. It is seen that all actors should work together whether they are government, enterprises, NGOs or even private individuals. In the international sphere, this is clear for the increased role of NGOs in semi-(in)formal monitoring and complaints mechanisms (OSCE). Indeed, we see completely new initiatives such as covenants, in which all parties work together. It is true, of course, that all actors have their own role to play.¹⁹ Codes of conduct, whether established in a setting of international organisations or of private corporations, are often published on the Internet. With these codes, private corporations also express their company profile; they become part of the company's identity.

In the most recent Dutch 'Nota Mensenrechtenbeleid'²⁰ [Human Rights Policy Paper], which gives an overview of the Dutch government's human rights foreign policy, it is reflected very clearly how this co-operative approach can take shape both in a bilateral and in a multilateral context. This is in line with the policy mood at the national level as well: both are oriented towards setting 'agendas' for fundamental rights protection and towards getting the relevant actors involved in a

¹⁹. See for a discussion, Willem van Genugten, Ruud Lubbers (ed.), *op. cit.* (note 16).

²⁰. Kamerstukken II, 2000-2001, 27 742, nr. 1.

positive way.

These three stages are not replacing one another, but every new stage forms an addition to the previous one. All the approaches, therefore, continue to play a role. Thus, the overall picture has become more diverse.

6 Corporate Social Responsibility: The Changing Focus in the Human Rights Debate

The field of human rights is a dynamic field. With the changing of the times, some human rights issues fade into the background. Other issues gain importance. Thus, for instance, in private contexts, with regard to freedom of opinion, it is not political opinions as such that are an issue. What has become an issue now is that of whistle blowing. And indeed, legislation is seen as important and is being initiated in this field. In the field of privacy, there are developments too. Whereas, in the 1980s, camera surveillance of the work force was challenged, now questions arise as to how far employees may use Internet and e-mail for private purposes during work time or on the computer at their work.

A few decades ago, the integration of women in the workforce was important; now attention has extended to age discrimination and the integration of handicapped persons. The integration of immigrants into the workforce is another area of concern. These are only a few examples of how the focus can change. With the liberalisation of services and the importance of fair competition and public tendering, integrity screening of companies has become important and legislation has been initiated in this field. This has also been criticised, expressly in view of the privacy protection of those involved.

Whatever subtle developments and shifts in attention take place, and however difficult it is to qualify them unilaterally and unequivocally as 'progress', quite recently an altogether different perspective has set the tone for the debate on the applicability of human rights standards to private corporations. This is in line with what we have above called the third stage of development of the debate.

The debate has made clear that the issue of applicability of human rights standards exceeds that of policies of national governments alone. Nor can it be simply transferred to international organisations or left to the initiatives of a (multinational) enterprise itself. It is clear that much more needs to be done. Each of the parties have their own role to play. However, efforts must be combined and co-operation is needed.

Information technology has given an enormous impetus to the formation of partnerships. We can think of recent initiatives such as the 'Global Compact' initiative of the General Secretary of the UN.²¹

²¹. For the 'Global Compact' initiative, see <http://www.unglobalcompact.org>. See also the 'Earth Charter' initiative: <http://www.earthcharter.org>.

The current debate is phrased in terms of social responsibility of enterprises and ethical entrepreneurship. The concerns of private enterprise are summarised in the so-called "Triple P"- concept: "People", "Planet", "Profit".

The Dutch government assigned the Social and Economic Council [SER] to advise on the social responsibility of enterprises. This Council, in which government representatives, and representatives of employers and employees are equally represented, issued its report on ethical entrepreneurship under the title "The Profit of Values" [*De winst van waarden*], which clearly reflects this idea of co-operation.²²

Furthermore, it explicitly states that ethical entrepreneurship is not simply an external obligation on private corporations. Increasingly, it is seen as their "core business". Even though it is clear that private corporations are no charities, the idea is that values are important for a corporation and that corporations have a social responsibility.

In a way, one could say that it is important from a PR- and marketing point of view, as consumers are increasingly aware of this. As to the social elements, these ideas seem to be in tune with modern management techniques, which discard classic hierarchical relationships between employers and employees and are formulated, much more, in terms of human resource management. Good human resource management makes for more motivated employees as well.

Also on a more modest scale, these developments cast their shadow ahead. A recent Green Paper of the European Commission has been issued on the topic of social responsibility of enterprises.²³ The Green Paper is intended to raise a debate on the subject. In the issues, human rights are mentioned, but among many. It is clear that the differences with social and environmental policy are not substantial. Furthermore, it is clear from many references to other initiatives how much the scene has changed; the Green Paper not only urged everyone to give reactions, but also to come up with proposals.

In its reaction to the Green Paper, the Dutch Government is positive,²⁴ saying that the stress is somewhat more on the people, and that the "planet" should also be important. Also, it emphasises that compliance and enforcement need to be given further thought.

These recent developments clearly show that the role of national states in this field has changed dramatically. All actors may have their own responsibilities and their own interests, but these may result in joint concerns and leave room for co-

²². SER, *De winst van waarden*, Advies 00/11, Den Haag: SER 2000. Also available in English, SER, *Corporate Social Responsibility: A Dutch Approach*, Assen: Van Gorcum 2001. For a discussion, see also J.G. Sijmons, "Verantwoord ondernemen: SER-advies en kabinetsstandpunt", in *Nederlands Juristenblad* 2001, p. 1114-1120.

²³. Green Paper "Promoting a European Framework for Corporate Social Responsibility", Com (2001)366, July 2001. The Green Paper contains a series of references to relevant Websites as well.

²⁴. Kamerstukken II, 2001-2002, 26485, nr. 21 (*Maatschappelijk verantwoord ondernemen*).

operation in this field.

7 Conclusion

The last few decades have seen an enormous development in theory and practice of the applicability of human rights standards to private corporations. Applicability of human rights standards to private corporations is no new phenomenon. With the development of labour law and, more generally, social law, human rights standards found implementation in corporate contexts. However, the development and application of such standards initially was not seen in this context. What is new is that, especially since the 1970s, applicability of human rights standards to private corporations has become an issue in its own right. In the Netherlands, this coincided with the run-up to the revision of the Constitution, which took place in 1983 and placed the doctrinal elements of the debate in sharp focus.

In the 1980s, the tone of the debate and the way human rights standards were actually developed took a different turn. The awareness that the state's ability to shape and steer society was limited grew stronger. Moreover, it was clear that steering society through traditional command-and-control legislation was specifically problematic. Steering ambitions were toned down. State withdrawal, deregulation, and self-regulation became popular notions. In the Netherlands, this strongly affected the way important fields of law, such as data protection law, social law, and environmental law were, structured. This immediately had its effects on the way human rights standards in private corporate contexts took shape.

In the 1990s, internationalisation, 'globalisation', again, put the debate in a different context. Internationalisation placed the major international human rights treaties firmly in the centre of attention. This is true also for the international codes of conduct for enterprises, which had been updated in recent years. Information technology provided a stimulus for information exchange in the field of human rights as well, and has certainly, directly as well as indirectly, contributed to the dynamics in this field. In their social and economic dimensions, IT-related developments were also important. Liberalisation of markets, the economic impetus, and the awareness of its potentially positive but also negative effects, again, affirmed the important relation between private corporations and human rights. The reality of the growing significance of the EC exercised its influence in this field, in that many of the policy areas relevant to our purpose became fields of EC activity. Furthermore, the EC has taken various initiatives which more directly address the position of corporate entities in relation to human rights.

The latter set of developments makes it also more difficult to qualify or even designate the particularly *Dutch* perspective. It is more appropriate to say that current developments in the Netherlands form part of a larger European and even worldwide movement, in which international organisations, governments, and

“organised civil society” all take part in an effort to improve social and environmental conditions. Private enterprises themselves are more and more seen as “partners” in further shaping policies and practices, instead of merely “objects” of policies and regulations. Characteristically, with the diminishing exclusivity of the role of the state, a wide variety of international, governmental, and non-governmental initiatives take place simultaneously and are, at least in part, in a process of linking up together.

The nature of the development we are currently witnessing is such that the specificity of “human rights” standards is somewhat fading into the background. Social policies, environmental policies, personnel management, and ethics more generally are equally important and have an equally important status in the debate.

It is important to notice that the various stages in the development add to the previous ones, and don’t replace them altogether. Thus, a classic command-and-control regulation still exists in the field of our interest, corresponding with the classic roles of the state, the individual, and the enterprise. “Classic” conflicts exist in which courts will have to decide on the private-party applicability of a particular fundamental right. This is also necessary. Notwithstanding the positive direction of modern developments in the way the relevant parties relate to each other and are committed to improving human rights implementation, not all private corporations will share the same positive attitude.

Human rights standards are no static entities and differences in opinion will always continue to exist with regard to their precise content in given situations. This, as well as the continuously changing contexts in which human rights need to gain flesh and blood, necessitate ongoing discussion and debate. Not only must we focus on the standards and the techniques through which they find legal expression, but assessing compliance and establishing effective systems of evaluation and enforcement will equally be a challenge for the future.