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Just business redux

Transnational corporate responsibility decoded through relational justice

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Summary of thesis

Dagan and Dorfman's relational justice theory is that liberal private law establishes the framework of *just* relationships of interpersonal respect to recognise individuals as self-determining and substantively equal. This PhD thesis presents a novel extension of relational justice theory to the context of global supply chains. In tackling this new challenge to private law theory that globalisation created, Dagan and Dorfman, in their seminal 2018 article outlining interpersonal human rights, focus their explanation primarily on the cross-border aspect of transnational corporate responsibility. They explain how private law can provide an interpersonal framework independent of the state-citizen relationship in formulating a global minimum floor and thus go beyond borders to address the *person*, not the *citizen*.

In doing so, Dagan and Dorfman's articulation of transnational corporate responsibility stops short of explaining how this responsibility arises in *supply chain* relationships where the distance created between the human rights impact and the transnational corporation through a series of contracts in the supply chain is as pertinent as the geographical distance between the impact and the corporation being in separate jurisdictions. Only the latter element of transnationality, i.e., the issue of separate jurisdictions, is sufficiently addressed by Dagan and Dorfman. The former explanation on how responsibility travels through supply chain relationships is what my PhD provides, elaborating on what is a just supply chain relationship. Further, Dagan and Dorfman's articulation of transnational corporate responsibility, in context of remedy as a backup mechanism in relational justice, stops short of articulating proactive processual responsibilities in private law in the formation of just relationships. This is the second extension of the relational justice theory in my PhD where I explain the necessity of *ex-ante* requirements for business relationships to be just.

First, in supply chain relationships, I posit that there is a cascading responsibility of transnational corporations as regards their human rights responsibilities in their supply chains. This is because there is no (business) relationship that exists in a complete vacuum independent of other relationships. A decision in a boardroom in New York may affect the treatment of

workers thousands of miles and many levels of contracts away in Namibia. Second, the framework must contain a distinction between arbitrary terms of relationships and just terms of relationships articulated as proactive requirements for the very formation of just relationships. It is coupled with the requirement of co-authorship of the terms of interactions in business decisions that affect interests otherwise ignored in the business process. The proactivity and co-authorship requirements are a crucial safeguard of substantive equality in relational justice terms. This is the *ex-ante* requirement in the formation of just relationships, which, in the corporate human rights context of the PhD, is human rights due diligence. Human rights due diligence is the process of uncovering risks to *third parties*, not the business itself, by way of considering the interests of potentially affected people as a limit to profit-making interests.

The PhD identifies legal materials like case law and legislation in support of the findings so as not to give the mistaken impression that this is merely a thought experiment. This is done through the portrayal of how the UN Guiding Principles on Business and Human Rights echoes these two extensions of relational justice in the thesis through its articulation of a responsibility for ‘directly linked’ impacts and human rights due diligence. Further, with the support of case law, it is shown how the cascading responsibility conception can be doctrinally sound and has an arguable basis in law, more particularly English tort law. Last, but not the least, it is demonstrated how human rights due diligence laws, now exclusively found in Europe, have relational characteristics that vindicate the requirements of co-authorship and substantive equality in relational justice terms.

Samenvatting

De relationele rechtvaardigheidstheorie van Dagan en Dorfman houdt in dat het liberale privaatrecht het kader voor rechtvaardige relaties van interpersoonlijk respect creëert waarin individuen worden erkend als autonoom handelend en materieel gelijkwaardig. Dit proefschrift presenteert een vernieuwende uitleg en toepassing van de relationele rechtvaardigheidstheorie binnen de context van wereldwijde toeleveringsketens. In hun bespreking van deze nieuwe uitdaging voor het privaatrecht en het theoretisch begrip daarvan die is ontstaan door globalisering, richten Dagan en Dorfman zich in hun baanbrekende artikel uit 2018 over interpersoonlijke mensenrechten voornamelijk op het grensoverschrijdende aspect van de transnationale verantwoordelijkheid van bedrijven. Ze leggen uit hoe het privaatrecht een interpersoonlijk kader kan bieden dat onafhankelijk is van de relatie tussen staat en burger bij het formuleren van een wereldwijde minimumondergrens. Zij gaan daarmee dus voorbij landsgrenzen om de verantwoordelijkheid van de persoon, in plaats van de burger, te adresseren.

Dagan en Dorfman gaan echter niet in op de vraag hoe deze verantwoordelijkheid ontstaat in relaties binnen de toeleveringsketen, waar de juridische afstand tussen de mensenrechtenimpact en de transnationale onderneming door een reeks contracten in de toeleveringsketen net zo relevant is als de geografische afstand tussen de impact en de onderneming die zich in verschillende jurisdicties bevinden. Alleen het geografische element van transnationaliteit, d.w.z. de betrokkenheid van verschillende jurisdicties, wordt voldoende behandeld door Dagan en Dorfman. Mijn PhD beantwoordt de eerste vraag over hoe verantwoordelijkheid zich verplaatst door toeleveringsketenrelaties, door uit te leggen wat een rechtvaardige relatie binnen een toeleveringsketen is. Daarbij komt dat Dagan en Dorfman's formulering van de transnationale verantwoordelijkheid van bedrijven, in de theoretische context waar een remedie gezien wordt als een back-up mechanisme in relationele rechtvaardigheid, niet in gaat op de rol van proactieve procedurele verantwoordelijkheden in het privaatrecht bij de vorming van rechtvaardige relaties. De uitleg dat ex-ante vereisten voor

zakelijke relaties noodzakelijk zijn om die rechtvaardig te laten zijn is de tweede bijdrage die mijn PhD doet aan de relationele rechtvaardigheidstheorie.

Ten eerste stel ik dat transnationale bedrijven in toeleveringsketens een getrapte verantwoordelijkheid hebben op het gebied van mensenrechten in hun ketens. Dit komt omdat geen enkele (zakelijke) relatie in een volledig vacuüm d.w.z. onafhankelijk van andere relaties, bestaat. Een beslissing door de directie van een bedrijf in New York kan invloed hebben op de behandeling van werknemers duizenden kilometers en vele niveaus van contracten verderop in Namibië. Ten tweede moet het privaatrechtelijke kader een onderscheid bevatten tussen arbitraire en rechtvaardige voorwaarden voor (zakelijke) relaties. Deze laatste worden geformuleerd als de proactieve processuele voorwaarden voor de vorming van rechtvaardige relaties. Dit is gekoppeld aan het vereiste dat er medezeggenschap moet zijn over de voorwaarden op basis waarvan zakelijke beslissingen worden genomen, die van invloed zijn op belangen die anders worden genegeerd in het bedrijfsproces. De vereisten van proactieve processuele verantwoordelijkheden en medezeggenschap zijn een cruciale garantie voor materiële gelijkheid in termen van relationele rechtvaardigheid. Dit zijn de ex-ante vereisten voor de vorming van rechtvaardige relaties, die, in de context van dit proefschrift over mensenrechtelijke verantwoordelijkheid van bedrijven, de zogenaamde mensenrechtelijke zorgplicht is. Deze zorgplicht, ook wel due diligence genoemd, is het proces waarbij de risico's voor derden, niet voor het bedrijf zelf, worden blootgelegd door de belangen van mensen die mogelijk impact kunnen ondervinden te beschouwen als een grens aan winstgevende belangen.

Dit proefschrift identificeert tevens juridisch materiaal zoals jurisprudentie en wetgeving ter ondersteuning van de bevindingen, om te laten zien dat de bevindingen niet slechts een gedachte-experiment zijn. Het proefschrift laat zien hoe de UN Guiding Principles on Business and Human Rights de twee uitbreidingen van relationele rechtvaardigheid weerspiegelen door het vastleggen van een verantwoordelijkheid voor 'directly linked' effecten van bedrijfsactiviteiten en van de mensenrechtelijke zorgplicht. Verder wordt, met behulp van jurisprudentie, aangetoond hoe het idee van een getrapte verantwoordelijkheid deugdelijk kan zijn op basis van de juridische doctrine en dus een verdedigbare basis heeft in het recht, meer

in het bijzonder in het Engelse recht inzake onrechtmatige daad. Tot slot, maar daarom niet minder belangrijk, wordt aangetoond hoe wetten die een mensenrechtelijke zorgplicht vastleggen, en nu uitsluitend in Europa te vinden zijn, relationele kenmerken hebben die de vereisten van medezeggenschap en materiële gelijkheid in relationele rechtvaardigheid weerspiegelen.

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