

THE ROLE OF PRIVATE LAW IN PROMOTING SOCIAL JUSTICE

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Already the title of this lecture may raise the eyebrows. We all have, at least: we think we have, some notion of social justice, but what has the law to do with it? Since the days of Roman law more than two millennia passed by. Are we able to identify any contribution of the law in the past to the promotion of social justice? From antiquity onwards there are many writers who deny even the possibility thereto. For them the image of the law is far too bad. The Roman philosopher Seneca said: There are in fact but three conceivable disasters that are truly a threat to humankind. "These are poverty, disease and falling in the hands of the law." The worst of these was the last: falling into the hands of the law. Poverty and disease approach us quietly. Our eyes do not see them approaching, our ears do not hear them, but the law? It arrives with a huge spectacle, with intense commotion, or, in the words of Seneca, *magno strepitu et tumultu*. The law arrives with weapons and fire, with chains, with a pack of wild animals and the law releases these wild animals onto the intestines of man. Look around you in the court room. Look at the cell, the crosses, the rack, the iron claw.

We cannot say that this awful image of the law belongs exclusively to classical antiquity. Horatius already warned his audience: *Quid rides? Mutato nomine fabula de te narratur* (Sat. 1.1.69). Change the name and the story is about you. And indeed so. Not so long ago South Africa imported Street Law projects from America. Even nowadays it is necessary to educate people, particularly young people, that the word "law" means more than a police baton in your neck or locking up people in overcrowded cells. Street Law (South Africa) works towards making people aware of their rights and how the legal system can be used to protect them. Today's lecture is exactly about this protection and the role of private law therein. An important point of reference is the speech of Lord Atkin in *Donoghue v Stevenson* ([1932] All ER Rep 1; [1932] AC 562; House of Lords) because there we find the well-known reference to the Good Samaritan. In the words of the Lord Bingham: "This speech seemed to make possible the doing of substantive justice."

That is exactly our topic for today: the notion of substantive justice. We will find that Seneca's image of the law as an instrument of deterrence became part of Christian thinking as a consequence of the persecution of the Christians under the Roman Emperors. We shall devote a few words to the demise of that awful image of the law as a result of the influence of canon law. Then there follows an important step. Canon law introduced and

integrated notions of Biblical origin into Roman law. Consequently Canon law recognized a number of private-law instruments for the protection of the socially weaker party, departing from the obligation to act as one's brother's keeper. Thereafter we shall turn our focus in the direction of the Enlightenment, which had only a very limited interest in a role for private law as an instrument of social justice. As a direct consequence thereof the 19th century European codifications show little or no interest for the position of the socially and economically weaker party. The Enlightenment, and consequently the codifications, depart from the notion of the autonomous citizen. We will confront these two notions, the solidary person of Canon law and the autonomous person of the Enlightenment and we will put them into a modern legal context. We shall end with a conclusion.

After Seneca Cyprianus, the Bishop of Carthage taught his pupil Donatus that the image of the law is the *eculeus*, the rack in the shape of a horse; the *uncus*, the claw pickaxe, the fire, the iron, a view so horrific that the accused already die just from seeing it. In short: the law is the persecution of the Christians. That is image of the law imprinted in the collective memory of Christendom. In the meantime, however, the Church taught, that the secular law is not the final instance. One has only to look at the images kept in the catacombs to feel sure that the Christian faith there expressed clearly a belief in judgment immediately after death. The image of that judgment mirrored on the one hand the image of the secular law, the image of deterrence. Psalm 130 (numbered as 129 according to the Vulgate), the same psalm which, according to Elsabé Kloppers, would play such an important role in the formation of the Afrikaner identity: *si iniquitates observabis Domine, Domine quis sustinebit? If thou, LORD, shouldst mark iniquities, O Lord, who shall stand?* Or in the words of the Afrikaans Reverend Totius: *As U, o Heer, die sonde na reg wou gadeslaan, wie sou een enk'le stonde voor U, o Heer, bestaan?*, but the text reads on: *quia apud te propitiatio est propter legem tuam.* "But there is forgiveness with thee, that thou mayest be feared." Or, in the words of Du Toit: "Maar nee, daar is vergewing altyd by U gewees; daarom word U met bewing reg kinderlik gevrees." That was the genuine consolation of the Church: there is more than secular law; the ultimate truth about our lives is revealed in the Bible. Therefore the Church accommodated legal principles taken therefrom into Roman law. Let us discuss one obvious example, namely the maxim that one is bound to if one has given one's word: *pacta sunt servanda*. Today we take this rule for granted and we tend to regard it as an axiom, a universal principle, that needs no further proof. In fact, it is a revolutionary statement. In the Common Law offer and acceptance only give rise to a valid contract once the conditions of consideration and privity have been met. In Roman law there was a similar rule in terms of which a contract only became binding once there was compliance with serious formalities, in the Middle Ages called *vestimenta* such as a specific cause, the speaking of specific words, written documents ratified by means of an oath. The maxim *pacta sunt servanda* is not Roman at all; it originates from Pope Gregory IX in 1234. He expressly deviated from Roman law. He considered the requirement of *vestita* for the given word to become a contract as superfluous, as pagan. Christianity had from antiquity known the godly

imperative of being faithful to one's word once one had given it to someone. Every promise had to be kept because that was in accordance with the words of Jesus himself (Matthew 5:34) and other comparable precepts of the Holy Scripture (see James 5:12, and also Numbers 30:2).

Consequently Gregory IX gave preference to the Biblical principle of faithfulness to the given promise, irrespective of formalities: *pacta sunt servanda*, and he codified that rule. The maxim, however, did not constitute a hard and fast rule. The canonists knew about (and recognized) a great number of exceptions to this rule, for example, in the law of sale the *lex commissoria*, the clause in a contract of sale which states that in the event of the buyer failing to pay the price in accordance with the contract, the seller shall be entitled to cancel the sale and take back the goods. The *pactum displicentiae*, the clause whereby the parties agreed upon the right of the buyer to return the thing sold to the seller and to dissolve the sale within an agreed time if the object does not suit him. Or the opposite, the *pactum de retro emendo*, the repurchase clause (art. 1665 C.c., art. 1555 Old Dutch Civil Code). The enumeration can be enlarged with a number of other provisions, such as the *clausula rebus sic stantibus*, the doctrine of *iustum pretium*, which calls for a reduction or increase of the price agreed upon, or the famous rule of the Roman jurist Celsus, who stated that there is no obligation to the impossible. For our purpose the most interesting remedy, however, is the *Condictio ob Paenitentiam*. This remedy has nowadays almost fallen into oblivion, but it is extremely interesting. The previous owner may reclaim his slave, once he regrets having transferred him/ even if in the meantime the slave might have been released. In that case the claim lies for damages. Nullification of the contract because of remorse. We might add a number of modern examples. There are in modern European law several statutory provisions that provide for a time during which a party can reconsider and eventually withdraw from the contract. In transport law for the sender. In medical scientific research and in fertility treatment adults who have donated their cells can reconsider their decision and reclaim their cells at all times. The private purchaser of a dwelling has during three days after receipt of the deed of the sale the right to have the sale set aside. Something similar applies to timeshare agreements. In the case of a distance sale there is a period for reconsideration. There is even more in the offing. If it were to depend on the European Union, consumers would get a 14-day time in which to reconsider in the case of every credit agreement up to 50 000 euro.

These medieval and these modern examples of the right to reconsider give rise to the question whether these examples are not connected by means of an underlying principle, a *ius paenitendi*. Thomas Aquinas specifically asked this question and he answered it in the affirmative. Nobody is bound to the impossible and Thomas did not only regard impossibility as objective impossibility, but also included subjective impossibility. Somebody overcome by remorse is in a condition in which it is impossible to abide by a promise. According to him social justice requires the recognition of the right to remorse, the *ius paenitendi*, and this *ius paenitendi* finds itself hand in hand with a serious remedy, the *condictio ob paenitentiam*. There is, however, one *obiter dictum*. Recognition of this right

does not lead to the consequence that the debtor may break his given word without any consequence attached thereto. Thomas did thus add a provision that where someone brought such impossibility upon himself (carelessly, irrespective of whether the impossibility was subjective or objective), he had to be held responsible, *poenitentiam agere*. Nevertheless, from the 13th century onwards Canon law recognizes as a rule reasons for succouring the socially and economically weaker side.

Six centuries later the drafters of the Code Civil asked themselves the same question. Does there exist one underlying principle that unites the exceptions to the general rule that *pacta sunt servanda* and that deserves recognition as such? They answered the question in the negative. They did not recognize such a principle as a *ius paenitendi*. The right to remorse was intentionally not taken up in the Code Civil, at least not as a general principle, but, on the contrary, it was laid down in article 1134 that agreements lawfully entered into are legally binding for those who have made them.

This was completely appropriate in the context of the time of the French Revolution and the period immediately thereafter. The point of departure was the freedom (*Liberté*) and equality (*égalité*) of all legal subjects. The free and equal citizens give effect to their society in accordance with their own, autonomous and free will. The Enlightenment and Natural law, which was devised by Hugo de Groot and his successor Samuel von Pufendorf, through Kant, Locke and Rousseau eventually formed the philosophical foundation and point of departure of the Code Civil.

Canon law set aside by the French Civil Code; the *condictio ob paenitentiam* abolished in favour of article 1134 C.c.: *pacta sunt servanda*. Social justice sacrificed upon the altar of freedom and equality of all legal subjects. Another, almost similar question arises: does this altar have its foundation upon a rock or on sand and will the altar be blown away by the first wind to come? Are people really free and equal? In fact it is an unacceptable conclusion that the law would equally prohibit the rich and the poor to sleep under a bridge or to steal bread. People are born and raised in a social context which to a large extent determines the choices that they can, may and ought to make. A person is who he is by virtue of his social environment. From the time of his birth he is *débiteur de l'association humaine*, as Léon Bourgeois said in 1896. In the exercise of his rights the legal subject needs to contend with the interests of fellow legal subjects. Duguit pays attention to the substantive right in the context of its *fonction sociale*. Moral and social dimensions go hand-in-hand and have the upper hand over the mere wording of the agreement.

In England, however, there was no debate comparable with the continental debate. In 1881 Mr Justice Holmes gave an opinion in terms of which he described the contract as a wager: I assure you of a certain event (which may or may not be in my control) and I pay in case of failure. The contract is regarded as the source of certainty regarding future events, and the function of the law of contract is to systematize the judicial decisions so that in the case of disputes the parties and their legal representatives may derive guidelines from these: *pacta sunt servanda*. A hard and fast rule. It

would last until 1944 before Buckland took up the point again. Until today the concept of good faith plays hardly any role in English law of contract, or, in the words of Brownsword, professor of King's College in London: English law resists the adoption of an explicit good-faith standard.

Around the turn of the 19th to the 20th century we see on the continent of Western Europe a serious debate going on between the hard-liners (*pacta sunt servanda*, agreements are legally binding irrespective of whether they are hard) and, on the other hand, supporters of the principle that creditors should not only serve their own interests, but should also consider those of the other contracting party and take into consideration that party's social position. In short, the two positions represented, on the one hand the followers of the doctrine of the autonomous person, free and equal to his fellow citizens; on the other the followers of the belief in the solidary person raises the question as to whether it makes a difference for legal practice whether a legal system is placed on one or the other side. Is English law, stock example of the autonomous person, really harder for the economically weaker party than the continental European law? We will test this assumption, particularly in the context of a contract. Do these jurisdictions really show differences with regard to (1) the coming into existence, (2) the operation and (3) the termination of contracts that may be traced back to the social character of the law? Let us throw a closer glance at the contract, and look first at its coming into existence.

For examples taken from labour law, from consumer law and from the law of landlords and tenants, and "tenants" I may refer to the written text of this lecture. I shall restrict myself now to the problem of cessation of negotiations. In French, German and in Dutch law the negotiating parties are only to a certain extent free to break off negotiations. This freedom is not unlimited. According to French law the limits of this freedom are exceeded when the breaking off of the negotiations result in a *faute*, a delict. In this way M. Ossona committed a delict against the shareholders of Peninsular. The parties had negotiated about the acquisition by Ossona of an "immovable" owned by Peninsular. During the short negotiation process Ossona had convinced Peninsular to leave the first floor of the office building vacant for his use and to refrain from lease agreements. The negotiating parties had even reached consent regarding the down-payment upon the signing of the agreement, and the balance would be paid upon transfer (the date had also been set). Ossona had created the clear impression on the part of the sellers that he would be able to pay the down payment from his own resources. The evening prior to the signing, Ossona broke off the negotiations. This constituted a delict which resulted in his being liable for payment of damages.

German law, certainly after the Schuldrechtsreform of 2002, but also before that, follows a similar course. The point of departure there is that either party has the right to end negotiations at any time, if so desired, without giving reasons. Where the other party has incurred costs as a result of reliance on that contract, these are as a general rule for his own account. There are exceptions to this rule, for example where the party who has broken off the negotiations can be blamed for *culpa in contrahendo*. This is a

very complex principle which may be traced back to an article by Rudolf von Jhering: *Culpa in contrahendo oder Schadenersatz bei nichtigen oder nicht zur Perfektion gelangten Verträgen*. The recent German revision of the codification (*Schuldrechtsreform*) made it explicit that even during the pre-contractual phase parties have to take the legitimate interests of the other party into consideration. Where for example a bank in the course of negotiations creates the impression that it will provide credit and in this way prevents a client from approaching a competitor, and later ends the negotiations without a valid reason, the bank will be held liable. The same will apply in the case where a future employer convinces an applicant during the course of the negotiations to give up his present employment and then, without providing good reasons, ends the negotiations.

The approach followed by the Common law is completely the opposite of the German, French and Dutch legal systems. In *Martin Walford v Charles Miles* ([1992] ADR.L.R. 01/23) Lord Ackner was at pains to argue that, based on the principle of freedom of contract, the parties are free to manage their own affairs and cannot be expected to take the interests of the other party into consideration. The House of Lords held that it is inherently inconsistent with the position of the negotiating party to expect of someone to negotiate in good faith. If the parties wanted to limit the freedom not to conclude the contract or to break off negotiations at any given time, they would have to do that in a separate agreement, for example, a *subject to board approval*-clause, in terms of which the parties make the coming into existence of any agreement expressly subject to the approval by a competent body, or an *entire agreement* clause, in terms of which the parties emphasize that exhortations not included in the final version of the contract have no binding power.

The English approach is very popular. In the Viennese Deed of Sale (CISG) there is no provision regarding *culpa in contrahendo*, although the desirability thereof had been discussed extensively during the preparations. In the same vein there was even a UNCITRAL-concept that contained a clause that in the course of the formation of the contract the parties had to observe the principles of fair dealing and act in good faith. Eventually the parties settled for a compromise. The concept of good faith was included in the CISG, but only with regard to the interpretation of agreements (art. 7).

The autonomous person opposite to the solidary person. The execution of the contract: the *clausula rebus sic stantibus*. If something was completely unforeseen, it was the fall of the Berlin Wall on 9 November 1989. This was experienced in particular by a couple in East Berlin. After a marriage of 27 years the couple had divorced in April 1989. The maintenance payable was fixed in the amount of 60 Marks (Ostmarken). That was not much but the man had suffered two heart attacks, was paralyzed on his left hand side and received a disability pension of 440 Mark. The wife could afford the 60 Mark. She was earning 820 Mark. With this agreement both of them would have been able to live. For this reason they did not make any agreement regarding the amendment of the maintenance agreement. Then the wall fell. The wife's income shot up to Western levels (in 1992 DM 2411,78). The man's disability pension also increased somewhat but not nearly enough to

provide in his needs. The question arises as to whether the agreement not to amend the maintenance stood in the way of the new situation.

The *clausula rebus sic stantibus* can be found in the same context as the medieval *condictio ob poenitentiam*. It came to fruition in medieval times. The Decree of Gratian contained a text in which it is stated that there are many situations in which legal rules should not be diluted, but that there are also many other situations where the surrounding circumstances require that moderation should be exercised. The conflict with the principle of *pacta sunt servanda* is obvious and the forensic outcome of that conflict remained unclear, until the French codifiers without any preconditions gave precedence to the principle of *pacta sunt servanda*, article 1134. In 1876 the Cour de Cassation refused to increase the canon, fixed at 3 sols in the 16th century, for use of water from the Canal de Craponne for irrigation purposes. Inflation or not, a Mark is a Mark, and a Franc is a Franc.

Galloping inflation seldom and rarely gives rise to the amendment of a contract. Not even in Germany. When after the First World War galloping inflation reduced the agreed price for a spinning mill to a ridiculous low, the seller nevertheless remained compelled to deliver the mill at the price agreed upon. Thus the decision in the case of the East-German couple was more than a landmark in the law; it constituted almost an earthquake. In that case, namely, the judge of Germany's highest court regarded an adjustment of the amount in the maintenance agreement fit. After the Schuldrechtsreform of 2002 this doctrine was included in the BGB (§ 313, Störung der Geschäftsgrundlage).

England was always hesitant to allow changing circumstances to influence the contents of contractual obligations. Where parties wanted these circumstances to be taken into consideration they had to include an explicit clause in their contract to this effect. If they failed to do this, the agreement would apply without variation. This was experienced halfway through the 17th century by a leaseholder, a certain Jane, when he was driven off the leased land by a group of men under the leadership of the German Prince Rupert; these men were rebelling against the king. For a long time the leaseholder was unable to return to his land. He remained responsible for the rental. In the 19th century Blackburn J, however, found a loophole. In the case of a concert hall which was leased for one night but then burnt to the ground before the time he denied both parties their claim: the lessee did not have to pay, but he could also not claim any damages. According to Blackburn there was a tacit provision in the lease in terms of which the leased property still existed at the time of the lease. The fiction of the implied term even led to good results in the so-called Coronation cases. Henry leased a flat from Krell for 26 and 27 June 1902. Even though it had not been mentioned in the contract, it was clear that Henry wanted a good view on the procession being held on the occasion of the coronation of King Edward VII. At the last minute the procession was cancelled. Did Krell still have a right to the rental? The question was eventually answered in the negative by means of the implied term theory.

Behind the rule *pacta sunt servanda* hides a world of presuppositions, in our days the presupposition of the Enlightenment and the French

Revolution, that all people are free and equal, and that these free, equal, autonomous and normal people are most capable of looking after their own interests. We referred to it as the image of the autonomous person, the person who expresses himself in accordance with his will and who gives form to his legal relationships. We contrasted this autonomous person with the solidary person, his brother's keeper, who in the process of his legal acts has to give account of the justified interests of his legal partner. We assumed that behind each legal system there was a presupposition, a portrayal of man as either an autonomous or a solidary person. We then asked ourselves whether that portrayal of man is reflected in the courtroom and our hypothesis was that the image of the autonomous person fitted more in the English courtroom than in the Dutch and *vice versa*, that the image of the solidary person was more typical of the Dutch courtroom than the English. For this reason we looked at a number of concrete disputes that arose from contracts in the respective phases of preparation, execution or termination. We asked ourselves first of all whether the disputes in practice led to different decisions and, where we answered this question in the affirmative, we asked ourselves whether these could be attributed to the (presupposed) differences in the portrayal of man.

What became clear is that we are not dealing with a clear distinction. Instead, the distinction is gradual, it is not so much case of either ... or; rather it is and ... and. It is not: either the autonomous or the solidary person that appears in the courtroom. Parties are (and have to be) both autonomous and solidary. Seldom if ever is the autonomous will of (one or both of) the parties the only and exclusive determinant for the outcome of disputes, and in the same vein the economically weaker party is not protected purely because of his weakness, certainly not when his own inertia is the basis of the conflict.

We have nevertheless found some differences in the outcome of comparable disputes. At the same time it has to be mentioned that it often is a case of legal technique. By means of a slightly different design of the relationship between the parties they could achieve the same result as their peers on the other side of the Channel. This we saw for example in the case of the cessation of negotiations. Notwithstanding the freedom to do so the party who breaks off negotiations might under certain circumstances find himself obliged to compensate the damage of the other (including the costs of work already done). When all is said and done the same result is achieved by the French *via* the *faute*, the English *via* their contractual terms, and the Dutch (originally) *via* the pre-contractual good faith. Maybe one system it is simpler than another, but it is not less fair, and the opposite is also not true.

Maybe that is connected with the observation I want to end with. It is often easier to determine what injustice is, than to determine what justice is. This we can also see here. The distinction "autonomous ... solidary" is less absolute than what it seems, because under certain circumstances parties will act autonomously and at other times solidarily. Maybe the Romans did not do it quite so badly. *Pacta sunt servanda* did not form part of their legal order, even though they lay the foundation therefore. Ulpian expressed it as

follows: the basic tenets of the law are the following: living honourably and honestly, not to harm anyone and to give to each his own. To each his own. The shadow of the solidary person precedes him. From a totally different culture we hear the echoes of the old word of the prophet Micah (6:8): "He hath shewed thee, O man, what is good; and what doth the LORD require of thee, but to do justly, and to love mercy, and to walk humbly with thy God." With these guiding words in mind also private law has to care for social justice.