

The Power of Open Norms

Ioannis Kampourakis

2021-06-15T10:36:30

In a [judgement](#) of 26 May, the District Court of the Hague found that Royal Dutch Shell (RDS) has an “individual responsibility” (4.4.13, 4.4.52) to limit its carbon emissions by at least 45 percent by 2030, in comparison to 2019 levels (for a summary and a commentary on the decision, see [here](#)). The legal ground for this decision was Dutch tort law, and specifically the standard of care, which stipulates that “acting in conflict with what is generally accepted according to unwritten law is unlawful” (Book 6 Section 162 Dutch Civil Code). In its interpretation of the unwritten standard of care, the Court considered, among others, the right to life and the right to respect for private and family life of Dutch residents under the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) and the International Covenant on Civil and Political Rights (ICCPR), the UN Guiding Principles on Business and Human Rights (UNGP), the Paris Agreement climate goals, the responsibilities of RDS with regards to its business relations and end users in global value chains, the effects and limits of the European Emissions Trading Scheme (ETS), the interests in maintaining a regime of fair competition, and the question of proportionality of RDS’ reduction obligation.

The Court does not make a *prima facie* radical claim: When referring to the ECHR and ICCPR rights the Court follows the established perspective that these rights apply between states and citizens and cannot be directly invoked with respect to RDS. Similarly, the Court clarifies that the UNGP do not establish legally binding obligations. However, the Court “factors in” the human rights and the values they embody in its interpretation of the duty of care, which directly applies to private actors. Likewise, it uses the UNGP as a “guideline” in the interpretation of the standard of care. At first, the interpretative approach of the Court could be understood as one more manifestation of the principle of *Völkerrechtsfreundlichkeit*, of openness to international law and of the inclination to take international legal instruments into consideration in the process of interpretation. Nevertheless, as the interpretation does not concern public law but the private law of torts, it indirectly challenges the established view according to which private actors do not have direct obligations under international human rights law. The duty of care functions as a vessel for the transposition of the normative thrust of international human rights law in the private realm.

Notable about the ruling is the unwritten standard of care functioning as an open norm, facilitating the accountability of private power. The openness of legal categories not only entails a potential to drive forward social change, but it also implicitly highlights the political role and nature of private law. In addition, the employment of international human rights norms as the basis for interpreting the duty of care affects the nature and the vector of the human rights norms themselves, paving a way in which they can directly address private power.

Legal Indeterminacy and the Political Nature of Private Law

Milieudefensie et. al. v RDS is an illustration of how the openness of legal categories enables their utilisation for social transformation. To understand the inevitability of such openness, it is worth referring to one of RDS' defences, namely that the claims of *Milieudefensie et. al.* require essentially political decisions that exceed the competences of the Court (4.1.3). The Court responds to this objection by affirming its duty to interpret the standard of care. Insofar as the Court must interpret the duty of care to come to reach a decision, there is no interpretation that can possibly claim the status of an "objective" interpretation that does not exceed the boundaries of the competences of the court. Had the Court opted for a more restrictive interpretation of the duty of care, it would have also engaged in policymaking, only this time prioritizing the commercial interests of RDS at the expense of the interest to prevent the damage caused by carbon emissions. While the Court's current decision involves policymaking by forcing RDS to reduce its carbon emissions, a different decision would have also involved policymaking by forcing the citizens of the Netherlands to endure the emissions of Shell. In other words, there is no privileged "neutral" interpretation in the allocation of legal entitlements.

Recognizing the indeterminate character of legal categories and the possibly widely different resolutions of social conflicts also highlights the political nature of private law. In this case, the duty of care is an open norm to be filled with meaning, as opposed to a signifier of a deeper "essence" that the judge is merely asked to uncover. As long recognized by [legal realists](#), legal categories do not by themselves decide cases, which means that courts inevitably engage in a balancing of competing interests that is to some extent informed by normative conceptions of society (e.g., the interest of RDS to only partially reduce emissions as per its company policy vs. the interest of citizens of the Netherlands to benefit from a cleaner environment and to mitigate the risks of dangerous climate change).

Beyond adjudication, it is incomplete – even if true – to say that *Milieudefensie et. al. v RDS* demonstrates that private law can be used to achieve social goals. In fact, private law, [through the allocation of legal entitlements and its various rules of permission and prohibition](#), is always involved in the setting and achieving of social goals. The political nature of private law might be more pronounced when employed in projects of indirect redistribution (e.g., in the form of rent caps) or in addressing climate change, but any arrangement of property rights and contractual freedoms has distributional and power-conferring effects in the first place. In other words, a private law that allows unhindered carbon emissions and a private law that involves an obligation of reduction are equally political, showcasing only different visions of society and different priorities.

A Case of Societal Constitutionalism?

Furthermore, *Milieudefensie et. al. v RDS* also shows how the openness of certain norms may constitute a subtle, backdoor way into modifying the legal status and the

scope of international human rights norms. For instance, while the UNGP may not in themselves be legally binding from a formal perspective, if they are consistently employed in the interpretation of binding private law norms then, substantively, they acquire a quasi-binding character. Similarly, while international human rights law does not primarily address private corporate actors, if courts use international human rights norms when deciding on corporate responsibility then, implicitly, the scope of the international legal instruments also expands.

It is possible to see in such developments traces of [societal constitutionalism](#), whereby civil society, supported by court decisions, exerts the kind of pressure on private actors that leads to the emergence of “civil constitutions” and the limitation of economic rationalities. The development of a [societal private law](#) indeed passes through the recognition of business responsibilities towards third parties. The horizontal effect of human rights can function as a [counter-institution](#) against the expansive tendencies of the economy, protecting not only direct victims of corporate misconduct but more broadly societal spheres of autonomy – which then encompasses the demand to address climate change even if the claimant is not currently and directly affected.

Indeed, norms that are particularly open to interpretation can be understood as a gateway that empowers visions of decentralized social transformation. This is because they can anchor societal impetus for reform, while at the same easing the reliance on the state and on centralized, top-down legal designs. However, it is also important to underline that the Court’s interpretation of the duty of care was only possible because of existing legal instruments, including the ECHR, the ICCPR, or the UNGP, upon which the Court relied. Legal indeterminacy cannot replace the need for legislation and concrete legal change.

