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De invloed van het EVRM op het ondernemingsrecht

Schild, A.J.P.

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Author: Schild, Alexander Johan Paul

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Summary

The influence of the European Convention on Human Rights on Dutch corporate law

This book will examine how fundamental rights, recognised and protected by the European Convention on Human Rights (ECHR) influence Dutch corporate law.

Part I

Chapter 1 considers the general relationship between the ECHR and Dutch corporate law. To what extent are legal entities entitled to ‘human rights’? And how can such rights be relevant in disputes between private parties?

Chapter 2 argues that legal entities should in principle be entitled to ‘human rights’ in the same way as natural persons, since legal entities ultimately serve the interests of natural persons. Legal persons are legal fictions intended to further the interests of natural persons. The fact that not all human rights are relevant to legal entities, does not diminish the importance of legal entities being able to enjoy, for example, the right of property without illegitimate interference. Or, indeed, the right to a fair trial.

Chapter 3 discusses how the scope of a fundamental right may be determined in a particular case. It is frequently difficult to derive the scope of fundamental rights from the case law of the European Court of Human Rights (ECtHR) as a multiplicity of interests and circumstances often determine outcomes. The argument explored in Chapter 3 is that to determine the scope of a particular human right, it is vital to keep in mind its purpose for society. The fundamental objective of all human rights is, surely, to protect human dignity. In cases where human dignity is at stake, the ECtHR may be expected to review critically the reasons for any interference which has occurred.

In this process of critical review, the following three steps can be recognised. First, the ECtHR will look at the position of the victim. The more it finds its human dignity to be compromised, the narrower will be any margin of appreciation.

Second the ECtHR will look at the alternatives, if any, which were available to the State. Whether an infringement of a fundamental right can be justified, often depends on whether in the light of the general interest pursued, it may be considered necessary, given the possible alternatives at hand. Third, the ECtHR takes into account the existence of different moral or political views, where

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these different views can reasonably be defended. The existence of ‘value pluralism’ is taken as a fact by the ECtHR.

In matters of corporate law, human dignity is not usually directly at stake. The ECtHR will usually allow for a wide margin of appreciation when it is asked to decide on questions in this field.

Part II

Part II examines how the ECHR influences Dutch company law. For large parts of Dutch corporate law there is no reason to doubt compatibility with the ECHR. Such questions only arise when a statutory provision creates the possibility that fundamental rights will be infringed. Examples might include the right of a peaceful enjoyment of property, the right to a fair trial, the right to privacy or the right to freedom of assembly and association.

Amongst the topics discussed are:

- The measures that the Enterprise Chamber can take pursuant to article 2:349 paragraph 2 and article 2:356 BW Dutch Civil Code (DCC).

Shareholders who own a certain percentage of the shares have the right to submit a request to the Enterprise Chamber of the Amsterdam Court of Appeal to initiate an inquiry into the conduct of business by the company. If the Enterprise Chamber determines that there are well-founded reasons to doubt the soundness of the way the company has been operated, an inquiry can be ordered. The inquiry proceedings may end with a declaration of the Enterprise Chamber that the company has been mismanaged, opening the door to claims for damages being brought against the responsible directors.

During the inquiry proceedings the Enterprise Chamber can order a range of measures. Such measures may set aside the Articles of Association of a company and may infringe the rights of shareholders. In this respect the question is to what extent the measures the Enterprise Chamber can order, may violate Article 1 of the First Protocol to the ECHR.

Chapter 4 concludes that as long as the Enterprise Chamber respects the boundaries as set forth in the relevant provisions and in the case law of the Dutch Supreme Court, it is difficult to envisage a situation in which Article 1 of the First Protocol to the ECHR will be violated.

- Are shareholders under certain circumstances entitled to a derivative action, pursuant to Article 1 of the First Protocol to the ECHR?

A shareholder may see a decline in value of his or her shares where a company suffers a loss due to the wrongful act of a third party. In theory, the company

can claim damages against that third party. If such an action is successful, this should lead to the value of the shares being restored. However, a company may not be willing to or capable of claiming damages. Shareholders have unsuccessfully invoked Article 1 of the First Protocol to the ECHR to establish a right to claim for damages themselves in such a case. Success in such a claim would have entailed a piercing of the corporate veil, as the shareholders were claiming damages for losses suffered by the company. The ECtHR has so far not been willing to grant shareholders a right to a derivative action on the basis of Article 1 of the First Protocol to the ECHR. In particular in *Agrotexim v. Greece*, 21 Eur. Ct. H.R. 250 (1995) the ECtHR made it clear that it prefers to respect the legal personhood of companies in such cases.

Under Dutch law, a shareholder will only be able to claim the loss of value of his shares where a specific standard of care was breached. Given that sufficient practical solutions exist for a shareholder to remedy his loss, it seems unlikely that a shareholder will be able to persuade the ECtHR that there is a breach of Article 1 of the First Protocol to the ECHR simply because Dutch law does not provide for a derivative action.

The question whether the shareholder is entitled to a derivative action is, of course, separate from the question of whether a shareholder may take a case to the ECtHR. A shareholder may refer a case to the ECtHR for a violation of a fundamental right suffered by the company where the company can be perceived as his 'vehicle'. Most obviously this may be the case where there is a single shareholder who is also the managing director. In such circumstances, the ECtHR may be prepared to look through the corporate veil when considering the question of admissibility.

– The Insolvency of Financial Institutions Act (Interventiewet)

The insolvency of a financial institution may pose a threat to the stability of the financial system. If the stability of the financial system is threatened by the imminent collapse of a financial institution, the Minister of Finance and the Dutch Central Bank are authorised to take certain measures to safeguard the financial system as a whole from contagion, pursuant to the Insolvency of Financial Institutions Act. Among the measures which may be taken are (i) the nationalisation of a financial institution and (ii) the transfer of assets from the troubled institution to third parties. Inevitably, such measures will usually interfere with the property rights of the institution and its shareholders.

The ECtHR takes the view that it is for the national authorities to determine when a problem of public concern warrants remedial action to be taken. Moreover, a wide margin of appreciation is usually allowed to the State under the ECHR when it comes to general measures of economic or social strategy. Reasonable measures which are taken in such circumstances are unlikely to be seen as a violation of the rights of the financial institution or its shareholders

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under Article 1. However, where the Dutch Central Bank sells assets of a financial institution to a third party as a remedial action, the financial institution is denied the right to dispute the amount for which those assets are transferred. In absence of sufficient justification, it seems likely that the ECtHR will judge that the State has failed to meet its positive obligation under Article 6 of and Article 1 of the First Protocol to the ECHR by failing to provide for adequate procedural safeguards in this respect.

- Is the right to a fair trial sufficiently guaranteed for directors in inquiry proceedings?

The reputation of a director may be adversely affected by a report arising out of the inquiry procedure. A director will not always be able to challenge the allegations made in the inquiry report, which is usually made public. The consequence is that the inquiry procedure effectively limits the right of a director to have access to a court to defend his or her reputation. From the case law of the ECtHR it can be argued that this limitation is justified by other overriding interests, such as the need for speed and efficiency in the inquiry procedure.

- A legal person may be dissolved where it has been declared illegal—either because of its objectives or activities, or after it has been listed as an organisation engaged in terrorist activities. How can this be reconciled with the right to freedom of association?

Article 11 of the ECHR allows the State to limit the freedom of association to the extent deemed necessary in a democratic society for reasons of national security, public order, prevention of criminal offences, the protection of health or good morals or the protection of the rights and freedoms of others.

When applying this test, the Dutch Supreme Court seems to take a harder line than the ECtHR. The ECtHR seems to be particularly critical where political parties are limited in their capabilities. However the ECtHR seems to have less concerns with the dissolution by the court of an association which is held responsible for repeated serious disturbances of the public order.

Legal persons placed on a ‘terrorist list’ are dissolved by force of law. Pursuant to the ECHR, they are entitled to an effective remedy to dispute their listing. It follows from the case law of the ECtHR that the absence of sufficient legal remedies cannot be justified in a democratic society. If challenged, the legal remedies which currently exist under Dutch law will probably be deemed sufficient by the ECtHR. However, the situation at EU level is less clear. The case law of the European Court in Luxembourg is still developing.

The following general conclusion may be drawn. Dutch corporate law is influenced by the ECHR on three levels. First, the legislature is obliged to take into account the ECHR when designing new laws. The first draft of the Insolvency of Financial Institutions Act, for instance, did not provide sufficient remedies to shareholders whose shares were nationalised or transferred to a third party. Arguably the amended Act which came into force is far more balanced, although still probably not ECHR proof in all circumstances.

Second, the ECHR influences court decisions. For example when the Enterprise Chamber orders a temporary transfer of shares to a third party, it is unable as a consequence of the ECHR to authorise that third party to issue certificates for shares unconditionally.

Third, fundamental rights influence the rules that private legal persons have to respect. If it were not for the ECHR, a company could, for example, set up a merger structure whereby a minority shareholder only received cash rather than new shares—thus bypassing the specific buy-out safeguards provided for by law. The effect would be a cash-out merger in which the value of the shares cashed out was not independently valued. Article 1 of the First Protocol to the ECHR *de facto* forces the company to respect the property rights of the minority shareholder and prohibits the execution of a cash-out merger under Dutch corporate law.

The ECHR forces the State, the courts and private parties to respect fundamental rights. In the field of corporate law, these limits are only occasionally applicable. The influence of the ECHR on Dutch corporate law is therefore *de facto* limited. Moreover, the ECHR usually allows for a wide margin of appreciation when it reviews interferences with fundamental rights that result from measures of economic or social strategy.

Looking to the future, the importance of the ECHR in relationships between private legal persons may be expected to increase—the so-called horizontal effect of fundamental rights. The ECHR seeks to ensure that States behave in a proper manner towards their citizens, but it also aims to ensure that private persons behave in a civilized manner towards each other. In the last fifty years, the economy has become ever more global in nature, stimulating the formation and growth of large companies. Legal persons may have comparable economic power to States and are consequently able to influence the lives of many. The challenge for future seems to be for States to ensure that these global corporations use their power in responsible manner and with respect for human rights.

