Het vetrouwensbeginsel en de contractuele gebondenheid : beschouwingen omtrent de dogmatiek van het overeenkomstenrecht

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Summary

This book ('The reliance principle and contractual liability; an inquiry into the dogmatics of contract law') aims to be a contribution to the field of civil law and legal theory. Its central theme is the question whether it is possible to give an alternative foundation of contractual liability, given the fact that the so called 'reliance principle' ('Vertrauensprinzip') does not meet the standards of legal 'Dogmatik' in an appropriate manner. Thus it should be stressed that this book is not only concerned with the role of the reliance principle as a basis of liability in contemporary law, but also with the character of (continental-European) civil law itself, hereby presenting a fundamentally different role for the legal scholar than in Anglo-American law. The 9 chapters of the book can be read as one elaborated argument on the *desired* foundations of contract law.

In the introduction it is pointed out that in modern civil law several problems regarding the formation of contract (such as the duty to negotiate in good faith and the value to be attached to unilateral promises) have led some scholars to talk of contract law as a field in crisis. For a better understanding of this tendency, chapter I takes as point of departure the philosophical question what the meaning should be of established rules and other legal standards, in view of the well-known fact that it is for the judge himself to decide which standard to apply to the case. Subsequently it is argued that the development from 'rule' to fact can only be seen in its proper proportions when the role of legal science as a 'Geisteswissenschaft' is taken into account. Confronted with a 'crisis', legal standards and facts can only be at stalemate when Rudolf Jhering's 'Unsere Aufgabe' is denied. If one follows Jhering, one has the continuous task of reforming the civil law.

The issue *how* to reform — which in our theory is nothing but the question how to treat established rules when confronted with a case — is treated under the heading of 'Dogmatik' in chapter II. A third way between the primacy of the rule and the primacy of the principle is examined by introducing the concept of 'leerstuk' (Rechtsinstitution) as a legitimate basis for liability. This 'leerstuk' contains a systematically embedded set of cases with corresponding rules. Rules are to be defined as standardised conflicts of interests that because of their resemblance with the case hic et nunc present give a pre-

sumption of a just decision without in any other way being imperative. In this perception the provisions of a civil code (e.g. those of the new Dutch Burgerlijk Wetboek) are at their best *recent* standards as to what is just. Concerning the problem where to find standardised rules, a Dworkinian approach is taken: they can be found through thorough research, be it in the 'positive law', in the legal systems of other countries or of other times. It is essential however that — at least in civil law — this approach is only possible thanks to the presence of perennial institutions ('leerstukken').

In the chapters III and IV the relationship between good faith and reliance is scrutinised in order to gain a clear insight into the matter what is exactly to be considered as the 'factual' element in law. Thus we try to discover what the non-dogmatic part of contract law exactly is. Our main-concern in chapter III is to point out that the concept of good faith ('Treu und Glauben', 'bona fides') has two functions. Firstly, it can be used to describe the judge's freedom to decide which standard (rule or principle) to apply to the case, secondly good faith refers to a standard of conduct for the parties to a contract. In our dogmatic perception it is of the utmost importance — and this is supported by arguments from Roman and modern Dutch law — that legal standards and good faith should be seen as complementary: since the bona fides only becomes important as a rule of conduct where a standard is lacking, one is able to identify new standards in a case where a judge makes reference to the principle of good faith. Subsequently, it is argued that the concept of good faith normally is referred to in case law by some sort of application of the reliance-principle. By this we aim to expose the reliance principle as a non-dogmatic factor in law.

This raises the question (discussed in chapter IV) whether it is possible to transform the reliance principle as we know it into a concept that *does* meet the requirements of dogmatic standards. After a critical survey of several possible criterions within reliance itself (such as the intensity of it, the object on which it is based), a pragmatic reason is given why such a venture is doomed to fail: it is the moral attraction of the principle, combined with its doubtful dogmatic merits, that have made it possible for the reliance principle to become a more and more eminent factor in law. Thus, as far as dogmatics are concerned, we are thrown back to square one and compelled to find an alternative basis for contractual liability.

Chapter V is dedicated to this task. First of all we are concerned with the very essence of concepts like 'obligation', 'duty of care' and 'right', which all turn out to be designed to describe a *vinculum iuris*. Inspired by Gaius' summa divisio obligationum, two possible approaches to the sources of obligations are presented. Unlike the traditional approach, it is held that in case of a desired liability that does not seem to fit into one of the established sources of obligations, one should alter the *content* of the various sources of obligation themselves, *not* the number of sources. This approach forces us to

develop a new basis for tortious liability (modelled after a normative concept of damage) and a restructuration of the general enrichment action and of negotiorum gestio.

This leaves still open what to do with contract itself. In the remaining chapters VI-IX the foundation of and possible criterions for contractual liability are scrutinised. It is submitted that the discussion whether one should take 'will', 'reliance' or 'promise' as a basis for liability does not present the true problem since one continues to give preeminent meaning to the *parties* to the contract and not to the performance (the content of the contract) these parties engage in. In our perception it is necessary to look behind the 'will' or 'reliance' or 'promise' and to see whether there is a 'good reason' for contractual liability.

This by itself however is not so revolutionary. One might be tempted to say that thus the Roman 'causa' or the Anglo-American 'consideration' in its original sense is introduced into contemporary contract law. However we come to defend on historical and theoretical grounds that the 'causa' can take over the role of the 'will', the 'reliance' and the 'promise' and — more importantly — that one can connect contract with the concept of enrichment by stressing that any contract should contain some sort of reciprocity between the performances. As a criterion the question should be put whether the conclusion that a contract exists, would entail unjustified enrichment of one of the parties. Inspired by the so called 'genetic synallagma', as a standard, the concept of 'reciprocal connection' is introduced. Thus one is able to distinguish between normal and abnormal counterperformance, the last being a form of liability in which the reciprocity is justified by other than 'normal' factors. In accordance with our dogmatic perception, it is thus taken into account that it may sometimes be more difficult to arrive at the judgment that there is liability.

In chapters VIII and IX we try to identify the guiding factors for establishing normal and abnormal contractual liability. Account is given of the significance of autonomy, detriment and written documents for the question as to whether there is any unjustified enrichment. The usefulness of the distinction between formal and substantive reasoning is emphasized. Finally, three types of contract are considered. The classic mutual promise (or executory contract) is presented as a legal peculiarity; the executed contract is defended to be the 'real' contract to which the parties are bound. The unilateral promise to perform is closely examined in chapter IX. It turns out that precontractual liability and the government's contractual liability, which are often seen as special forms of liability, can adequately be placed within this scheme of three possible types of contract.

Finally, in an afterthought, it is stressed that regardless the merits of *our* argument for the proposed concept of contract, contractual liability should in any case be placed more firmly in association with the other sources of

obligation. This is, in our dogmatic perception, the only possible way to give effect to the need for 'contractual justice'.