FUNDAMENTAL RIGHTS TALK
An enrichment of legal discourse in private law?

Hans Nieuwenhuis

In her book RIGHTS TALK, the impoverishment of Political Discourse Mary Ann Glendon attacks the predominance of the rhetoric of rights in American political discourse. What is conspicuously lacking, according to her, is the rhetoric of responsibility:

Thus far, in our investigation of American rights talk, we have observed a tendency to formulate important issues in terms of rights; a bent for stating rights claims in a stark, simple, and absolute fashion; an image of the rights-bearer as radically free, self-determining and self-sufficient; and the absence of well-developed responsibility talk.

In this paper I advocate an opposing view: FUNDAMENTAL RIGHTS TALK, an enrichment of legal discourse in private law.

With regard to the American preoccupation with rights Glendon complains:

The new rhetoric of rights is less about human dignity and freedom than about insistent, unending desires.

1 Professor of Civil Law, Faculty of Law, Leiden University.
2 Mary Ann Glendon, Rights Talk, the impoverishment of Political Discourse, New York 1991.
4 Rights Talk p. 171.
In private law the most insistent and unending desire is the desire for money; money to be collected by means of claims for damages. In the Netherlands this eagerness to claim compensation is commonly labeled ‘The Claim Culture’, or simply ‘The American Way’ (*Amerikaanse Toestanden*).

A woman gives birth to a child because an operation intended to sterilize her husband had failed. She claims the costs for bringing up the child from the doctor who has performed the operation. Isn’t this a striking example of highly inflated rights talk? Rights talk completely lacking the rhetoric of responsibility towards the unwanted child? What if, growing up, the child discovers that his parents considered the costs of bringing him up as ‘damage’? How are we to assess the language of the German *Bundesgerichtshof* awarding compensation for the cost of bringing up the child by explaining that ‘the concept of damage as such is value-free’ (*der Schadensbegriff als solcher ist wertfrei*).5 Can we improve our rights talk by transforming it into *fundamental* rights talk? Does invoking the European Convention on Human Rights improve the quality of the debate on how to apply our current Tort Law?

Mrs. G. lives in Edam (say: cheese). She receives state benefit. K., one of her neighbors, suspects her of deceiving the authorities by not telling them that she lives with a friend in a manner closely resembling married life. K. keeps her under close observation and informs the authorities that she walks with this man hand in hand in public places and that his car is parked all night in front of her house. Mrs. G. considers this relentless attention a violation of her right to privacy.

The judge in the summary proceedings agreed, but on appeal his decision was quashed by the Court of Appeal in Amsterdam. The sole fact that Mrs. G. felt spied upon after having discovered that she had been kept under close observation by her neighbor did not amount to a violation of her privacy, according to the Court of Appeal. Mrs. G. again appealed to a higher court and at the Supreme Court (*Hoge Raad*) she complained that the Court of Appeal had not given due consideration to Article 8 of the European Convention:

(i) Everyone has the right to respect for his private and family life, his home and his correspondence.
(ii) There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being

---