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In Search of Less Categorical Laws (Editorial)

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Lawyers need categories. Legal effects formulated in rules or in doctrines from precedents distinguish between cases where the effect is applied or granted and others. Whereas modern law went to a large extent 'from status to contract' and other rules applying in principle to any person in cases meeting certain usually abstract requirements, late 20th century law to a large extent moved back from contract to status. Categories of persons became dominant again in large parts of the law, the most obvious example being the distinction between consumers and professionals. Equally important is the distinction between employees and self-employed. New categories have been created on the basis of social sciences in order to turn the classical law into a kind of therapeutic law. In the law of accidents, motor vehicle drivers are treated differently from other traffic participants. More mixed has been the evolution of the relevance of the distinction between private persons and public authorities or bodies. To some extent these categories of persons and similar fundamental categories in contemporary law are the expression of giving priority to clear-cut rules, to 'hard and fast' rules. They resist calls for a more 'mobile' system as i.a. Walter Wilburg advocated (the so-called 'bewegliche System')., with more 'comparative' rather than absolute rules, even if some corrections on the basis of a proportionality principle are accepted Turning to this issue of our Journal, the articles at first sight have nothing in common. They deal with different disciplines and highly different topics. Nevertheless, it is the task of your editor to uncover the secret relationship between them. And indeed, they all deal to some extent with differentiation from hard and fast rules or categories. This is most evident in the article by Katarzyna Południak-Gierz on personalization of information duties: are undifferentiated information duties towards consumers rational rules, and what are the main obstacles for alternatives? Daniele d'Alvia tackles the border between the born and the unborn. Ipek Çevik discusses the fate or tort rules limiting damages to the direct victim or merely certain categories of relatives. Bernold Nieuwesteeg, Louis Visscher and Bob de Waard discuss i.a. segmentation or differentiation in insurance contracts. And Thomas Schultz and Jason Mitchenson discuss comity as a doctrine putting into question the normal rules on jurisdiction and applicable law as not appropriate in the circumstances. In all disciplines of law, vested interests resist the weakening of personal categories, the weakening of status. But underneath we may detect alternative currents introducing new forms of flexibility.

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