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Editorial

Whose Right/Law Is It Anyway?

European law is full of paradoxes. This issue of our Review is again an opportunity to point to one of them. On the one hand, there is a tendency to expand the duty of courts to raise ex officio rules of (European Union) law protecting in the first place the rights and interests of private parties, namely consumers. This duty was expanded or at least confirmed in the Asturcom judgment of the European Court of Justice (ECJ), albeit under the technique of equivalence of protection: European consumer law has to be treated as if it were national public policy. Given the special context of the case (the question arose in an *exequatur* procedure for an arbitral award) and the many questions related, we have given ample space to two young colleagues to discuss these. The European citizen appears in this case law as a person not really able to take care of its own interests, and the judge therefore is obliged to set aside unfair contracts.

On the other hand, as Dr Rösler put it in his contribution, '[European law] seeks to make the individual a participant of European integration'. Citizens are granted rights of enforcement and (as discussed in the contributions of Rösler and Hazelhorst) in some cases (anti-discrimination law, for example) or proposals (competition law, for example) even punitive damages in order to act as private enforcers of public policy. Citizens' rights granted by state liability rules are discussed also from the perspective of an incentive to act efficiently (see the contribution by Dari-Mattiacci, Garoupa, and Gomez-Pomar). It is true that these rights are not given to citizens in the belief that they will pursue the public interest, but rather in the belief that 'the pursuit of self-interest is vital to a competitive market economy' (Rösler). Adam Smith has already explained to us how virtuous self-interest results in invisible cooperation, and according to Bernard Mandeville even private vice results in public benefit (Fable of the Bees).

Geoges Rouhette already showed in 1981 the contradictory images of mankind (*Menschbild*) in the general civil law, on the one hand (*in casu* the French *Code civil*), and in consumer law, on the other hand (in a thorough analysis of the preparatory works of both).[1] The same citizens who are unable to take care of their own interests have been promoted to guardians of the public interest.

However, even Mandeville has not pretended that the inability to take care of one's own interest results in public benefit. Private inability, Public virtue? Moreover, shifting the enforcement of public policy to private individuals does not lead to an equal level of enforcement; not all private claims are founded and private enforcement thus also risks to result in a blame game, in lawsuits as lotteries, in

[1] Georges Rouhette, 'Droit de la Consommation et Théorie Générale du Contrat', in *Etudes offertes à René Rodière* (Paris: Dalloz, 1981), 247 ff.

disproportionate effects of good or bad luck (as well in competition law as in anti-discrimination law, to name but two examples).

Or have I missed the real meaning of the paradox? Is there no paradox at all? Maybe, when rights of consumers have to be raised ex officio by judges as if they form public policy, the *ratio* is that consumers do not only have a right but also a duty to raise their right in order to advance public policy. It is maybe their task to be instruments of the visible hand of law.[2] Or would it not be safer not to use citizens as instruments of public policy and believe that it is already beneficial if they pursue private interests as long as this occurs within the boundaries of that visible hand of law?[3] The old-fashioned distinction between public and private laws is maybe not that mad after all.

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[2] I borrow the metaphor from E.J. Mestmäcker, 'Die Sichtbare Hand des Rechts. Über das Verhältnis von Rechtsordnung und Wirtschaftssystem bei Adam Smith', in *Recht und Ökonomisches Gesetz*, ed. Mestmäcker (Baden-Baden: Nomos Verlagsgesellschaft, 1984), 104.

[3] *Ibid.*