European Review of Private Law 4-2024 [575–576] © 2024 Kluwer Law International BV, The Netherlands.

Editorial

Windfall Profits and Some Legal Theory

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A large part of this new issue is devoted to interesting specifically contemporary problems, such as mobile investment apps (by Nadia Coggiola) or access to digital personal data (an extensive case note by Larisa Munteanu), or at least modern problems such as market abuse in the secondary securities market (by Heidi Yli-Kankahila) or economic loss caused by cutting a cable (see *infra*). Nevertheless, I'd like to pick up a far more general question on law, which is addressed explicitly in the article by Frederik Peeraer on restitution under an illegal contract, where he distinguishes an instrumental from a non-instrumental finality ascribed to the law. A non-instrumental finality would largely coincide with deontological ethical theory, and the goal of law would be to express end emphasize values and principles, law being an expression of an objective order and reflecting intrinsic ethical values. An instrumental view of law would largely coincide with consequentialist ethical theories, and the rule should depend on the economically and socially efficient outcomes of a rule. It becomes even more interesting when the author, applying this to the question of restitution under an illegal contract of performances that cannot be returned in kind, and sees the arguments against restitution (safeguarding the dignity of the court and the want for retribution) ex the expression of the non-instrumental, deontological view, and arguments against always refusing restitution (deterring parties from acting illegally and avoiding windfall profits) as expression of an instrumental, consequentialist view. Without in any way criticizing the excellent arguments the author further develops on this concrete question, I may add two additional perspectives.

First, a non-instrumental view can also be seen as instrumental in the long term. In the short term, it leads to blunt results, but keeping up moral principles could be an instrument to civilize society in the long run. Moral relativism may be efficient in the short term but destructive in the long term. In a way, this dialectic is also present in debates on comparative law methodology, where we can distinguish e.g., a classical functionalist view of law, analysing the law as an instrument to solve societal problems, from a so-called expressivist view, where law is seen es expressing values and collective commitments of a society. But when function is understood broad enough, one could discern the expressive functions of legal rules and institutions and explain that to the extent they are expressive, they are also a response to societal needs, e.g., by promoting to some extent social cohesion and stability. In the same way, one could understand the instrumental character of non-instrumental views.

Second, windfall profits. Arguments against certain rules and interpretations because they would cause windfall profits can be found in many parts of private law: the law of restitution, remedies in contract law, insolvency and enforcement law, tort law, etc. ... As to the law of restitution, ample attention is given to it in Peeraer's article in this issue. Where an aggrieved party suffers damage by its own fault and that of a tortfeasor, his own contribution to the damage will not count when the tortfeasor acted intentionally – a topic which among others is discussed in this issue in Leonard Lusznat's article on the role of intention in the law of delict and tort. When a buyer has contracted a bad bargain, paying too much for goods, the non-performance of the seller entitling the buyer to termination and restitution may sometimes grant the buyer a windfall profit, a topic which will be analysed at length in an article by Matteo Dellacasa in one of the next issues. In a lecture which is not published yet, I analyse cases where a creditor may profit from rules having as their results that certain transaction cannot be opposed to the creditor, although they can against other creditors, thus giving the creditor a higher share in their product compared to when they would have to share it with other creditors. One would expect that legal scholarship would pay more attention to this question in general, but it seems that windfall profits are basically studied only in order to promote taxing them away. It would be interesting to see the topic also being studied more generally from the perspective of their possible function.

Evidently such considerations should not dispense us from analysing carefully the economic effects of legal rules and judging whether they set the right incentives. An excellent example is the article on cable cases in tort law (liability for economic loss caused by cable accidents) by Isabel Mousinho de Figueiredo in this issue, taking into account all relevant factors, including also the coherence with contract law solutions.

Our Journal has always considered procedural law as an important part of private law; in this issue, the discipline is represented by an article by Hilal Ünal Kaya comparing German and Turkish law on the scope of appellate proceedings. We conclude the issue with reviews reviewing some excellent books all integrating an historical perspective on private law. Enjoy reading.

Matthias E. Storme,
co-editor in chief.