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Book Reviews

Hans-W. Micklitz (ed), *The many concepts of social justice in European private law* (E. Elgar Cheltenham, UK, Northampton, MA, USA, 2011).

1 The occasions at the basis of this review

This review is the result of several meetings and occasions that accompanied and conditioned this paper. A research project was financed by the MIUR (Italian Ministry for Education, University and Research) on the impact that the Lisbon Treaty has and can have on private law institutes. There was also a Workshop that took place in Florence on 8 June 2013. There were European private law courses of 2012 and 2013 during the doctorate organized by the SUM (Italian Human Sciences Institute) and by the University of Florence. At the Festival d'Europa organized in Florence on 8 May 2013, the volume was the subject of an analysis and investigation session. Several official or private meetings with the author occurred, which strengthened the interest towards an important work to collect the most significant data of European private law. I will speak immediately of the editor and then I will focus on the introduction that contains the idea which inspired the volume.

Mr Micklitz started his activity in Bremen at the end of the Sixties and studied the contract and responsibility, but particularly focused on the philosophy of law and on the social and economic evolution of that period, marked by a series of significant facts. First of all the special legislation that developed in those years, outside the BGB (German Civil Code) and alongside the Pandectists' formal law, and then the beginning of the process for the standardization of community law that developed after the European Single Act of 1986 and took off with the 1993 Directive about restrictive clauses, with everything that followed up to an harmonization model which, now, aims at a maximum homogeneity level, which had been unthinkable for a long period.

From the observation of what had happened, there arose the idea of this book that cannot disregard a fact. The European law activism is not aimed at making a common review of the rules on contracts or agreements; rather, it has a precise task. It is that of opening the market and fostering competition through the act of autonomy that initially turns to an advanced consumer, using Internet, knowing English, analyzing the terms of the contracts offered him, in no need of protection but only of information. The model is very far from any idea of distributive justice and finds it difficult to diverge from the private law categories which have prevailed in the last two centuries, inspiring the continental codifications or

taking their cue from the tradition of common law. Not only this: the peculiarity of European Union about this point is manifest.

Its institutions cannot be set in the classical forms of Politics and Democracy. Inside there is, and there will be again, an important role for States, at least up to a transformation in a federal sense. In this structure the fiscal policy, the control of public spending and national debt, the protection of social rights mainly lie with the single national systems. So the definition itself of European private law is complicated, since there is a structured and reticular system of different sources converging only partially on some common principles. But Micklitz's observation doesn't stop here for he wants to catch the most significant data of present times, up to the Lisbon Treaty.

With that main source that summarizes and strengthens what has been done before, community law ensures access to the market according to a series of strong provisions (the visible hand)¹ which progressively aim at ensuring transparency, non-discrimination and defence of disadvantaged (asymmetrical) positions, up to the explicit recognition of the fundamental rights embedded in the Nice-Strasbourg Agreement that now has the same juridical effect as that of Treaties. Our author is attracted by a provision in particular: Article 36, which grants and ensures access to services of general economic interest in order to promote social and territorial cohesion. The innovation is manifest.

Through the contract optimized with protective standards, community sources endorse forms of cohesion and justice that are not only commutative, since general interests not related to the dynamics of individual relationships are also involved. There is a precise connection between the development of the market and social cohesion,² as recalled by the European Commission and the Monti Report, underling the need for further protection in order to eliminate the asymmetries and differences which hinder territorial integration and the strengthening of the Single Market. The Lisbon Treaty does not just fix the objective of balanced growth based on a highly competitive market social economy. This is a principle that must be translated into rules with the contribution of all social sciences.

There follows the structure of the volume that analyses the different justice models entrusted to the best European juridical science and contains in the second part the conceptual distinction between commutative and procedural

1 H.-W. Micklitz, 'La mano visibile del diritto privato europeo in materia normativa. La trasformazione del diritto privato europeo dall'autonomia al funzionalismo nella concorrenza e nella regolazione' *EUI Working Papers*, Department of Law, 2010/09.

2 G. Vettori, 'Diritti e coesione sociale' www.personaemercato.it and *Rivista diritto privato* 2012, 1 *et seq.*

justice (with a dialogue between Wojciek Sadurski and Christine Chwaszeza), in the third part the relationship between constitutional values and private law (with contributions by Ernest Ulrich Petermann, Hugh Collins and Ugo Mattei), in the fourth part the comparison between social-economic development and social justice (with contributions by Alessandro Somma, Cornelius Torp, Ruth Sefton-Green, Pia Letto-Varano and Arthur Dyevre), in the fifth part aspects of labour law, consumer and competition law (with contributions by Marie-Ange Moreau, Hannes Rosler, Chris Willet, Bastian Schuller and K.J. Cseres). I cannot produce here an effective summary of every essay,³ so I will focus on the key idea of the book and on the comparison with Italian law.

2 The idea of Hans-W. Micklitz and the comparison with the Italian debate on contractual justice

Our author, as we said, has a strong view of the European debate, which is the result of regulatory interventions that express values and remedies that are in sharp contrast with the categories and foundations of juridical modernity. The evolution of community sources is evident and is caught with great clearness.

Professor Micklitz emphasizes the decisive role of competition, passing with the Lisbon Treaty from single and independent pillar for market strengthening to a tool that, together with other ones, deal in a different way from the past, with the meaning and basis of contractual autonomy of private persons.

The visible hand of the legislator corrects the pure logic of contract freedom with at least two strong choices: the anti-discriminatory law which concerns every aspect of relationships between private persons and the right of access to the market that allows everyone to have a concrete and realistic opportunity of accessing general economic interest services.

We can discuss whether this is an acknowledgement directed only to an excellent operation of market dynamics; yet, the meaning of some provisions of the Nice-Strasbourg Agreement is precise. Article 36, in order to promote social and territorial cohesion, acknowledges access to general economic interest services. The reference to the provisions of national regulations and practice does not obscure the reference to the general interest that is pursued ie social and

3 A summary of all interventions can be consulted in the most complete review of the volume contained in *Persona e Mercato*, 2, 2013 at www.personaemercato.it.

territorial cohesion of the Union. The ratio goes beyond the commutative logics of an act of/between private persons. The Union wants to realise, through such access, a stronger integration and distributive justice which passes from public law to the causal justification of the act of autonomy and to the evaluation of lawfulness of the behaviours that hinder or limit such access. A confirmation of this is derived from another direction.

Article 47 expressly provides that 'Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal'. The substantial acknowledgement thus is linked to a procedural provision, and the concrete opportunity of accessing the market and general economic interest services becomes a fundamental right that has an enforcement tool remitted to the legislator and the judge in their respective competences.

This leads to an important conclusion. The domestic and community system grants citizens and contractors rights and remedies against asymmetries, giving importance to principles and general clauses to evaluate behaviours and acts. With the contract, certainly, you cannot realise objectives and purposes of a more general social justice nature that should be realised by national and community Welfare institutes. But private persons' activity should follow the principles and rules to be implemented in a different context from the exclusively national one. And this goes beyond the position of consumers or weak enterprises.⁴ I will recall only some aspects that have emerged in the Italian doctrine.

This theme has been treated in different venues and occasions. A clear historical analysis has underlined the fact that contractual justice is 'an unsolved matter in Italian private law of the nineteenth and twentieth century'⁵ and has explained the reason very well. The volume reproduces the decisions of some legal cases about restrictive clauses, extremely onerous agreements, very high interests and gains, all of them linked by the 'common thread' of the difficult task of ensuring balance and protection, in the presence of the pivot principles of individualism and of the classical contract doctrine, such as *pacta sunt servanda* and the force of law of contracts. The different answers given by judges and jurists to these problems, in that historical context, all deal, each one with a different result and sensitivity,⁶ with the theme of equality and equity in contracts, which

4 G. Vettori, 'Contract without numbers and without adjectives. Beyond the consumer and the weak enterprise' *European Review of Contract Law* 2013, 221 and following ones.

5 G. Chiodi, *La Giustizia contrattuale. Itinerari della giurisprudenza italiana tra otto e novecento* (Milan: Giuffrè, 2009) XI et seq.

6 Chiodi, n 5 above, speaks of 'a dissention, a dialectics, an explicit and latent tension which pervades all judgments', XXXIV.

can be translated into the formula of contractual justice⁷ that certifies the existence of a problem: the discussed and discordant use of defences and institutes (defects in the agreement, annulment, good faith, cause, public order and public morality) as a limit to the compulsory power of the contract and the inviolability of the agreement.

In the second half of the twentieth century all this was described very well in France in a famous essay⁸ and in Germany in a work⁹ that urged legal doctrine to reconsider the foundations of private law. In Italy, at the beginning of the new century, the reference to contractual justice re-emerged, in a deeply changed normative context, but the positions in doctrine and law still remain apart.¹⁰

The non-juridical meaning of the term 'contractual justice' has been criticized,¹¹ by claiming that the community controls on the content of the contracts of consumers and enterprises are not intended to moralize the contract; rather, to regulate exchanges so that the ethical-political claim can at the most be considered a 'reason', among others, for a regulation model expressed only by the needs of the market. This calls for an objection. Justice in private law does not match an ethical view or social appeals that require an act of political balancing between

7 Chiodi, n 5 above, quoted work XVIII. In the light of the narrow-mindedness of someone reasserting the private power of contract and the limits of the intervention of the judge called to guard on the dogma of will and on the original values of the code (dated 1865), there are people who, on the contrary, claim for the judge and the interpreter the power of 'coordinating the respect of contractual agreements with the rules of good faith, equity, public morality... in an organic and harmonic whole', XXXVIII.

8 J. Ghestin, 'L'utile et le juste dans les contrats' *Archives de philosophie du droit* 1981, 35 et seq.

9 L. Raiser, *Il compito del diritto privato* (1977), Italian translation by M. Graziadei, ed by C.M. Mazzoni (Milan: Giuffrè, 1990) 98.

10 I take the liberty of quoting G. Vettori, 'Autonomia privata e contratto giusto' *Rivista diritto privato* 2000, 21 et seq; G. Vettori, *Diritto dei contratti e costituzione europea. Regole e principi ordinanti* (Milan: Giuffrè, 2005) 83 et seq; G. Vettori, 'Giustizia e rimedi nel diritto europeo dei contratti' *Europa e diritto privato* 2006, 53 et seq, but in particular H. Collins, 'La giustizia contrattuale in Europa' *Rivista critica del diritto privato* 2003, 659 et seq; The Manifesto called 'Giustizia sociale nel diritto contrattuale europeo: un manifesto', published in G. Vettori (ed), *Contratto e costituzione in Europa* (Padua: Cedam 2005) and in *Rivista critica del diritto privato* 2005, 99 et seq and finally V. Scalisi, 'Giustizia contrattuale e rimedi: fondamento e limiti di un controverso principio', in V. Scalisi, *Il contratto in trasformazione. Invalidità e inefficacia nella transizione al diritto europeo* (Milan: Giuffrè, 2011) 337 and its wide bibliography. The widest and most complete work on European law is by C. Castronovo and S. Mazzamuto (eds), *Manuale di diritto privato europeo* (2nd ed, Milan: Giuffrè, 2013).

11 See M. Barcellona, *Clausole contrattuali e giustizia contrattuale. Equità e buona fede tra codice civile e diritto europeo* (Turin: 2006) 257 et seq. M. Barcellona, 'I nuovi controlli sul contenuto del contratto e le forme della sua eterointegrazione: Stato e mercato nell'orizzonte europeo' *Europa e diritto privato* 2008, 33 et seq; in a different sense see in particular Collins, n 10 above.

different values. On the contrary, it has a distributive function because a different configuration of structural elements and protections distributes in a different way the risks deriving from private autonomy.¹² This objection only indicates the need, also present in private law, to reflect and fix, with reasonable precision, the rules and remedies suitable to the time and issues treated, combining equality and singleness with an adjustment effort and a risk of inexactitude that is connatural to every sound idea of justice that requires only to look for 'always more and further'¹³ in imputing to everyone what is due, considering the absolute and unrepeatable value of each individuality.¹⁴

With that term, today such as in the past, we can only correctly indicate a non-prescriptive principle evoking a necessary reflection on the remedies against illicit behaviours and unfair agreements in a particular system, to be reconstructed in the light of fundamental, recognized and guaranteed rights. In other words, the features of the juridical system have changed, from the age of codes to post-modern complexity, but the need for correction and adjustment of rules and defences is unchanged.

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¹² Collins, n 10 above, 659 *et seq.*

¹³ J. Nancy, *Il giusto e l'ingiusto* (Milan: Feltrinelli, 2007) 28 'Be fair is thinking that justice has still to be done and that it can require always more and go beyond. Each person (or group of persons) convinced of knowing what is fair and unfair, convinced of doing justice, of not having to strain to become fairer, each person like this is dangerous. The beginning of justice... consists in knowing that you are never fair enough' (58).

¹⁴ Vettori (2006), n 10 above, 53 *et seq.*