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The nemo auditor rule in European law

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Abstract

In 1987, Robert Feenstra wrote an essay concerning the origin of the Latin adage *nemo auditur suam turpitudinem allegans*. This *nemo auditor* rule was not applied in Dutch law until 1992. Feenstra has invited other authors to address the question why the rule played no role whatsoever in the Netherlands, whereas almost all legal systems in Western Europe, except the Finnish, have adopted it. In this presentation I will compare the ‘Dutch/Finnish’ approach with the French, on the basis of a few examples.

Roman law knew several *condictiones*, which were provisions regarding the restitution of an unjustified enrichment. Improper behaviour could exclude the application of one of these *condictiones*, the *condictio ob turpem causam*. This specific exclusion was later formulated by the Glossators as the more general adage *nemo auditur suam turpitudinem allegans*. This adage means that someone should not benefit (“be heard”) from his own improper behaviour.

As has already been indicated above, the *nemo auditur* rule was not adopted in Dutch law until 1992, and even since then it has played a minor role. The Netherlands found themselves in a rather unique position with this 'refusal', since the rule was accepted almost everywhere in Western Europe, except in Finland. Thus, in the Netherlands and in Finland, the courts always allowed restitution, even when the plaintiff had behaved in an immoral way. This caused much debate because results obtained in some cases were considered to be unfair.

Contrary to the Netherlands and Finland, the *nemo auditur* rule was adopted into the civil codes in Germany, Italy and many other countries, or simply applied by the courts, for instance in France and in England. The courts in France sometimes rejected the claim for the recovery of a benefit subsequent to an illegal or immoral contract. For this judgement they relied on the (unwritten) adage *nemo auditur suam turpitudinem allegans*. However, not every illegal contract justified this result, and this led to unpredictable judgements.

Several cases will be examined to outline the differences between the legal systems of the Netherlands and Finland, as opposed to that of France. As examples I will use the (restitution of a) payment to commit a crime and the sale of a piano to a brothel-keeper.

Keywords: illegal contracts, law of restitution, immoral behaviour, comparative law