

Udo Reifner, “The Lost Penny – Social Contract Law and Market Economy”¹

The invitation to write this blog gave me an excuse to look at some old books on my shelf. This essay appeared in the last century. What struck me was that the essay reflected how political and economic ideas had shifted the debating starting points so far that it was impossible to imagine anything other than a liberal market oriented framework at that time. All the “left” could do was to re-orientate the debate somewhat, but was forced to mimic the language of neo-liberal economics. In contrast Udo asserts that the law has (and has more potential to) become more liberal and ensure community values are protected. So, strangely, the traditionally conservative legal institutions responded by ensuring the social values were not eroded entirely.

This is not quite the same as the toothpaste analogy regarding discretion, whereby discretion is just pushed around the landscape. There was certainly less social welfare values in society, but the law at least ensured some community welfarist values were entertained as part of the mix. In the UK one saw a similar pattern. When I was a student the judges were the focus of the left’s resentment and Prof Griffith’s book the *Politics of the Judiciary* showed how they represented a conservative agenda. Actually this was for the most part an individualistic agenda fighting against collectivist solutions, such as the closed shop in the work place. In fact at a time when the judiciary is seen as a valuable resource by the left, I still detect they favour individual rights over collective rights. Often this is dressed upon as human rights arguments to protect individuals against the state as it tries to find collective solutions to rationing scarce resources.

Since Udo’s “Lost Penny” paper was written, we have had the 2008 economic crisis. This seems to have provided scope for some commentators from the left to re-open new political and economic arguments, but sadly has for the most part given rise to fear and protectionism as the capitalist economic and social order seeks to shore up its institutions to allow business to continue as usual. There have undoubtedly been important legal innovations, especially in the field of law Udo specializes in - consumer credit. Responsible lending is not quite here yet as a fully fledged principle in European law, but information duties are made more active with the duty to provide adequate explanations and in some contexts businesses have to take into account the needs of consumers. Major financial crises, such as the housing market collapse in Spain and problems of using foreign currency loans when the Swiss franc increased in value, were resolved by the European Courts using unfair terms legislation in innovative manners. They retrospectively cleaned up the mess – as Udo quoted “*da mihi facta dabo tibi ius*” (Give me the Fact, I give you the law). However, I am a bit surprised that Udo has such faith in the private law. He always teases me about the conservatism of the common law. Sometimes I think that is unfair, but more generally even in a system with a broad good faith doctrine and rules to intervene in contracts by interpretation or use of judicial discretion, I think there are limits on the extent to which private law as traditionally understood can assist. Udo himself quotes a case that said the character of oranges was not affected by the human rights abuses of the country exporting them. At a far more pragmatic level the costs of litigation are so high (in terms not only of money but also effort) that few people litigate. Class actions have not normally been taken to protect the collective interest in matters such as the environment, but rather the collected individual losses of

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individuals in the financial services sector or those who paid too much in the UK for replica football shirts.

Udo notes the potential for contracts to become a place for the creation of legal rights. I see soft law Codes and guidance having an important role and public authorities (in some countries consumer organisations) having great practical impact.

I was always told you needed a good title to grab the reader's attention and make him or her remember the paper. Udo is always excellent at doing this. This time he uses a religion parable about a Lost Penny. His point is that the market is neutral and you have to ensure community values have a value in the market place. However, he does go on to suggest that money is becoming less anonymous given the ability to trace it electronically. We also have to be cautious about the neutrality of market exchanges as some studies show discrimination exists as the same deal is not provided to all regardless of their characteristics. This has been suggested to be the case based on wealth, colour or sex, but nowadays can be based on your internet browsing habits.

This article reflects some of the real strength of Udo's work. He has a deep breadth of knowledge about law, politics, economics and philosophy. He challenges traditional perceptions from a position of intellectual strength and places legal discussion in a real world context. In other aspects of his professional life he has delivered meaningful practical benefits to consumers and citizens. That practical approach is reflected in his willingness to use the instruments that already exist in creative ways to benefit the community. He remains a forceful advocate of consumer values in a world that embraces consumerism, but not always consumer values of the sort Udo espouses. If there were more people, like Udo, willing to challenge established viewpoints in the courts then the world would be a better place and private law could fulfil the potential Udo has revealed to us.

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