

Udo Reifner, marxist or missionary?¹

I first met Udo on June 16 1984, when he addressed the Dutch legal aid movement during a Conference celebrating the 10th anniversary of the Amsterdam Legal Aid bureau. When I entered the room to shake hands with our German guest he whispered to himself ‘Jetzt kenne Ich alle Spezialisten in Konsumentencredit’. Just like Udo I had defended my PhD on that topic, he in 1977 in Berlin, I in 1981 in Utrecht. In my copy of the conference brochure Udo has written:

Solid(t)aire (Sartre), that is the question (Shakespeare).

Udo’s paper was called ‘Theorie und Praxis struktureller Rechtshilfe’ in which he described the collective actions by the Verbraucherzentralen against malpractices of German banks.

I was impressed both by the theoretical breadth of his approach and its practical relevance, which was completely new to the Dutch legal aid scene.

Consequently Jo van Saasse and myself travelled in 1995 to Hamburg to conduct an interview with Udo for *Recht & kritiek*, the Dutch equivalent of *Kritische Justiz*.

It was a Herculean task to type out the texts of ten hours of interviewing and it took us many more hours to compose an orderly tekst of thirty pages, the longest interview ever published in that journal.

In the Introduction we portrayed Udo first as an intellectual of the left who loved private law. Second as a pragmatist who designs well reflected mass actions and third as someone who places the agency of human beings at the centre of all his work.

For this blog I highlight the key issues of the interview that offer some insights in the ideas of the young Reifner, who was 37 then.

Arbeit ist Konsum, Konsum ist Arbeit

In that period of time the focus on private law was remarkable because left wing legal aid lawyers concentrated on labor and housing law. Consumer law was seen as a bourgeois affair for the (upper) middle class.

Udo argued – quoting Marx – that labor and consumption are both productive activities. When I eat, I reproduce myself, when I perform for someone else, we call it labor. Unpaid labor by the housewife is considered consumption if she goes to the shop to get food. But if the food is brought to the house by the supplier, it is labor. This difference between paid and unpaid labor is perverse and indefensible

Reifner argues for a sort of progressive economic analysis of law: ‘If I leave out every activity that does not generate a profit, I am with Posner’s depressive analysis. I include every activity with societal benefits.’

Modern consumption takes a lot of time investment of the consumer, including his so called free time, i.e. time after work. Organizing your financial affairs for instance is a complex matter and requires a lot of unpaid work .

Furthermore the worker does not only value the wage that he receives from his employer but also what he can buy for it. His purchasing power is the reflection of his earning power.

¹ Comment on: Theorie, aktie en recht bij Udo Reifner. Interview over rechtshulp, consumentenrecht en kollektief handelen. 11 *Recht & kritiek* (1985), 4: 320 -350 .

Consumer issues are indirect labor issues. So consumer law can be inspired by the achievements and the strategies of the labor movement and labor unions.

Collective consumers actions

This was demonstrated by the mass consumer action in the field of instalment sales. Lower class people were legally bound by usurious contract terms. They were not used to bring their grievances to court, although they were interested in the legal dimension of their problems. During group consulting hours ‘Sittenwidrigkeit’ (against good morals’) emerged ‘bottom up’ from the interviews with these clients of the Consumer Bureaus. The legal concept, embodied in § 128 of the BGB (Bürgerliches Gesetzbuch) provided much ‘mobilizing power’ at the collective level. It inspired clients to protest together against their exploitation, one of the consequences of Caplovitz’ law ‘The poor pay more’.

Intellectual inspirations

An important author that inspired Udo was Josef Esser, who argued in *Vorverständnis und Methodenwahl*, that in private law courts motivate in their judgements ‘lege artis’ results that they have found elsewhere. Udo used Esser’s approach to infuse new social values in the existing system of private law.

A second author he mentioned was Louis Althusser, who showed in ‘*Theorie und theoretische Praxis*’ that law is not just an object for analysis for the question what is good and bad. Law also shows avenues for practices. Law exists of words, ideas and forms of consciousness. Law offers schemes of interpretation of reality in the form of judicial decisions. It is not just an ideology, but it is also laid down around people in organisational structures. Therefore it is interesting to study the law itself. A progressive lawyer does not have to be a critic of society or an empirical sociologist.

Thirdly, he mentioned historical studies on the labor unions in the beginning of the 19th century and the brave conduct of some liberal lawyers during the Nazi-era.

Access to justice

Reifner differentiates between three kinds of legal aid. First, the Fürsorgemodell, that is a kind of support for poor people that are ignorant about their rights and are only in need of care, because the law cannot solve their problems. Second, the service model practised by commercial law firms where clients pay for legal services. The model allows for autonomy of the client, but only if he can afford to pay the lawyer. Third, the collective interest model, that is developed by the trade unions as a form of collective solidarity, based on monthly contributions and risk sharing.

Based on this third model Reifner c.s. developed a new form of ‘soziale Execution’ (Kahn-Freund) that was not directed towards the courts. Judges don’t focus on the realization of rights, they just say what the law is. This new way to get access to justice focusses on collective actions by the affected people themselves. Via ‘*Rechtsdurchsetzung*’ it was possible to confront the law and legal institutions with social interests that were not included before. So the legal system was forced to adapt and to change. Labor law has showed that social pressure is effective and therefore pressure must be used also by other groups in society

The project changed the focus from juridification to teaching the clients how they could help themselves. The people were stimulated to initiate contacts with the banks about their complaints. The clients felt empowered when they realised that they were not alone, but that

‘their’ bank had also treated many other customers badly. This helped them also to overcome their individual ‘guilt complex’

The clients were also asked to collect information about the bank that had charged them too much interest. This information was collected via ICT and personal computers, indispensable tools for this new kind of assistance. In Udo’s words: ‘Collective action is well informed action’.

Looking back on the interview

More than 30 years later many of the ideas formulated in 1985 are as relevant now as they were then.

The boundaries between labour and consumption (Arbeit ist Konsum, Konsum ist Arbeit) have been blurred considerably in the meantime. Many activities that traditionally belonged to the private sphere have been outsourced to the market of professionals and commercial delivery, for instance day care for babies and dog walking services. At the same time many consumers have commercialised private items of the consumption sphere: from AIRBNB to taxi services with their private cars.

Consumer law has become an integral part of the so called social fields of law. Collective class actions against powerful banks are brought to the courts in all developed legal systems. Most of the time they are supported by collective action in the media.

Two years after the interview, in 1987, Udo started the IFF in Hamburg, in which many of the preceding ideas were materialised. The Institute became a prominent and sustainable center for international conferences, multi-disciplinary studies, collective actions in Germany and in Europe. IFF also developed towards an inspiring intellectual home for many scholars, practitioners and activists from all over the world.

I consider Udo as a visionary, who was far ahead of his time in the 1980s and who paved the way for many new initiatives in the field of consumer credit, debt and financial services. Over all those years he has shown a remarkable and rare combination of 1968 idealism, detailed legal knowledge, impressive financial and technical expertise and political and intellectual resilience.

In September 2017 I met a member of the International Association of Consumer Law during a colloquium in Pretoria. We gossiped about our mutual colleagues in the field. She asked me ‘Is Reifner a Marxist?’ In my answer I referred to the last question of our interview: “Udo, you come from a family of missionaries. Aren’t you also one yourself?” (After a long silence) he replied: ‘Yes, a Prediger, a Richter, or another figure from the Bible’.

Nick Huls