Comments on Udo Reifner, Verbraucherschutz und Neo-Liberalismus. DCFR, EU-Verbraucherschutzrichlinien und die Kritik Stürners"[1]

1. In March 2017, Professor Nogler invited me to participate in a commemorative publication on Professor Reifner's work. The format of such a publication was to be an unusual one. Instead of a book, it was to be a blog, where each author was supposed to comment on one of Professor Reifner's many books or articles. I gladly accepted, choosing Professor Reifner's article on the challenges to consumer protection law arising from neoliberal politics [Reifner, U. (2009) pp. 3-11].

"Verbraucherschutz und Neo-Liberalismus" focuses on two grand projects of European contract law. The draft directive on consumer rights aimed at becoming a European consumer code and the draft common frame of reference aimed at becoming a European civil code [see Hesselink, M. (2009) pp. 919-971; Jansen, N. / Zimmermann, R. (2010) pp. 94-112; Jansen, N. (2010) pp. 147-172]. It is apparent that both of them failed. The draft common frame of reference was transformed into a draft common law of sales and eventually abandoned. The draft directive on consumer rights aimed at consolidating four directives. It aimed at consolidating Directive 85/577/EEC, on contracts negotiated away from business premises, Directive 97/7/EC, on distance contracts, Directive 93/13/EC, on unfair terms in consumer contracts, and Directive 88/44/EC, on consumer sales. In spite of the fact a directive on consumer rights was enacted—Directive 2011/83/EU—, it is much more limited in scope than the draft directive. It merely consolidates Directive 85/577/EEC, on contracts negotiated away from business premises, and Directive 97/7/EC, on distance contracts. In spite of the fact the grand projects failed, the paradigms of contractual justice underlying both of them did not disappear. Reifner's article continues to be up-to-date.

I found it particularly interesting on two grounds. It emphasizes the difference between spot contracts and long-term contracts. Furthermore, it emphasizes the difference between the paradigms of contractual justice appropriate to spot contracts and to long-term contracts. Spot contracts are fundamental to all market economies—ll market economies are based upon exchange and, without spot contracts, such as sales, there would be no exchange. Long-term contracts, such as credit and employment, are fundamental to contemporary market economies—contemporary market economies are based upon services and, without long-term contracts, there would be no services [see, for instance, Reifner, U. (2009) p. 3; Nogler, L. / Reifner, U. (2009); Grundmann, S. (2011), p. 468; Grundmann, S. (2011a) pp. 523-524]. In what concerns spot, transactional contracts, contractual justice tends to equate to contractual freedom. In what concerns long-term, relational contracts, such as employment and tenancy, contractual justice tends to equate to humanity, equality and solidarity.

2. The draft directive and the draft common frame of reference focused on sales."European contract law is sales law"—"Das EU-Vertragsrecht ist Kaufrecht" [Reifner, U. (2009) p. 3]. The draft directive on consumer rights was no more than a draft directive of consumer rights in sales contracts, and the draft common frame of reference of European private law was no more than a draft common frame of reference of European sales law. In keeping with the example of European consumer law, the draft common frame of reference, i.e., the draft European civil code was "an international sales code, regulating occasional acts of exchange between individuals"—"Der DFCR ist im Gefolge des EU-Verbraucherrechts ein inter- nationales Kaufgesetzbuch zur Regelung punktueller Tauschakte zwischen Individuen geworden" [Reifner, U. (2009) p. 5]. It could be, as it eventually was, transformed into a draft common European sales law. Furthermore, the draft common frame of reference and the draft directive focused on contractual freedom. They assumed that consumer protection is a matter of commutative, corrective justice, and that commutative,

[1] In: *Verbraucher und Recht* 2009, pp. 3 ff.

corrective justice can be achieved by correcting asymmetric information between consumers and professionals—they assumed that contractual justice is no more than a matter of information. Whenever the consumer is properly informed, free contracts would be fair contracts. Therefore, the model of contractual justice underlying the draft common frame of reference basically is a model of disclosure and information—contractual justice would be no more, and no less, than informational justice [see, for instance. Dauner-Lieb, B. (1983); Fleischer, H. (2001) pp. 205-207; Grundmann, S. (2002) pp. 269-293].

3. In criticizing both the paradigm of contract and the paradigm of contractual justice underlying the grand projects in European contract law, Reifner argues that the exclusive reference to commutative justice, albeit "materialised" or modified, is fundamentally flawed. It fails to take into account the economic and social differences between spot, transactional contracts and long-term, relational contracts—it fails to take into account differences that make all the difference.

Luca Nogler and Udo Reifner single out long-term contracts that allow human persons to have access to money and long-term contracts that allow human persons, as well as their families, to have access to the satisfaction to one of their most fundamental needs—housing [Nogler, L. / Reifner, U. (2014)]. In fact, access to money either results from work or from credit, and access to housing either results from credit or from tenancy. The problem is that that the most important long-term consumer contracts tend to be lifetime contracts—contracts regulating the social relationships of employment, credit and tenancy tend to be lifetime contracts [Nogler, L. / Reifner, U. (2014)]. Even though humanity, equality and solidarity are peripheral to the regulation of long-term commercial contracts, they are central to the regulation of long-term, lifetime contracts [see, for instance, Nogler, L. / Reifner, U. (2014) pp. 14 ff.; Nicolussi, A. (2014); Nogler, L. / Reifner, U. (2017) pp. 65 ff.; Pinto Oliveira, N. M. (2017) pp. 101-104; Pinto Oliveira, N. M. (2017a) pp. 247-248].

In spot, transactional contracts, such as sales, contractual justice is a matter of contractual freedom. Consumer protection is a matter of acknowledging that contractual freedom is context-sensitive. In keeping with Wilhelmsson's classification of the varieties of welfarism in contract law, consumer protection is a matter of market-rational welfarism [see Wilhelmsson, Th. (2004) p. 725].

4. In long-term, relational contracts, there is a difference between commercial and consumer contracts. Reifner advocates a comprehensive concept of consumer contracts, suggesting it should refer to the economic and social process that starts start with providing human persons opportunities to work, that continues by making an income available to them, as well as to their families, and that ends up by providing them the opportunity of using their income in the satisfaction of their needs, as well as in the satisfaction of their families' needs [see Reifner, U. (2009) p. 11]. It follows from such a comprehensive concept of consumer contracts that, in long-term relationships, contractual justice is a matter of humanity, equality and solidarity [Reifner, U. (2009) pp. 3 and 6]. Consumer protection is both at matter of freedom, at the moment of the conclusion of the contract, and a matter of solidarity, at the moment of the performance of the contract. Furthermore, it follows from such a comprehensive concept of consumer contracts that, in long-term, lifetime relationships, contractual justice is a matter of correcting the distributive results of the market mechanism. In keeping with Wilhelmsson's classification of the varieties of welfarism, consumer protection would be a matter of market-rectifying welfarism [see Wilhelmsson, Th. (2004) p. 725]. The image of the consumer underlying the regulation of spot, transactional contracts points to individuals that, instead of needs, have interests and, instead of goods, lack information [Reifner, U. (2009) p. 5]. The image of the consumer underlying the regulation of long-term contracts, such as employment contracts, points to individuals that do have needs, and whose needs cannot be left to the market.

5. In referring to long-term, lifetime contracts, Udo Reifner proposes a new model of contractual justice. I would like to emphasize the focal points of the new model and to contrast them with the

focal points of four alternative paradigms—with Weinrib's concept of "formalist", unmodified commutative, corrective justice, with Canaris' concept of "materialised", modified commutative justice, with Micklitz's concept of access justice, as well as with the Study Group's concept of social justice [see Study Group on Social Justice in European Private Law (2004); on the Study Group's concept, see, for instance, Hesselink, M. W. (2008), and Rutgers, J. (2016)].

6. Firstly, the new model of contractual justice combines commutative and distributive elements [for a general presentation of the relationship between commutative and distributive justice in contract law, see Kronman, A. T. (1979-1980) pp. 472-511; Canaris, C.-W. (2012) pp. 35-137; Arnold, S. (2014)]. Secondly, the new model requires both fair access of consumers to the market and fair treatment of consumers in the market. Fair access of consumers to the market comprehends access rights, equality and non-discrimination. Fair treatment of consumers in the market comprehends both "materialization" of contractual freedom and "materialization" of contractual justice—"materialization" of contractual freedom, by means of information and withdrawal rights, and "materialization" of contractual justice, by means of adaptation of social relationships to changed circumstances, as in the case of "social *force majeure*" [see, for instance, Reifner, U. (1979); Wilhelmsson, Th. (1990), pp. 1 ff.; Wilhelmsson, Th. (1992) pp. 180 ff.; Wilhelmsson, Th. (2004), pp. 722, 725 and 730 ff.; Nogler, L. / Reifner, U. (2014) pp. 44-45], as well as by means of fair remuneration and social responsibility [see Nogler, L. / Reifner, U. (2009) pp. 43-47]. Thirdly, the new model of contractual justice is "need-directed", "need-oriented" or "need-rational" [on the concept of a "need-rational contract law", see e.g. Wilhelmsson, Th. (1992), p. 97, and Wilhelmsson, Th. (2004), pp. 721-722]. It aims at rectifying the results of the market mechanism by referring to the individuals' concrete material and moral needs.

7. In what concerns Weinrib's concept of "formal" commutative, corrective justice, the difference is apparent. Reifner's concept of contractual justice goes beyond formal justice, for it requires contractual justice to be "materialized", and it goes beyond commutative, corrective justice, for it requires commutative and distributive elements to combine. In what concerns the Study Group's concept of "substantive", distributive justice, the difference is less apparent. In spite of the fact Reifner shares the values of social justice put forward by the Manifesto [see Nogler, L. / Reifner, U. (2014) pp. 38-39; Nogler, L. / Reifner, U. (2017) pp. 74-75], there are both differences in the paradigms of contractual relationships and differences in the perspective according to which the issue of social, contractual relationships is to be tackled. The Study Group's paradigm of contractual relationships focuses on spot consumer contracts [see Hesselink, M. W. (2008); Hesselink, M. W. (2008a); Hesselink, M. W. (2008b); Hesselink, M. W. (2008c), arguing that the Common Frame of Reference meets the requirements of social justice]. Furthermore, the Study Group's is a purely functional paradigm, failing to acknowledge the dogmatic, technical dimensions of social contracts [see Nogler, L. / Reifner, U. (2017) pp. 74-75]. Finally, in what concerns "access justice", as defined by Micklitz, or "materialized", commutative justice, as defined, for instance, by Claus Canaris or Franz Bydlinski, there are at least three fundamental differences.

Micklitz argues that there is a distinctive, European concept of contractual justice and that distinctive, European concept of contractual justice is access justice [see Micklitz, H.-W. (2011), (2012), (2012a) and Micklitz, H.-W. / Patterson, D. (2012)]. "It [would be] for the European Union to grant access to those who are excluded from the market or those who face difficulties in making use of the market freedoms" [see, for instance, Micklitz, H.-W. (2012) pp. 74-75]. Canaris does not consider whether there is or there is not a European concept of contractual justice. In referring to Habermas' description of the so-called "materialization of private law" [Habermas, J. (1996) pp. 392 ff.], Canaris argues, on the one hand, that the concept of contractual justice is, as it should be, a procedural concept [Canaris, C.-W. (1997) and (2012)] and, on the other hand, that the procedure of contract formation should be regulated, so as to improve the functioning of private autonomy within the framework of the market mechanism [see, e. g., Canaris, C.-W. (2000)].

Reifner acknowledges that access justice and "materialised", modified commutative justice are constituents of contractual justice [see, for instance, Nogler, L. / Reifner, U. (2017) p. 70]. In spite of acknowledging they are constituents of contractual justice, he suggests that both access justice and "materialised" commutative justice are to be found wanting in respect to three issues. (i) Whereas access justice and "materialised" commutative justice are about fairness in the making of contracts, irrespectively of whether they are spot contracts or long-term contracts, Reifner's concept of contractual justice is about justice both in the making and in the performance of contracts.(ii) Whereas access justice and "materialised" commutative justice are market-rational, for they point at regulation through which the market mechanism is improved, Reifner's concept of contractual justice is market-rectifying, for it "points at regulation through which the outcome of the market mechanism is corrected, or the drawbacks of the market mechanism are remedied" [Wilhelmsson, Th. (2004) pp. 718-719]. (iii) Whereas access justice and "materialised" commutative justice are, at most, examples of market-rational welfarism, Reifner's concept of contractual justice is need-rational welfarism [see Reifner, U. (1979); Wilhelmsson, Th. (1990); Wilhelmsson, Th. (1992); Wilhelmsson, Th. (2004)]. It aims at improving the situation of parties with special needs, in comparison to other parties in similar situations [see Wilhelmsson, Th. (2004) p. 725].

8. Professor Reifner suggests that the values relating to long-term, lifetime contracts are crucial for Europe. They will determine Europe's future. "If Europe, under the current neoliberal trends, consents to be a purely economic project, aimed at improving the functioning of the market mechanism, and nothing else, then there will be more and more human beings giving up to this Europe" [Reifner (2009] p. 6]. I cannot but agree—Europe's identity is to founded on the values of humanity, equality and solidarity. Either Europe is social, distinctively social, or there will be no Europe at all.

Nuno Oliveira

Bibliography

Arnold, Stefan (2014). Vertrag und Verteilung. Die Bedeutung der iustitia distributiva im Privatrecht. Tübingen : Mohr Siebeck.

Dauner-Lieb, Barbara (1983). Verbraucherschutz durch Ausbildung eines Sonderprivatrechts für Verbraucher. Tübingen: Mohr Siebeck.

Canaris, Claus-Wilhelm (1997) and (2012). Die Bedeutung der iustitia distributiva in deutschen Vertragsrecht. In: Sitzungsberichte der Bayerischen Akademie der Wissenschaften 1997. = In: Claus-Wilhelm Canaris. Gesammelte Schriften. III — Privatrecht. Berlin : de Gruyter.

Canaris, Claus-Wilhelm (2000) and (2012a). "Wandlungen des Schuldvertragsrechts. Tendenzen zu seiner 'Materialisierung'". In: *Archiv für die civilistische Praxis* 2000 273 ff. = In: *Claus-Wilhelm Canaris. Gesammelte Schriften*. III — *Privatrecht*. Berlin : de Gruyter.

Fleischer, Holger (2001). *Informationsasymmetrie im Vertragsrecht.* München: C. H. Beck.

Grundmann, Stefan (2002). "Information, Party Autonomy and Economic Agents in European Contract Law". In: *Common Market Law Review* 2002 pp. 269 ff.

Grundmann, Stefan (2011). "The Future of Contract Law". In: Muller, Sam / Zouridis, Stavros / Frishman, Morly / Kistemaker, Laura (eds.), *The Law of the Future and the Future of Law.* Oslo: Torkel Opsahl Academic Publisher pp. 467 ff.

Grundmann, Stefan (2011a). "The Future of Contract Law". In: *European Review of Contract Law* 2011 pp. 490 ff.

Habermas, Jürgen (1996). *Between Facts and Norms. Contributions to a Discourse Theory of Law and Democracy*. Cambridge (Massachussetts) : The MIT University Press

Hesselink, Martijn W. (2008). "Common Frame of Reference & Social Justice", in: *European Review of Contract Law* 2008, pp. 248-269

Hesselink, Martijn W. (2008a). "European Contract Law: A Matter of Consumer Protection, Citizenship or Justice?". In: Grundmann, Stefan (ed.), *Constitutional Values and European Contract Law.* Alphen aan der Riijn: Kluwer Law International, pp. 241 ff.

Hesselink, Martijn W. (2008b). *The Values Underlying the Draft Common Frame of Reference: What Role for Fairness and 'Social Justice'?,* available at < http://www.europarl.europa.eu/thinktank/en/document.html?reference=IPOL-JOIN_ET(2008)408312 >

Hesselink, Martijn W. (2008c). *CFR and Social Justice.* Munich: Sellier. European Law Publishers.

Hesselink, Martijn W. (2009). "The Common Frame of Reference as a Source of European Private Law". In: *Tulane Law Review* 83 (2009) pp. 919 ff.

Jansen, Nils / Zimmermann, Reinhard (2010). "'A European Civil Code in All but Name': Discussing the Nature and Purposes of the Draft Common Frame of Reference". In: *Cambridge Law Journal* 69 (2010) pp. 94-112

Jansen, Nils (2010). "The Authority of the Academic "Draft Common Frame of Reference". In: Micklitz, Hans-Wolfgang / Cafaggi, Fabrizio (eds.), *European Private Law after the Common Frame of Reference*. Cheltenham / Northampton: Edward Elgar Publishing pp. 147 ff.

Kronman, Anthony T. (1979-1980). "Contract Law and Distributive Justice". In: *The Yale Law Journal* 89 (1979-1980) pp. 472 ff.

Micklitz, Hans-Wolfgang (2011). *Social Justice and Access Justice in Private Law.* EUI Working Paper LAW 2011/02, available at <

http://cadmus.eui.eu/bitstream/handle/1814/15706/LAW_2011_02.pdf?sequence=1&isAllowed=y >.

Micklitz, Hans-Wolfgang (2012). "Social Justice and Access Justice in Private Law". In: *Persona e mercato* (2012) pp. 73 ff.

Micklitz, Hans-Wolfgang (2012a). *Do Consumers and Businesses Need a New Architecture of Consumer Law? A Thought-Provoking Impulse.* EUI Working Paper LAW 2012/23, available at: < http://cadmus.eui.eu/bitstream/handle/1814/23275/LAW_2012_23_Rev.pdf?sequence=3&isAllowed=y >].

Micklitz, Hans-Wolfgang / Patterson, Dennis (2012). *From the Nation State to the Market: The Evolution of EU Private Law.* EUI Working Paper LAW 2012/15, available at: < http://cadmus.eui.eu/bitstream/handle/1814/22415/LAW_2012_15_ERPL_02.pdf?sequence=1&isAllowed=y >.

Nicolussi, Andrea (2014). "Etica del contratto e 'contratti di durata per l'esistenza della persona'". In: Nogler, Luca / Reifner, Udo (eds.) (2014). *Life Time Contracts. Social Long-term Contracts in Labour, Tenancy and Consumer Credit Law*. The Hague: Eleven International Publishing pp. 123 ff.

Nogler, Luca / Reifner, Udo (2009). "Lifetime Contracts – Rediscovering the Social Dimension of the Sales Contract Model", available at: WWW. < http://eusoco.eu/wp-content/uploads/2009/12/reifnernoglerfswilehmensson_lifetime-contracts_rediscovering-the-social-dimension1.pdf >.

Nogler, Luca / Reifner, Udo (eds.) (2014). *Life Time Contracts. Social Long-term Contracts in Labour, Tenancy and Consumer Credit Law*. The Hague: Eleven International Publishing.

Nogler, Luca / Reifner, Udo (2014). "Introduction: The New Dimension of Life Time in the Law of Contracts and Obligations". In: Nogler, Luca / Reifner, Udo (eds.) (2014). *Life Time Contracts. Social Long-term Contracts in Labour, Tenancy and Consumer Credit Law*. The Hague: Eleven International Publishing pp. 1 ff.

Nogler, Luca / Reifner, Udo (2017). "*Life Time Contracts*: Um primeiro balanço". In: Pinto Oliveira, Nuno Manuel / MacCrorie, Benedita (eds.) (2017). *Pessoa, direito e direitos. Colóquios 2014-2015*. Braga: Direitos Humanos — Centro de Investigação Interdisciplinar pp. 56 ff.

Pinto Oliveira, Nuno Manuel / MacCrorie, Benedita (eds.) (2017). *Pessoa, direito e direitos. Colóquios 2014-2015*. Braga: Direitos Humanos — Centro de Investigação Interdisciplinar.

Pinto Oliveira, Nuno Manuel (2017). "Uma introdução aos contratos existenciais". In: Pinto Oliveira, Nuno Manuel / MacCrorie, Benedita (eds.) (2017). *Pessoa, direito e direitos. Colóquios 2014-2015*. Braga: Direitos Humanos — Centro de Investigação Interdisciplinar pp. 93 ss.

Pinto Oliveira, Nuno Manuel (2017a). "Os deveres acessórios 50 anos depois". In: *Revista de direito civil* 2017 pp. 239 ff.

Reifner, Udo (1979). *Alternatives Wirtschaftsrecht am Beispiel der Verbraucherverschuldung. Realitätsverleugnung und soziale Auslegung im Zivilrecht*. Neuwied: Luchterhand.

Reifner, Udo (2009). "Verbraucherschutz und Neo-Liberalismus. DCFR, EU-Verbraucherschutzrichlinien und die Kritik Stürners". In: *Verbraucher und Recht (*2009) pp. 3 ff.

Rutgers, Jacobien (2016). "European Contract Law and Social Justice". In: Twigg-Flesner, Christian (ed.), *Research Handbook on EU Consumer and Contract Law.* Cheltenham / Northampton: Edward Elgar pp. 535-548.

Study Group on Social Justice in European Private Law (2004). "Social Justice in European Contract Law: a Manifesto". In: *European Law Journal* 2004, pp. 653 ff.

Weinrib, Ernest J. (1995). *The Idea of Private Law*. Cambridge (Massachussetts) / London: Harvard University Press.

Weinrib, Ernest J. (2012). *Corrective Justice*. Oxford: Oxford University Press

Wilhelmsson, Thomas (1990). "Social *Force Majeure*—A New Concept in Nordic Consumer Law". In : *Journal of Consumer Policy* 13 (1990) pp. 1 ff.

Wilhelmsson, Thomas (1992). *Critical Studies in Private Law. A Treatise on Need-Rational Principles in Modern Law*. Dordrecht : Springer.

Wilhelmsson, Thomas (2004). "Varieties of Welfarism in European Contract Law". In: *European Law Journal* 10 (2004) pp. 712 ff.