Alternative Economic Law Challenging the Paradigm of Legal Dogmatics

The editors of this commemorative publication to celebrate Udo Reifner on his 70th birthday have given the contributors a very difficult task. Each one of us is to choose one or a few of Udo's texts to comment on or review. We all know the immense breadth of his work, spanning from consumer law issues relating to, *e.g.*, consumer credit, consumer advice and life time contracts to broad analyses of the role and function of money, not to forget the interesting discussions on the law of the *Third Reich.* The difficulty of the choice is enhanced by the fact that these analyses are usually both deep and very original.

In this abundance of interesting texts I have decided to go back to the roots, and write some comments on Udo's first large (476 pages) monography *Alternatives Wirtschaftsrecht am Beispiel der Verbraucherverschuldung* (Alternative Economic Law, as Exemplified by Consumer Indebtedness).[1] There are several reasons why I think this old work, from 1979, should still be devoted some attention.

Already the fact that this work gives a first expression of Udo's interest in many of the issues and perspectives that he has been developing throughout his academic and practical life makes it impossible to ignore it in a commemorative publication. The number of citations in both German and international legal discourse also shows that this work has not passed unnoticed.[2]

However, I also have a personal reason for choosing to write a comment on this book. It has influenced my own legal thinking[3] and it has had an impact on Finnish legal theoretical and dogmatic discourse. In addition, this discourse has been noted in legal research in the other Nordic countries as well.

In the beginning of the eighties at the University of Helsinki we had established a discussion group of academics and other lawyers regularly convening around issues relating to alternative ways of doing private law research. Together we studied both classics like Karl Renner, Otto Kahn-Freund and Morton Horwitz, but also many at that time contemporary writers, like P.S. Atiyah[4], Gunther Teubner[5] and Roberto Mangabeira Unger[6], to mention some of the authors who had much impact on the following discussions. Among the works of these renowned scholars Udo's book was one of the first we chose for scrutiny, and the discussion we had was very inspiring. I could still find in my archives the old type-written manuscript of Jyrki Tala[7] who was entrusted to present the work on our occasion on Wednesday 31st of March 1982.

Remembering a good seminar evening 35 years ago is not a sufficient reason for returning to a book published almost 40 years ago. The impact and continuing topicality of the book is. So why did we find the book so inspiring and what ideas seem valuable even from today's perspective?

One feature which is fascinating already in this book, and in many later writings by Udo, is the successful combination of theory and practice. This is certainly one trademark of his production, a feature that strongly contributes to its originality. In *Alternatives Wirtschaftsrecht* Udo's starting point is a deep and fundamental theoretical critique of the private law system. But the story does not

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[1] Reifner, Udo. *Alternatives Wirtschaftsrecht am Beispiel der Verbraucherverschuldung: Realitätsverleugnung oder soziale Auslegung im Zivilrecht*. Luchterhand, 1979.

[2] Already Google Scholar notes 38 references, by many well-known authors.

[3] You will find several references to Udo's book in my *Critical studies in private law: A treatise on need-rational principles in modern law*. Law and philosophy library Vol. 16. Dordrecht: Kluwer, 1992.

[4] Atiyah, Patrick Selim. *The rise and fall of freedom of contract*. Vol. 61. Oxford: Clarendon Press, 1979.

[5] Teubner, Gunther. "Substantive and reflexive elements in modern law." *Law and society review* (1983): 239-285.

[6] Unger, Roberto Mangabeira. "The critical legal studies movement." *Harvard law review* (1983): 561-675.

[7] Then Councellor of Legislation at the Ministry of Justice, responsible for drafting i.a. consumer protection legislation (later professor at The University of Turku).

end at the fundamental critique. It goes on to formulate, on the basis of this critique and a more concrete critical analysis of the topic of consumer indebtedness, concrete conclusions concerning a new interpretation of private law as well as a sketch for new legislation on consumer credit. The practical consequences of the theory are spelled out in detail, to be used in legal practice. It is well known that Udo did not even stop here, offering practical solutions for others to implement. Through his *Institut für Finanzdienstleistungen (IFF)* he was for many years himself practically engaged in improving the position of consumers on the credit market.

The fundamental critique (*prinzipielle Kritik*) that is the starting point of his analysis is based on a recognition of two fundamental contradictions within and behind the modern civil law system. These contradictions express a tension between traditional basic elements of the system and new societal structures. The first contradiction is the one between on the one hand an ideal-type of civil law that expresses power based on the private ownership of the means of production and exercised thorough an exchange between equal and free individuals, and on the other hand an increasingly social nature of production that requires more planning and control. Or phrased in a shorter form: there is a tension between the individualism of private law and the increasing need for a social regulation of production. Udo's second contradiction again relates to the conflict between a civil law that represents minority interests and a growing political pressure from general societal interests.

As mentioned, Udo brings this general critique to a concrete legal level as well, through a critique that he calls symptomatic (*symptomatische Kritik*). The symptomatic critique is based on a concrete legal analysis of elements in law that brings to the fore the contradictions revealed by the fundamental critique. This critique makes it possible to replace the formal interpretation of civil law with a social interpretation (*soziale Auslegung*) that is able to analyze relevant social relationships and bring into the legal assessment also such interests that were not accepted before.

The contradictions within law and between law and society can be described in many ways. The basic idea that makes this approach "alternative", however, is not the descriptions of the contradictions as such, but the fact that the existence of contradictions is made the starting point for legal reasoning. Whilst "traditional" legal dogmatics tends to view contradictions as anomalies, Udo views them as vehicles to create a new legal approach, a social interpretation. In this sense he works within a similar paradigm as many others interested in alternative legal dogmatics, such as the critical legal studies movement in the US, and the *uso alternativo del diritto* in Italy. And this is the route some of the discourse on alternative legal studies has taken in Finland and the Nordic countries as well. I personally think that precisely this emphasis on law's internal contradictions is the most prominent distinguishing feature when trying to picture what is "alternative" in so called alternative legal dogmatics.

The emphasis on the basic contradictions leads research to focus on the conceptual and systematic structure of law. The researcher is led to question why certain parts of legal reasoning are usually described as operationalizing established general principles and main rules, whilst others are deemed to play the role of exceptions that should be interpreted narrowly. Realising that the established conceptual structure is not the only possible, one might even picture the core of law as an eternal struggle between main rules and exceptions. Legal dogmatics plays an important, sometimes even decisive role in this struggle. What alternative dogmatics does, in general terms, is demanding a kind of "switching of the principles", a change of places between main rules and exceptions, to the extent this is socially justifiable.

But there is, of course, a difficult challenge connected with such a project. The switching of the principles is no end in itself, but needs to be justified socially, as just noted. Personally I think these choices cannot be made using only criteria from within the law, but the choice is ultimately politico-moral. Therefore alternative dogmatics cannot, without betraying its own starting points,

claim that its resystematisation has a different and stronger truth value than the traditional systematisations. It can only offer a new possible approach leaving the final choice to the decision-maker. Needless to say, such anchorage of the final outcome in "decisionism" can be and has been criticised.

To be fair, Udo's analysis does not appear as "decisionist" in this sense. When the alternative forms of legal dogmatics were discussed in the 1970s and 1980s a firmer vision was indeed possible. These were the times when the welfare state still was advancing. For a future-directed law it was natural to claim that the elements of welfarism in private law were expressions of the new thinking towards which society was heading. Therefore it seemed possible "objectively" to found the demand for an alternative dogmatics on the new societal situation and its normative claims. Today this continuing advancement towards more welfarism is (unfortunately) history, and even those defending the welfarist achievements have to take decisions whether to rely on an openly social paradigm or defend the achieved results in a more traditionalist manner. There is no generally accepted grand narrative of the welfare state in the condition that some prefer to call postmodern.

That, however, makes the recognition of the contradictions of various kinds within the legal system even more topical and important. There is much to be learned also for contemporary discourse from Udo's fundamental and symptomatic critique of private law.

In the symptomatic critique Udo discusses, among other issues, the question whether certain social reasons for a debtor's failure to perform may be taken into account in the legal assessment of the situation.[8] In Udo's social interpretation a debtor who fails to pay in time because of lack of means due to his unemployment, short-time work, illness, strike or other similar occurrences cannot be said to have acted negligently as required by the *BGB*. Therefore such a debtor cannot be charged with sanctions related to the delay. Needless to say, most German writers did not embrace this new interpretation.[9] Neither was Udo's proposal for a section with this content[10] in a new consumer credit act followed. Such a proposal, based *inter alia* on Udo's work, was discussed at the German lawyer's meeting, but was rejected.[11]

But again, these ideas still have an impact on the European debate on what is nowadays often called *social force majeure*. More or less at the same time that Udo was presenting his ideas, but independently, there were some cases on social force majeure decided in the Swedish Market Court, and the Finnish legislator enacted an interesting Act on Interest. It contains an express provision according to which a consumer can claim adjustment of his liability to pay interest for delay, if the delay was caused by payment difficulties which the consumer had encountered mainly through no fault of his own in consequence of illness, unemployment or some other special cause. In the following Finnish and Nordic discussions concerning the development of a principle of social force majeure, switching from exception to principle, also the work of Udo was cited. And in contemporary European private law discourse one can still find occasional interest in the concept of social force majeure.

Udo's reasoning was not only based on empirical evidence. It also emerged from a conception of consumer in which consumption and production were not understood as opposites. Udo rather wanted to connect the position of consumer to the position of employee and see consumption primarily as a means of reproduction of the workforce.[12] In such a perspective it seemed natural that

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[8] p. 291 *et seq.*

[9] Concerning the discussion, see, *e.g.*, Hörmann, Günter. *Verbraucher und Schulden: eine rechtstatsächliche und rechtsvergleichende Untersuchung zur Schuldbeitreibung und Schuldenregulierung bei privaten Haushalten*. Nomos-Verlag-Ges., 1987, p. 84.

[10] p. 432.

[11] Verhandlungen des 53. Juristentages, Berlin 1980, Band II. München, 1980, p K 247, K 251.

[12] p. 19-20.

a debtor who had lost his income as an employee could not be accused of having negligently left his consumer credit unpaid. This broad perspective on the position of the individual in the social structures, combining various roles as, *e.g.*, consumer, tenant and employee, has remained an important feature also in Udo's later works. Recently he has contributed in a very interesting way to the European contract law discourse through a project on social long-term contracts in labour, tenancy and consumer credit law.[13]

In this short paper I have attempted to show that Udo's early work on *Alternatives Wirtschaftsrecht* is topical and thought-provoking also for a contemporary reader. And I do hope that these ideas will find readers also in the future. There is still need for a discourse on social interpretation of private law in Europe.

My sincere congratulations, Udo!

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[13] Nogler, Luca, and Udo Reifner. *Life time contracts: social long-term contracts in labour, tenancy and consumer credit law*. Eleven International Publishing, 2014.