Udo Reifner, The other contract – Life Time Contracts in labour, tenancy and consumer credit law, Baden-Baden 2023

English Summary of the German book.

1 A “Contract” is the central legal heuristic for organizing social relations. According to the German Constitutional Court it is through which the law realizes individual freedom and democracy.

"The decisive legal instrument for the realization of free and autonomous action in relation to others is the contract, by means of which the contracting parties themselves determine how their individual interests are to be brought into an appropriate balance with one another. ... The expressed concordant will of the contracting parties therefore generally suggests an appropriate balance of interests established by the contract, which the state must respect in principle." [1]

Three elements determine the contract: the voluntary agreement, the settlement of the conflict and the recognition by the state. This recognition makes it possible to enforce private will using physical power through the state. Since contractual rights are sufficient to create an enforcement title, the contract provides access to the unilateral private use of the state's monopoly on the use of force. It dispenses it from legislative legitimacy, because according to the court "as a rule" the contract "suggests" a balance of interests. This guarantees the freedom of contract. [2]

The contract materialises the principle of private autonomy, which is the expression of the constitutional guarantee of individual freedom as a human right. For G.F. Hegel, “Reason makes it just as necessary for men to enter into contractual relationship - gift, exchange, trade, & c.-as to possess property."[3]

"In his property a person exists for the first time as reason." (§41) "To have power over a thing ab extra constitutes possession. The particular aspect of the matter, the fact that I make something my own as a result of my natural need, impulse, and caprice, is the particular interest satisfied by possession."(§45)

Social contract theory (Hobbes, Locke, Rousseau, Rawls) extended the contract of obligation to the establishment of property and the establishment of public order. It is assumed that they arose from a general consensus. The transition from the property rights on things to the property rights on anything else confirms it. Contract is the central legal figure of democracy.

2 But is it really a single institution or rather a collective term covering quite different phenomena? Martin Luther translated God's contract with Noah, Abraham and the people of Israel with as a *Bund* (*covenant)*. The agreements between Rome and Carthage or between emperors to divide power were called *treaties.* In German a collective agreement between social partners is called a Tarif*vertrag*, although it lacks essential elements of the individual contract type. General terms and conditions of business are classified as abstract offers, although the consent of the addressee is assumed even without knowledge of the content.

Is the contract therefore only a collective term for a multitude of phenomena in which private regulations are created? Then there would be no *contract* as such, different from i.e. property and possession

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[1] BVerfG 26. 7. 2005 - 1 BvR 782/94 u. 1 BvR 9 = NJW 2005, 2363; see also BVerfG NJW 2001, 957; *Maunz/Dürig/Badura/Di Fabio/F. Kirchhof/P. Kirchhof/Kube/Langenfeld/Papier*, [99]2022 Art. 2 Abs. 1 Rn. 101.

[2] BeckOGK/Möslein, 1.5.2019, BGB § 145 Rn. 20 ff; Bydlinski, System und Prinzipien des Privatrechts, 1996, 150 ff.; *Raiser*, Privatrechtstheorie ; Bd. 1 2015; *Claus-Wilhelm Canaris*, Privatrechtstheorie ; Bd. 1 2015.

[3] *Hegel*, 1821. § 71

that has minimum requirements for all relations which are organised in contracts. The law is unclear. EU-Directive 93/13/EEC is built on the idea of *one abstract contract*. Transposed into German law in Art. 307 (2) 2 BGB the common nature of a contract does exist. Accordingly, a GTC clause is invalid if it "restricts essential rights or obligations arising from the nature of the contract in such a way that the achievement of the purpose of the contract is jeopardized." However, in practice case law and doctrine relate this primarily to types of contracts that pursue a specific purpose.

However, Art. Art. 145 ff BGB are dedicated to the regulation of a contract as such. But it defines its contents and purpose only indirectly in the rules on the juridical act. But this is not very productive taking into account that the contract was supposed to be the central institute of the bourgeois revolution to replace status law. In fact, the contract law of the European law of obligations has more. It even follows an own model of justice derived from the sales contract as the central economic form of communication. [4] As a spot contract, it ignores the essential element of human relationships, their duration and consumed lifetime. This asserted itself rather implicitly. Through the productive elements of trade and the ideals of freedom and equality, the bonds of status law are dissolved. But time and duration are ignored.

Evolving social durations in legal relations require more complex models. The fact that duration is an anomaly rather than a basic structure of human relations in the sales contracts has led to a loss of competence of law in the pursuit of justice. Justice presupposes first of all that the model of thought used is *just* with regard to the underlying reality. Secondly it supposes a *just* distribution of rights and duties with regard to the people. It needs protection of social contractual purposes, which have gained importance far beyond their core areas in labour, consumer and residential tenancy law. Up to now, the doctrine has reacted to the lack of justness through the creation of special types of contracts such as the employment contract in §§611a BGB, the multitude of consumer contracts e.g. in §§491, 474, 13 BGB or in residential tenancy law in §§549 ff BGB. In our research on life-time contracts, we have countered this deficiency with the thesis that, in addition to the sales contract model of spot contracts, a more appropriate social model of contracts of duration must be developed. It would at least respond to the deficiencies in employment law, consumer credit law and residential tenancy law, but useful also for many other privately provided services of first necessity such as insurance, energy, water, communication etc. It should supply them all with general minimum standards.

But this contract of duration will not be an alternative to the sales law model. Es specially our studies in labour law have revealed, that the pillars of freedom of contract that emerged in sales and trade law should not be ignored either.

There is only one contract. The sales contract and the contract of duration belong together. This conveys the liberal basic structure of a free and equal contract and solidarity in the cooperative relationships of people. It is nothing less than the search for a uniform concept of contract applicable to all contractual relationships which, in addition to freedom, equality and security, integrates the social purpose as well as its duration and relationship to the lives of the contracting parties. Anyhow the growing number of interrelated contracts, such as financed or insured consumer contracts, makes it difficult to consider LTC contracts in isolation anyway.

3 The search for the nature of this contract, its overriding purpose and its conditions is of existential importance for the development of a peaceful coexistence of people. They want to and have to deal responsibly and with an international view with the use of collective resources of nature. Those who

[4] *Henry Summer Maine*, 1874.

want to actively shape the future must understand and be able to handle not only economic instruments such as money, but also legal instruments such as contracts.

But in the view of the EU-Commission globalization seems to set other priorities. The contract model drawn up on behalf of the Commission and Parliament of the European Union was essentially intended to enshrine the purchase contract model of the 19th century for all member states and thus also the multitude of states in the third world that usually follow it. The EU motto "united in diversity" changed into "pacified in unity". The principle of subsidiarity was transformed from a competence to protect consumers in the market into a right to maximally harmonize fundamental national structures.[5]

This also affected the concept of contract. It is not possible to regulate the consumer credit contract without implicitly claiming the existence of a general concept of contract. If this model is outdated, this leads to reimporting what has been "achieved" in Brussels (acquis communautaire). The lowest common denominator of the European concept of contract would then neglect the social and time related dimensions even more than the national legislators who had developed highly specialised protection of private rights.

As a consequence, there is a threat that a new cast of scholars and doctrine could evolve which segregates itself from civil law through English language and the structure of Anglo-Saxon law. It filters solutions out of the multitude of consumer protection directives, legitimizes regulatory philosophies with the help of the ECJ, which operates in the no man's land of democratic selection processes, and promises legitimacy beyond historically grown national legal dogmatics. “Democratic diversity” is invented as the new legitimacy claimed for the old contract model.[6] But capitalism will fail if it does not open itself to social justice, life time and peace in its cultural diversity. Justice demands "equal freedom for all"“[7], which understands cultural and national differences not as an obstacle, but as a treasure. (Art. 3 (3) p. 5 TEU)

4 Such an extension of the cultural basis is pursued by the Research Network on social Contracts of Duration called *life time contracts* (www.EuSoCo.eu). It emerged from the debate on the EU efforts to create a uniform European civil code on the basis of the prevailing sales law model: a contract of obligation excluding social purposes and long.-term duration. The Draft Common Frame of Reference (DCFR) [8] initiated by the Commission was seen as a danger to the social development of private law.

In the view of this group, the perspective had to be changed. Instead of looking at employment, residential tenancy and consumer credit law from the perspective of the idea of consumer debt instead of consumer obligations, this model was confronted with the requirements of employment, tenancy and consumer credit contracts. This change of perspective brought new dimensions into the contract discussion, both in terms of personnel and discipline and national level. What had been taken for granted, such as the idea of the juridical act as the basis of each contract, had to be questioned. This pointed to the historical roots in Roman law. Far away from the “mass tourism” of European legal scholars to the United States, a joint inner-European voyage of discovery of international specialists from labour,

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[5] *Udo Reifner*, in: Blaschek/Reiffenstein (Hrsg.), Blaschek et al. 2004, 2004.

[6] Martin Hesselink uses this approach. Cosigner of the „Manifesto for Social Justice in European Contract Law“ (Eur Law J 10 (2004), 653) he defended the informational approach in consumer protection against ist critique as neo-liberal. (*Martijn Willem Hesselink*, 2008a; *Martijn Willem Hesselink*, 2020). This defense has been developped into an own EU-contract model. (*Martijn W. Hesselink*, 2021b *Martijn W. Hesselink*, European review of contract law 18 (2022), 281;) EuSoCo Group, which adhered collectively tot he Manifesto Group, had a different material concept of consumer protection similar to labour and tenancy protection.

[7] Zum Ideal der Gerechtigkeit vgl. *Udo Reifner*, 2017b. S.23 ff

[8] *Bar/Clive/Schulte-Nölke*, 2009.

consumer credit and residential tenancy law followed. Together with legal historians and representatives of contract law theory, national languages and cultures. The Life Time Contract (LTC) was contrasted with the DCFR model of purchase law. The common features of the three large special fields of law were worked out in 16 principles. They added the dimension of time and social responsibility to the dominant concept of contract.[9]

In its common principles, special attention was paid to the element of duration (time) and basic needs (life). These life-time contracts should not be confused with lifelong contracts. Rather, LTCs build on the basic structure of a general social utility contract, the broad lines of which represent commonalities in the pursuit of social justice that have so far been used more in exceptional arrangements than in the essence of the contract.

5 The way back to the roots of the sales-contract has brought us back to the question of the extent to which the transition from status to contract took place in those areas where the property but use was the core subject. Had the victory of the contract of obligation over feudal legal relations truly brought freedom, equality and security to the law or had there been alternatives? This question led us beyond the familiar critique of the exploitative mechanism that the interplay of formal legal equality and inviolable private property[10] had generated. It had split the discussion into mutually paralyzing camps, one predicting the death of law and the other its simple instrumentalization for the benefit of any state.[11] In order to open up to a constructive dialogue, individual hurdles had to be overcome. Instead of leading the discussion in consumer protection, whose idea swings back and forth between social protection and market protection, we put our focus on labour law. This opened up more insights into the historical contract model and revealed the political dimension of the special nature of labour law in the law of obligation. It should not be concealed that its findings go far beyond the results of the joint work of the EuSoCo group and do not reflect the opinion of its labour law scholars in particular. Nonetheless, it serves us as a permissible theory to provide suggestions for the "other contract."

In these findings, I assume that

- there was no model of an employment contract with dependant wage workers in the pre-industrial society of Roman law,
- the service relationship of today requiring subordination and dependence was no radical liberal alternative to slavery. Restrictions which are self-evident, such as the unenforceability of the obligation to work, the unity of a person and its labour power, the indispensable right of self-determination in the contract, etc., have still to be introduced quasi from the outside into the structure of the service contract,
- there is no usable labour force separate from the person that is obliged to work,
- there was no service contract in Rome, only a service obligation,
- instead the contract for work was the free alternative to slavery in Roman law, from which the variety of labour relations should be derived even today,

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[9] Results are among others published in *Luca Nogler/Udo Reifner*, Life Time Contracts, 2014; *Luca Nogler/Udo Reifner*, Tidskrift utigven av Juridiska Föreningen I Finland (JFT) 3 (2009), 437; *Pinto Oliveira/MacCrorie*, Em Torno de Life Time Contracts, 2016; *Ratti*, Embedding the Principles of Life Time Contracts. A Research Agenda for Contract Law, 2017. For members and activities of the group see www.eusoco.eu. The notion *Life Time Contracts (EN)* used in the eusoco-project has been translated into different languages with quite distinct concepts as i.e. *soziale Dauerschuldverhältnisse (DE) , contratos sociales a largo plazo (PT), contrats à temps essentiels à l'existence (FR), contratti di durata per l'esistenza della persona (IT);* 사회적 구속력이 있는 계속적 채권채무관계 원칙 *(KOR)*. Discussion and reviews are put together in *Luca &. U. R. Nogler*, in: Ratti (Hrsg.), Ratti 2017, 2017.

[10] *Engels/Kautsky*, in: Marx/Engels (Hrsg.), Marx et al. 1969, 1969.

[11] *Udo Reifner*, 2017b S.5 Fn 1.

- the free worker is therefore contractor and tenant of a collectively integrated workplace,
- subordination and dependence are functional parts of the collective workplace tenancy.

These insights into the nature of the employment relationship can also be applied to the understanding in the other fields. Less but persistently visible to this day are rent and credit relations shaped by the ideology of slavery (field slave, house slave, and debt slave). The similarities with labour law can also be seen in the contract concerning the use of money (loan) and the use of real estate (tenancy). The threats that determine the lack of power of the party which use the capital are also similar: unemployment, homelessness and over-indebtedness.

Ancient law applied solely to its free and equal citizens. It coexisted with a significant system of slavery. The bourgeois revolution claimed to have abolished it. But it lived and lives on to varying degrees in practice and legal ideology to this day. This should not be evaluated only morally. The eco0nlmic reasons are important. Productivity requires that unequal people are brought to productive cooperation by a general system. This applies no less to democratic systems than to authoritarian ones. The difference lies in the fact whether they are assigned to the person as scalar rule, i.e. ascriptively, or functionally required by the needs of the cooperative character of the use. Functional subordination is the answer to the abolition of slavery.

Industrialization made subordination, which in pre-industrial society was determined by scale, a functional necessity. It demanded the dissolution of the assumed "natural hierarchy" inside communities where the leader guaranteed the cooperation. It was replaced by individual freedom and equality. The motherland of democracy is still fighting against these structures today.[12]

In the organization of the private cooperative use of means of labour, real and monetary capital, we therefore still find pre-capitalist forms of cooperation such as externally determined work and dependence, the subordination of residents towards the landlord as pater familias in the villa rustica and the separation between the contractually agreed use of capital from the debts through which the creditor influences a debtor's life. The the permanent use of foreign capital has not received a democratic form in the law as it has been developed with the acquisition of property through the sales contract.

6 This is not due to the idea of contract. It is older than market economy and exchange. It describes every binding agreement for the cooperative permanent or unlimited use of the resources of others. It was trade that first combined its binding nature with the freedom of the owners to use the goods. It made property and its exchange the ideal type. Rent, loan, service and partnership contract were pushed into the area of the exceptions and special areas.

The contract of obligations has been made immune to criticism with the doctrine of the judicial act. [13]

With it the declaration of will (consent) is declared the only basis of a contract. The freedom of the individual is no longer a consequence of changed economic circumstances. It is the effect of a fictively defined free will of each party. It is no longer the use of capital to satisfy needs which requires ownership and individual freedom but freedom and property of those who dominate its contents which is seen as root for subordination.

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[12] *E. S. Morgan*, The Journal of American History 59 (1972), 5.; Hannah-Jones, Nikole (2021): The 1619 Project. A new origin story. New York: One World.

[13] See *Flume*, 42013.

7 The exceptions became the rule in the service society.[14] The tenancy between user (locatio) and provider (conductio) became at least equally important as the provision of property by the seller (venditio) to the property of the user (emptio). Even after the reform of the law of obligations in 2002, the German BGB declared §§313 (rebus sic stantibus) and 314 (termination for good cause) BGB to be exceptions instead of typical characteristics of a contract of duration. The advance of a general user relationship according to the idea of rent remained hidden under the conceptual neologisms such as license agreement, leasing, short sales, installment plan, warranty, agency, employment and credit relationship. Only residential rent remained linguistically recognizable as rent, but its conceptual limitation to housing also prevented it from becoming a recognizable general expression of the contractual use of capital and assets. If this could be overcome, the discovery of the social relationship in the content of the contract would be a similar revolution for its understanding as the discovery of purpose[15] or interest[16] in classical contract law.

The discovery of comparable features in credit and labour could already yield contours of an expanded concept of contract, in which both will and use would be given their place in the "interpretation of the contract in good faith with due regard to custom" (§157 BGB). Employees, residential tenants and credit users as capital tenants then made superfluous much that still retains from feudal society the seemingly undemocratic elements of status, loyalty, faith, dependence, obedience and care

It is not by chance that the consumer loan is the pioneer here. It had no equals in the pre-civil rights era. Although it had its origins in the free loan as a donation the pre-capitalistic model of a gratuitous contractus realis let the basic structures of a general social continuing obligation contract become recognizable in practice. Its reformulation in the 2002 German law from gift to rent revealed this.

The fact that labour law could learn from this must appear as a provocation to socially minded labour law experts. They see in the rental model of the employment contract, as many Romanists suggested in the 19th century, a relapse into the slave-owning society, in which the occasionally provable (self-)rental of a free worker as a debt slave to pay off his debts occurred. As a result, however, this rental model confirmed slavery. The greatest challenge within the concept of life-time contracts is therefore to prove that employees cannot rent or sell neither themselves as a person or an fictious separate labour force under civil law. Accordingly, it is the employee, like the borrower or residential tenant, who acquire a right to use the workplace, money or home which are organised om the form of industrial property and made productive by the organisational efforts of its owner.

8 The book is divided into a general part (§§1-3) and a part on the three most important contracts of duration (§§4-6). It starts with a survey of the prevailing contract law, its historical models, functions and shortcomings. In §2 it is contrasted to the legal situation as it appeared in Roman law before the French Revolution. Roman law would have had other options than the code civil, BGB and the Austrian ABGB. However, this potential for democratizing the economy were ignored. The third section (§3) develops a contractual model of long-term use of capital as an alternative to the sales contract which makes acquisition of property a core interest of modern contract law. The final three chapters discuss current issues of residential tenancy, labour, and consumer credit law in the light of a concept of contract which includes duration, use, and social purpose.

[14] I relate to my definition of economy as cooperation: *Udo Reifner*, 2017aS. 52 ff

[15] *Rudolf von Jhering*, 1884.

[16] *P. Heck*, 1914.