

Norbert Reich, Founder and Pioneer of Consumer Law 1937–2015—Obituary

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Received: 8 December 2015 / Accepted: 8 December 2015 /

Published online: 28 December 2015

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Norbert Reich was a German private lawyer, a European lawyer, and co-founder of the *Journal of Consumer Policy*. His understanding of law as a discipline is deeply rooted in American legal sociology and critical German and American legal theory. That is where his interdisciplinary and cross-cultural understanding came from. Consumer law and policy became a topical issue at the right moment in Norbert's academic life. Consumer law and policy force us to stop thinking in boxes, in particular disciplines of social science or in national legal orders. There were two stages in Norbert's academic involvement of consumer law and policy: first, an early commitment to German consumer law and, at a later second stage, an ever stronger focus on European consumer law and policy. Together with Gerhard Scherhorn and Folke Ölander, he founded the *Zeitschrift für Verbraucherpolitik* in 1977. It was published for a couple of years in German and then became the *Journal of Consumer Policy*. One of the reasons for this shift to an English-language publication was that an interdisciplinary journal could not survive in the narrow-minded German academic publishing market. In the long run, however, it was exactly this interdisciplinary outlook which made the journal so unique and which established its reputation. In this regard, Norbert was ahead of his peers in understanding the need for an interdisciplinary approach to consumer law and policy—something which has only really been accepted widely over the last 10 years or so.

Laying Down the Foundations

Norbert Reich began research on German consumer law as early as the mid-1970s. Together with Klaus Tonner and Hartmut Wegner, and on behalf of the then social-liberal government, he published the first draft of what would later be referred to as consumer law. Yet, he was not satisfied with the dogmatic analysis of the new topic. His emphasis was rather on the derivation and creation of a critical economic law, in which consumer law played an essential

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and permanent role. As early as in 1974, he advocated and initiated a structural reorganisation of civil law that was based on status—he does not speak of private law. He writes: “I would like to distinguish between three fields following the reflections of the socialist theory of civil law¹: a) the legal communication of businesses (in the field of production capital), i.e., *company law* (companies in terms of antitrust law and not in terms of commercial law HWM), b) the exchange of goods between businesses and final consumers (in relation to the ownership of means of production to the ownership of consumer goods), i.e., *consumer law* (in the strict sense of the term—in the broader sense, consumer law refers to administrative, penal, and procedural rules; see Reich 1974), c) the field of private legal communication between citizens (classification and exchange of ownership of consumption means), i.e., *citizen law*.” The threefold division into company, consumer, and citizen law enabled him to determine the significance of private autonomy, which remains the guiding principle of company and citizen law. Yet, things are different with regard to consumer law: consumer law requires a structural reorganisation, an inversion of rule, and exemption that allows for the rediscovery of the political aspects in civil law. Norbert Reich quotes Ferdinand Lasalle (1972): “Where the legal element in the form of private law starts to become detached from the political element, it is more political than the political element itself, since it is the *social* element.” As a logical conclusion of the case for an autonomous consumer law, he argued persuasively for a constitutionalisation of consumer law, a reversal of the relationship of dispositive and mandatory law, and a reorientation of the legal dogmatic principles towards social science.

“True Law” (Private Law in the German Civil Code) and “Law as Politics” (Consumer Law)

Traditional German legal scholarship sharply criticized Norbert Reich for this fundamental reorientation of civil law. The more profound reasons of the criticism and rejection are based on the founding history and the theoretical fundaments of the BGB. The one-sided orientation towards the requirements of the capitalistic economic order without regard to the social question was also met with severe reactions. Beside a rather polemic criticism against a “socialist civil law theory” or the audacity of citing Karl Marx during a phase of political upheaval in the Federal Republic of Germany, the fact that Norbert Reich proposed a special private law for consumers was the focus of criticism. For decades, a serious ideological debate between supporters and opponents of a consumer law in the shape of a special private law took place among German legal scholars, conducted with a fierceness that was difficult to understand for foreign observers. However, this debate never really resulted in changes to the law. The social-liberal government had commissioned an expert opinion on consumer protection in the course of the discussions about a reform of the law of obligations in 1980. Yet, a real discussion about an autonomous consumer law with a solid theoretical basis did not take place in Germany in the 1980s and 1990s. That is not to say that Germany did not participate in the further development of substantive law. Three projects deserve to be mentioned: the reform of the German Instalment Sales Act, the adoption of the Standard Contract Terms Act in 1976,

¹ Norbert Reich wrote his habilitation on Soviet Civil Law. He translated P. Stučka, the second important marxist theorist alongside Paschukanis, from Russian to German. P. Stučka, *Die revolutionäre Rolle von Recht und Staat*. Einleitung von Norbert Reich (Frankfurt a. M.: Suhrkamp), 1969.

and the introduction of absolute liability in pharmaceutical law following the thalidomide disaster. Norbert Reich vigorously participated in these three projects. The essential conceptual setting of consumer law took place in a rather unspectacular way. In the course of the implementation of the Distance Selling Directive in 2000, the Social Democrat and Green Party coalition government integrated Art. 13 and 14 into the BGB. Within the scope of the reform of the law of obligations in 2002, significant parts of consumer law also became part of the BGB.

The European Dimension

It is precisely 40 years ago that Norbert Reich argued for the reorganisation of private and economic law. If one looks back over this period and thinks of the initial situation of the 1970s, it comes as a surprise that the trisection of civil law as it was called for by Norbert Reich has largely become a reality—within and through the Europeanisation of consumer law. The status-based revision of private and economic law has prevailed, but was not supported by legal science or national states. It was rather promoted by the European Union that had gradually become the driving force of legislation, culminating with the adoption of the Single European Act in 1986. At an early stage, Norbert Reich had realised and prepared the shift of consumer law from the German towards the European level. The first step was a study on the status quo of consumer law in the then nine Member States that the European Commission (through Ludwig Krämer) had commissioned.² The country reports were published in the late 1970s with Norbert Reich as editor (Reich 1980/1981).

It was precisely in this period that a far-reaching shift of political responsibilities with regard to consumer policy took place in Germany. The social-liberal government of chancellor Helmut Schmidt moved the decision about the introduction of a law on product liability to the European level. Looking back, this decision was of paradigmatic importance. The German government paved the way for the EU to assume the leading role in consumer law. From now on, Norbert Reich followed the creation and the development of a genuinely European consumer law in his role as managing director of the Centre for European Legal Politics (ZERP) at the University of Bremen that had been founded in 1982. While Europe was once again at a critical juncture, the then mayor of the city-state of Bremen Hans Koschnick, driven by a remarkable political instinct, had ensured funding for an institute that had “social Europe” at its heart. Christian Joerges (professor at the University of Bremen) had created the intellectual environment for Bremen and its university to host this institute. The social-empirical research group under the leadership of Volkmar Gessner that had been outsourced from the Max-Planck-Institute became a part of the ZERP as a social scientific counterpart.

Fruitful years of an intellectual and social-scientific reorientation of consumer law as well as labour, social, and product safety law followed. Norbert Reich searched for their theoretical foundations by applying the concept of the “protection of diffuse interests” that included not only consumers, but also every other social group in need of protection. Being increasingly promoted by the EU, environmental law gradually became a part of Norbert Reich’s research that he published in 1987 as the first volume of the ZERP series with the title “Promotion and protection of diffuse interests through the EC.” The title “Law and diffuse interests in the

² The nine country reports are available in English, the comparative analysis in English, French and German.

European legal order” of the *Liber Amicorum* on the occasion of his 60th birthday in 1997 sums up the lines of discussion (Krämer, Micklitz, & Tonner 1997).

His own research projects peaked in the monograph called “Civil Rights in the European Union,” published in 1999. The subtitle clarifies the topic: “Subjective rights of Union citizens and third-country citizens with particular focus on the legal situation according to the case law of the ECJ and the Treaty of Amsterdam.” In order to justify the necessity of the protection of subjective rights in a transnational quasi-state institution such as the European Union, Norbert Reich chooses *Georg Jellinek’s System of Subjective Rights (1892)* as the starting point. In retrospect, there is a direct link between the ground breaking contribution on the reorientation of civil and economic law (1974), the publication on the promotion and protection of diffuse interests in the European legal order (1987), and his work on the civil rights in the European Union (1999). During a period of 25 years, Norbert Reich not only contributed to the Europeanisation of civil and economic law, but also illustrated the necessity of their integration into a European constitution. From this perspective, it is beneficial to perceive his theory of a trisection of civil and economic law, of the protection of diffuse interests, and of the civil rights in the European Union as a constitutionalisation and democratisation of civil and economic law. In this evolution, consumer law plays a predominant role that necessarily results from the growth of the consumer society.

In 2001, Norbert Reich was appointed rector of the Riga Graduate Law School. In this context, he focused on the eastward expansion, especially on questions of a modernisation of consumer, civil, and economic law in the Baltic States as well as in the former central and eastern European bloc states, the integration of which into the EU had been agreed (and came into effect in 2004). After his retirement in 2005, he again dealt with European consumer law and Union law in the shape of a conceptual and dogmatically thought-through overall presentation. It is due to his indefatigable energy and dedication that Intersentia published the second edition of the “European Consumer Law” under Reich’s overall responsibility (Reich et al. 2014). Being conceptually committed to diffuse interests and subjective civil rights, this monograph represents a general overview of the many aspects of European consumer law. At his initiative, the co-authors had agreed to meet in Hamburg during spring 2016 in order to discuss in a congenial way how to update the book to incorporate the conceptual changes of European consumer law. Shortly before his death, the new edition of his work “Understanding EU Internal Market Law” was published. Although the publication had proved challenging, Norbert Reich confidently managed the situation (Reich, Nordhausen Scholes, & Scholes 2015). As the title of the book suggests, it is not another introduction to EU law; rather, it focuses on the “internal market,” the civil and economic law of the EU that is surrounded by civil rights, and their leading principles.

Although these two later works may be reason enough to trace his work and his enormous creative power, his intellectual legacy lies in a dense monograph on the “General Principles of EU Civil Law” that was published in 2014. This book brings his work on the reorientation of civil and economic law, which he first argued for 40 years ago, full circle. From Norbert Reich’s point of view, the careful choice of a title reflects the economic and socio-political significance of civil law. European Civil Law should be guided by general principles that are rooted in the constitutional order of European society. At this point, I would like to quote Norbert’s words directly:

General Principles of EU Civil Law focus on a rapidly developing but still highly controversial area of EU law: the emergence of general principles with constitutional

relevance for EU civil law, guiding its interpretation, gap filling and legality control. This study brings to light seven principles in the case law of the Court of Justice of the European Union and in the Charter of Fundamental Rights. Principles 1 to 3 on framed autonomy, protection of the weaker party and non-discrimination are now part of substantive EU law, mainly contract law. Principle 4 on effectiveness, together with the principle of equivalence, is an “old acquaintance” of EU law and has mostly to do with procedures but can also be extended to cover substantive and remedial matters. Principles 5 and 6 on balancing and proportionality are primarily concerned with methodological questions: the first has to do with judicial interpretation and application of EU civil law, the second with legal-political questions on the future of a (questionable) codified or optional EU civil law, in particular sales law. Finally, principle 7 on good faith is still an emerging principle but is gradually gaining importance.

Again, Norbert Reich was ahead of his time. While people elsewhere argue over the bases of a constitutionalisation of EU law, or even for its legitimacy, Norbert Reich reveals the principles that were developed by the European Court of Justice and provides them with their own language. Norbert Reich leaves a legacy which constitutes an inexhaustible source of inspiration to all people that are dedicated to consumer law. His creative power and his ideas have promoted far more than German and European consumer law.

For the rest of his life, first as an editor, later as a member of the editorial board, and throughout these years as an author, he accompanied the development of the *Journal of Consumer Policy* to a leading academic journal benefitting from the highest reputation. Consumer research has lost one of its greatest characters; the Journal has lost its inspirational rector. The current editors would like to thank him wholeheartedly for his commitment. I have lost a marvellous and reliable friend who has accompanied me for nearly 40 years with his creative ideas, his almost infinite energy, his advice (always constructive), his great vitality, and his baroque zest for life.

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References

- Jellinek, G. (1892). *System der subjektiven Rechte*. Tübingen: Mohr Siebeck.
- Krämer, L., Micklitz, H.-W., & Tonner, K. (Eds.). (1997). *Law and diffuse interests in the European Legal Order—Recht und diffuse Interessen in der Europäischen Rechtsordnung, Liber Amicorum Norbert Reich*. Baden-Baden: Nomos.
- Lasalle, F. (1972). Das System der erworbenen Rechte. In N. Reich (Ed.), *Marxistische und sozialistische Rechtstheorie* (pp. 25–48). Munich: Ch. H. Beck.
- Reich, N. (1974). Zivilrechtstheorie, Sozialwissenschaft und Verbraucherschutz. *Zeitschrift für Rechtspolitik*, 7, 187–194.
- Reich, N. (2014). *General Principles of European Civil Law*. Cambridge: Intersentia.
- Reich, N., Micklitz, H.-W. (1981) *Verbraucherschutzrecht in den EG-Staaten – Eine vergleichende Analyse, 1980, English 1980*, French.
- Reich, N., & Stučka, P. (1969). *Die revolutionäre Rolle von Recht und Staat. Einleitung von Norbert Reich* (pp. 3–24). Frankfurt: Suhrkamp.
- Reich, N., Micklitz, H.-W., Rott, P., & Tonner, K. (2014). *European consumer law* (2nd ed.). Cambridge: Intersentia.
- Reich, N., Nordhausen Scholes, A., & Scholes, J. (2015). *Understanding EU international market law*. Cambridge: Intersentia.