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Lifetime Contracts – Rediscovering the Social Dimension of the Sales Contract Model

1. Social Justice, Civil Law and "Lifetime"

Three headlines could be used to classify the extensive legal research Thomas Wilhelmsson has delivered to us on "Social (Alternative, Critical)"[1], "European" [2] and "Consumer"[3] Law. All three of them can again be merged into one single approach concerning the introduction of what could roughly be called "social-mindedness" into contract theory. The lack of respect for human needs, the lack of concern for human mishaps like unemployment, illness, homelessness, separation, social conflicts and poverty, the absence of consumption and reproduction in the *causa* of the contract, the lack of care and solidarity in its obligations and the purely formal concept of equal justice ("*Qui dit contractuel, dit juste*") preoccupied him not only after, but during legal dinners. Such attitudes are no longer as uncommon as they may have been at the turn of the 19th century when globalisaton, trade and productive developments introduced the ideological requirements of liberal capitalism into legal reasoning.

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[1] i.e. **Social** civilrätt : om behovsorienterade element i kontraktsrättens allmänna läror Helsinki: Lakimmiesliiton Kustannus , 1987; Social Contract Law and European Integration, Alderschot: Dartmouth 1994 **Critical/Social**: Questions for a critical Contract Law - and a Contradictory Answer: Contract as Social Cooperation, in: Wilhelmsson (ed) Perspectives of Critical Contract Law, Dartmouth 1993 pp 9 ff, where an additional synonym "material values" appear (pp 30 ff); **Alternative/Critical:** Critical Studies in Private Law Kluwer 1992 (where the notion "alternative" is used throughout the text pp 4 ff; 21 ff); Alternative Use of Law, in Faralli, C. and Pattaro, E. (eds) Reasons in Law, Vol. 2 Giuffre Editore pp 257 ff; . **Welfarist:** The Philosophy of welfarism and its Emergence in the Modern Scandinavian Conatract Law, in Wilhelmsson, Twelve Essays on Consumer Law and Policy, Helsinki 1996 pp 3 ff; From dissonance to sense : welfare state expectations, privatisation, and private law, Aldershot [u.a.] : Ashgate, c 1999; **Need orientation /material**: Bedürfnisorientierung im Schuldrecht, Demokratie und Recht, no. 2/1887, p. 175 ff; Need-rationality in Private Law? in: Twelve Essays ... pp 21 ff; Self-Regulation and Need-Orientation as Models for Legal Dogmatic, in: Bankowski, Z. (ed.) Revolutions in Law and Legal Thought, Aberdeen University Presse 1991

[2] i.e. **European Contract Law** Harmonization: aims and Tools in: Wilhelmsson, Twelve Essays ... pp 44 ff; Legal Integration as Disintegration of National Law, op. cit. pp 74 ff; ; Services of general interrest and European private law, in: Rickett, C. and Telfer, T. International Perspectives on Consumers' Access to Justice, Cambridge 2003 pp 149 ff; Social contract law and European integration, Aldershot [u.a.] : Dartmouth, 1995

[3] i.e. **Consumer law** (with Howells, Geraint G.) Aldershot : Ashgate, 1997; Wilhelmsson, Th. & Howells, G. EC consumer law: has it come of age? European Law Review 2003, 370 ff ; Most of the "Twelve Essays on Consumer Law and Policy", Helsinki 1996 i.e. "Social Force Majeure" - A New Concept in Nordic Consumer pp 226 ff.; Varieties of Welfarism in European Contract Law, European Law Journal 6,2004 pp 712 ff, 726 ff; noch Wilhelmsson, Th. Social Contract Law and European Integration, Alderschot: Dartmouth 1994

Bernhard Windscheid's view that „ethical, political or economic deliberations as such are not the business of a lawyer"[4] were the core ideology of Roman Law traditions. Whereas today, Otto von Gierke's quest to pour "more socialist oil onto private law" is one of the most frequently cited phrases in modern contract law. It underlies the manifesto of the Social Justice Group. It has been traced in modern contract literature.[5] Parallel to quests in economics and social sciences, "the moral dimension" (Amitai Etzioni) as well as "need orientation" (Armatya Sen) have gained importance in market theories and influenced the law, especially since the current financial crisis has revealed that the market economy has to live at the mercy of the state as a lender of last resort. Nationalisation and reregulation are requested by the industry itself. The economic analysis of the cost of law seems to be followed by a period in which the cost of the absence of legal regulation in the economy is being rediscovered.

Since his 1987 publication on needs orientation in civil law, favouring the use of general clauses in consumer law to introduce what the Jubilee later called the "social force majeure", the discussion remains where it was: Is the social dimension of contracts located outside its sacred synallagmatic duties or has it got a place within? Would a social (re)interpretation of the parties' true will[6] do harm to the achievements of the traditional trade model, to freedom and equality although it was the initial intention of the German lawmakers to make good faith a principle governing only the interpretation of contracts (§. 157 BGB) instead of developing into a questionable emperor's clause (§ 242 BGB) that corrects its outcome[7]?

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[4] „ethische, politische oder wirtschaftliche Erwägungen sind nicht Sache des Juristen als solchen" B. Windscheid, *Gesammelte Reden und Abhandlungen* Hrg. von Paul Ortmann, Leipzig, Duncker & Humblot, 1904, p. 112. See Falk U., *The Real Jurist and the Jurist as Such. In Memoriam Bernhard Windscheid*, in Journal for History of Law (12/1993).

[5] Lurger, B. Grundfragen der Vereinheitlichung des Vertragsrechts in der Europäischen Union, Springer: Wien 2002; Knops, K. Die Personalität des Schuldverhältnisses, Habilitation Bremen 2008; v. Stebut, Der soziale Schutz als Regelungsproblem des Vertragsrechts - Die Schutzbedürftigkeit von Arbeitnehmern und Wohnungsmietern, Duncker & Humblot, Berlin 1982; Eichenhofer, E. Die sozialpolitische Inpflichtnahme von Privatrecht, Juristische Schulung, H. 10 1996 pp 857 ff; Contributions in Brüggemeier, G./Hart, D. (eds) Soziales Schuldrecht, University of Bremen 1987; Zöllner, W. Die politische Rolle des Privatrechts, Juristische Schulung, vol. 5 1988 pp 329 ff; v. Hippel, E. Der Schutz des Schwächeren im Recht, Mohr: Tübingen 1982; Weitnauer, Der Schutz des Schwächeren, 1975; Oechsler, Gerechtigkeit im modernen Austauschvertrag, 1997; Neuner, Privatrecht und Sozialstaat, 1999. See also the landmark decision of Bundesverfassungsgericht Neue Juristische Wochenschrift 1997, pp 1147ff; 1997, pp 2143 ff. (unconscionable personal guarantees of spouses and children in credit contracts); Wieacker, Das Sozialmodell der klassischen Privatrechtsgesetzbücher und die Entwicklung der modernen Gesellschaft, 1953. Critical evaluation by Reuter, Die ethischen Grundlagen des Privatrechts - formale Freiheitsethik oder materiale Verantwortungsethik?, Archiv für die civilistische Praxis Vol. 189 (1989), pp 199 ff.; Medicus, Abschied von der Privatautonomie im Privatrecht?, 1994; Canaris, Wandlungen des Schuldvertragsrechts - Tendenzen zu seiner Materialisierung, Archiv für Civilistische Praxis Vol. 200 (2000), pp 273 ff

[6] see Reifner, Alternatives Wirtschaftsrecht, Neuwied 1978 pp 321 ff, discussed in Wilhelmsson, Critical legal Studies in Private Law, pp 43, 185 ff

[7] Leff, A. Unconscionability and the Code - The Emperor's New Clause, 115 U. Pa. L. Rev. 485 (1967); see the classical warning of Hedemann, J.W. Die Flucht in die Generalklauseln – Eine Gefahr für Recht und Staat, Tübingen: Mohr 1933 pp 7 ff; also citing the Reichsgericht Decisions Vol. 81 p. 40 from 1912 where it said „Such a flexible principle (good faith) based only on equity and discretion would only take the greatest

How can human needs, the human personality, the social dimension of economic action and the aspirations of social justice adequately be reflected in contract law? Where is the place where "do ut des" opens to social welfare? What kind of alternative thinking is possible to make judges as well as lawmakers reflect on increasing social discrimination? How can national culture regain its importance for a Europe which is culturally diverse but has one single market?

There are a number of possible answers. We believe that the time has now come for legal theory to take the notion fully on board that time is not alien to contract law. There are a number of important scientific studies which deal with the principles of long term relations.[8] But although the authors assume that today, long term relations represent the overwhelming majority of all contractual relations in force and that the general law of contracts and obligations do not provide adequate tools to understand such relations[9], time seems to be little more than a parameter to identify when obligations have to be performed. Understanding it is based on multiplying sales contracts. The analysis of the service contract should always "start from the assumption that it deals with the marketing of products in the most general sense on the basis of barter contracts"[10] The performance of the obligation is allocated to one single spot of time in sales contracts while term contracts allocate it in between the time limits of the indicated period.[11] Since v. Gierke, contracts for repeated performances with many single obligations (*Wiederkehrschuldverhältnis*) have erroneously been qualified as long term contracts.

There is insufficient space here to offer a complete new theory setting out why it is necessary to rethink the dimension of time in the general law of contracts and obligations. We would nonetheless like to indicate some possible lines of enquiry.

2. Lifetime Relations before the industrial age

insecurity into social life."

[8] Wendehorst, Chr. Das Vertragsrecht der Dienstleistungen im deutschen künftigen europäischen Recht, Archiv für die civilistische Praxis, Vol. 206 (2006) pp 205 ff; Knops op.cit. pp 239 ff; Oetker, Das Dauerschuldverhältnis und seine Beendigung, pp 47 ff; Rumpf, Das Synallagma im Dauerschuldverhältnis, pp 16 ff; v. Gierke, Dauernde Schuldverhältnisse, Jerhings Jahrbücher Vol 64 (1914) pp 355 ff, 356 f; Macauley, St. Long-Term Continuing Relations, The American Experience Regulating Dealerships and Franchises, in: Joerges, Chr. (ed) Franchising and the Law. Theoretical and Comparative Approaches in Europe and the United States. Nomos: Baden-Baden 1991 pp 179 ff; ibid. Relational Contracts Floating on a Sea of Custom? Northwestern University Law Review 94 (2000) p 775

[9] Knops aaO p 237; Goetz/Scott, Principles of Relational Contracts, Virginia Law Review 67 (1981) pp 1089, 1091; Leonard, M. Internationaler Anlagenvertrag. Konflitvermeidung udn Konflikterledigung. Betriebs-Berater 1999, Addendum 13

[10] Wendehorst op.cit. p 225;

[11] Knops op. Cit. p 240

The social dimension in contract law has to be sought elsewhere than in those areas where the present law and welfare state addresses it. Care, social welfare, moral and ethics are concepts from outside the law. The absence of social regard is due to a far deeper problem of the market and money driven legal forms in which society mirrors what it assumes to be important in the economy. Sale contract ideology ignores lifetime. It only accepts its finished product as a tradable commodity and legal object. It uses historical forms of distribution as eternal concepts to understand its present state. Polanyi's critique on Adam Smith's has to be taken seriously: "The division of labour, a phenomenon as old as society, springs from differences inherent in the facts of sex, geography, and individual endowment; and the alleged propensity of man to barter, truck and exchange is almost entirely apocryphal." Law is older than the market economy which is the product of a "comparatively recent period of history in which truck and were found on any considerable scale"[12]

Economies, irrespective of which form they took, have been divided into three areas: two vertical and one horizontal relationship. In production and consumption people work and consume. They use intermediaries such as the state, the aristocracy, entrepreneurs or organisations to do this collectively. These institutions receive the results of combined labour separated from the workers who produced it and distribute it collectively to the same people as consumers. On the other hand, the horizontal relations concern the relationship of intermediaries as between one another which was only trade in the beginning and has, in the end, turned into multinational companies.

This split between the worker and his product, falsely denounced as expropriation in the Communist Manifesto, allowed globalization and the best use and development of human resources in general. It was administered by legal rules which after an early period of public status law developed into three different bodies of law driven by the success of the market model: trade law governing the horizontal process, labour law governing production and consumer law governing reproduction.[13]

Trade law was the first to emancipate itself from feudal status law. Its contract model conquered the world. As its task was to receive and distribute only the results of labour ("frozen labour") seen as commodities its typical legal form was the sales contract which reduced all time to a logical second, all social purposes to the one purpose of exchange and all eternal relations to tradable products. Trade was freed from social responsibility, care, quality standards (caveat emptor), cultural barriers, political intentions in order to achieve one single

[12] Polanyi, The Great Transformation, 1944 p 45 a treatise on the economic and social consequences of the Industrial Revolution

[13] Labour law in this economic sense comprises all law that organises labour relations including all kind of service contracts, public functioners and liberal professions as well as agents. Consumer law is here seen as the core of contract law which applies not only exclusively to consumers.

goal: allocate commodities for production (raw material, prefabricated goods) and consumption as quickly and as cheaply as possible whereever there was a demand for it in the world.

While trade law started to develop in ancient times mirrored in Roman and Babylonian sales law, labour and consumption, both restricted in mobility and flexibility through feudal bondage, family ties and soil, remained for a long time governed by feudal status law or direct subordination or slavery. The vast majority of it became subject to contractual relations only after the French and American Revolutions, when the different waves of liberations (slaves, farmers, women, worker, consumers, third world etc) prepared the industrial age. With industrialisation by then a permanent feature, working as an employee emerged from its legal connotation of *status* – meaning, depending on the context, either proprietary, family or company (business or firm) – of the pre-modern period[14] including the period of the Roman Empire[15].

3. Lifetime relations after the industrial revolution

3.1. The Starting point: the Dominance of Sales Law

As the early scholars of long-term contracts noted[16], the processes described in the previous paragraph took place at a time when private law was dominated by the issue of the circulation of goods.

In fact the 1804 *Code Civil*, Austria's ABGB of 1811 as well as the Italian civil code of 1865, are all based on Grotius' notion of contract, adopted by Pothier[17]. This centres on the reciprocal *alienatio* of *promissiones* [18]; from this arises the importance of the *causa transferendi* of the parties' act of consent (*causa proxima*). In the French code, this general law of contracts is contained in the book concerning the modalities of acquisition of property. One example will suffice to illustrate the prevalence of contracts whose subject-matter is an obligation to render – namely the important feature of the *Code Napoleon* that obligations to

[14] As Mayer-Maly T. comments, *Überwindung des Lohnvertrages?*, in *Selbstinteresse und Gemeinwohl*, Berlin, Duncker & Humblot, 1985, p. 13 *ff* .

[15] The principle of status was already a feature of Roman law, as Zimmermann R., reminds us, *The Law of Obligations. Roman Foundations of the Civilian Tradition*, Oxford Univesity Press, 1996, 387:

[16] Gierke von O., *Dauernde Schuldverhältnisse*, in *Jhering Jahrbücher für die Dogmatik des bürgerlichen Rechts*, 64 (1914), 24 *ff*.; Lotmar P., *Der Dienstvertrag des zweiten Entwurfes eines bürgerlichen Gesetzbuches für das Deutsche Reich*, in *Archiv für soziale Gesetzgebung und Statistik*, 8 (1895), 1*ff* . now in Lotmar P., Schriften *zu Arbeitsrecht, Zivilrecht und Rechtsphilosophie* ed. J. Rückert, Frankfurt am Main, Keip, 1992, p. 99 *ff* .

[17] Pothier R. J., *Traité des obligations*, Paris, 1761 poi in *Oeuvres complètes de Pothier*, I, Paris, Thomine et Fortic, 1821, no. 42.

[18] Schmidlin B., *Die beiden Vertragsmodelle des europäischen Zivilrechts: das naturrechtliche Modell der Versprechensübertragung und das pandektistische Modell der vereinigten Willenserklärungen*, in *Rechtsgeschichte und Privatrechtsdogmatik* ed R. Zimmermann in collaboration with R. Knütel and J. P. Meincke, Müller, 1999, p. 187 *ff.*

do something (or refrain from doing it) become obligations to pay damages, since they are not susceptible to orders for specific performance[19]. It should be recalled, in any case, that since, under the French system, l'*obligation de livrer la chose est parfaite par le seul consentement des parties contractantes* (art. 1138 *code civil*), it follows that the French law on obligations is not so broadly developed as German law is.

Conversely, the BGB, the Swiss *Obligationsrecht*, the AGBG as reinterpreted in the course of the nineteenth century and the 1942 Italian Civil Code, all rest on the Kantian notion of the contract as an *Einigung* (consent). This V*ertragswille* is a different concept from the *Wille* of the one of the contracting parties, which in itself represents the (ultimate) purpose *(causa*) of the contract. Precepts of natural law attribute a nominative force to this, which presupposes equality of bargaining power, contrary to what typically happens (and therefore leaving aside certain special cases) in lifetime contracts. The regulatory focus therefore shifts to the effects rather than the factual basis, as is demonstrated among other things, by the absence in the German code of any definition of what is meant by *Vertrag* (contract).

So far as *Schuldrecht* (the law of obligations) is concerned, the BGB in its original formulation identified, as is well known, the source of contractual liability not in non-performance, but in fault-based impossibility of performance. Highlighting one instance will suffice to demonstrate that the archetypal obligation is that of rendering in connection with the purchase of goods/property. It should also be specified that, in accordance with the philosophical underpinning of Kant, the draftsmen of the German code rectified the subject-matter of the contract such that it was no longer identified with the *Sache (the thing/item)* but with the *Tat (the deed)*, by which the item or subject-matter itself was transferred to the power of the other party. Given this innovation, as Otto von Gierke observed, in his pioneering study of long-term contracts in 1914, it is beyond doubt that "the general doctrine of obligations rests upon relationships of obligation which are transitory (*vorübergehende*) in nature"[20].

In legal areas underpinned by German conceptual foundations, this (general) law of obligations has been presented as historically de-contextualised, as the only possible regulatory regimen and, in so doing, its origins in the contract of sale are obscured. This is true of all the civil codes which have been modelled on the BGB. Giorgianni notes, in this regard, that "the 1942 code, in imitation of the BGB, and indeed improving upon its organisation, has clearly differentiated the obligations and their sources, introducing in Book IV a "general part" concerning obligations [...]. This reorganisation of the 1942 code has strengthened the conviction that, despite awareness of historicity and the consequently

[19] Art. 1142 civil code: "toute obligation de faire ou de pas faire se résout en dommages et intérêts en cas d'inexécution de la part du débiteur".

[20] Gierke von O., *Dauernde Schuldverhältnisse* cited at note 1, 356-357.

relative nature of the legal categories, obligations, or rather the relationship of obligations, is presented [...] as an a-historic, self-referencing category"[21].

In a system of private law in which the law of contracts is dominated by values bound up with the circulation of goods, the worker is likewise considered as the owner of his own body or his potential for work which he sells or, at any event, hires out to his employer.

Dienst and *Werk* are external to the persona of the "freed" wage worker The first social laws which were passed for the protection of the latter – for example the legislation on safety at work, which throughout all the European legal systems was modelled on the *Factory Act* of 1833 [22]- operated outside the contract and belonged wholly to the sphere of public law. This was a perspective which lasted in the civil law systems until the Thirties in the last century. The progressive part of the Weimar legal commentators still classed labour law as "social law" that is, in fact, as public law, at least in part.

3.2. The early development of the legal problem of long term relations in legal science: Gierke v Lotmar

Otto von Gierke is credited with having grasped the importance of relationships of obligation, whose performance need not be fulfilled at any *precise* moment, but over a *period* of time. Such relationships, which in the original version of the BGB were referred to in only one paragraph of the regime governing the most important type from a social viewpoint, namely the *Dienstvertrag* (§ 617 BGB), confer a further function – according to Gierke[23], still - on the law of obligations with respect to the traditional one, of transferring the ownership of property: long-lasting relationships of power.

Through scrutiny of the underlying function of the *Schuldrecht,* Gierke recognised above all the relative nature of the law of obligations. He also perceived the outstanding importance of long-term contractual relationships, which he analysed in minute detail.

However, Gierke believed, rightly, that the modern contract of employment could not be regarded in the same light as the (not very common) case under Roman law, of slaves who held themselves out for hire (*si ipse se locasset*) [24], bearing in mind that, as it later became apparent, that it is illogical to believe that the labourer gives the use of his muscle-power because "energy cannot be utilised unless it is consumed"[25].

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[21] Giorgianni M., *La «parte generale» delle obbligazioni cinquant'anni dopo*, in *I cinquant'anni del codice civile*, Milano, Giuffré, 1993, I, 141

[22] Mayer-Maly T., *Die exemplarische Bedeutung des englischen Arbeitsrechts*, in *In memoriam Sir Otto Kahn-Freund*, Beck, München, 1980, S. 563 *ff.*

[23] Gierke von O., *Dauernde Schuldverhältnisse* cited at note 1, 406-407.

[24] D 19, 2, 60, 7.

[25] Mengoni L., *Il lavoro nella dottrina sociale della Chiesa* ed. M. Napoli, Vita & Pensiero, 2004, 21.

Contrary to the views advanced by other writers[26], it was not even possible to invoke by far the most important contract to the pre-modern economy, the contract of sale. On this point Gierke concurred with Lotmar on the premise that, with regard to those which the latter called contracts of employment governed by BGB, the worker's obligation - as distinct both from the *locatio conductio operarum* and the *emptio-venditio* - related to his "being" rather than to his "having" [27]. Work did not represent an object of barter, but was the «Ausfluss der freien Persönlichkeit»[28] ("expression of the free individual"), and is therefore linked to a moral value of greater import than the simple need to possess. As can be seen, legal scholars interested in long-term relationships, contrary to what was asserted by Bernhard Windscheid, began to take interest in the moral principles linked to private law.

The weak link in Gierke's construction however, is to be found in the effects which he attributed to long-term contracts (*dauernden Schuldverträge)*. Leaving aside rescission (already recognised at that time by the *Reichsgericht*) and the non-applicability of the first clause of § 362 BGB[29], he opted decisively for the stark choice of invoking, respectively, the regime governing property rights (*Sachenrecht*) for contracts guaranteeing the right of possession, the use or usufruct of goods and, on the other hand, to the regime governing personal rights (*Personenrecht*) for those which he colourfully called the *Rechtsgschäfte* for social organisation which included, for example, employment contracts.

Finally, Gierke had no doubt that the general part of the *Rechtsgschäfte*, including contracts and obligations had to develop in a way that was abstracted from the *empio-venditio* regime[30]. In Gierke's view, the specific problems of long-term contracts had to be resolved in isolation from the law of obligations; by combining the latter with the law governing personal rights, a specific discipline could be created which would become a part of the immutable general provisions of the BGB.

Conversely, Lotmar's Roman law framework led him to the innovation (that is, to support the needs of long-term employment contracts) wholly within – and not outside- the context of contractual relationships of obligation. This innovation was predicated on the earlier assumption of the (moral) premise that the *contractual duty which concerns a person's being*

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[26] L. Brentano, *Das Arbeitsverhältnis gemäss dem heutigen Recht. Geschichtliche und ökonomische Studien*, (Reprint d. Ausg. Leipzig 1877) 1993; Carnelutti F., *Studi sulle energie come oggetto di rapporti giuridici*, in *Rivista di diritto commerciale*, IX (1913), 384 *ff*. For a fuller analysis, cfr. Veneziani B., *The Evolution of the Contract of Employment*, in Hepple B., *The Making of labour Law in Europe*, London, Mansel, 31 *ff*.

[27] Lotmar P., *Der Arbeitsvertrag nach dem Privatrecht des deutschen Reiches ,* I, Leipzig, Duncker & Humblot, 1902, 7.

[28] Gierke von O., *Dauernde Schuldverhältnisse* cit. at note 1, 409.

[29] «Das Schulverhältnis erlisch, wenn die geschuldete Leistung an den Gläubiger bewirkt wird».

[30] He criticised the Justinian maxim„"*locatio et conductio proxima emptioni et venditioni, iisdemque regulis consistit*".

is on a higher moral plane than a proprietary one[31]. This was a real leap up the scale of values inherited from Roman law, which conversely promulgated the «moral inferiority of paid work » which was proffered, furthermore, «*loco servorum*»[32]. Lotmar's thinking tended to the view that this superiority in values, which came into play in the context of long-term contracts, should lead to a rethinking of the laws of obligations, no longer putting in pride of place the exchange of goods, but the *dauernde Schulverhältnisse*,

History for a while, if we limit the discussion to Germany, judged Gierke to be in the right. From the beginning of the Weimar Republic until the middle Eighties of last century, work relationships were described as *personenrechtliche Gemeinschaftsverhältnisse* [33]. This solution also found favour outside Germany, because it was supported in France by Paul Durand [34] and in Italy by a faction of academic writers in the early period after the Second World War. This permitted certain rules to be avoided, typical of the general part of the *Rechtsgschäfte*, in particular § 142 BGB, which provides for the nullity of the former to be effective *ex tunc*. As Siebert remarked, "it is impossible to eliminate a common relationship between persons from the world" [35]. Another problem which reliance on personal rights resolves, is the worker's obligation of fidelity (*Treuepflicht*).

Also in this period, tenants' law was understood as a father-child relationship where the landlord had the responsibility for his tenants' welfare supervised by the state, which wanted decent homes for its soldiers. With the principle of responsible lending, consumer credit relations even today impose a paternalistic duty to refuse credit to incompetent consumers to prevent them from falling into over indebtedness from unconscionable borrowing. "Modern" contract law thus managed its entrance into the world of lifetime relations with public, feudal and religious or moral status forms of law. This is mirrored in the literature which constantly

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[31] P. Lotmar, *Der Arbeitsvertrag* cit. alla note 11, I, 8.

[32] De Robertis F., op. cit. note 1, 10. F. De Robertis*, I rapporti di lavoro nel diritto romano*, Milano, Giuffrè, 1946.

[33] Gierke von O., *Die Wurzeln des Dienstvertrages*, in *Festschrift für Heinrich Brunner*, München-Leipzig, Duncker & Humblot, 1914, 37 ff.; on the history of Gierke's theory before its current frame of reference as Schuldrechtsbeziehung cfr. see the outline traced by Annuß G., *Der Arbeitsvertrag als Grundlage des Arbeitsverhältnisses*, ZfA, 1994, 283 ff. BAG, Grosser Senat, 27 February 1985, in AP, § 611 BGB, no. 14 which marked the now definitive abandonment of the ideology of the *Treuepflicht*.

[34] Cfr. P. Durand, *Traite de droit du travail*, Paris, 1947; whereas for Spain, cfr., , M. Rodríguez Piñero, *Contrato de trabajo y relación de trabajo. (Bilance provisional de una polemica)*, in *Annales de la Universidad Hispalense. Derecho*, XXVII (1967), p. 1ff .. As regards Italy, cfr, critically, L. Spagnuolo Vigorita, *Studi sul diritto del lavoro tedesco*, Milano, 1961.

[35] DAR, 1935, 99; in a critical sense cfr. Simitis S., *Die faktischen Vertragsverhältnisse als Ausdruck der gewandelten sozialen Funktion der Rechtsinstitute des Privatrechts*, F.a.M., Klostermann.

reproaches consumer[36] as well as labour law[37] for paternalism which in principle they think is necessary but in practice mostly exaggerated.

3.2. The Develop of the Civil Law Tradition

With the decline of the Ford model, the system prevailing in Lotmar's time[38] has come to predominate in Germany, too – as it already had for some time in Italy[39] and France[40], which does not have recourse to personal rights, but which, if anything, is concerned to open up the law of obligations to the protection of non-economic interests.

But labour law has had difficulties in contributing to general contract law [41].

So far as the law of contracts is concerned, labour law has contributed to making the distinction between *Abschlussfreiheit* and *Gestaltungsfreiheit*, between the formal regulation and the content of the agreement, between *Wille* (will) and *richterliche Kontrolle* (ratio) (judicial control), between initial regulation and mechanisms for adaptation of the individual contract (for instance, the *unmittelbare Wirkung (direct effects)* of collective agreements).

At a later stage, consumer protection law has introduced a sort of General Part of the Law of the Weaker Party, sparking a debate - as yet unresolved - as to whether the relevant provisions are also applicable to employment contracts [42].

As regards the law of obligations, on the other hand, it has contributed to the following grafts and transformations: a) *Schutzpflichten (obligation to regard and care)* (§ 241, comma 2, BGB) are recognised, protecting the debtor's person and – so resolving the problem for the solution of which the Gierke tradition had created the *Fürsorgepflicht (paternalistic care)* –

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[36] Canaris, C.-W. Wandlungen des Schuldvertragsrechts – Tendenzen zu seiner "Materialisierung", Archiv für civilistische Praxis (Vol 200) 2000 pp 273 ff, 364 "spießbürgerlicher Paternalismus" (square paternalism)

[37] Schwarze, R. Arbeitnehmerbegriff und Vertragstheorie – Der paternalistische Kern des Arbeitnehmerschutzes, Zeitschrift für Arbeitsrecht 1,2005, S. 81 ff

[38] BAG, Grosser Senat, 27 febbraio 1985, in AP, § 611 BGB, no. 14 which marks the now definitive abandonment of the ideology of the *Treuepflicht***.**

. Cfr. F. Gammillscheg, *Das deutsche Arbeitsrecht am Ende des Jahrhunderts*, in *Recht der Arbeit*, 1998, p. 5 where the most authoritative contemporary German labour law scholar takes the opportunity to lament the fact that those abroad are often reluctant to take note that German legal scholars have abandoned this for some time now.

[39] Grazie a L. Mengoni, *Contratto e rapporto di lavoro nella recente dottrina italiana*, in *Riv. Società*, 1965, p. 682 and G. Giugni, Mansioni e qualifica nel rapporto di lavoro, Jovene, Napoli, 1963..

[40] Grazie a G. Lyon-Caen, *Du Role des Principes Généraux du Droit Civil ed Droit du Travail (Première Approche)*, in *Revue Trimestrelle de Droit Civil*, 1974 (229), p. 231ff.; C. Radé returns to this point, *La figure du contrat dans le rapport de travail*, in *Droit social*, 2001, p.. 802 ff.

[41] Cfr. Wieacker F., *A History of Private Law in Europe*, Oxford, Clarendon, 1995 reprinted 2003.

[42] It is one of the main themes of the volume entitled *Jahre Bundesarbeitsgericht*, München, Beck, 2004; of those in favour, in particular there are, Däubler (p. 7) and Preis (p. 123); whereas against, there is , Reichold (p. 174).

that of the creditor [43] ; b) the rules on liability involve the payment of damages only if the debtor is responsible for the inadequate performance of the obligation (*nur wenn der Schuldner die Pflichtverletzung zu vertreten hat*) (§ 280 BGB); this presupposes the differentiation between the content of the duty and the object of the credit right [44] and the construction of contractual liability on the basis of inadequate performance (see the Italian Civil Code and the *2002 reform of the BGB*); d) the possibility of claiming damages for non-economic loss).

Finally, labour and employment law has opened the way to the use of techniques which traditionally were part of public law, such as, for example, the diffusion of fundamental rights in the context of employment relationships, the prohibition on discrimination, abuse of power, unequal treatment, the conditioning of the exercise of extra-judicial powers by the existence of a factual assumption. From this perspective, it can be seen that the *DCFR Model Rules* generalise the *right not to be discriminated against* [45].

Where it has not been possible to influence general law, differentiated regimes have been provided in respect of the *Dauerschuldverhältnisse.* The *fristlose Kündigung*, now expressly codified[46], is an example, in cases of just cause, under § 314 BGB. Some instances are the subject of heated debate. For example, priority given to specific forms of protection [47], which at any event have already been affirmed in individual systems, such as the Italian one.

Other types which would certainly lend themselves to being classified generally among other long-term contracts, have been relegated to the status of exceptions, applicable only to employment contracts. For example, the regimen for employees' contracts governs the parties' reciprocal obligations on the basis that this contract, so far as the worker is concerned, performs a pre-eminently social function of support and affirmation of his/her personality. For this reason, the risk of non-performance based on impossibility, linked to specific events (illness, accident, pregnancy, conscription, performance of public duties, etc) relating to the debtor, is transferred from the latter to the creditor who, contrary to the synallagmatic

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[43] The fundamental 1929 writings of Hans Carl Nipperdey on *Die Privatrechtliche Bedeutung des Arbeiterschutzes, in Festgabe für das Reichsgericht*, IV, de Gruyter, Berlin-Leipzig, 1929, S. 203 ff. he highlighted the importance of provisions aimed at the protection of the worker's person ‚as accessory obligations for private law, too,

[44] Cfr. Mengoni L., *L'oggetto dell'obbligazione*, JUS, 1952, p. 156 ff. and Mengoni L., *Obbligazioni «di mezzi» e obbligazioni «di risultato» (Studio critico)*, RDComm., 1954, I, p. 185-209, 280-320, 366-396.

[45] Artt. 2:101-2:105 of Book II°.

[46] *Gesetz zur Modernisierung des Schuldsrechts* («reform of the law on obligations ») of 26.11.2001, BGBL, I, p. 3138 which came into force on 01.01.2002.

[47] Cfr. In Francia, Wèry P., *L'exécution forcéè en nature des obligations contrattuelles non pécuniares. Une relecture des articles 1142 à 1144 du code civil*, Kluwer, Liège, 1993 which proposes the following interpretation of art. 1142: „*toute obligation de faire ou de pas faire peut se résoudre en dommages et intérêts en cas d'inexécution*".

principle, is required to pay remuneration for a certain period[48]. Why should events concerning the work relationship (such as, for example, a dismissal on objective grounds) not be reflected in a more incisive way than mere renegotiation of terms, in other long-term social relationships (for example, in terms of the unacceptability of withdrawal from a contract)?[49]

Contract law itself offered no place for lifetime problems like illness, homelessness, age, childcare and child birth. It sought its remedies outside the scope of the synallagmatic duties in general clauses, "protective" rules and administrative precautions. "Protection" admits that the contractual system has created imbalances and weaknesses which have to be compensated for later.

Housing law could have paved the way for lifetime contracts in the civil code. But it was a similar case to labour law, being collocated outside civil law when it first appeared at the beginning of the 20th century. The Tenants Protection Laws[50] were seen as public law. In Germany the *civilian Amtsgerichte* (juge de paix) were officially mandated with administrative functions in order to administer the vast body of public protective rules.[51] It was only when consumer credit emerged first in the form of an instalment purchase contract, sales contract and credit were so amalgamated that it had to be dealt with in civil law itself.[52] From its very beginning it challenged the general doctrine of the law of contracts and obligations at its roots. Its tripartite structure, linked contracts, holder-in-due-course, usury and social force majeure were the items which now were discussed not only by the socially minded, but also by the most eminent representatives of the civil law doctrine itself.[53]

Creating an open contract, identifying lifetime as the core element, credit law could offer an alternative view of contract law which could serve as a door-opener to labour and landlord and tenant law.

Meanwhile the principle of responsible lending, as well as in the various restrictions for default, interest rates or refinancing practices, the prevention of over indebtedness has become

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[48] For the German context, cfr. Hoyningen-Heune v. G., *Arbeitsentgelt ohne Arbeit – Die Durchbrechung des Synallagma im Arbeitsrecht*, in *Festschrif für Klaus Adomeit*, Luchterhand, 2008.

[49] Cfr. Nogler L., *Why Do Labour Lawyers Ignore the Question of Social Justice in European Contract Law?*, ELJ, 14 (2008), 4, 498 and in reply Wilhelmsson T., *Comment to Luca Nogler: A Social Contract through Labour and Consumer Credit Law?*, ivi, 503-504.

[50] See Dannenberg, R., Die Geschichte des Mieterschutzes, Wien 1928

[51] The German tenants protection law (MSchG 1923) reduced early terminations to three reasons, capped the rent, put all charges of maintenance onto the landlord, allowed assignment of leases and gave the judge administrative discretion. It was seen as "upholding the peace of the house-*Gemeinschaft*" see Wesel, U. Juristische Weltkunde – Eine Einführung in das Recht , suhrkamp: Frankfurt Main 2000, pp 146 ff

[52] The German Civil Code had one article 455 BGB concerning reservation of property and instalment purchases while the protective law which was a purely civil law had already been passed in 1894 (Law on Instalment Purchase AbzG) before the civil code came into force.

[53] See Reifner, Alternatives Wirtschaftsrecht, 1979 pp 226 ff; Gernhuber, Austausch und Kredit im rechtsgeschäftlichen Verbund – Zur Lehre von den Vertragsverbindungen, Festschrift Larenz, Munich 1973 pp 455 ff; Larenz, K. Das Zurückbehaltungsrecht im dreiseitigen Rechtsverhältnis, Zur Rechtslage des Käufers beim „finanzierten Ratenkauf", in: Festschrift Karl Michaelis, Göttingen 1972 pp 193 ff

part of the dogma of the civil code. It would offer similar space for the parallel problems of unemployment and homelessness in labour and tenants' law. With consumer credit, consumption as a special purpose of providing money and guaranteeing its effective use, (causa consumendi), as well as labour as the source of income for the repayment of the credit are both considered in consumer credit protection law. Labour and tenants' law could require a similar discussion of their social implications in the civil code.

But such developments are confronted by two aberrations which are based on two opposing models. The liberal model assumes that freedom is linked to the elimination of long-term rules and that all reference to lifetime will lead to paternalistic forms. The corporatist model instead replaces lifetime by personal care and treats social dimensions as problems of weakness. Both keep each other alive and can only be superseded if none of these models are used. This is apparent for the liberalist model but should also be applied to the protectionist model.

4. Re-thinking the time dimension in contract law: re-departing from the Roman Tradition

The civilian tradition ignores the differences between the contractual object "time" and time as a method of identifying contractual limits and dates.

In his essay on "law and time" Mengoni[54] distinguishes law in time from time in law. While the former reflects the disputed questions between the historical and the positivistic school as to whether law is always a-historically present, the latter concerns the use of time in law. In this regard he sees the law as a tool which cuts out parts or terms from the time continuum in order to define the "moments" and "instances" when duties have to be accomplished. But strictly speaking, dates are not time. They reduce time to a spot and thus do not use time as such. It is a form of eliminating the moving current of time by assuming that in the contractual world it suddenly stops when the term has expired or the deadline has been reached.

Von Gierke[55] saw the main difference between spot contracts and long-term contracts in the fact that the latter offered time itself as a performance, so that it was logically impossible to assume that the performance of an obligation occurred when the time limit had been reached. He thought that in the light of long term relations, Art. 362 BGB stating that a duty is accomplished when the debtor has performed was a "misleading generalization."[56] Unlike most authors after him, he did not think that the right of termination was typical for term

[54] Mengoni, L. Diritto e Tempo, in: Studine Scritti in onore di Giugni, I.Bari: Cacucci, 1999 pp 708 ff , 711 ff; see also Engisch, K. Die Zeit im Recht, in: Vom Weltbild der Juristen, Heidelberg 1956 p 69

[55] Dauernde Schuldverhältnisse op. cit. p. 359

[56] op. cit. p. 363

contracts. Since time was the core element of such contracts, he assumed that such contracts ended either when the convened time had elapsed or, as in many instances, never during the lifetime of the parties.[57]

Time exists in four forms, as *history* where law is situated in a certain historical period, as *duration* where limits for the performance of rights and duties are fixed, as *dates* which mark points within historical time when rights and duties are created or expire and as *terms* where time as lifetime is the object of the contract itself. The social problem of civil law only lies in the form of time in the law mentioned at last.

We are aware of a possible misunderstanding, since the word "Lifetime" is already used for relations that are designed for the whole life of a person. For example in microeconomics Lifetime Value (LTV) summons up the total amount of expected spending during the life of a person. Lifetime leases stand for leases which shall last until death of the other party. This is not, in fact, what we have in mind. Instead we want to start from the distinction between spot contracts and (long-) term contracts, respectively in German: *Einmalschuldverhältnissen* and *Dauerschuldverhältnissen* where the definition of spot contracts - “single time contracts” as literally translated - reveals how little the absence of time is reflected in this denomination. It is not the number of contracts which distinguishes one from the other. A spot contract is conversely a term contract where the term is reduced to zero. If we used the word "term contract" alone, we concentrate on the fact that they are mostly limited by time, since a term (*Dauer*) is a period which is not the most important element for identifying such contracts.

To express the human dimension of time, the word "lifetime" is the correct expression. We accept the challenge of getting back to the roots of the wording and call these contracts "lifetime contracts", which others may call "social long term contracts".

In ancient law, such a notion of lifetime was the typical content of productive relations. These relations lasted forever, were mostly unilateral and hierarchically organised. Trade society gradually replaced them with the rent model of the locatio conductio, when forms of market distribution required a pecuniary counterpart for the use of others’ lifetime. This early focus on rent models has been gradually replaced by sales models which require less and less human contact. Labour has thus lost more and more of its time dimension, when it turned from slavery into renting yourself out as a slave to a labour contract (operarum) and finally to the independent worker legally administered by the Werkvertrag (operiis), or even the Werklieferungsvertrag (emptio venditio), where sales law is applied to labour.

[57] op. cit. P 401: life annuities (Leibrentenvertrag), open account (Kontokorrent), associations, societies and companies, cartels and collective agreements

In the modern service and credit society, we have to come back to this early model of time-related legal forms. In modern labour, housing and credit contracts, time is not only a delimitation for the accomplishments, but itself the subject of the transfer. This first became obvious in credit contracts. When the German Reichsgericht voided a loan on usury, it had to decide which performance could be retained for free by the borrower, according to § 817 al. 2 BGB. This article excludes immorally achieved benefits from undue enrichment claims.[58] In its first decision[59], the supreme court held that the borrower could keep the loan. In the second decision the joined chambers of the Reichsgericht[60] came to the opinion that it was only time that he was allowed to keep for free. The borrower had to repay at the convened dates but was not obliged to pay any interest since the interest payments were the counterpart of the used time. The abstraction of the loan contract, where all material purposes have been eliminated, reveals the true nature of long term contracts. The core element of long-term contracts is the use of another person's productive time. In credit on both sides of the contract, time is supplied. It is the frozen labour time represented in the value of the borrowed amount of money and its use on one side and the money representing future labour time on the other. The nature of a term contract is therefore not the fixing of a beginning and an end of the performance of the contract. This use of time is not different from sales contracts, which may also provide a certain term longer than a logical second in which the duties can be performed. This is why recurrent duties are not term duties but only the sum of duties while a term duty is not maior to a spot duty but an aliud. It is the use of such time which has an economic value, due to its incarnation of present or past labour that become the object of the contract.

Feudal status law was still conscious that most productive or consumptive relations dealt with lifetime. The use of the lifetime of slaves was allocated to their master. He could order them to use their time to work for him whenever he ordered it. The same applied to the serf. The use of lifetime by others also ruled relations in kinships.

When the trade society, where a surplus of goods replaced subsistence economy, overtook the mechanisms of distribution and coordination of labour, it introduced two models: the sales model (emptio vendita) with property (dominium) and the rent model (locatio) with lifetime.

While the sales model reduced human relations to a logical second and freed them to choose and exit such relations, the rent model, which came into use just at a time where the whole of

[58] "If the purpose of performance was determined in such a way that that the receiver, in accepting it, was violating a statutory prohibition or public policy, then the receiver is obliged to make restitution. A claim for return is excluded if the person who rendered performance was likewise guilty of such a breach, unless the performance consisted in entering into an obligation; restitution may not be demanded of any performance rendered in fulfilment of such an obligation." Art. 817 BGB

[59] Reichsgericht Decision from March 27, 1936 Vol. 151 p 70

[60] Reichgericht Joined Chambers, Decision from June, 30, 1939 Vol. 161 p 52

Roman society was marked by the "dissolution of clientelism and the end of autonomous household economy" [61] incorporated human relations and lifetime and was used where social contact persisted.

Mayer-Maly showed that the locatio conductio was the legal form which covered all contractual relations between equal individuals where the use of one's time by another was at stake. Its most important element besides the use of the time was the fact that the object of the use remained in the dominium of the other party which offered this use and therefore had to be respected and kept in good shape. The duty to care for a worker's life, including his or her health, family, well-being and even education, was thus a logical part of the synallagmatic duties where the slave was not sold but rented. (locatio conductio operarum) Those who later on rented themselves out as slaves under Roman law, or earlier under the Codex Hammurabi could legally claim that the hirer had to respect their dignity and lives and use their lifetime only in such a way that the person remained healthy and secure.[62] Lotmar[63] saw the difference between locatio and emptio vendita in so far as "sale is always a transitory relationship while labour contracts, rent and lease are always enduring ones, measured according to time and with a remuneration which adapts to this time." "In rent contracts the object is not consumed. Only its use is offered."

Renting the use of another's lifetime as a form of dependent wage work therefore introduces all those values as part of the nature of a labour contract which seems to escape the barter ideology of the sales model. Unlike Marxian claims, the labour contract does not give a title of ownership on the *Arbeitskraft"* (manpower) of another person. Manpower is so linked to its personality that this would amount to slavery. The entrepreneur only gets a title on the use of lifetime and has no title on the person itself.

In landlord and tenant relationships, (locatio conductio rei/rerum) lifetime enters the contractual relationship in two forms. Since the tenant needs the use of the home to spend his lifetime in it, the home has to be fit for hosting this part of the lifetime of the client. It obliges the landlord to do everything, so that the tenant can enjoy his lifetime in this home decently. But there is a second element of lifetime in such contracts. The tenant does not only pay money as a rent but offers the landlord a participation in his use of lifetime to earn money for living. He participates in his income from labour which presupposes a second lifetime contract, the labour contract. Both are linked to each other not only objectively but also by the

[61] Mayer-Maly, Th. Locatio Conductio, Herold: Wien u. München 1956 p 15; Burckhardt, Zur Geschichte der locatio conductio (1889) pp 26-33: locare = put, displace and conducere = lead away or fetch it elsewhere..

[62] For an Analysis see Knoch, St. Sklavenfürsorge im Römischen Reich, Formen und Motive Hildesheim: Olms 2005 pp 21 ff who argues that even the owned slave was not a mere thing but seen as a human being which had certain rights.

[63] Lotmar, Philipp: Der Arbeitsvertrag nach dem Privatrecht des deutschen Reiches Band 1 , Leipzig 1902 p 48

will of the party, when the landlord requires a proved regular income as a precondition for renting the flat. While the entrepreneur gets the use of real lifetime the landlord only gets the use of its economic representation in money. To this extent he shares this attitude with a lender, who offers immediate capital in exchange for future earnings which again is none other than a participation in lifetime.

While there is a vast discussion on the relationship between locatio and labour or rent contracts, we find little on the relation between loans and locatio. Economically there is little evidence of money loans in ancient times. Money loans were seen as immoral and identified with usury.[64] The use of the word credit in common law misled legal reasoning, since credit only describes the economic impact and not the legal form of "renting money". Credit as it is still visible in the English use of the words Creditor (Gläubiger, lat. creditor/stipulator) only describe the demanding party of any claim (Forderung, lat. postulatio) which is not necessarily linked to a term contract. "Creditum" occured basically involuntarily where the debtor of a spot contract was unable to pay in time. Creditum is therefore linked to default and not to what is called a credit by consent today. Where the use of time was offered, locatio was used. If money was given, interest was mostly banned and feudal status law prevailed. This is still visible in the modern legal forms where the unilateral "lien" (loan, Lehen, prestito, feudum) was used to denominate a credit contract, but assumed to be normally free of interest. Lending was either stigmatised or part of charity. But where housing was concerned and a credit contract mirrored the use of a thing, mortgage credit was perceived as a form of the locatio conductio. [65] The true predecessor of modern credit law was therefore the locatio conductio irregularis[66] which concerned the renting of fungible things, which in Germany until 2002 were regulated under the same § 607 BGB, where the money loan was seen as the most prominent "fungible thing" which could be lent. It shares the specialty that the lessee can return another but equal thing to the lessor than the one he originally gave to him. To this extent we can shed more light on Reifner's much criticised "social interpretation" of the borrower's duty to pay limiting it to an obligation "out of the borrower's monthly income"[67]. While in this interpretation factually existing labour income was seen as linked to the duty to

[64] Aristoteles, Hauptwerke, Kröner Stutttgart 1942, S.300 on usury. For the middle ages see Max Weber, Rechtssoziologie, 2nd ed. Luchterhand: Neuwied 1967 p 269 §5; ibid. Wirtschaft und Gesellschaft, 4th ed, Part 2, Chapter V §11

[65] Bible: Exodus 22:25: "If you lend money to one of my people among you who is needy, do not be like a moneylender; charge him no interest." Deuteronomy 15:8: "Rather be openhanded and freely lend him whatever he needs." Luke 6:35 "But love your enemies, do good to them, and lend to them without expecting to get anything back. Then your reward will be great, and you will be sons of the Most High, because he is kind to the ungrateful and wicked." (The word "lend" referred primarily not to money lending but to locatio rei. Luke 11:5 "Friend, lend me three loaves of bread"

[66] op.cit. pp 34 ff

[67] For an English description of my deliberations in Reifner op.cit 1979 p 327 see Wilhelmsson, Critical Studies op.cit. p 198 ff

repay by the will of the lender who requires proofs of its existence. It is even part of the *nature* of consumer credit contracts (§ 307 al. 2 BGB), where the use of lifetime is at stake.

These somewhat preliminary remarks may hint at the direction of future research. If lifetime is what in all three areas is offered for use, then the coincidence that all problems which may be faced by a person turning his or her lifetime into an unproductive state affect the synallagmatic contractual relation itself. If we then acknowledge that only real and productive lifetime can be rented, the partners of such rent contracts have to know from the very beginning that they have to do with human lives, well-being and dignity including democratic rights and chances.

Future research would also have to address the quality of the lifetime addressed in the contract. Whether consumption, labour or housing are concerned, contract law should regard the different impact the respective lifetime has for the individual. Articles 16 and 86(2) of the EU Treaty has already distinguished between services in general and "*services of general economic interest*". The Annexed Protocol No 26 mandates the EU to guarantee "a high level of quality, safety and affordability, equal treatment and the promotion of universal access and of user rights"[68] for such services.[69] It should also be used to qualify access to credit or bank accounts. European Constitutions (see Art. 9, 13 German Constitution, Art. 1, 4 and 14 Italian Constitution) have given labour and housing already a similar status. As consumer credit is only a form of making (future) labour income available for consumption and housing, it shares this high esteem given to labour and housing.[70] It should be mirrored in the requirements for access, continuity and quality of such contracts which cover its supply. Much what is presently discussed as consumer, labour or tenants' protection could thus be redefined as a reference to the special quality of lifetime which is at stake.

But first, European contract law for the future may have to rethink the Roman Law distinction between locatio conductio and emptio vendita, in which the former may have a much longer tradition within market societies than the latter. At least the time dimension is a fundamental prerequisite to the introduction of human elements into the synallagmatic relations where

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[68] *Protocol (No 26) on Services of General Interest* in the Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union Official Journal C 115 , 09/05/2008 P. 0001 - 0388

[69] *White Paper on services of general interest* EU COM(2004) 374 final Annex I; "The term «services of general economic interest» is used in Articles 16 and 86(2) of the Treaty. … The concept of services of general economic interest thus covers in particular certain services provided by the big network industries such as transport, postal services, energy and communications."

[70] Art. 47 of the Italian Constitution reads: "The Republic … regulates, co-ordinates and overseas all operation of credit. The Republic promotes the access through citizen's mutual savings to the ownership of housing …"

lifetime is at stake, especially in those predominant areas of society where, as in labour, housing and credit, the questions of social coherence and justice will be discussed in the future.