

Conformity of Goods, the Network Society, and the Ethical Consumer

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Abstract: European contract law requires goods marketed to consumers to satisfy various standards such as to be fit for the purposes for which such goods are ordinarily used and to ‘possess such qualities and performance capabilities as the buyer may expect’ (Art. 100(g) Common European Sales Law (CESL)). Although the law tends to focus on the qualities of the goods in themselves, my question is whether the reasonable expectations of consumers include reference to the means of production up the supply chain and an expectation that the goods will not be produced through the use of labour that is employed under conditions that violate European Union (EU) labour laws, international labour standards, and human rights law. For instance, should consumers have the expectation that the clothes we purchase are not produced through child labour, or that the mobile phones we buy are not produced under working conditions that breach basic standards such as the International Labour Organization (ILO) and EU rules on working time, or that the tomatoes we eat are not picked by labourers working under conditions of servitude contrary to Article 4 of the European Convention of Human Rights? If consumers have such expectations and EU contract law can protect them, the law may provide a vehicle for addressing some of the worst instances of labour exploitation worldwide.

Résumé: Le droit européen des contrats exige à propos des produits commercialisés pour les consommateurs qu’ils répondent à différents critères, notamment être adaptés aux buts pour lesquels ils sont ordinairement utilisés et ‘avoir les qualités et performances que l’acheteur est en droit d’attendre’ (DCEV article 100(g)). Alors que les textes légaux tendent à se concentrer sur les qualités intrinsèques des produits, je me pose la question de savoir si les attentes raisonnables des consommateurs incluent une référence aux moyens de production en amont de la chaîne d’approvisionnement et une présomption que les biens ne sont pas produits par un travail fourni dans des conditions contraires au droit du travail de l’UE, aux règles internationales du travail et des droits de l’homme. Par exemple, les consommateurs devraient-ils présumer que les vêtements que nous achetons ne sont pas produits par le travail exécuté par des enfants ou que les téléphones portables que nous acquérons ne sont pas produits dans des conditions de travail violant des normes fondamentales telles que les règles de l’OIT et de l’UE sur la durée du travail, ou que les tomates que nous mangeons ne sont pas cueillies par des personnes travaillant dans des conditions d’esclavage contraires à l’article 4 de la Convention européenne des droits de l’homme ? Si les consommateurs ont effectivement de telles attentes et si le droit européen des contrats peut les protéger, le droit peut fournir un moyen d’agir contre quelques-uns des pires exemples d’exploitation du travail dans le monde entier.

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Zusammenfassung: Das europäische Vertragsrecht erfordert, dass Verbrauchergüter verschiedene Standards erfüllen, bspw. ihre Tauglichkeit für die gewöhnlichen Zwecken, zu denen solche Güter normalerweise verwendet werden und dass sie 'diejenige Eigenschaften und diejenige Tauglichkeit besitzen, die der Käufer erwarten kann' (CESL Art. 100g). Obwohl das Recht neigt dazu, die Eigenschaften der Güter als solche zu fokussieren, ist meine Frage, ob die angemessenen Erwartungen des Verbrauchers auch einen Bezug auf die Art und Weise der Produktion entlang der Lieferungskette sowie die Erwartung einschließen, dass die Güter nicht durch einen Einsatz von Arbeitskraft produziert worden, der das EU Arbeitsrechts, die internationalen Arbeitsstandards und die Menschenrechte verletzt. Beispielsweise, sollten die Verbraucher die Erwartung haben, dass die Kleidung, die wir kaufen, nicht durch Kinderarbeit produziert wurde oder, dass die Mobilfunkgeräte, die wir kaufen, nicht unter Arbeitsbedingungen hergestellt wurden, welche die grundlegenden Standards wie etwa die Arbeitszeitregelungen des ILO und der EU widersprechen oder auch, dass Tomaten, die wir essen, nicht von Arbeitern geerntet wurden, welche Sklavenarbeit im Streit mit Art. 4 der Europäischen Menschenrechtskonventionen verrichten? Wenn Verbraucher solche Erwartungen haben und das EU-Vertragsrecht diese schützen kann, könnte das Recht ein Vehikel darstellen, um einige der schlimmsten Fälle der Arbeitsausbeutung weltweit zu bekämpfen.

1. Introduction

In the *Manifesto on Social Justice in European Contract Law*,¹ a central argument was that it would be inappropriate in a post-national multilevel Europe in the twenty-first century simply to duplicate the nineteenth century tradition of codification of civil law. Such an agenda, it was suggested, would fail to accommodate how those civil codes had been revised and even marginalized in respect of most common transactions such as sales to consumers and employment, in order to ensure both procedural and substantive standards of fairness. The strong presumption in favour of freedom of contract with respect to the choice of terms no longer seems appropriate outside transactions between businesses, and even in those commercial contexts where small businesses are involved, questions about inequality of bargaining power may sometimes be appropriate. The task for a modern code is not simply to refine and articulate the idea of freedom of contract but to engage in the analysis of social policy with a view to identifying where regulation is needed to correct market imbalances in favour of the weaker party.

Furthermore, it was pointed out in the *Manifesto* that in an age of respect for human rights, as highlighted by the coming into force of the Charter of the Fundamental Rights of the EU, one could observe many trends towards the constitutionalization of private law by means of the insertion of fundamental

1 Study Group on Social Justice in European Private Law, 'Social Justice in European Contract Law: A Manifesto', 10. *ELJ (European Law Journal)* 2004, p. 653 (*Manifesto*).

rights into private law.² Although no doubt private law in general upholds many of the values and principles contained in human rights documents,³ modern interpretations and understandings of some rights such as equal treatment and respect for private life have strengthened and expanded their compass of the application. For instance, freedom of contract in the sense of freedom to choose a contractual partner has been radically limited by controls against discrimination on grounds of sex, race, nationality, age, disability, and sexuality in many kinds of transaction.⁴ The principle of equality or equal opportunity is treated as a fundamental principle of European Union (EU) law,⁵ which is incompatible with the more or less unbridled freedom to choose a partner envisaged in nineteenth century codes. At the time of their enactment, the embracing of formal equality by the civil codes was a radical measure levelled against prior status-based societies, but in the twentieth century a radical restatement of the law would have to abandon formal equality and replace it with a more substantive notion of equality of opportunity.

Adding to these points regarding protection of weaker parties and the growing impact of human rights on contract law, the *Manifesto* asked further whether broader distributive considerations should be influential in the development of modern European law.⁶ Should a modern law of contract be concerned not only with the protection of weaker parties to a contract but also others who might be adversely affected by contracts concluded in Europe?

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- 2 D. OLIVER & J. FEDTKE (eds), *Human Rights and the Private Sphere: A Comparative Study* (London: Routledge, 2007); C. MAK, *Fundamental Rights in European Contract Law: A Comparison of the Impact of Fundamental Rights on Contractual Relationships in Germany, the Netherlands, Italy and England* (The Netherlands: Wolters Kluwer, 2008); S. GRUNDMANN (ed.), *Constitutional Values and European Contract Law* (The Netherlands: Kluwer Law International, 2008); G. BRÜGGEMEIER, A. COLOMBI CIACCHI & G. COMANDE (eds), *Fundamental Rights and Private Law in the European Union, Vol. I, A Comparative Overview* (Cambridge: Cambridge University Press, 2010); O. CHEREDNYCHENKO, *Fundamental Rights, Contract Law and the Protection of the Weaker Party* (Munich: Sellier, European Law Publishers, 2007); D. HOFFMAN (ed.), *The Impact of the UK Human Rights Act on Private Law* (Cambridge: Cambridge University Press, 2011); C. BUSCH & H. SCHULTE-NÖLKE (eds), *Fundamental Rights and Private Law* (Munich: Sellier, 2011).
- 3 A. BARAK, 'Constitutional Human Rights and Private Law', in D. Friedmann & D. Barak-Erez (eds), *Human Rights in Private Law* (Oxford: Hart Publishing, 2001), p. 13 at 21-22; J. SMITS, 'Private Law and Fundamental Rights: A Sceptical View', in T. Barkhuysen & S. Lindenberg (eds), *Constitutionalisation of Private Law* (Leiden/Boston: Martinus Nijhoff 2006), p. 9; R. STEVENS, *Torts and Rights* (Oxford: Oxford University Press, 2007).
- 4 H. COLLINS, 'The Vanishing Freedom to Choose a Contractual Partner', 76. *Law and Contemporary Problems* 2013 p. 101.
- 5 CJEU 2010, Case C-555/07 *Kucukdevici v. Swedex GmbH & Co. KG* IRLR 346.
- 6 H. COLLINS, 'The Constitutionalisation of European Private Law as a Path to Social Justice?', in H. Micklitz (ed.), *The Many Concepts of Social Justice in European Private Law* (Cheltenham: Edward Elgar, 2011), p. 133.

Similarly, given that the protection of human rights is a general moral imperative, should a modern law of contract be concerned not only with the protection and vindication of the human rights of parties to contracts concluded in Europe but also the human rights of others adversely affected by such contracts? Following those lines of thought, the *Manifesto* argued, for instance, that ‘the Charter [of the Fundamental Rights of the EU] prohibits child labour, which suggests that products made using child labour should not be placed on the market or at least that consumers should have the right to rescind purchases of such products’.⁷

This novel suggestion could be generalized. A variety of reasons could be invoked in order to impugn the quality of goods marketed in Europe. As well as production systems that involve the use of child labour, the prohibition could extend to goods produced under conditions of forced labour or in violation of other minimum international labour standards such as maximum hours of work or health and safety conditions. The marketability of the goods might also be challenged on the grounds that the production process involved unacceptable degrees of environmental damage by causing heavy pollution that is injurious to human health.

The concern about human rights and the environment in these examples is directed towards third parties who are not directly involved in the contract that is being impugned. The violations of human rights or basic labour standards occur up the supply chain during the manufacturing process or perhaps the distribution process. The consumer contract with a retailer does not involve any rules or practices that interfere with the human rights of the parties. The problem of violation of labour standards and rights is rather with respect to other parties who have helped to produce and distribute the product and who may be several contractual steps removed from the final purchaser of the product. Under traditional contract law doctrine, the interests of such third parties or strangers to the contract are not regarded as relevant to the interpretation and enforcement of a contract. The contract usually only creates rights and obligations between the parties but does not confer benefits or obligations on others. Economic analysis of contracts labels the interests of third parties as ‘externalities’, because in making their cost/benefit assessment of the attractions of market opportunities the parties will generally not take them into account. Contract law focuses on considerations relevant to the parties to the contract; the task of protection of third parties is left to public regulation. Under theories of the efficiency of markets, parties to contracts should be entitled to focus on their own interests and preferences, a process that permits the invisible hand of the market to guide economic growth. Where the market produces serious adverse effects, these

7 *Manifesto*, n. 1 above, p. 668.

should be remedied, in the traditional view, by public regulation that sets limits on the scope and content of market activities.

This essay challenges the traditional division of labour between contract law and public regulation with respect to labour rights. The first section examines the new international division of labour in a network society with a view to suggesting that remote suppliers up the supply chain are in fact semi-integrated into a production system in which the hub business organization should be (and in fact is) held morally responsible for labour standards among the suppliers. The second section explains the inadequacy of current regulatory tools for addressing the problem of poor labour standards in foreign jurisdictions outside Europe. The next section explores how the remedies available to consumers in sales have been transformed in recent years by a switch from focusing on the content of the seller's promise to the expectation of a consumer. That analysis is then applied in the next section to the potential for consumers to use the modern European law of sales with respect to defective products in order to address poor labour conditions in the processes of manufacturing the products. The conclusion argues that European contract law is on the verge of empowering consumers to regulate through their rights under sales law the labour conditions under which their goods have been produced.

2. The International Division of Labour in Networks

The mobile phone is surely the most successful new consumer product of the last 20 years. In the USA, the market grew from 5 million subscribers in 1990 to 291 million in 2009, resulting in about 93% of Americans having a cell phone.⁸ In the United Kingdom, the regulator OFCOM reported in 2012 that 92% of the adult population use a mobile phone and, oddly, that there are 81.6 million subscriptions, a number that significantly exceeds the total population.⁹ The United Nations reported in October 2012 that worldwide there about 6 billion mobile phone users in a total population of less than 7 billion.¹⁰ The portability and multi-functionality of the mobile phone, especially its access to the Internet, increasingly make it appear an indispensable feature of modern life. Many people love their mobile phones and quite a few would be lost (literally) without one. The mobile phone is also emblematic of two defining features of our contemporary world.

First, the mobile phone is increasingly a vital part of the tools of global instantaneous communications. The phone or 'portable communications device' permits us to discover what is going on in almost any part of the world and to

8 O. BAR-GILL, *Seduction by Contract* (Oxford: Oxford University Press, 2012), p. 185.

9 <http://media.ofcom.org.uk/facts/>.

10 <http://www.bbc.co.uk/news/technology-19925506>, International Telecommunications Union, *Measuring the Information Society* (BBC News, 12 Oct. 2012).

respond to developments, whether they comprise political news stories, market fluctuations, or staying in touch with the needs of friends and family. The ‘information society’ is better understood as a communications society, where the linkages or networks channel our access to others and society as a whole, whether those groups and associations comprises the workplace, a political association, or friends and family. Texts replace personal meetings, emails diminish the number of committees demanding our presence, podcasts substitute for lectures, and access to the Internet and the digital commons removes the need to consult books collected in the public spaces of libraries.

Second, the mobile phone is a characteristic product of the modern international division of labour. Instead of the Fordist mode of production, in which goods are conceived, designed, tested, manufactured, and then distributed from a single location owned and managed by a single capital unit or firm, now sophisticated products are conceived and developed in technologically advanced countries, then manufactured by different companies in the sweatshops of the developing economies, and are finally marketed and distributed globally under a brand name by other companies. Advanced economies in the West prosper through developing a knowledge economy and providing sophisticated services to others, while developing economies such as China and Southeast Asian countries aspire to modern versions of the labour intensive factory production reminiscent of Victorian England. This productive organization is aptly described as a network of businesses, bound together by contracts rather than ownership and organization, united by a common purpose to make profits through a product such as a mobile phone, but simultaneously with each business working in its own interests.¹¹ It is not simply a supply chain, however, because every detail of the product, its production process, and its marketing is organized and managed by the central hub, as in the case of Apple.

In his analysis of the network society, Manuel Castells observes not only how economic networks diminish the vertical integration of production but also reduce the presence of social hierarchies.¹² Individuals are less likely to identify themselves by reference to the organizations to which they belong, whether these associations are a business, a church, a trade union, or a political party, since their links to those organizations are looser than before. Instead of finding our identity through membership of these hierarchical organizations, we become more autonomous individuals, who have greater freedom to create ourselves rather than finding a niche in an organization. At the same time as we experience greater autonomy, though, we are not isolated from others owing to the omnipresence of

11 G. TEUBNER, *Networks as Connected Contracts* (Cambridge: Cambridge University Press, 2010).

12 M. CASTELLS, *The Rise of the Network Society, The Information Age: Economy, Society and Culture Vol. I* (Cambridge, MA: Blackwell, 1996; 2nd edn, Oxford, UK: Blackwell, 2000), p. 3: ‘Our societies are increasingly structured around the bipolar opposition of the Net and the Self’.

communications technology. Through communications networks we learn about the world and other people, what we want, with whom to associate, and where we want to go. Of course, the dominant feature of the Internet is that it is designed to sell us products, so we are likely to conceive ourselves as needy consumers, anxious to achieve material welfare, and through acquisitions in the online market, we hope to find happiness. However, the Internet cannot be confined to marketing of products. It also provides us with knowledge about what is going on in the world; both the organized and the informal media of the blogosphere steer us towards (or market) various political viewpoints.

On our mobile phones, therefore, we can discover (indeed it is hard to avoid) information about the latest features in the new model that are made to appear essential for modern living and personal development, but we can also encounter news stories that reveal that the phone was produced under sweatshop conditions in foreign countries by poorly paid workers who toil for long hours under oppressive working conditions. The iPhones that many of us admire and cherish, though designed and marketed by Apple Corp., are produced in China in factories not owned or managed by Apple,¹³ where the working conditions are clearly harsh.¹⁴ In one factory, the workers have been required to sign a new contract under which they promise not to commit suicide, though this does not seem to have been effective.¹⁵ This is an intriguing response (together with higher pay, outsourcing of dormitories, and the termination of compensatory payments to bereaved families) to a spate of suicides that appear to be mostly related to the long working hours at the factory, which far exceed the International Labour Organization (ILO) standard of a maximum of 48 hours a week. Apple has admitted that at least 55 of the 102 factories that produce its goods were ignoring Apple's rule that staff cannot work more than 60 hours a week.¹⁶ Apple has also admitted that its suppliers and assemblers have used child labour in the factories in the past. Apple also found that 24 of its contractors' factories employed workers who were not even paid China's very low minimum wage.

Apple is concerned about the labour conditions in the factories run by its contractual partners because consumers appear to include political concerns when exercising their preferences in making purchasing decisions. Large corporations like Apple manage their network by insisting that their partners conform not only to business efficiency requirements such as Total Quality Management (TQM) but

13 The principal factories are owned by Foxconn, a Taiwanese company, which is also a supplier for Microsoft and other major IT companies.

14 China Labor Watch, *Beyond Foxconn: Deplorable Working Conditions Characterize Apple's Entire Supply Chain* (2012), <http://www.chinalaborwatch.org/pro/proshow-176.html>.

15 'More Suicides at Foxconn', *Wall Street CheatSheet* (19 May 2013), <http://wallstcheatsheet.com/stocks/more-suicides-at-apple-supplier-foxconn.html?a=viewall>.

16 Apple publishes annual reports on the conduct of its suppliers: <http://www.apple.com/uk/supplierresponsibility/reports.html>.

also to a code of conduct that are largely concerned with labour standards, though they may also include environmental standards. Such firms may also create associations for branding mechanisms that consumers value such as Fair Trade coffee or compliance with sectoral codes of conduct. The dominant motivation behind such measures is presumably the concern that, if consumers believe that the processes by which the product was produced violate ethical standards, they may boycott a corporation's products in sufficient numbers to affect sales and profits.

Questions need to be posed of course about the wisdom of consumer boycotts and other methods for asserting political and ethical views through purchasing decisions. The well-intentioned consumer who avoids products made using child labour, such as cotton clothing from Asia,¹⁷ may discover that the main group who suffer from a consumer boycott are the children themselves, who may be forced to survive by accepting even worse kinds of jobs such as prostitution.¹⁸ Evidence suggests that it is not boycotts but willingness to pay a higher price for goods that will diminish child labour and probably other harsh working conditions.¹⁹ Nevertheless, we must remain sceptical about the effectiveness of much hyped corporate codes of conduct and similar measures in upholding minimum labour standards, for even well-intentioned western corporations cannot properly supervise the daily conduct of management in foreign businesses in the context of the 'organized irresponsibility' of business networks. For instance, Apple must rely on its supplier's records and reports of pay to individual workers to determine whether or not the contractors comply with a maximum of 60 hours work per week, but those records can evidently be easily falsified. The consumer is probably wise not to trust completely the claims of ethical trading issued by global businesses but equally needs to be circumspect in participating in product boycotts that may backfire. Although urgent action may be required for proven violations of human rights, it is always worth questioning whether trade bans and boycotts are the appropriate response. Although these dilemmas are serious concerns, in a network society it is unclear what alternatives are available to individuals to have a political influence other than by using the communications network itself and their purchasing decisions.

17 http://www.youtube.com/watch?v=Hntampr_k7M&feature=relmfu.

18 J. BHAGWATI, 'Afterword: The Question of Linkage', 96. *AJIL (American Journal of International Law)* 2002, p. 126 at 132.

19 E.V. EDMONDS & N. PAVCNIK, 'The Effect of Trade Liberalization on Child Labor', 65(2). *JIE (Journal of International Economics)* 2005, p. 401; E.V. EDMONDS & N. PAVCNIK, 'International Trade and Child Labor: Cross-Country Evidence', 68. *JIE* 2006, pp. 115-140.

3. Regulatory Alternatives

Citizens can hope to influence the political process to do something in response to their concerns about the plight of foreign workers. However, in reality, a national government cannot exercise much influence over foreign business under a different jurisdiction. The United Nations has never empowered the ILO to go beyond the establishment of optional Conventions of Labour Standards that are unenforceable except through moral persuasion.²⁰ Other techniques could be developed to try to uphold international labour standards,²¹ but in the absence of effective international or regional legal regimes (as in the EU), these regulatory strategies seemed destined for ineffectiveness. International law has also maintained a fairly strict separation between the rules facilitating international trade and concerns about labour standards.²² As a result, national governments or the EU will experience great difficulty in justifying bans on products based on the labour conditions under which they were produced.

The General Agreement on Tariffs and Trade (GATT) rules governing international trade prohibit product regulations that discriminate between ‘like products’ of domestic and foreign origin.²³ In the *Tuna/Dolphin* dispute,²⁴ the World Trade Organisation (WTO) panel could not accept that tuna was not a ‘like product’ whether it was caught by line or by nets that also trapped dolphins, so a ban on imported tuna caught by nets was impermissible. The same reasoning that distinguishes between the product and the process by which it was produced should apply to trainers whether manufactured by children or adults: provided the trainers are a ‘like product’, a state should not be permitted to discriminate against imported products on the grounds that they were manufactured by children.²⁵ It is true that in the subsequent *Shrimp/Turtle* decisions of the WTO appeal panel,²⁶ it was accepted that environmental and ecological measures might

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- 20 B. CREIGHTON, ‘The Future of Labour Law: Is There a Role for International Labour Standards?’, in C. Barnard, S. Deakin & G.S. Morris (eds), *The Future of Labour Law* (Oxford: Hart, 2004).
- 21 K. STONE, ‘Labour and the Global Economy: Four Approaches to Transnational Labor Regulation’, 16. *MJIL* (*Michigan Journal of International Law*) 1995, p. 987; B. HEPPLE, ‘New Approaches to International Regulation’, 26. *ILJ* (*Industrial Law Journal*) 1997, p. 353.
- 22 B. HEPPLE, *Labour Laws and Global Trade* (Oxford: Hart Publishing, 2005).
- 23 Article III, 4. ‘The products of the territory of any contracting party imported into the territory of any other contracting party shall be accorded treatment no less favourable than that accorded to like products of national origin in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution, or use.’
- 24 Panel Report, *United States – Restrictions on Imports of Tuna*, DS21/R (3 Sep. 1991) GATT B.I.S.D. (39th Supp) 155 (1993).
- 25 <http://www.youtube.com/watch?v=xVuScVCF1Ws&feature=related>.
- 26 Appellate Body Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R (12 Oct. 1998); Appellate Body Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, recourse to Art. 21.5 of the Dispute Settlement Understanding by Malaysia, WT/DS58/AB/RW (22 Oct. 2001).

be saved under the separate provision of Article XX of the GATT agreement on the grounds that the policy goal was one that sufficiently concerned the importing nation itself and that the regulation satisfied something equivalent to a test of proportionality. Although the US government could plausibly claim it was concerned about the fate of turtles in its territorial waters, it would be more difficult to satisfy this exception where the policy addressed poor labour standards of workers in foreign countries. The argument would have to be that the exploitation of workers in Southeast Asia was directly causing a loss of jobs and a decline in living standards in Western countries rather than simply causing a new international division of labour to the benefit of all concerned. Assuming the failure of such an argument, in the absence of effective political and legal measures available to governments to use trade regulation to secure better labour standards in foreign countries, all that may remain is consumer purchasing decisions as an expressive and symbolic choice, even if that choice proves ineffective, risky, and sometimes counterproductive.

In a network society, where formal political associations are weak and cannot provide leadership, the citizen's vote becomes partly transformed into purchasing decisions guided to some extent by political, social, and cultural considerations. As the US Supreme Court has recognized, a consumer boycott is an aspect of the right to freedom of speech or expression.²⁷ It can be used to put pressure on both public and private actors to adopt ethical policies with respect to labour standards, human rights, and environmental concerns. The principal way that consumers can exercise these expressive and symbolic choices is through their purchasing decisions.²⁸ They can choose a coffee shop that uses 'Fair Trade' coffee and pays a fair amount of taxes in preference to others that do not. As Kayser observes with respect for the Fair Trade label, '[T]he observed demand for process-labelled goods reflects in part the value that individuals place on the ability to express their moral and political views through the medium of conscientious consumption'.²⁹ When buying their cappuccinos, consumers are not simply quenching their need for froth and caffeine, but they are also exercising 'voice' in the sense that they may be condemning according to their personal ethical values the conduct of other businesses that do not comply with those standards. 'Consumer behaviour, which appears to be focused and directed at the object and at pleasure, in fact responds to quite different objective: the

27 M.C. HARPER, 'The Consumer's Emerging Right to Boycott: *NAACP v. Claiborne Hardware* and Its Implications for American Labor Law', 93. *Yale L.J (Yale Law Journal)* 1984, p. 409, 'A refusal to buy non-union [products] gains significance as self-definition, as well as expression, when that decision is associated with the decisions of others', p. 415.

28 D.A. KYSAR, 'Preferences for Process: The Process/Product Distinction and the Regulation of Consumer Choice', 118. *HLR (Harvard Law Review)* 2004, p. (525) at 601 *et seq.*

29 *Ibid.*, p. 604.

metaphoric or displaced expression of desire, and the production of a code of social values through the use of differentiating signs'.³⁰ Even with the many restrictions on freedom of contract today, unlike governments, the consumer retains the freedom to make such discriminatory purchasing decisions, provided, of course, she is willing and able to pay a bit more in order to align her product preferences with her ethical principles. Despite the fact that most consumers are ignorant about the ethical features of products they purchase, studies have shown that, with some prompting from the media about an identifiable problem such as child labour or animal testing with a particular brand, consumers are likely to rate such issues near the top of the attributes of the product that they select.³¹ Many consumers want to affirm a personal moral position through their purchases, even if it may not serve their instrumental goal of the reduction of the violation of labour standards or would not survive rational scrutiny under an objective test of proportionality.

These expressive and ethical dimensions of consumer behaviour clearly inform choices between products and provide the main grounds for boycotts. The law protects consumer sovereignty in these respects, even when similar measures by governments would be prohibited. But what about claims made after a purchase of goods? Suppose the consumer acquires a mobile phone but discovers shortly afterwards that it had almost certainly been manufactured using child labour, indentured labour, or working conditions that violated international labour standards, human rights, and local labour laws? Is there any remedy for the consumer who now feels that her ethical principles have been compromised?

One possible avenue of redress may be found in the law of fraud or misrepresentation. If the seller of the goods has represented certain facts about the product, such as that the coffee was produced in accordance with Fair Trade standards or that the trainers were made without the employment of children, and if those representations turn out to be false, a court might rescind the contract under the common law for misrepresentation.³² Although it will not matter under the common law for the purpose of rescission of the contract whether the misrepresentation was deliberate or the result of a mistake by the seller, it will be necessary for the consumer to establish that the false statement was a material inducement to purchase the product, without which the consumer would probably have purchased a different product. A further obstacle to such a claim for misrepresentation might arise if it is not the retail seller who made the misrepresentation, but the manufacturer further up the supply chain, perhaps in

30 J. BAUDRILLARD, 'Consumer Society', in M. Poster (ed.), *Jean Baudrillard: Selected Writings* (Cambridge: Polity Press, 2nd edn, 2001), p. 32 at 49.

31 P. AUGUR, P. BURKE, T.M. DEVINNEY & J.J. LOUVIERE, 'What Will Consumers Pay for Social Product Features?' 42. *JBE (Journal of Business Ethics)* 2003, p. 281.

32 False labelling may also be an offence under the Unfair Commercial Practices Directive 2005.

its advertisements for the product. If the retailer has not repeated the representation, the consumer cannot rely on misrepresentation to avoid the contract but must bring a claim against the manufacturer for pure economic loss caused by a negligent misstatement (or deceit), a claim that would almost certainly fail.

In some European legal systems, it may be possible to invoke a general principle of ‘good morals’ or public policy for the purpose of invalidating the sale.³³ Given that the purpose of the transaction such as the purchase of a mobile phone is not immoral or contrary to public policy in itself, the legal argument must be that somehow the marketing of this product tends to encourage immorality elsewhere, as in the sweatshops of eastern Asia. That argument might work, for instance, in the case of the sale of child pornography that tends to encourage the production of such images, but in that example, unlike the mobile phone, the product itself is also likely to be regarded by the courts as inherently immoral. English law is, however, reluctant to invoke the nebulous grounds of public policy and immorality in the absence of clear statutory authorization to invalidate particular kinds of contracts. Just as cotton picked by slaves in the southern United States could be marketed in England without questions being raised about the validity of the domestic sales on moral grounds, despite the widespread and official disapproval of slavery in the nineteenth century, so too the marketing of products manufactured under appalling working conditions in Southeast Asia is unlikely to raise the eyebrows of the English judiciary.

This essay examines instead the possibility of a claim through the law of sales. Here, the consumer’s claim is that the product failed to comply with the implied obligations of the seller to deliver goods in conformity with the contract. The essay explores the changing ideas about conformity in the context of a network society. The central question is whether the distinction between the product itself and the process by which it was made, or, to express the point in a different way, the distinction between the intrinsic and extrinsic characteristics of the product, still governs the notion of conformity. It is argued that it is possible to discern a transition in the concept of conformity of goods from an analysis of the content of the seller’s promise to an assessment of the buyer’s expectation. Once the expectation of the buyer becomes the guiding thread for conformity, the distinction between the product itself and the process by which it was made becomes less significant, because the buyer’s expectations may be addressed both to the functioning of the product and symbolic and expressive qualities that may include the manufacturing process.

33 L.K.L. TJOE SOEI LEN, *The Effects of Contracts beyond Frontiers: A Capabilities Perspective on Externalities and Contract Law in Europe* (PhD Thesis, University of Amsterdam, 2013).

4. **Conformity: from Promise to Expectation**

In its primary sense, conformity requires a seller to deliver goods that match the description contained in the contract. The goods must be of the quantity, quality, and description required by the express terms of the contract.³⁴ This standard mirrors the requirement of the general law of contract with regard to terms expressly agreed between the parties. Sales law in many countries differs from general contract law, however, with respect to the remedy afforded to breach of this primary sense of conformity, with many jurisdictions according the buyer the right to reject the goods for minor deviations from the contractual specifications.³⁵ However, there is an important secondary sense of conformity in European legal systems, which originates from the general requirement of good faith in the Roman Law of obligations.

The law of sales in most European countries also makes the seller liable for latent defects in the product that would not have been obvious to the buyer. In France, for instance, Article 1641 of the Civil Code provides:

A seller is bound by a warranty with respect to the latent defects of the goods sold which render them unfit for the use for which they were intended, or which so impair that use that the buyer would not have acquired them, or would only have given a lesser price for them, had he known of them.

Originally, Roman law only made the seller liable for defects actually known to the seller, but by the time of Justinian's *Corpus Iuris*, strict liability for latent defects was prescribed for all sales. Interestingly, this strict liability appears to have originated in a special law governing the sale of slaves, where the slave-owner might not be aware of certain 'defects' such as the information that the slave was a vagabond, a runaway, or subject to forfeiture for a tort previously committed by the slave (noxal liability).³⁶ Liability for latent defects in the product itself could be described as a secondary meaning of conformity, since, for instance, if a mobile phone does not connect to a phone service, the defect could be described as one rendering the goods not in conformity with the contract for the sale of a mobile phone. However one classifies the liability for latent defects, the focus of the seller's obligation with respect to latent defects is clearly on the product itself and how it functions rather than on the process by which it was made.

Although not embracing liability for latent defects as such, English common law achieved a similar result through the implied term in sales of goods

34 For example, United Nations, Art. 35 Convention on the International Sale of Goods (CISG): (1) The seller must deliver goods which are of the quantity, quality and description required by the contract and which are contained or packaged in the manner required by the contract.

35 Sale of Goods Act 1979, s. 13.

36 B. NICHOLAS, *An Introduction to Roman Law, Clarendon Law Series* (Oxford, 1962), p. 181.

of merchantable quality,³⁷ which was subsequently consolidated in the Sale of Goods Act 1893.³⁸ The seller had to supply goods that satisfied this term unless the seller alerted the buyer to the defect, excluded the warranty, or the defect would have been discoverable by the buyer when she actually inspected the goods. By characterising the seller's obligation as an implied term, the common law presented the obligation as supplementary to or implicit in the general conformity requirement as specified in the express terms of the contract.

The seller's obligations to supply goods that comply with the terms of the contract, correspond to descriptions of the product, and that are free from latent defects constitute the traditional core of the idea of conformity. These obligations can all be linked to the seller's promise in a sale of goods by describing them as express and implied elaborations of the content of the promise. Assuming the seller to be acting in good faith in the sense of honesty, the promise to sell an item such as a horse, a slave, or a mobile phone implies that the goods are free from defects, will function in the ordinary way, and have the features that the seller has described. The emphasis on the seller's promise tends to restrict the notion of conformity of goods to the qualities of the product itself, because the seller is warranting that the goods are worth buying at the price on offer. The seller is not promising that these are the goods that the purchaser really wants or needs or that the goods will help to establish the purchaser's plans or ethical goals.

The first important shift away from the content of the seller's promise towards the expectations of the buyer occurred with respect to notified special purposes of the buyer. If the buyer told the seller the purpose for which the buyer required the goods and relied upon the seller to select suitable goods, subject to any disclaimers, the seller was held to have impliedly promised that the goods were fit for that particular purpose.³⁹ This exception for notified purposes could at a pinch be included as an elaboration of the seller's promise about the quality of the goods, for, having been told about the particular purpose, a seller acting in good faith could be regarded as having impliedly promised to ensure that the goods could serve that particular function. However, in my view, it is preferable to recognize the importance of the promisee's expectations in determining the conformity standard in such cases, because the goods supplied may not have any intrinsic defects and be fit for all ordinary purposes for which such goods are

37 *James Drummond and Sons v. EH Van Ingen & Co.* (1887) 12 App. Cas. 284.

38 M. BRIDGE, *The Sale of Goods* (2nd edn, Oxford: Oxford University Press, 2009), pp. 417-423.

39 For example, Art. 35(2)(b)(b) CISG is fit for any particular purpose expressly or impliedly made known to the seller at the time of the conclusion of the contract, except where the circumstances show that the buyer did not rely, or that it was unreasonable for him to rely, on the seller's skill and judgment.

supplied. It is the buyer's expectation combined with reasonable reliance on the seller that creates the standard of conformity that governs the contract.⁴⁰

A major shift towards the protection of the buyer's expectation rather than the content of the seller's promise occurred in response to the policy to protect consumers. In UK law, the replacement of the standard of merchantable quality with that of 'satisfactory quality' shifted the focus away from the seller's promise and the inherent qualities of the goods to the expectations of the consumer to acquire a product that satisfied her.⁴¹ To meet the standard of satisfactory quality, new goods have to be not only capable of functioning effectively, safely, and for a reasonable period of time but also perfect in appearance, free from minor defects, blemishes, and scratches. The general question posed to the court is whether a reasonable person would regard the goods as satisfactory in all the circumstances. Though presented as an objective standard, the reasonable person is surely to be understood as a reasonable purchaser, for it is the purchaser who has to find the goods satisfactory. The test of conformity contained in the 'satisfactory quality' standard should therefore be understood as focussed on the buyer's expectations about the product.

This shift towards the consumer's expectation became even more decisive with the European Consumer Sales Directive.⁴² Article 2(d) defines the criterion of conformity to include:

Show the quality and performance which are normal in goods of the same type and which the consumer can reasonably expect, given the nature of the goods and taking into account any public statements on the specific characteristics of the goods made about them by the seller, the producer or his representative, particularly in advertising or on labelling.

This formulation speaks explicitly about the reasonable expectations of the consumer. Furthermore, it emphasizes that such expectations can be increased and manipulated by advertising and labelling. This standard is repeated, though with a clearer formulation that benefits from the work on the Draft Common Frame of Reference,⁴³ in the proposed European Regulation on a Common

40 Not every expectation will be protected, for it must be reasonable for the buyer to rely upon the seller to achieve that particular expected result, which will not be the case where the buyer must also contribute to its achievement (*Jewson Ltd v. Boyham* [2004] 1 Lloyd's Law Reports 505 (CA)) or the functional failure is attributable to a separate cause (*Slater v. Finning Ltd.* [1977] AC 473).

41 Sale of Goods Act 1979, s. 14(2) (as amended).

42 Directive 99/44/EC.

43 Article IV.A.-2:302, Volume II, p. 1283.

European Sales Law (CESL). Article 100 CESL adopts two broad standards with which goods must comply:

the goods must...

(f) possess the qualities and performance capabilities indicated in any pre-contractual statement which forms part of the contract terms by virtue of Article 69;

(g) possess such qualities and performance capabilities as the buyer may expect.

Again, the emphasis of the standard of conformity contained in CESL is the expectation of the consumer rather than the express and implicit dimensions of the seller's promise.

5. Expectations of Process

We can now address the question of whether the conformity standard in sales to consumers might include the issue of how the goods were produced as opposed to the intrinsic qualities and functions of the goods themselves. If the goods have been produced down the supply chain under labour conditions that verge on forced labour or breach minimum international standards of safety and fair working conditions, does that mean that the goods disappoint the expectations of a consumer? In other words, does the new emphasis on the expectation of the consumer undermine the traditional distinction drawn between the product itself and the process by which it was produced and open up the possibility of consumers rejecting goods or claiming damages for breach of the implied seller's obligations in a contract of sale?

Such a claim is by no means straightforward, even with the transition to the emphasis upon consumer's expectation. The requirement of conformity in CESL (and the Consumer Sales Directive) is still expressed as a quality that the goods must possess, which suggests that some kind of intrinsic quality or function of the goods remains the central focus of the enquiry. Even so, it may be possible to interpret the concept of expectation to influence the scope of the idea of a quality of the goods to encompass at least some aspects of the manufacturing process. If a product is claimed to be ethically sourced, free from genetically modified organisms, or manufactured in a carbon neutral manner, the reasonable expectation of the consumer is that the product will possess those qualities, even though they relate to the process by which it was produced rather than the performance of the product itself.

Bearing in mind those general remarks about the product/process distinction, it is convenient to consider the two arms of the conformity standard applied to consumer sales in turn.⁴⁴

5.1. *Pre-contractual Statements*

Both the Consumer Sales Directive and CESL contain the idea that goods should have the qualities ascribed to them in pre-contractual statements made in the course of advertising and publicity documents. The test under Article 69 CESL is whether the trader, manufacturer, or supplier in earlier links of the business chain or network makes a public statement about the characteristics of what is to be supplied. No doubt some of these statements should be ignored as meaningless or mere puff that cannot be relied upon. However, claims about the ethical sourcing of products are surely not in that category of mere puff, even if the consumer is bound to be a little sceptical about their veracity. On the other hand, consumers may reasonably judge that statements about a product and its provenance by its manufacturer or owner of the brand name are more likely to be trustworthy than representations made by a retailer who lacks expertise in the qualities of the product. In particular, the consumer may pay considerable attention to the Codes of Conduct that large corporations that manage extensive production networks claim to impose on their suppliers. Apple Corp. is a case in point.

Apple publishes and to some extent enforces its Apple Supplier Code of Conduct, which is available for consumers to inspect on the Internet.⁴⁵ There are many statements in this document that might be read by a consumer when considering whether to purchase one of their products. It is worth quoting a few sections from the document that demonstrate how the statements concern the process of production in the network of suppliers:

The Apple Supplier Code of Conduct requires suppliers to provide safe and healthy working conditions, to use fair hiring practices, to treat their workers with dignity and respect, and to adhere to environmentally responsible practices in manufacturing. To that end, the code includes standards in the areas of Labor and Human Rights, Health and Safety, Environmental Impact, and Ethics and Management Commitment.

Apple's Supplier Code of Conduct is based on the standard established by the Electronics Industry Citizenship Coalition (EICC), an organization established

44 According to the Draft Common Frame of Reference, vol. II, p. 1297 in some EU systems, the seller's liability for statements made by third persons is not restricted to consumer sales (Austria Civil Code, s. 922(2); Finland Sale of Goods Act, s. 18; Germany Civil Code, s. 434(1); Norway and Sweden Sale of Goods Act, s. 18(2)).

45 http://www.apple.com/supplierresponsibility/pdf/Supplier_Code_of_Conduct_V3_1.pdf.

in 2004 to promote common codes of conduct for the electronics and information and communications technology industry. The EICC code was developed using internationally recognized standards from the International Labor Organization and the United Nations, among others. The Apple code includes these standards and goes beyond them in the areas of ending involuntary labor practices, eliminating underage labor, and preventing excessive working hours. Apple is the first technology company accepted by the Fair Labor Association (FLA). As a member, Apple will open its supply chain to the FLA's independent auditing team, measuring our performance against the FLA's own Workplace Code of Conduct. We execute an aggressive compliance-monitoring program that includes Apple-led factory audits, corrective action plans, and confirmation that these plans have been carried out. Our goal is to work with every supplier to meet our expectations. When suppliers don't respect the code or they refuse to take corrective actions based on audits, we terminate our relationship with those suppliers.

Apple does seem to have largely eliminated child labour from its main suppliers and assembly plants, but other labour standards are very poor.⁴⁶ For instance, with respect to hours of work, the Code states that:

Working Hours

Except in emergency or unusual situations, a work week shall be restricted to 60 hours, including overtime, and workers shall take at least one day off every seven days. All overtime shall be voluntary. Under no circumstances shall work weeks exceed the maximum permitted under applicable laws and regulations.

According to Apple's own report, it seems that about 90% of weeks worked in the suppliers and assembly plants have recorded hours for individual workers of less than 60. That leaves about 10% working more than 60 hours per week. We are not told how reliable the record-keeping is in these factories. Apple does not record how many of their suppliers' employees work over the ILO and EU maximum of 48 hours, though presumably it is a large number. There is no report on the effectiveness and levels of compliance with the requirement for overtime being voluntary. Apple does seem to be trying to respond to consumer concerns about labour standards in its factories and those of its suppliers. This improvement has been achieved simply by adverse publicity in the media.

46 See the report commissioned by Apple but carried out by the Fair Labor Association into working conditions at the major supplier Foxconn: Fair Labor Association, *Foxconn Investigation Report* (29 Mar. 2012), <http://www.fairlabor.org/report/foxconn-investigation-report>.

The question being considered here is whether the threat that, in the EU, every purchase of an Apple product might be terminated on the grounds of non-conformity under Article 100(f) CESL (or equivalent national provisions that have implemented the Consumer Sales Directive), because it was produced in breach of Apple's own Code of Conduct and its misleading claim that it conforms to ILO standards would provide an additional incentive for Apple to revise its Code to comply with international standards and to police the conformity of its suppliers with greater assiduity.

The legal question is, first, whether any of these statements can be described as a public statement about the characteristics of what is to be supplied. The difficulty here is that the statement does not directly claim that Apple products are made in compliance with the Code of Conduct. This seems to be the aspiration but is not a clear promise or statement of fact.

Furthermore, and secondly, Article 69 (and Art. 2(4) of the Consumer Sales Directive) creates an exception when the consumer is aware when the contract is concluded that the statement was incorrect or could not otherwise be relied on as a term of the contract. Here, it might be argued that, given the adverse media coverage of sweatshops in China, many consumers who purchase Apple products are well aware that Apple may have some good aspirations, but they have been unable to live up to them.

It is therefore far from clear that Article 101(f) CESL (or the equivalent provisions based on the Consumer Sales Directive) can assist a claim that the goods are non-conforming on the grounds that they are produced in violation of Codes of Conduct that ostensibly uphold human rights and require compliance with international labour standards in the supply chain.

5.2. *The Expectation of Quality*

It will be recalled that this definition of conforming goods in Article 100(g) requires the goods to possess such qualities and performance capabilities as the buyer might expect. Under the Consumer Sales Directive, the goods must 'show the quality and performance which are normal in goods of the same type and which the consumer can reasonably expect'.⁴⁷ The questions to be addressed in this context are whether the compliance with international labour standards or local minimum labour standards or some other criteria is a quality that a good may possess and whether a consumer buyer might (reasonably) expect that the good had a quality of that kind.

In answering those questions, there is a recurrence of a version of the product/process distinction that must be addressed. The ideas of a good 'possessing' or 'showing' a quality are not straightforward. In general, people

47 Article 2(2)(d).

possess things as an aspect of ownership. The idea of goods possessing something seems to be a kind of metaphor that seeks to express the idea of ‘belonging to’ or, more loosely, ‘associated with’. It seems to me possible to say that goods can possess a reputation; after all, that is what a brand name is all about. The iPhone has a great reputation and brand name, much of it no doubt well deserved. If goods can possess a reputation, that reputation might also include a reference to how it was produced down the supply chain. In other words, if the Apple iPhone name stands for, in part, an ethical and legal production process, in substantial compliance with their Code of Conduct, the products could be said to possess the quality of being produced according to good labour standards.

If so, then the second question is whether the ordinary consumer (or average consumer) would expect compliance with good labour standards in the production of iPhones. Apple itself seems to concede that consumers have such an expectation on its website:

At Apple, we care just as much about how our products are made as we do about how they’re designed. We know people have very high expectations of us. We have even higher expectations of ourselves.⁴⁸

Again, we encounter the difficulty that adverse media publicity might destroy any such expectation. However, I suspect that a court would be unwilling to permit Apple (or its retail outlets) to rely on its well-publicized failings to live up to its Code of Conduct as a defence that no consumer should have that expectation. That would be to permit a company to rely upon its own wrong to escape its legal liability.

In short, once the standard of conformity of goods includes a consumer’s expectation, the sharp distinction once drawn between the product itself and the process by which it was produced ceases to be determinative of the scope of liability. A consumer’s expectations about a product often include not only the functioning of the product but also the processes by which it was produced. In networks, the hub organization often goes to great lengths to reassure consumers that their expectation of ethical sourcing is met by their branded products. It is therefore possible to argue that the product itself ‘possesses’ or ‘shows’ this quality of ethical manufacturing process. If that quality turns out to be missing in the light of better information regarding the manufacturing process, a consumer may be able to argue that her expectation of conformity in this respect has been dashed. It should follow that the normal remedies for breach of the requirement of conformity should be available, including rejection of the goods or compensation for the reduction in value.

48 <http://www.apple.com/uk/supplierresponsibility/reports.html>.

6. Regulating Production Networks

This essay has sought to question the traditional regulatory strategy with respect to markets and contracts that limits the law of contract to the justice of the arrangements between the parties and relegates the task of concern about externalities to public regulation. It questions the adequacy of that dominant regulatory strategy in the light of the evolution of aspects of a network society. First, it is evident that the international division of labour found in production networks resists any straightforward regulatory solution. A national government cannot regulate labour standards in another country and nor does it seem likely that it will be permitted under GATT rules to ban imports of products on the grounds of violations of human rights or labour rights. The alternative of international legal measures such as compliance with ILO conventions offers a possible avenue for challenging exploitative labour practices in foreign jurisdictions, but the ILO remains fundamentally a voluntary organization without powers of inspection and enforcement.

Some additional pressure can be applied to the hub of a production network like Apple Corp. in the country where it is primarily registered as a legal entity. Although the network consists of formally separate legal entities, without responsibility for the conduct of each other, the hub can certainly use its contractual bargaining power to dictate through measures such as TQM how the spoke businesses should be managed. Political or consumer pressure on the hub business can therefore certainly affect how its suppliers treat their employees. Consumers hold the hub business morally responsible for the activities of its network. The question being considered here is whether the law can and should empower consumers hold the hub organization responsible and through the law of sales to enforce minimum international labour standards and related human rights instruments.⁴⁹

A second feature of a network society that has been stressed is the role of consumption as an expression of allegiances and values. If that is correct, it can be argued that the value of the product to a consumer is not simply the intrinsic qualities of the product such as how well it functions or satisfies a need but also its extrinsic qualities such as its original source, its environmental impact, and the labour standards under which it is produced. The ethical issues are therefore part of the price/quality ratio that the law can assess in an analysis of contracts. This essay has explored the possibility of using the quality standard imposed on consumer sales as a vehicle for consumers to exercise political and moral choice with respect to labour conditions in remote locations up the production chain.

If it is correct that product/process distinction no longer holds the dominant position governing the warranty of quality against latent defects and

49 H. COLLINS, 'Ascription of Legal Responsibility to Groups in Complex Patterns of Economic Integration', 53. *MLR (Modern Law Review)* 1990, p. 731.

that it is now qualified by the criterion of the reasonable expectation of a consumer, it becomes possible to link the expectation of the consumer to be able to purchase ethically with the warranty in sales. The standard of conformity of goods in CESL (and the Consumer Sales Directive) certainly tries to move in that direction. Article 100 of CESL comes tantalizingly close to achieving a major breakthrough in aligning consumer protection law with human rights law and minimum international labour standards.