Chapter 17

Renting a Slave – European Contract Law in the Credit Society[1]

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[Usury] '[E]xploiting the predicament, inexperience, lack of judgment or considerable weakness of will of another party ... in exchange for a performance, whereby these pecuniary advantages are clearly disproportionate' (Art. 138 alinea 2 BGB)

1. INTRODUCTION

The present move towards a joint European contract law will promulgate a shareholder value-driven concept that lacks links to social and cultural developments in the Member States. Its sales law model of spot contracts provides no place to discuss social justice inside contractual relations. According to economic contract theory, the prevailing long-term contracts of the present service and credit society require institutional arrangements that could solve unforeseen problems in the

1. This paper, presented at the Conference on Private Law and the Many Cultures of Europe at the University of Helsinki, Faculty of Law, Department of Private Law, 27 August 2006, summons up the ideas presented in the German language paper 'Zur Zukunft des europäischen Vertrogsrechts–Soziale Daurschuldverhältnisse in der Kreditgesellschaft', *Verbraucher und Recht*, 2007, pp. 1–33.

future instead of upholding the fiction that parties with sufficient information and time would be able to regulate all problems in advance. EU consumer protection regulation has largely facilitated this fictitious world of the Common Market of Europe. What is called 'consumer protection' thus even threatens traditional legal protection of socially weak persons as it is expressed in the usury principle, which all national legal orders still have in common and which has numerous repercussions in the law. The economic language of consumer law overwrites the limitations of economic power through sophisticated legal forms in national law. The information model burdens consumers with responsibility for social risks in an increasingly unstable social environment, and makes institutional arrangements of the welfare state in contract law seemingly superfluous.

The old principles of freedom of contract and limitation of power, of free will, and usury, must be discussed in the light of a service and credit society and its symptomatic repercussions in contract law. Credit renders future income accessible for present expenditure where either prepayment is required or individuals have to invest for their future. The money relation adds a second layer onto consumption and turns the sales contract into a service relationship where labour and consumption are integrated, just as had been the case in the Hammurabi Codex where renting oneself as a slave combined all aspects of life into one single contractual relationship. But unlike this historical relationship, consumer credit seems to be even more remote from social reality: consumers exchange money for money. All needs in consumption and labour thus merge into one remaining need: to be solvent and to have access to credit while all social problems culminate in personal bankruptcy and over-indebtedness. But just as money has no value at all without goods and services, consumer loans are empty boxes without contracts that directly address labour and consumption. Credit indeed combines both contractual relationships by using the future rights that human beings acquire in labour contracts to fulfil the present duties in their sales and service contracts, which are thus part of one single triangle of contractual relations.

The actual law so far disregarded by present EU consumer law has long since incorporated elements to react probably to problems arising from this link. With the figure of linked agreements, with usury ceilings, capped default interest rates, protection against early termination and discharge, with warnings and information on debt and time they tackle the social consequences and hinder a return to slavery. European contract theory is instead stuck with comparative sales law, international trade and commercial transactions. Consumption, labour and housing have remained outside its consideration. What is called consumer law is the law of the buyer; what is called consumer protection is market protection.

Credit could inspire a new model of a unified long-term social contract where broken credit relations teach that the rising contradiction between instability in labour income along with a formalized requirement for continuous payments for consumption through credit and debt allocate all social risks to the consumer. The time element would enter consumption into consumer law just as labour contracts

social reality. It would have to face the contradictions between long-term labour and short-term contacts in consumption, between social responsibility for human lives in labour relations and its omission in creditor-debtor relations.

In this chapter we will argue that EU consumer law misrepresents consumer protection, misuses the idea of consumption to reduce needs orientation in national law but could be turned upside down if European consumer lawyers allied with labour lawyers to show that the rent contract is the basic contractual relationship in society and that modern sales contracts could be better understood as unlimited rent contracts.[2] To understand how the law could organize renting money, goods or services for human needs would enlighten a policy in which law and justice merge again.

The following pages summon up a paper on 'Social Contracts – Consumer Protection, Labour Law and Tenants Law in the European Credit Society' which – written in German – uses the social implications of civil law language to show how social justice could be revitalized by using existing forms and contents of law in a modern theoretical framework.

2. CONCEPTS FOR A UNIFIED EUROPEAN CONTRACT LAW

Contract law of the EU Member States has a long history of harmonizing economic and social interests expressed in the tension between the principle of usury and the principle of freedom of contract. This tradition is not represented in the Consumer *acquis communautaire*. This approach summons up those EU directives that followed the negative implications of the Common Market concept. Enlarged markets as the driving form of European unification require economic freedoms to overcome national obstacles. Freed from the historical necessity to compromise between historical cultural values and economics, between efficiency and social responsibility, between ethical and national values, between competing cultural institutions such as religion, the labour movement and regional independence, which enriched national law and led to its specific form of 'frozen power relations', the law of the EU has the typical innocent form and substance of a purpose-driven negative private approach to legislation.[3]

2. *See* U. Reifner, 'The Lost Penny – Social Contract Law and Market Economy' in *From Dissonance to Sense: Welfare State Expectations, Privatization and Private Law*, T. Wilhelmsson and S. Hurri (eds) (Ashgate, Dartmouth, 1999), pp. 117–175.
3. *See* C. Schmid, 'The Instrumentalist conception of the Acquis Communautaire in Consumer Law and its Implications on a European Contract Law Code' (2005) 2 ERCL, 211 *et seq.*; Fabrizio Carfaggi (ed.), *The Institutional Framework of European Private Law* (European University Institute, Oxford University Press, 2006), p. 24; P. Bo Madsen, 'Scandinavian Contract Law

2.1 Acquis Communautaire

EU Directives have not been designed as legal rules but as binding recommendations to be transformed into legal rules at the national level. They thus respect the legal culture of the Member States, which especially in civil law is mostly expressed in the form of law rather than its substance. '*Willenserklärung*', '*Darlehen*', '*Antrag und Annahme*' are different from will, credit and consent. They are linked to cultural traditions that go beyond the globalized market-driven approach in contract law. The directives follow the economic approach of common law, where the legal form has already adapted to a purely commercial supra-cultural use of contract law that does not reflect cultural implementations of equality and rule of law (*Rechtssicherheit*). In order to gain power, the European Court of Justice has increasingly neglected the important difference between legal rules and legal programmes. Some countries such as Greece or even Italy and Luxembourg have supported this transformation of (formless) economic EU law into national law by incorporating some Directives like the Consumer Credit Directives even literally into their body of law where they have a destructive impact on traditional legal values protecting the weaker party.

The purpose-driven approach of directives replaces legal language with economic language. Literal and systematic interpretation is replaced downwards in favour of questionable teleological interpretation. In Italy and Germany (whose legal scholars have taken the lead in efforts to unify European contract law) the existing contract system with the active participation of its legal scholars had once been transformed into a purpose-driven system of interpretation under fascist rule eliminating the formal virtues of contract law through the direct application of political principles.[4] This seems to be forgotten in directives that start with a political programme in relation to which legal regulation itself looks like an instrument and not like the true text of the law.

2.2 New Legal Language

EU law chooses a body of law that allows the direct application of economic principles. It solves the problem that Member States preserve their own cultures in different dogmatic wording where justice is hidden in forms that have proved to be able to tame economic power. Additionally, the Common Core approach of 'Principles'[5] replaces form by substance and follows the common law approach

4. *See* B. Rüthers, *Die unbegrenzte Auslegung: zum Wandel der Privatrechtsordnung im Nationalsozialismus* (6th edn, Tübingen, Mohr Siebeck, 2005) (The Unlimited Interpretation – The Change of Private Law under Nationalsocialism).
5. O. Lando, H. Beale, *Principles of European contract law prep. by the Commission of European Contract Law, Part I and II*, combined and revised (The Hague, Kluwer Law International, 1999); O. Lando, E. Clie, A. Prüm, R. Zimmermann (eds), *Principles of European contract*

where a legislator introduces a law by writing its aims into either its preamble or its first paragraphs. The core model is the form of restatement[6] of law in the US. Others use the form of international trade agreements. They omit family labour, consumption and housing relations where a diversity of legal forms mirrors the wealth of cultural diversity.

While commercial conflicts have always been the reason for economic language entering contract law, especially in the commercial (e.g. 'merchant', 'commercial customs') and civil codes ('profit' Art. 252; 'damage' Arts. 249–252; 'creditworthiness' Art. 824 BGB), it did not question contractual duties as such but only its interpretation or the legal consequences of its breach. Instead, EU Consumer law has opened the definition of individual rights and duties of the contract itself to purpose-driven economism.[7]

With the clause 'that any circumvention of this directive through contractual wording and design shall be void' a judge is given full discretion to apply or not apply legal rules to factual situations, overriding the literal meaning of the legal text. Teleological interpretation of the law replaces its literal application. Not even the rules of analogous application have to be observed. Acceptable as a legal programme (as directives were designed by the Treaty) it is a deviation from the rule of law if copied into national law, as for example in Art. 502 BGB. Purpose-driven legislation monitors the economic effects of regulations in an area where the form of law seems to be in the hands of the stronger party. Teleological law is therefore the price for effective protection.

But the price is high. Teleological purpose-driven law, once introduced, can carry all kinds of other values and purposes. The present proposals on payment systems and consumer credit even abolish consumer protection in its own name.

The new European economic language in law reduces legal rules to mathematical formulas. There are important differences between loan and credit, between personal security and *Bürgschaft*, between *Sammelverwahrung* and Savings, between *Rechtsgeschäft* and Will. *'Vertragen'* (go along with, agree) is different from 'contract' (*contrahere* 'pull together') and '*Zweck im Recht*' is different from *causa* or consideration. Those who deplore the absence of social justice in EU law should study those elements designed to tame economic power in national law. It is not the lack of a social justice purpose that is deplorable but the abundance of economic purposes in contract law that threatens social justice.

Part III in German, C. von Bar and R. Zimmermann, *Grundregeln des Europäischen Vertragsrechts* (Munich, Sellier, 2005); R. Zimmermann, 'Die Principles of European Contract Law als Ausdruck und Gegenstand europäischer Rechtswissenschaft' [2003] Zentrum für europäisches Wirtschaftsrecht, Rheinische-Friedrich-Wilhelms-Universität zu Bonn, No. 138.
6. For a critique *see* N. Reich, 'A Common Frame of Reference (CFR) – Ghost or host for integration? 7/2006 ZERP – Discussion paper, Bremen, 23 *et seq.*
7. Reich, n. 6 *above*, 23. 'European law ... has been using contract law as a starting point for further objectives like competition, free movement, public procurement, consumer

Even the core principles of sales law are misunderstood. Mutuality was historically not a principle granting market freedom for the strongest but a principle to limit superior power from extracting more than was appropriate with respect to the offer. Exploiting weakness is not the expression of freedom but the exercise of illegitimate power. [8] The biblical *principium talionis* 'An eye for an eye, a tooth for a tooth' was a principle for hindering revenge on families' lives even for minor offences. Usury and consideration, *Wucher* and *Synallagma*, are historically twins in the legal form of contracts. The design was to offer state power to private individuals only if the other party had freely accepted these duties and their fulfilment in advance. Error and intimidation, lack of experience, disability and youth were seen as obstacles to such freedom long before standard contract terms, '*faktische*' ('implied') contract terms , *Rechtsschein* (contract by semblance) and *sozialtypisches Verhalten* (socially typical behaviour replacing expression of will) could have been imagined as a manifestation of free will.

2.3 Consumer Law without Welfare

Law securing individual consumption in society has never been private law alone. Especially where consumption had to be secured, as in landlord-tenant law or with services of first necessity, administrative supervisory and police law have always been much more important than contract law. The freedom of contract principle was thus applied within the frame of 'embedded competition'[9] in which the state retained responsibility for minimum standards of products and services as well as for their social and political effects. It was only because social justice had been kept a task of administrative rules ('*droit public*') that private contract law had been acceptable at all to the people of modern society. Labour law would have been unthinkable without a strong state that intervened when child labour operated the English coal mines. The same is true for consumer law. The retreat of the welfare state left much of its former responsibility to the private sector, something which especially EU consumer law ignores when it focuses on the role a consumer has to play on the demand side of the market.[10]

8. K. Llewellyn, *The Common Law Tradition: Deciding Appeals*, (Boston, Little Brown and Company, 1960), p. 362 *et seq.*, 'Two-fisted bargainers on either side have worked out in the form a balanced code to govern the particular line of trade or industry, there is every reason for a court to assume both fairness and wisdom in terms' standard contract terms instead are 'tools of intentional and creative misconstruction.'
9. A. Etzioni, *The Moral Dimension. Towards a new Economics* (New York, Free Press, 1988).
10. For the political implications of EU Consumer law under the Welfare-Paradigm *see* T. Wilhelmsson, 'Varieties of Welfarism in European Contract Law' (2004) 10 *European Law Journal* , 726 *et seq.*; T. Wilhelmsson, and G. Howells, 'EC consumer law: has it come of age?' (2003) 28 *European Law Review*, 370 *et seq.*; still in the form of a question in T. Wilhelmsson, *Social Contract Law and European Integration* (Aldershot, Dartmouth, 1994), p. ix: 'Is European contract law ... functioning as a counterpower to social contract law?'; M. Hesselink, 'The

Freedom has different connotations for those who are hungry and those who are fed, for those who sleep under bridges and those who reside in homes. The problems of market economies with social justice pertain. Ignoring them in EU consumer law will only burden the unprepared judiciary with additional tasks. When in the name of the economic freedoms of the Treaty the ECJ banned German insurance authorities from requiring a licence for newly-introduced insurance products, it only transferred this necessary control to the civil courts via standard contract term law.[11] The abdication of the welfare state does not replace welfare but 'state'. So far, EU consumer law is not only no answer to this shift in public responsibility but a misrepresentation of consumer welfare. Using this as a model contract law would have no responsibility at all to cope with the exploitation of poverty in society.[12]

3. THE NEW MODEL OF EUROPEAN CONTRACT LAW – SPOT CONTRACTS AND INFORMATION SEEKERS

Legal economism threatens the limitations that the rule of law imposes on the exercise of power in society. The spot and sales contract ideology undermines the effectiveness of general principles in national law in the upcoming service and credit society. If time contracts are managed with a spot ideology, then the social impact of credit relations is out of reach.

3.1 Spot Contracts Versus Long-term Contracts

Long-term contracts have gradually replaced the spot contracts of the 19th century sales economy. A modern sales relationship is basically an after-sales relationship where after-sales services become the true source of income for the supply side. Unlike legal contract theory, economic contract theory always emphasized the collective and long-term aspect of contracts.[13] Management science studies

(ideology) and defines legal culture as 'nation versus Europe', levels of power as levels of governance and symbolism. 'Politics' thus confounds political means and appearances with its political substance which in consumer law as well as in labour or landlord-tenant law refers to the politics of social justice.
11. *Verband der Sachversicherer e.V. v. Commission*, Case no. 45/85 [1987] ECR 405 (life insurance); *Commission v. Federal Republic of Germany*, Case no. 205/84 [1986] ECR 3755 (no right of insurance authorities to limit admission) on the one hand and the answer by the German Supreme Court Bundesgerichtshof, 2 July 1996, *Neue Juristische Wochenschrift* 1996, p. 1409 (no influence of authorization on the validity of standard contract term).
12. I have elaborated on the question how to face this challenge with a new form of 'inclusive contracts' where collective soft-agreements like the 'principles of responsible credit' of the European Coalition for Responsible Credit and the good faith interpretation of individual contracts meet in law in Reifner, *Inclusive Contract Law – Poverty in Civil and Common Law* (New York 2000 <www.responsible-credit.net>, 16 January 2007).

what implications the shift of everyday contracts to long-term relationships has for corporations with regard to their management[14] or with regard to other economic actors in the value chain. They argue that less concern should be given to conclusion and formulation of the contents of the contract.[15]

> The orientation is entirely different. Rather than optimizing over a general contract set that is subject to incentive, renegotiation-proofness, and participation constraints, long-term contracts are taken to be of a pre-specified (incomplete) form, and the control variables become instead ownership titles, control rights, decision-making rules, discretion, tasks, authority, and the like, to be allocated among contracting parties.[16]

Openly and incompletely formulated relational contracts are seen as much more promising and cost-efficient than contracts that try to regulate unforeseeable events at the beginning. The dominant dogmatic figures of legal contract theory such as will, error, choice and contractual information are relatively unimportant. The performance of such 'incomplete contracts' instead depends primarily on the institutional arrangements that accompany the life of the contractual relationship. These arrangements include especially the law, power relations of the parties and dependence on suppliers or clients to whom the partner has adapted his services and products over time. While buying a mobile phone linked to a service contract is still seen as a purchase, the true problems arise when the phone is lost and the service fee continues. In credit contracts the agreed instalment presupposes steady income although it will not occur.

Instead, the abandoned child of legal contract theory, the concealed labour contract, is used as a promising model to investigate new forms of efficient contracting.[17] Instead, the conclusion and representation of contracts,

der Deutschen Literatur University of St Gallen Department of Economics May 2002, Discussion paper no. 2002-10, <www.vwa.unisg.ch/RePEc/usg/dp2002/dp0210birchler_ganz.pdf>, 22 January 2007; P. Bolton and M. Dewatripont, *Contract theory* (Cambridge, Mass., MIT Press, 2005).

14. E. Rasmusen, 'Moral Hazard in Risk-Averse Teams', (1987) 18 *RAND Journal of Economics*, 428–435; R. Biel, 'Inequity Aversion and Team Incentives' ELSE Working Paper, University College London, 2002; R. Rob and P. Zemsky, 'Social Capital, Corporate Culture, and Incentive Intensity' (2002) 33 *RAND Journal of Economics*, 243–257; F. Englmaier and A. Wambach, 'Optimal incentive contracts under inequity aversion' Bonn, IZA, June 2005 Discussion paper series / Forschungsinstitut zur Zukunft der Arbeit; 1643 (at <ftp://ftp.iza.org/dps/dp1643.pdf>, 16 January 2007, <www.iza.org/en/webcontent/publications/papers/viewAbstract?dp_id = 1643>, 16 January 2007).
15. Bolton and Dewatripont, n. 13 *above*, p. 488 call it the 'final stage of development ... It is concerned with long-term contracts.'
16. *Ibid.*, p. 488.
17. *Ibid.*, p. 38: 'In short, employment contracts are highly incomplete contracts where the employee agrees to put herself under the (limited) authority of the employer. Employment contracts thus specify a different mode of transactions from the negotiation mode prevalent in spot markets. It is for this reason that Simon, Coase, Williamson and others have singled out the employment

cooling-off periods and an overload of information form a useless mosaic in consumer law.

3.2 Trade Versus Social Contracts

Ignorance about time-related issues hits especially those contracts that have a social object in labour, housing and consumer credit. All three functions are related to the execution of contractual duties and not to their genesis.

But before we denounce the inadequacy of this model for modern contract law, we should be aware of its merits for consumers to whom it offered competition and choice as a tool. Where consumers act as repeat players by transforming their short-term income into short-term expenditure, the transformation of social interest into money values and demand could achieve rather satisfying results. Although no consumer could ever decline buying bread and butter, their right to 'exit' a specific supply gave sufficient incentives to provide good, cheap bread and butter under competitive conditions. The ideology that buying instead of eating bread satiates hunger opens markets to those who want to eat and allows developing economies of scale for those who provide bread and butter. To cite Adam Smith indirectly, it is the right not to care for the hungry that allows an efficient system of baking bread and indirectly attaining the common good.

Assuming that the buyer is a consumer will then help to make the instrument of rational choice more effective and teach the seller to be careful with his counterpart. The purchasing society thus made labour and its products available at any place, creating opportunities for cooperation and economic progress. The *caveat emptor* rule liberated the economy from feudal bondage and responsibilities of care. Its ideology that people do not want to eat but just buy bread had enormous potential. All social risks for individual consumption should remain outside the contractual relationship and be essentially carried by those who want or have to consume. But this system was never able to abstain from state intervention. Its political survival, after being fundamentally questioned at the turn of the 20th century, was then guaranteed by a whole body of interventionist and protective law as well as administrative institutions. It balanced the odd effects of its social ignorance. Most of the efforts were concentrated to stabilize the income of consumers so that their consumption could be built on the phrase that 'money thou shalt have.' Only money can turn needs into demand, which alone can be satisfied by the market. A social consumer law and social labour, social security and welfare law were the step-sisters of the modern economy, in which, strangely enough, the sales law applied on consumption was the legitimate – and the service law applied for labour was the illegitimate – child. Berthold Brecht already corrected the biblical example of King Solomon when in his *Caucasian Chalk Circle* he showed that the true mother is the one who cares and not the one who gets the status.

But still, 'the proof of the pudding is in the eating' and there is no bread without consumption. This dormant insight of consumer law breaks through where landlords have been held responsible for the health conditions of their tenants and where the entrepreneur has to care for working conditions during the whole lifetime of the contract. Service society has brought this eruption of legal responsibility for social issues to consumer law, while consumer credit has finally opened all consumer law to questions of labour contracts.

With unstable income relations, less compensation through the welfare state, long-term unemployment and fading public supply of free goods and services, the pillars of the abstract sales contract ideology are melting. However, within rich nations needs are no longer always sufficiently stuffed with money and able to turn into demand. Poverty has entered the market just via the credit sector, which on the other hand keeps the lower half of the population, which have no savings within the system, by compensating for their lack of assets for necessary investments by providing access to their future income.

3.3 Sales Versus Rental Contracts

In sales law, commodities are exchanged with respect to their money values through spot decisions without regard to the origin of the money spent or to the consumption purpose of goods acquired. Both elements are allocated in the buyer's legal sphere and responsibility and can remain unmentioned in the wording of the contract without creating its formal incompleteness. The purpose of the law is consumed by the purpose in the law ('*Der Zweck im Recht*' (Jhering)) and exhausted by the exchange principle of *do ut des*.[18] To all problems that arise from this separation between social life and the economic exchange system, adequate solutions just promise to optimize the demand side's decision. For labour lawyers, this sounds like the horse's solution for all political problems in George Orwell's *Animal Farm*: 'I must work harder'. Labour lawyers do not assume that there is no pay without work in any circumstance, that error or incapacity voids contracts that have already been executed, that the worker carries all future risks that arise out of the social quality of the object of desire, and that upfront information would significantly improve labour relations for workers and compensate for the superior power of their employers.

There is no difference in renting money. How can a consumer pay his instalments if the monthly income from which this pay has to be deducted is taken away? What happens if health problems hinder income and burden the budget by additional necessary expenditures? Who should carry the risk that a financed good or service turns out to be worthless? If society gradually dissolves labour relations and replaces them by entrepreneurial forms of earning, then

consumer law will have to deal with those social problems which have until now been absorbed by labour law.

Instead, European consumer law is still going in the opposite direction: less consumption, more decision-making and choice, less risk allocation and more *caveat emptor*-rules. Its focus on sales law, its ignorance towards empirical developments and the priority for unification over understanding will separate its scientific community from those who will discuss adequate contractual forms to cope with our true problems in private labour, credit, debt, health care, education and old age pensions. Lawyers who once were able to gain social competence by offering legal justice instead of religious submission will lose this competence if they continue to turn into engineers of efficiency in a globalized economy.

4. CONSUMER LAW – ALTERNATIVE TO OR MANIFESTATION OF SOCIAL JUSTICE

Contract theory could have learned lessons from labour law. Instead, consumer law was created with the false pretension of opening a second area of social law within private law. It factually only offers choice but claims to help the weak. It offers remedies for imagined problems in the decision-making process of ordinary citizens without any evidence that their 'sheltered' clients need help, like the right of withdrawal, to solve problems that consumers truly have.

4.1 Freedom or Paternalism?

While the protagonists of a unified contract law blame usury and social protection for paternalism and protectionism, they use paternalistic language to justify their interference with markets. A social justice approach would refer to market failure with regard to the necessity of people to steady consumption with unstable income. Instead, the representatives of the information model argue that consumers are stupid, inexperienced, careless and unable to reflect rationally. 'Seduction' and 'temptation'[19] are consumer defaults whose 'particular individual weakness (is) caused by lack of experience'.[20] Such paternalism allows qualifying information rights and cooling-off periods as donations. While consumer law has lost its welfare implications, welfare has become the basic argument for its existence.

This paternalism is also used to exclude democratic decision-making. If those who represent the law have to exercise care for the weak, then the weak themselves need not be involved in the rule-making process just as parents do not have to ask their children how they want to be protected. Expert opinion replaces

19. This notion dominates the essay of C. Canaris, 'Wandlungen des Schuldvertragsrechts – Tendenzen zu seiner "Materialisierung"' (2000) 200 *Archiv für civilistische Praxis* 259–355.

democratic decision-making,[21] especially visible in the Lamfalussy procedures where the European Parliament resigned in advance even its few rights of participation in financial services legislation.

Self-appointed and recognised consumer organizations have to play the role of the people. The Commission involves a handful of Brussels representatives from understaffed organizations with little expertise in law and products and with no membership base in their rule-making process. Commercial publishing companies like 'Which?' are officially acknowledged as consumer representatives and are the only consumer representatives among 240 bankers and government officials in the Post Financial Services Action Plan (FSAP) discussion. Why should such a media company not support the information model if it earns its living with it? If this is consumer protection, then the *Financial Times* could easily count as a consumer organization.

There is certainly still an enormous input of a few consumer activists in Brussels voicing consumer concerns. None of them would agree with the Commission that they are able to represent consumers effectively with regard to the thousands of lobbyists from the supplier side. But as advisors for legal donations to weak populations, this may be acceptable.

4.2 Commercial Agents or Consumers?

There is no definition of consumers in law. As Canaris correctly pointed out, consumer law is governed by the definition of commercial agents who are the true special group exempted from 'consumer protection rules'.[22] Neither the consumer ('that are we all, all honourable consumers') nor consumption is addressed as such in the law. Consequently, DG Market publications have started to replace 'consumer' by 'user' creating institutions with appointed experts like the Financial User Advisory Committee (FinUse).

Why is this concept so dear to European lawyers that they even want to build a future European contract on such shaky foundations? The ideology of consumer law provides enormous potential to manage legal change.

First, consumer protection creates political legitimacy. The protection of the buyer in the market was real progress in a legal system where freedom,

21. *Ibid.*, 710 'The draft for a European Contract Law Code and – as a first Step – for a common frame of reference should probably be developed in groups dominated by academics and certainly in groups acting without a democratic legitimation.' For a critique of this apolitical approach *see* M. Hesselink, 'The Politics of a European Civil Code' (2004) 10 *European Law Journal*, 675 *et seq.*; Wilhelmsson and Howells, n. 10 *above*.
22. *See* Canaris, n. 19 *above*, 359, 361: 'the notion "consumer" has no positive function in law, to protect the so-defined group of persons. On the contrary it serves negatively to exclude another group from protection. Thus consumer law has overtaken the role merchant law played in former times.' As all human beings are consumers, the true target group of this kind of regulation are the

will, absence of error, as well as the contents of the contract, including its conclusion, could be unilaterally simulated by the supplier side. It was consumer protection that gave individuals access to the benefits of competition such as choice and exit, voice and compensation. It made retail markets able to play on prices and provide a variety of offers for less wealthy individuals as well. This kind of 'consumer protection' was neither 'protective' nor 'consumption-based'. It was part of competition law to control production and distribution where state authorities had resigned from it.[23] The consumer is the comptroller of the market. Making his control more effective is a basic requirement for serious believers in the market economy and its quest for efficiency.

Second, consumer law is able to discredit social protection in civil law. The communal critics of liberalism in civil law (Gierke, Menger, Ehrlich, Duguit) expressed their distaste for individualistic rules that had replaced authoritarian systems in pointing to the fate of the weak and the lack of care for them. Did they really care for them or did they bewail the loss of those who cared before?[24] Feudal law had always cared for the weak in compensation for their total submission. But it was the freedom of contract and the freedom to earn money that had freed them from submission and care. Imperfect market conditions in a system that punishes those whose demand is biased by indispensable needs, led to a race to the bottom especially in labour law, giving rise to communal dreams on the right and on the left. Fascism has widely used the conservative critique of this process creating a corporative alternative to contract law where social care is sold in compensation for the loss of freedom. Paternalism and the abolition of individual freedom were the price of protection.[25]

Third, consumer law promotes market liberalism to the detriment of social justice. Contract law is incorrectly dichotomized into freedom and protection, into autonomy and regard and care.[26] Paternalism within the information model has

23. *See* H. Micklitz, 'The Concept of Competitive Contract Law', (2005) 23 *Penn St. Int'L. Rev.*, 585.
24. E. Ehrlich, *Grundlegung einer Soziologie des Rechts* (3rd edn, Berlin, Duncker and Humbolt, 1967) stated in his sociology of law that 'only aristocrats can be true democrats'.
25. *See* U. Reifner, 'Individualistic and Collective Legalisation' in *The Politics of Informal Justice, Vol. 2* (New York, Academic Press, 1982), p. 81 *et seq.*; U. Reifner, 'Gewerkschaftlicher Rechtsschutz – Geschichte des freigewerkschaftlichen Rechtsschutzes und der Rechtsberatung der Deutschen Arbeitsfront von 1894–1945', Science Centre Berlin International Institute for Management, Discussion Paper 1979-104; Reifner, n. 18 *above*, p. 169 *et seq.*
26. B. Lurger, *Grundfragen der Vereinheitlichung des Vertragsrechts in der Europäischen Union* (Wien, Springer, 2002), p. 531: 'The theory of the free will has therefore to be substituted by a new theory'. Elements of this theory are 'common contractual interest', the concept of a 'social market'. 'The "contract" in its legal meaning is not the same as the consent but the result of a valuation, filtering and completion of this consent according to the principles of justice.' (with reference to similar concepts in the Critical Legal Studies movement (p. 406 *et seq.*) and to Adams, Brownsword and H. Collins (p. 427 *et seq.*). Other works in this direction are B. Lurger, *Vertragliche Solidarität – Entwicklungschance für das allgemeine Vertragsrecht in Österreich*

been mentioned above. The protagonists of social justice can be placed outside the legal system just by reference to consumer interest. They are seen as a romantic small minority impeding the market-driven process of European integration to the detriment of all consumers. Both sides complement each other in this false battle. According to the political or ethical stand of the author, the market-driven commutative approach is defined as free, individual, formal, secure, reliable, effective, and equal; or defined by its critics as asocial, egoistic, capitalist, cold, money-driven, power – enhancing, and so on. Those who demand more distributive justice argue with notions such as welfare, social, regard, care, altruistic, community-oriented, empathetic, socially responsible while again their critics answer with the paternalistic, irresponsible, unfree, unsafe, totalitarian, and so on. Both share the assumption of a fundamental contradiction between the market approach and the social welfare approach. This contradiction can be called systematic.[27] But it confounds law with science and misunderstands its ideologies, which are not insights about reality but tools to guide human behaviour towards productive relations with minimized conflict cost.

4.3 Social Long-term Contracts: a New Perspective

There is an alternative to the contradiction between libertarian and paternalistic options in consumption law. It has been developed especially in the Nordic states where fascism had less impact on the legal system and a consensus society left its marks on the contract law system. This law views consumer protection as a means to tame not only the economic cartel but also the power that economic interests exercise on social interests through its social ignorance. This was also the historic view of the German fathers of the *Herrenchiemsee* constitution where, due to allied reservations on Germany, five countries were directly involved. Consumer protection as implemented in the first draft was later replaced by the 'domestication of economic power'.[28] Not the consumer but the supplier was seen

S. Augenhofer, *Österreichisches und Europäisches Konsumentenschutzrecht* (Wien, Springer, 2005); *Id.*, The Future of European Contract Law between Freedom of Contract, Social Justice and Market Rationality' (2005) 1 ECRL, 448 '[T]his leads me to the conclusion that "party protection" or – as I called it – the concern for "regard" and "fairness" in contractual relations can be nothing less than a principle of contract law, being situated on the very same level as the principle of freedom of contract, without any signs of subordination to the latter.'

27. U. Reifner, *Alternatives Wirtschaftsrecht am Beispiel der Verbraucherverschuldung* (Luchterhand, Neuwied, 1979), p. 66 *et seq.*; *Id.* 'Verbraucherschutz – Vom Schutz des Marktes zum kollektiven Schutz des Konsums' in *Verbraucherpolitik – Politik für Verbraucher*, E. Mielenhausen (ed.) (Osnabrück, 1986), p. 86 *et seq.*

28. '[P]rohibition of the misuse of economic power'. (Art. 76 No 14 Constitution); *see also* Bundesverfassungsgericht, 2 May 1996, AZ 1 BvR 696/96, WM 1996, 948 = NJW 1996, 2021 unter II 1. a): '[I]n civil law ... the law of the stronger party is not acceptable. If in contract law one party has such a strong dominance, that he is able to determine the contents of the contract

as the problem. The Kennedy declaration on consumer protection instead turned economic reality upside down when it addressed a seemingly consumer weakness instead of entrepreneurial power as the reason of market failures to provide freedom for all.

Law that intends to fill socially incomplete contracts with the necessary insight into needs and consumption is not protective but empowering. Imposing product liability, voiding personal guarantees of spouses or offering a right to the effective use of credit in linked agreements limits the exercise of illegitimate power in contractual relations. Tenant and labour law are more honest in this respect. Workers are not presumed to be inexperienced or stupid contractors.

The core element of this social approach is based on the legal usury principle. It assumes that justice has two functions in exchange: to enable and to limit markets. Modern law has to find the traces of usury elements in national contract law to find the traces of a legal order that could truly represent national contract law on a European level.

I have called this legal research the 'symptomatic critique' of contract law.[29] It builds on the 'systematic critique' which identifies those areas where opposing realities underlie the contractual form. But unlike this fundamental critique it will not be satisfied with denouncing false realities, ideologies and bounded rationalities in the law. Such an analysis about legal fictions and about law as a fictitious world is necessary to understand the mechanisms of conflict resolution by reducing the factual complexity of the case in legal thinking.

The political left has always misunderstood this function as ignorance of the law denouncing its partial character for those who have by ignoring the needs of those who have not.[30] This has led to inertial fundamental opposition instead of development of more adequate forms of law.

Law does not have to tell the truth. Legal fictions are either useful or useless. They may carry false assumptions like 'consumer protection' but are still valid if they help to fulfil the specific task of this regulation. Law has to be understood as a bounded rationality in which certain assumptions help to organize everyday life ideologically. If this works, citizens do not have to reflect or even to know the specific contents of the corresponding regulation[31] and will continue to do so if

unusually oppressive consequences for the weaker party, civil law has to intervene and correct the imbalance.'

29. Reifner, n. 27 *above*, p. 91 *et seq.*; *see also* T. Wilhelmsson, *Critical Studies in Private Law* (Dodrecht, Kluwer, 1992), p. 101 *et seq.*

30. As examples of such a critique *see* H. Sinzheimer, 'Das Weltbild des bürgerlichen Rechts' in *Arbeitsrecht und Rechtssoziologie, Vol. 2.*, H. Sinzheimer (ed.) (Frankfurt, Bund, 1976), p. 76 *et seq.*; F. Engels and K. Kautsky, 'Juristen-Sozialismus' in Karl Marx and Friedrich Engels – Works (5th edn, Berlin, Dietz, Band 21, 5, 1975), pp. 491–509.

31. Vgl. A. Dieckmann and S. Krauss, 'Wenn weniger Wissen mehr sein kann: Einfache Heuristiken zur psychologischen Entscheidungsfindung' (2005) 8 *Zeitschrift für Erziehungswissenschaften*, 187–201; R. Hertwig, and U. Hoffrage, 'Empirische Evidenz für einfache Heuristiken : Eine Antwort auf Bröder' (2001) 25 *Psychologische Rundschau* 165–167

these assumptions save on time and conflict. The assumption of free will creates the conviction of binding obligations for those who have signed a contract.[32] It does not matter whether there is such a thing as free will as Albert Einstein questioned the freedom to light a pipe. Such fictions will fulfil the legal purpose if only the majority of people organize their lives accordingly. As the core-bounded rationality of the market society is the fiction of money as real wealth, which helps to communicate with and trust people worldwide, the law only uses this human habit of betraying oneself and develops it into a sophisticated set of rules.

But wherever fictions organize social relations there is also a threat to modernization, which may impede necessary social developments. People who believe in the law and thus accept these fictions as their rationality will not be able to develop new and more adequate tools. They may even feel threatened when new ways of legal thinking emerge because this may force them to start thinking about certain accepted realities. It is the role of science to foresee such developments and to propose new instruments to cope with them.

Legal science has to a large degree lost this capacity and degenerated to a form of engineering existing power relations in society. Their close dependence on those who dominate society has prevented them from using their eyes and ears to recognize what reality has done to justice. But while science remained compromised, the judicial system sensitive to public opinion constantly reacts to such changes by developing exemptions from the rule. The number of exemptions will increase with the degree of inadequacy of the underlying pictures until the former rule and its fictions turn into an exception. The dominant sales model has already lost much of its convincing power in the credit and service society. The increase in consumer law indicates that there will be new rules in the future.

The European discussion tries to use the pressure for unification to reintegrate consumer aspirations apparent in national law into the contractual spot market model of EU law. It follows the American approach, which through mutual recognition and total harmonization managed to abandon much of what had been developed to cope with poverty in state law. But it just wasted time. Disregard for injustice does not cure it.

Labour law could again be of great help. Collective agreements are a visible expression of the collective dimension of an individual will. Labour lawyers have therefore returned to civil law and investigated the implications that a theory of collective agreements would have, in the light of the individual freedom of contracts.[33] Its potential impact is obscured by the still dominating welfare and organizational theories of collective law – an error which since Olson's

32. This ideology is not very old. In ancient law it was not the word that bound but the ceremony under which a word had been made binding by using the help of the goddess and religious formulas.

33. *See* especially the profound analysis of the effects of collective agreements on individual consent by L. Nogler, *Saggio sull'efficaccia regolativa del contratto colletivo* (Padova,

misinterpretation of collective action as organized action has also misguided consumer theory. Collective is neither joint nor common and does not presuppose any organization or group. It is the way the actor views his or her individual action with regard to others that qualifies individual or joint action as collective.[34] There are many other collective elements outside the contract which are entered into through good faith interpretation, collective agreements, ethical standards, soft law and protective rules.

The exceptions to the binding force of contracts such as 'frustration, hardship, *force majeure*, *imprévision* or changed circumstances' have developed a new dimension to the law: the 'adaptation' of contracts to changed environments as well as to insights that would have been important for the contract. As this adaptation is a special form of objective interpretation governed by good faith and the average or decent person's view, it gradually incorporates collective elements into these areas of consumer law.

Already the time dimension omitted in long-term relationships has obtained its legitimate expression in Art. 313 BGB,[35] which in other law is also used to include the omitted social dimension. It could be used as a starting point to think about remedies to incomplete contracts.

5. PERSPECTIVES FOR SOCIAL EUROPEAN CONTRACT LAW

Consumer law is a challenge and not an *acquis*. It should be developed out of a systematic and symptomatic critique of the given sales law model. Because the *acquis communautaire* is neither an effective nor an exhaustive regulation of consumer-supplier relations, legal scholars, who are interested in the development of the law in action, have to turn to national law. Consumer credit contracts are the most promising area to analyse the impact of modern service and credit society on the law. Their understanding as rental agreements which combine labour and consumption will give way to a more direct reference to social needs which is the basis for an increased respect for social justice in EU contract law.

To achieve these goals, some bounded rationalities should be gradually abandoned. 'Protection' is a paternalistic word which tends to single out groups and open their problem to authoritarian treatment. The neo-liberal critique on such a concept is correct and necessary. Better a free market than falling back into slavery. European contract law should always run through this test for which the experience with fascist labour and welfare law is available. Consumer protection can instead be seen as 'consumer empowerment'. This means that 'economic

34. Reifner, n. 25 *above*.

35. '(1) If circumstances upon which a contract was based have materially changed after conclusion of the contract and if the parties would not have concluded the contract

power has to be tamed' and that consumers get the necessary institutional environment, in substantive and procedural law, to introduce their collective interest in order to complete the incomplete long-term contracts of the credit society. This curbing of economic power has to be split into the domestication of cartel power and the enhancement of competition, including more information and choice for consumers on the one hand and, on the other, embedding competition into rules derived from the usury principle to allocate state enforcement for private interests in order to enhance the factual freedom of the person.

Consumer empowerment has to use the means that civil codes offer the judge for the interpretation of contracts 'in good faith and with regard to common customs' (Art. 157 BGB). This is mentioned again in the *clausula rebus sic stantibus* regulation, which adds adaptation to interpretation. These general clauses for the completion of contracts have to be completed in accordance with the rule of law using binding rules for strict interpretation of the law as well as existing collective agreements and accepted general standards. It further should follow the approach required by German standard contract term law to use the implications for justice inherent in the contract models offered by the civil code where the 'nature of the contract' and its basic assumptions on its typical rights and duties (Art. 307 al. 2 BGB) are especially used as a yardstick.

The initiative for a European Social Contract Code (EuSoCo)[36] will try to stir cooperation between labour, tenant and consumer lawyers as well as with those who are concerned about the lack of social justice elements in the European contract debate. For this, labour lawyers should return to civil law and translate their law into terms of an economic rent and credit relationship, where collective elements as well as mechanisms for these elements to enter into the individual contract are disclosed. Contract law should profit from principles which respond to lack of knowledge and concern for long-term social relations in this area.

Credit lawyers, who presently form a subgroup of consumer law but have developed additional links to the sociology of law, bankruptcy law, and social science, studying over-indebtedness or community reinvestment should be eager to learn, to compare and to provide the necessary economic knowledge for this work. A side effect of such research cooperation based presently at the faculty of law of the University of Trento and supported by an Italian government research grant could be the involvement of social actors in the creation of a European contract code supported by the policies of social organizations in the area of labour, welfare, consumption and housing.

Learning how 'to rent a slave' with tribute and respect to his human dignity and needs in a modern credit society will open European contracts to social justice.

36. *See* <www.responsible-credit.net>, 16 January 2007 ('issues'/'EuSoCo').