The effects of contracts beyond frontiers: A capabilities perspective on externalities and contract law in Europe

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INTRODUCTION

This book poses questions about the way we live in terms of the transactions we engage in and the transactions that our society supports through contract law.

The deplorable production conditions of goods on the market in Europe...

On 11 January 2012, mainstream media reported on the threat of mass suicide by Chinese assembly line workers at a factory that produces popular consumer goods.\(^1\) Reports varied regarding the number of workers (ranging from 80 to 300) who threatened to end their lives.\(^2\) The news regenerated concern regarding actual suicides at the same location a few years earlier, allegedly caused by poor working conditions. For instance, in 2010 the BBC had reported on a young man, who had jumped off the top of a building.\(^3\) According to media reports, deplorable working conditions had led twelve of his co-workers to similar desperate acts earlier that year.\(^4\)

...give rise to moral concern and public scrutiny...

This case is one of many to invoke critical scrutiny regarding the conditions under which popular consumer goods sold on the

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\(^3\) ‘Taiwan iPhone-maker Foxconn suffers another death’ The BBC, Online <www.bbc.co.uk/news/10169595> accessed 27 May 2011.

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European market are produced elsewhere. These goods figure as intimate elements in European citizens’ lives: we exchange money to eat these goods, to wear them, and use them to write dissertations, which makes the association between these goods

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And with regard to modern forms of (child) slavery see:

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and the deplorable production conditions under which they are produced unsettling. Although Europeans are often physically removed from the locations where, and the ways in which the goods they buy are made, the knowledge thereof is often not so remote. As a topic of debate, cases involving deplorable production conditions have proven to be structural and persistent over time, receiving media, political and academic attention, raising broad moral concern.6

...regarding costs imposed on others elsewhere...
Arguably, these moral concerns arise because these cases entail market activities that are perceived as imposing unacceptable costs on others who are already disadvantaged. The production of goods under deplorable conditions, externalizes costs that are associated with producing goods under decent conditions.7 The market transactions in Europe, which consumers and corporations engage in, do not reflect the costs of decent production. Instead, these costs are borne by those who are affected by deplorable conditions, but who lack the ability to adjust their conduct accordingly in response to these market activities.

...as an issue of minimum justice...
These cases of cost externalization raise a particular concern in the current global setting. Although the globalization of economic and social cooperation is praised for the potential to contribute to economic growth and human welfare, the current distribution of advantages and disadvantages thereof is heavily criticized as

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unjust.\(^8\) Those who are already the most vulnerable and who have the least power, bear a disproportionate share of the disadvantages of global cooperation.\(^9\) In this context, imposing costs of market activities on others who are disadvantaged elsewhere, raises an issue of minimum justice. The inability to adjust one’s conduct in response to the market activities of others may entail the inability to function in a way that is thought to be of central importance for human beings. The latter raises an issue from a capabilities perspective on minimum justice. From this perspective all human beings are entitled to a basic set of abilities to function in valuable ways and a decently just society should be structured in a way that promotes and secures these basic capabilities to all individuals.\(^10\) This book explores a capabilities perspective on the fundamental legal structure underlying market transactions, in particular in relation to transactions in Europe that impose costs on others elsewhere.

...raise questions regarding minimum standards in contract law in Europe...

Contract law provides the fundamental legal structure underlying market transactions: it contains normative standards that reveal

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how transacting parties should behave towards each other, others and society as a whole when engaging in market activities, if they wish to have state power available for the enforcement of their transactions.11 Contract law reflects a society’s fundamental values and a contemporary vision of a way of life through minimum standards for contractual behaviour.12 This thesis understands contract law to represent a model for just market conduct.13

How is a regime of contract law to deal with transactions on a market that imposes negative effects on others elsewhere? Should a model for just market conduct in Europe take account of the costs imposed by market transactions on others elsewhere and should Europe support such transactions through a contractual regime? And, are these transactions compatible with the fundamental values reflected in minimum standards for contractual behaviour?

The specific normative question is central to the current inquiry: should mutually beneficial contracts that have adverse effects on the basic capabilities of others elsewhere be invalid under a regime of contract law in Europe? This question is raised in tandem with a question of positive law, namely: are mutually beneficial transactions that have adverse effects on the basic capabilities of others elsewhere, immoral and on that ground invalid under current rules of contract law in Europe?

...which aim to contribute to a larger debate on social justice in contract law in Europe.

These questions can be read as a continuation and exploration of current moral concerns that people have about goods sold on the market in Europe, which have been produced under deplorable production conditions elsewhere. In the context of this book,

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however, these questions are raised in tandem, first and foremost, as part of a larger topic of debate concerning social justice and contract law in Europe. Specifically, this book approaches the negative implications of contracts on others elsewhere as an issue of contractual justice, and takes a specific case thereof to illustrate the implications of a capabilities perspective on contractual justice. Hence, this book aims to contribute to the current debate on social justice and contract law in Europe by addressing a topic and a perspective that deserve additional consideration.

The debate on social justice and contract law in Europe encompasses several large questions, including the contentious issue whether or not contract law should pursue social justice aims. This book, however, starts from the assertion that contractual justice is, in part, a matter of social justice, and that the central question is what notion of social justice should be reflected by contract law in Europe. This book does not purport to give a comprehensive answer to this larger question, nor does it suggest that it can or should be answered by legal academic research. Instead, this book aims to engage in the normative debate that this question generates. It will contribute by putting forward a capabilities perspective on contractual justice applied to the particular case of effects of contracts on others elsewhere.

The role of contract law in actually bringing about just outcomes in the world should not be inflated. Contract law is not the most effective or efficient instrument particularly in relation to the specific case discussed in this book. The objective of the research has not been to search for an instrument to improve

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44 In theories of private law the question regarding the relationship, or absence thereof, between social justice and private law (or contract law in particular) is foundational. The question of whether or not social justice is a legitimate aim of private law is answered in the negative, by Weinrib, for instance in Weinrib, E.J., The Idea of Private Law (Harvard University Press, 1995) and recently in Weinrib, E.J., Corrective Justice (Oxford University Press, 2012), see also Gordley, J., Foundations of Private Law (Oxford University Press, 2007), but in the affirmative by Collins, for instance in Collins (2003).

directly or contribute to solving the problem of deplorable production conditions globally, i.e. this book does not propose contract law as a problem-solving instrument. The purpose of raising contract law questions with regard to mutually beneficial transactions for goods made under deplorable conditions elsewhere, is to reflect on the normative standards of contract law in Europe, and on the underlying narrative of European initiatives in the area of contract law. This exploration asserts the underlying idea that whether or not the market order in Europe can be considered just depends, in part, on its contract law.