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

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3. **The effects of market transactions in Europe beyond frontiers: the example of a sweatshop**

This chapter is devoted to establishing the plausibility that there are transactions governed by contract law in Europe with negative implications on others elsewhere, which can give rise to questions concerning contractual immoralities and invalidity (Chapter 4). The case of sweatshops in the supply chains of goods sold on the market in Europe is taken as the main illustration of production conditions that are publicly scrutinized. The first part of this chapter provides a description of sweatshops’ most common features, as they are referred to in studies on sweatshops in the garment industry, as well as the context in which sweatshops exist and have persisted over time (section 3.1-3.2). Subsequently, the main arguments articulated in the debate regarding the objectionable status of sweatshops are described (section 3.3). The final section illustrates a capabilities perspective on the experience of sweatshops as externalities of market transactions in Europe and concludes with the question of why sweatshops evoke questions of contractual immorality and invalidity (section 3.4).

3.1. **Deplorable production conditions of goods on the market in Europe**

This section provides a descriptive overview and background of the defining features of sweatshops, as they are reported on in academic studies. These sweatshop features overlap with those described in mainstream media sources. In mainstream media reports, sweatshops are publicly scrutinized amongst a range of production conditions of goods sold on the market in Europe.

3.1.1. **Reports in mainstream media on deplorable production conditions**

There are many popular consumer goods sold in Europe that are linked to conditions of production that are subject to (moral) criticism. The types of harm that are caused allegedly throughout the supply chains of popular goods are numerous, ranging from human rights violations and animal cruelty, to environmental damage. A well-known example of the latter, highlighted in media
CHAPTER 3

reports, concerns Shell’s involvement in gas flaring activity in the Niger Delta, which has caused environmental damage over a time span of more than 50 years. Gas flaring is notorious for its contribution to greenhouse gases and severe health problems for local residents. Oil spills have caused water contamination, the loss of fisheries, plants and vegetation, which in turn has led to economic deprivation for Nigerian farmers who have lost their source of income. Another much-publicized example concerns industrialized agriculture, which has been critiqued for its low levels of animal welfare. The industry is castigated for using methods of animal production that cut costs at the expense of animal and human welfare, causing public health and environmental threats. And, in the area of human rights violations, chocolate manufacturers are blamed for creating conditions in which cacao-farmers resort to child slavery by bargaining for increasingly lower prices. All these examples illustrate a spectrum of criticism in the public sphere relating to a variety of production conditions in which our goods are made, i.e. the goods that are bought and sold in European shops and the transactions of which are governed by contract law in Europe.

The case of sweatshops in the supply chains of popular consumer goods can be counted amongst these examples. In mainstream media reports, the term is used in relation to the example with which this book began: a corporation was

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1 Zembla, ‘Vuile Olie van Shell’, ‘Shell dringt affakkel van gas in Nigeria terug’
2 Together with several Nigerian farmers, Friends of the Earth Netherlands (an NGO) started judicial proceedings against Shell Nigeria and Royal Dutch Shell for compensation for damages. Recently, the Rechtbank Den Haag held Shell Nigeria liable for the damages of one Nigerian farmer, because under Nigerian law, they breached a duty of care to prevent his damages. See: Rechtbank ’s-Gravenhage, 30 January 2013, LJN BY9854.
4 In the Netherlands a Dutch consumer, four alleged former child slaves from Burkina Faso and 2136 other ‘worried consumers’, demanded prosecution by the Dutch state of the aforementioned consumer for buying chocolate made with cacao picked by child slaves (Opzeteling (handling unlawfully obtained goods), art.416 Dutch Criminal Code) see: Chocolate slavery: Gerechtshof Amsterdam, 5 April 2007, LJN BA2372.
5 The above examples also illustrate test cases, regarding civil and criminal liability, similar to the sort that may be envisaged with regard to the hypothetical case regarding contractual invalidity as described in this book.
discredited for outsourcing the production of popular consumer goods to a supplier abroad with allegedly unsafe and low standard working conditions. The corporation confirmed the claims made in the media reports, referring to the use of n-hexane, the occurrence of suicides and involuntary labour, unsafe working conditions, falsification of wage statements and bribery in the supply chain first in its 'Supplier Responsibility Progress Report' of 2011. These production conditions correspond to the way in which sweatshops in other contexts are described, particularly as they occur in supply chains of the garment industry. The garment industry has been the object of elaborate studies, which unanimously assert that sweatshops are endemic and structural features of its global supply chains. In this book, the case of sweatshops is singled out as a basis for a case study, to be the focus of questions of contractual immorality (Chapters 4-5).

3.1.2. Sweatshops
The word sweatshop has been primarily associated with dispersed workspaces located in the homes of agents who obtained work orders from manufacturers, for which they employed workers compensated poorly with low pay. However, over the course of the 20th century, the term transposed into the context of full-fledged factories, denoting primarily low standard working conditions in the manufacturing stage of globalized supply chains.

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6 See Introduction of this book.
8 For instance: Klein (2003); Ross, R.J.S., Slaves to Fashion (University of Michigan Press, 2004), p.13. Bonacich, E. and R.P. Appelbaum, Behind the Label: Inequality in the Los Angeles Apparel Industry (University of California Press, 2000) show that sweatshops have also been located in affluent countries, where vulnerable groups (e.g. illegal immigrants) make up majority of the workforce p.169-175.
9 See Ross (2004), p.13-19, for a discussion on the historical development of the term sweatshop.
CHAPTER 3

Although there is no univocal agreement on the exact definition of a sweatshop,10 studies into sweatshops reveal nevertheless a descriptive core that includes features concerning wage, working hours, health and safety standards, elements of force and coercion, and degrading practices.11

From the outset of its usage, the term denotes a very low wage received by workers, indicated by various benchmarks.12 Some refer to the structural violation of minimum wage legislation, if in place and applicable. But, the applicability of such legislation can be displaced for the sake of trade, as is the case in Exporting Processing Zone’s.13 As a standard, minimum wage legislation is also said to disguise the deprivation characteristic of workers’ lives. The claim is that although workers receive

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10 See for an overview of various definitions ibid. who shows how the term is historically connected to features of labour that connote “material deprivation and extreme exploitation and to abusive relations and degrading conditions.”, p.24. A more restrictive definition is offered for purposes of measurement, in accordance with the U.S. General Accounting Office a sweatshop is defined as a business that “regularly violates both wage or child labour and safety or health laws”, p.26-27. Bonacich and Appelbaum (2000) expand the definition which refers to the structural violation of legal standards to include “factories that fail to pay a “living wage”, meaning a wage that enables a family to support itself at a socially defined, decent standard of living.”, p.3-4. Arnold, D.G. and L.P. Hartman, ‘Worker Rights and Low Wage Industrialization: How to Avoid Sweatshops’ (2006) 28 Human Rights Quarterly 676-700 refer to sweatshops as “any workplace in which workers are typically subject to two or more of the following conditions: income for a 48 hour workweek less than the overall poverty rate for that country; systematic forced overtime; systematic health and safety risks due to negligence or the willfull disregard of employee welfare; coercion; systematic deception that places workers at risk; and underpayment of earnings.” Zwolinski, M., ‘Structural Exploitation’ (2012) 29 Social Philosophy and Policy 154-179points to the fact that the definition of sweatshops centrally takes on a pejorative meaning. The term sweatshops refers to “a place of employment in which worker compensation or safety is compromised, child labour is employed, and/or local labour regulations are routinely disregarded in a way that is prima facie morally objectionable.”, p. 11


minimum wage they may remain in poverty. Others therefore refer to ‘living wages’ as a benchmark for identifying low wage levels in sweatshops. The notion of a ‘living wage’ refers to the ability of a family to support itself at a decent standard of living, defined in terms of the fulfilment of basic needs, such as food, shelter and basic health care. Along with low wages, sweatshops are also described in references to practices that lead to discrepancies in formal statements of wage and actual income. Those practices include the deduction of excessive amounts for workers’ transportation and housing. Moreover, they include the practice of firing and re-hiring, which allows employers to pay a ‘training-wage’ during extended probation time that is below minimum wage. Fraudulent records may also show that workers receive minimum wage, while they are not paid for overtime and their wage statements (if existing) may not show the actual amount of hours that they have worked. Moreover, wages are reported to be deducted on the basis of mistakes, refusals to work overtime, failures to reach daily quotas, and for taking breaks for lunch, bathroom visits and talking during work.

Another feature of sweatshop labour is the excessively long working day and workweeks. Workweeks of 60-80 hours are commonly described, as well as frequent (and often uncompensated) overtime. Overtime is purportedly imposed on workers either through physically enclosing them in buildings or by means of threats. Common examples include the threat to be fired or to lose earned wages through penalties for noncompliance with supervisors’ orders. Next to low wages and long working days, sweatshops are also described to operate under unhealthy and unsafe working conditions, such as overcrowding, lack of ventilation, unsafe equipment and materials, unsanitary toilets and lack of clean water. These conditions lead to ailments such as asthma, bronchitis and tuberculosis. Moreover, the lives of

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17 Ibid., p.63.
18 Ibid., p.64.
19 Arnold and Bowie, p. 229, ibid., p. 72.
20 Ibid., p.66-68.
workers are endangered by the practice of locking workers in factory buildings – closing doors and windows from the outside, which leads to a high number of deaths in the event of a fire.\footnote{A much referred to example is the New York Triangle Shirtwaist Factory fire in 1911, where one hundred forty-one workers died. Armbruster-Sandoval, R., \textit{Globalization and Cross-border Labor Solidarity in the Americas: the Anti-Sweatshop Movement and the Struggle for Social Justice} (Routledge, 2005), p.2. Recently a contemporary equivalent was reported on: one hundred workers died a fire at a factory in Bangladesh. See for instance: Van der Hulst, A., ‘Snelle mode, onveilige arbeidsomstandigheden’ \textit{Het NRC Handelsblad, Online Edition} <www.nrc.nl/carriere/2013/02/08/snelle-mode-onveilige-arbeidsomstandigheden/> accessed 12 February 2013.}

Other sweatshop features that studies consistently make mention of are degrading and abusive practices including mental and physical abuse by superiors.\footnote{Varley \textit{et al.} (1998), p.68-69.} There are specific cases of verbal and physical abuse, which have been documented (including cases of rape and beatings),\footnote{Bonacich and Appelbaum (2000), p.189.} but sweatshop regimes are also generally described by practices that reveal a high level of control over basic human freedoms. Notably, sweatshop regimes are characterized by severe restrictions on workers’ freedoms to interact socially with others during their work, receiving fines for talking. They are restricted from eating and from making use of basic sanitary facilities.\footnote{Ross, p.23.} In reported cases, restrictions to leave the workplace in order to receive medical care have resulted in health hazards, miscarriages and death.\footnote{\textit{ibid.}, p.191-192. Experiences of women show that they feel that they are treated as less than human beings: as “dogs” or as “machines”; Armbruster-Sandoval (2005), p.62.}

3.2. Context: sweatshops in the garment industry

3.2.1. Outsourcing
Production of clothing has moved (with the production of many other goods) to developing countries during the last three decades of the 20th century. This move is part of the broader development of globalization in which the competitiveness of corporations depends to a large degree on their ability to take advantage of the opportunities made available by the increasing scope of business environments. Corporations have used internationalization strategies to achieve or maintain competitiveness and are able to capitalize on the supply of factor conditions (i.e. land, labour and capital) abroad. Previously, many manufacturers therefore moved their own facilities for production abroad, but internationalization is now observed in the cross border extension of supply chains through the outsourcing of production. Outsourcing is a specific strategy in which corporations subcontract activities to other business entities in order to increase competitive advantage. For most garment corporations, production is outsourced completely to other entities. This strategy provides many benefits for corporations such as increases in capacity, flexibility, specialization and cost reduction. Corporations give orders for their goods to contractors and agents in the supply chain, who serve as middlemen between retail and production level. The distance between the beginning and end of the supply chain is increased as well as the number of players with which the corporation is directly or indirectly engaged. Corporations become more flexible in their ability to have orders fulfilled and meet the demands of the market. This flexibility is important for corporations in the garment industry given the nature of the demand and competition within the industry. (See 3.2.3) Outsourcing production is an advantageous strategy in the labour-intensive garment industries, as globalization offers the

31 Ibid., p.276.
CHAPTER 3

opportunities to make use of low-cost labour sources in other countries.\textsuperscript{34} Economic studies have revealed diverging correlations between the globalization of production and the wage levels and working conditions at production level.\textsuperscript{35} On the one hand, globalized production is said to create employment options with higher wage levels, than would otherwise be available, while, on the other hand, other researchers point to adverse effects on working conditions due to unequal bargaining power.\textsuperscript{36}

3.2.2. Bargaining power

Studies on sweatshops point to systemic features in the garment industry that place retailers in powerful bargaining positions in supply chains.\textsuperscript{37} At the beginning of the supply chain, clothes are manufactured in factories owned by contractors and subcontractors who employ garment workers. The barriers to enter the market at this level are relatively low (i.e. low start-up costs) and the number of players is high, which leads to a high level of competition.\textsuperscript{38} The number of players involved in retail, is relatively low. And, the barriers to enter the market are high, making control and power concentrated to the extent that a small number of retailers control a big market share. The high level of concentration is described as being the result of consolidation of retailers, and so-called manufacturers.\textsuperscript{39} Manufacturers are not involved in the actual production of clothes, but in activities of design and branding.\textsuperscript{40} Consolidation occurs on the one hand, where retailers take on the activities of designing and branding the clothes they sell, and on the other hand, where corporations

\textsuperscript{34} Rugman (2003), p.279; Varley et al. (1998), p.61.
\textsuperscript{36} See references footnote 35.
\textsuperscript{37} Armbruster-Sandoval (2005), p. 5-7.
\textsuperscript{40} Klein (2003): “What was changing was the idea of what (...) was being sold. The old paradigm had it that all marketing was selling a product. In the new model, however, the product always takes a back seat to the real product, the brand, and the selling of the brand acquired an extra component that can only be described as spiritual.”, p.21. “(...) Brand X is not a product but a way of life, an attitude, a set of values, a look, an idea.”, p.23.
originally engaged solely in the design and branding of clothes move into retail, in effect merging the two levels in the supply chain to one.\textsuperscript{41} A high concentration at the end of the supply chain gives corporations at this level increased bargaining power. Retailers and manufacturers place their orders for the production of clothes with contractors around the globe who compete on their ability to produce at low-cost. The bargaining power of retail and manufacturing corporations reportedly results in the practice of top-down price dictation.\textsuperscript{42} Price dictation refers to the ability of powerful corporations to set the price levels for the orders they need fulfilled, and the inability of competing contractors (see further in the next section) to negotiate prices that cover certain cost levels of production cost. The result is described in terms of a race to the bottom, or downward squeeze of all determinants of production costs such as wages, health and safety standards and overall working conditions.\textsuperscript{43} In cases where production facilities have been tailored to process large orders, accepting orders for prices that do not cover costs is described as a preferred alternative over leaving facilities unproductive.\textsuperscript{44}

3.2.3. \textit{Fashionability and flexibility}

The demand for clothing is subject to seasonal fluctuation, and is highly unpredictable. Retailers’ and manufacturers’ success depends on their ability to meet the rapidly shifting demands of their customers. Consumer demand pushes the need for corporations to use flexible means of production.\textsuperscript{45} By outsourcing production processes, corporations eliminate the need to make investments, and long-term commitments to any one supplier or location.\textsuperscript{46} Subcontracting various suppliers provides corporations with the freedom to move quickly towards the best available

\footnotesize{\textsuperscript{41} Armbruster-Sandoval (2005), p.7; Another reason for increased concentration of power is due to mergers and acquisitions at retail level during the 1980’s and 1990’s. Bonacich and Appelbaum (2000), p.80-86.


\textsuperscript{43} Armbruster-Sandoval (2005), p.8-9; Appelbaum, R.P. \textit{et al.}, ’The End of Apparel Quotas: A Faster Race to the Bottom? University of California, Santa Barbara, Center for Global Studies accessed 15 April 2013, p. 2.

\textsuperscript{44} Varley \textit{et al.} (1998), p.21, 94-95.

\textsuperscript{45} Ibid, p.85.

\textsuperscript{46} Bonacich and Appelbaum (2000), p.136.}
competitors. The purchasing processes in place are set up in support of this freedom. For example, large retailers are said to use fully electronic auction processes for their orders.\textsuperscript{47} In such a system, contractors are placed in direct competition with each other. As they are assessed in the first place on their costs, but also on their ability to offer short lead-times, contractors strive to improve on features in their production process that work against low cost and short lead-time. Studies on sweatshops point to the incentives created within such systems towards sweatshop conditions.

\textbf{3.3. The debate on the moral status of sweatshops}

In the debate concerning sweatshops, the discussion focuses on the role of corporate actors. Divergent solutions have been evaluated in terms of their potential to improve or worsen sweatshop conditions, notably voluntary codes of conduct and legal regulatory measures.\textsuperscript{48} In the context of the debate on the moral dimensions concerning sweatshops, different questions have generated different arguments concerning, for example, the moral duties of specific actors, including corporations (and groups within corporations, e.g. shareholder, management) and consumers. The purpose of this section is not to bring to the fore a comprehensive overview of all questions and arguments raised, or to take on grand questions of moral theories and their application to sweatshops. Instead, a general overview of the dominant arguments used to substantiate either the moral legitimacy (3.3.1-3.3.4) or the moral objectionability of sweatshops (3.3.5-3.3.6), is sufficient to show why sweatshops raise moral concern.\textsuperscript{49}

\textbf{3.3.1. The ‘it’s a choice’ argument}

The most active and forceful contribution in defence of sweatshops comes in the form of, what is referred to as, the

\textsuperscript{47} Hearson, M., ‘Cashing In’ (Clean Clothes Campaign, Amsterdam 2009), p.47.
\textsuperscript{49} For an overview of these arguments see Varley et al. (1998), chapter 3; from a different (economic) perspective see Powell and Zwolinski (2012).
mainstream libertarian position on sweatshops. Arguments are articulated with regard to conditions of low wage and long working hours, rather than features of coercion, threats and forms of degradation. The most widely used arguments put forward are the ‘it’s a choice’ and the ‘better-than-nothing’ argument, which hinge together (see 3.3.2). The ‘it’s a choice’ argument is articulated from a consequentialist perspective, which takes the following form. Under the condition that workers are not forced to accept sweatshop labour against their will, they choose, freely, to accept the conditions of their work and therefore engage in a voluntary agreement. Such choices are good indications of individual preferences, as they reflect the fact that individuals who work in sweatshops prefer to accept the work rather than decline it. In the absence of force, individuals choose the best alternative available to them. The individual liberty of sweatshop workers to make choices has priority over third party interference, because interference is assumed to take away a preferred and therefore best option from individuals. Measures and actions against sweatshops are likely to cause workers harm and on that ground, opposing sweatshops is considered immoral. This version of the ‘it’s a choice argument’ thus turns on empirical evidence for the claim that external efforts to improve working conditions in sweatshops engender harmful consequences. The argument shifts to the extent that it could be shown that regulation or other actions would not cause harm, but would even offer better alternatives to sweatshops workers.

Before examining this point, another libertarian version of the ‘it’s a choice’ argument should be discussed that is independent from the possible consequences of interference. In this version of the argument the priority of liberty is based on principle, i.e. on the idea that sweatshop workers’ choices are autonomous choices that deserve respect. Interference with the autonomous choice for sweatshop work is wrong not because it brings about harmful consequences, but because it shows a lack of respect for a person. According to this line of reasoning, an

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52 Miller (2003), p.103-106.
CHAPTER 3

individual’s choice to accept sweatshop-working conditions is no
different from an individual’s choice of religion. Namely, the claim
is that the choice to work in a sweatshop likely involves a decision
that is of central importance to a person, for instance it may
represent securing survival or the provision of basic nutrition for
children and family. As such, the choice to work in a sweatshop
expresses personal identity and an understanding of what it means
to be a parent or member of a family. Opposing sweatshops is
immoral, according to this view because it is reflective of a lack of
respect for sweatshop workers’ autonomy.54

Against both versions of the ‘it’s a choice’ argument,
stand claims of coercion.55 These claims address the acceptance of
sweatshop work in the first place, but also in relation to
requirements on workers’ productivity in the context of their job.56
In the latter context, a claim of physical coercion points to the fact
that sweatshops regimes include practices in which workers are
physically forced to work, either through enclosing them on
factory grounds or by means of physical abuse.57 More often than
not, however, the claim addresses the features of non-physical
coercion that are associated with threats to which workers are
exposed. Namely, critics of sweatshops point to the fact that
workers often work overtime because supervisors threaten to fire
them, or withhold their wage or impose penalties in case of non-
compliance.58 These threats constitute forms of psychological
coopercion that erode arguments based on voluntary acceptance.
From this perspective, the fact that workers yield and comply with
demands under such threats provides no evidence of voluntary
choice.

54 Ibid. Zwolinski states: "But when the subject matter of the choice is of central
importance to the agent’s identity or core projects, it is plausible to suppose that
autonomous choices do generate strong claims to liberty. And it is hard to deny that
the choices made by potential sweatshop workers are of central importance in just this
way.", p. 692.
56 For reasons previously mentioned, cases in which the acceptance of sweatshop
work is subject to coercion, debt labour etc., are kept separate in this discussion.
57 These sweatshop features are focused on for instance by Arnold and Bowie
(2003), p. 229. Neither version of the ‘it’s a choice’ argument addresses situations in
which sweatshops coincide with modern forms of slavery, such as debt bondage.
58 Ibid., p. 229-231.
CHAPTER 3

The ‘it’s a choice’ argument is also refuted on the basis of its inability to answer the question of the moral status of sweatshops to begin with beyond arguments that focus on practices in sweatshops that constitute physical or non-physical coercion. Can individual choices, regardless of the conditions in which they are made, disprove claims of immorality? Sweatshop critics have argued that immorality cannot be established without taking into account the conditions in which workers choices are formed. In other words, they have argued that the ability to choose, and the availability of alternative options inform what it means to voluntarily accept sweatshop-working conditions. Their arguments are discussed in sections 3.3.5-3.3.6 on exploitation and background conditions, but first, we turn to another oft-used argument in defence of the moral legitimate status of sweatshops, namely the ‘better than nothing’ argument.

3.3.2. The ‘better than nothing’ argument
The ‘it’s a choice’ argument (section 3.3.1) is often combined with the claim that sweatshops represent the best available alternatives to the workforce in those circumstances. Namely, in the absence of force, individuals choose the best alternative available to them. Defenders of sweatshops view the fact that sweatshop workers do not have valuable alternatives as an argument in favour of sweatshops, or rather, as an argument against intervention. The ‘better than nothing’ argument is not a freestanding justification for opposing any effort to improve the conditions of sweatshop but is dependent on the assumption that any effort to improve working conditions will be counterproductive (as such it is closely associated to the argument from impossibility, see section 3.3.3). Specifically, improvements in working conditions are claimed to, in effect, take away a preferred and therefore better alternative from the world’s poor. The claim is based on the idea that if conditions in sweatshops were to be improved, corporations

CHAPTER 3

would not use the labour forces in developing countries as they would otherwise.\textsuperscript{61} The argument puts forward, that due to rising production costs, developing countries will lose their competitive advantage since corporations would produce their goods elsewhere, leaving current sweatshop workers without their preferred option.\textsuperscript{62} Moreover, increases in wages and other improvements in working conditions thwart employment opportunities for others in developing countries, as the demand for goods is diminished with increases in production costs. In other words, from this viewpoint sweatshops are good and desirable, as they generate economic growth and lift people out of poverty.\textsuperscript{63}

However, the ‘better than nothing’ argument is contested on the basis of the empirical assumptions on which it depends. Improvements in working conditions and increased wages in the past have not cancelled incentives for corporations to outsource their production activities in the developing world since production costs remain substantially lower than elsewhere.\textsuperscript{64} And, raising wages and improving working conditions need not affect demand and result in unemployment. Much depends on the way goods are branded, which may lead to increased demand for goods that are produced under better conditions.\textsuperscript{65} In fact, research suggests that consumers would be willing to pay higher prices for goods produced under socially responsible conditions.\textsuperscript{66}

3.3.3. The impossibility argument

The impossibility argument claims the absence of an alternative to sweatshops, to be precise, the argument claims the impossibility of improvement in sweatshop conditions. If the existence of sweatshops is a necessary fact of world production, sweatshops cannot be immoral, as morality cannot demand what is

\textsuperscript{61} Powell (2006), p.1037.
\textsuperscript{65} Varley et al. (1998), p.50.
\textsuperscript{66} Klein (2003).
impossible.\(^6\) In one form, the argument is based on a notion of sweatshops as part of a ‘natural’ progression, namely, as necessary a step on the road to prosperity. This ‘step on the road to prosperity’ argument holds that all nations (necessarily) go through a phase of deplorable working conditions as they strive towards prosperity. A sweatshop-phase is considered essential, because it is the only source that gives developing countries a competitive edge over developed nations. Support for this view is found often in the historical development of developed countries that went through a similar period in which sweatshop existed before wages increased and working conditions improved.\(^5\) In response to this claim, others point to the fact that historically, improvements in working conditions often resulted from political pressure, not as a ‘natural’ result of market forces.\(^6\) Some have argued that wages sometimes fall even when productivity is rising, contrary to economic models.\(^7\) The assumption that developing nations move towards prosperity, because productivity itself will necessarily lead to improved working conditions over time is not supported empirically.\(^8\) Notably, critics of sweatshops point to the fact that the benefit that workers obtain from sweatshop arrangements are insufficient to pull them and their family members (including future generations) out of poverty. In any case, the argument of a step on the road to prosperity does not show that alternative forms of development are impossible.

In a second form, the impossibility argument refers to the economic impossibility for corporations to make shifts away from sweatshop production.\(^9\) Corporations who currently produce their


goods in sweatshops would lose their source of competitive advantage, if sweatshop conditions were to improve (i.e. production costs were to rise) and thereby would be unable to survive over time. This claim does not however, contest the objectionable status of sweatshops, but rather, indicates a possible issue with regard to competitive forces that determine the success and survival of corporations.

3.3.4. The argument from relativism
Another argument found in the debate on global sweatshops is based on various forms of relativism. The argument generally expresses the view that individuals or groups of persons hold different beliefs about morality and that these beliefs can only be considered within the context in which they are held. Relativism problematises the debate on the moral status of sweatshops as a whole, to the extent that participants take as points of departure standards of morality that are articulated outside the context in which a sweatshops is situated. The argument takes shape primarily in terms of cultural relativism as a counter argument against those who consider sweatshops to be immoral. According to this viewpoint, it is considered illegitimate to assess sweatshops located in foreign nations on the basis of moral standards defined externally to the culture in which they are embedded. A counter argument against the immoral status of sweatshops is based on the idea that sweatshop-working conditions reflect standards that are considered acceptable within the cultural context in which they are situated.

Two arguments counter this cultural relativist view. In the first place, the standards according to which the status of sweatshops is debated need not be (exclusively) ‘external’ to the culture in which they are embedded. It is in particular the voices from within, that is, from those who work in sweatshops that inform moral concern. Moreover, the argument can be

74 Ibid.
75 Varley, p.20-22.
formulated that the standards that sweatshops infringe are universally articulated standards of decent working conditions\textsuperscript{76} and therefore not externally imposed on others from a high-handed position. In the second place, the claim that sweatshops are in some sense an expression of a culture, which demands respect, is countered by claims that sweatshops are manifestations of the exact opposite. Namely, critics of globalization argue that the domination of capitalist market culture encroaches on the integrity of other cultures, by requiring their engagement in commodification as a form of cooperation. From this perspective, sweatshops are manifestations of capitalism imposed as a foreign element on other cultures.\textsuperscript{77}

3.3.5. \textit{The exploitation argument}

Those defending the moral acceptance of sweatshops find a large number of critics who argue that sweatshops are morally objectionable, because they represent wrongful exploitation.\textsuperscript{78} The exploitation argument engages both the ‘it’s a choice’ argument, as well as the ‘better than nothing’ argument, in either claiming their irrelevance with regards to the moral status of sweatshops or in claiming a mistaken understanding of \textit{choice}, as merely the absence of force and deception. In the first case, where critics claim that consent to or benefit from an arrangement does not necessarily transform an otherwise immoral status, the exploitation argument is generally framed in terms of unfairness or degradation.

For instance, exploitation predicated on unfairness points to a party taking advantage of the deprivation of another by

\textsuperscript{76} Indicated by their articulation in the Fundamental Conventions of the ILO.


\textsuperscript{78} There are several forms in which this argument is made, in which exploitation is based on harm, insufficient benefit, unfairness or the infringement of a minimum standard. See for an overview Zwolinski (2007), p.704-711, who argues that even though other features of sweatshops may be exploitative, low wages are not. Also: Meyers (2004), who argues that wrongful exploitation may occur even if the person exploited benefits from it and even if that person prefers the exploitation over other alternatives. Of interest is the fact that in the CESL Commission (2011), plural conceptions of exploitation have been included in article 51, for instance excessive benefit and unfair advantage, but also the background conditions of the transaction. See section 3.3.6 on the ‘unjust background conditions’ argument.
CHAPTER 3

securing a benefit that is considered disproportionate in relation to the contribution. They argue from a Kantian perspective that sweatshops are immoral as they are representative of a lack of respect for those who work in them. In a similar spirit, the argument from exploitation based on lack of respect is also articulated with reference to basic needs. This argument develops to substantiate the claim that low wage and long working hours characteristic of sweatshop, independent of threats, coercion and degrading practices, represent objectionable exploitation. Needs exploitation, refers to an arrangement in which one takes advantage while disregarding the basic needs of the other. In the

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81 Arnold and Bowie (2003), p. 230-231. They argue from a Kantian perspective that sweatshops are immoral as they are representative of a lack of respect for those who work in them.
82 Snyder (2008) focuses on the fact that the basic needs of the individuals working in sweatshops are disregarded and therefore they are not respected as persons.
83 Ibid.; also Sample (2003), p. 159-160.
78
context of sweatshops, the notion of needs exploitation is
evidenced by the fact that workers are unable to fulfil their basic
needs while working up to 80 hour work-weeks.\textsuperscript{84}

The exploitation arguments need not necessarily claim
the irrelevance of choice. Instead, these arguments may take into
account the influence of the conditions that characterize the lives
of those who accept sweatshop jobs. In such form, arguments
based on exploitation rebut the claim that sweatshop workers
voluntarily agree to sweatshop conditions, merely because they
are not physically forced or deceived. Unfavourable life
circumstances may coerce an individual to agree to what would
otherwise have been unacceptable.\textsuperscript{85} In this light, the fact that
sweatshops are —as claimed under the better than nothing-
argument— the only alternative aside from starvation,
substantiate the wrongfully exploitative status of sweatshops
rather than their moral legitimacy. This argument draws attention
to the fact that the morally objectionable character of sweatshops
cannot be properly understood by isolating the exchange which
sweatshop workers engage in, from the overall circumstances
of their lives. The unjust background conditions in which sweatshops
are embedded represent a freestanding source of moral concern,
which are paramount to the debate on the moral status of
sweatshops.

3.3.6. The (unjust) background conditions argument
There are at least two ways in which the life circumstances are said
to matter for the moral status of sweatshops. Firstly, sweatshop
workers’ life circumstances are relevant in a notion of choice that
goes beyond the absence of force or deceit and thereby contribute
to an understanding of why a particular exchange is morally
objectionable. Secondly, the moral status of sweatshop can be
predicated on the unjust background conditions that caused the
circumstances that shape sweatshop workers’ lives.

\textsuperscript{84} This argument is used in particular to substantiate the claim that workers should
receive a living wage. See for example Snyder (2008) who argues that wage levels
that fall below a decent minimum are for that reason morally problematic.
Tanner Lectures on Human Values, p.94.
CHAPTER 3

The first argument does not focus on the reasons behind the circumstances that shape lives. The mere fact that there is a lack of alternative options of a certain quality (e.g. beyond starvation and death) for sweatshop workers substantiates the claim that there is a defect in consent, or at least that the acceptance does not perform its ‘moral magic’.\(^{86}\) Namely, under conditions of severe deprivation and inequality, people accept conditions that they would otherwise never have agreed to.\(^{87}\) According to this line of reasoning, the morally relevant comparison to make is between sweatshop conditions and conditions to which people would have agreed under fair background conditions, e.g. in the absence of pressing necessity. People with excellent life chances do not, in fact, choose sweatshop work. And, sweatshops are not generally considered as just another category of job among a range of alternative occupations. The argument aims to show that there is a morally significant difference between choices made under conditions of urgent need, and those made under conditions of substantive freedom, i.e. the availability of valuable alternatives.\(^{88}\)

The second argument points to the reasons why some people do not have alternative options beyond sweatshop work. In this context it is of relevance to draw attention to the fact that individuals who lack alternative options are not distributed randomly among societies, or among groups of individuals at varying starting positions in life. Rather, sweatshop workers are located predominantly in developing countries, or, are members of a particular vulnerable and marginalized group, such as (illegal) immigrants.\(^{89}\) The arguments concerning the unjust background conditions follow an inquiry into the context in which vulnerability, and comparatively, favourable bargaining positions of those who gain advantage from vulnerability, are shaped. The claim that the

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\(^{88}\) This line of reasoning, which focuses on the importance of substantive choice and freedom, shows significant overlap with the type of reasoning based on capabilities frameworks.

moral status of sweatshops is predicated on unjust background conditions, appeals to the idea that sweatshops are indicative of structural injustice, i.e. that sweatshops only prevail within an unjust context.\textsuperscript{90} This argument has been made in reference to both previous and current ongoing injustices, which are claimed to contribute to disadvantage on one side, and advantage on the other. Previous injustices that are brought to the fore include the seizure of natural resources and land under periods of colonialism, conditions of slavery and war.\textsuperscript{91} Current features are also referred to as aggravating and sustaining the current measure of inequality between the lives of individuals in different nations and regions exemplified by institutional structures supportive of terms of trade that protect the interests of those who are already well-off or the suppression of unions and labour protection at the request of corporate actors.\textsuperscript{92} All these features are said to create a context of structural injustice and inequality that enables and sustains the existence of sweatshops over time.\textsuperscript{93} It is not the very idea that these background conditions are unjust, or that they matter for the moral status of sweatshops, rather, the question of how these conditions transform the moral status of sweatshops is the subject of debate.

3.4. Sweatshops as contractual externalities?
The previous sections show that sweatshops are the topic of critical scrutiny in popular media and of academic debate regarding their moral status. Sweatshops and forms of slavery are often bracketed together as examples of fundamental rights violations in corporate supply chains and as examples of production conditions that illustrate costs imposed on others, i.e.


\textsuperscript{93} In some instances, this argument targets specific actors. For example, MNE’s are faulted for bargaining and lobbying for advantages, such as lower tax rates and diminished standards of labour protection in return for investments.
CHAPTER 3

externality. However, the contrasts between sweatshops and slavery as subjects of moral debate and as examples of externalities relate to this book’s questions regarding contractual immorality and injustice.

3.4.1. Sweatshops and slavery as subjects of moral debate
In the debate on the moral status of sweatshops, the latter are distinguished from modern forms of slavery on the basis of consent. Sweatshop workers subject to practices described above are said to have the freedom to leave their jobs whereas slaves do not. As such, sweatshop work is set apart from modern forms of slavery where total control is exercised over a person by means of force for the purpose of economic exploitation.96 Where past forms of slavery entailed ‘legal’ ownership of persons, modern forms of slavery are recognized as all forced or compulsory labour, defined by the International Labour Organization (ILO) as “all work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily.”95

Modern forms of slavery occur in today’s world as part of supply chains of goods that are sold in Europe.96 In the first place, modern forms of slavery can also be said to occur within the context of sweatshops. Namely, studies on sweatshops also describe the most common form of compulsory labour today, namely debt bondage or bonded labour.97 Debt bondage occurs where workers have incurred debt and agree to repay their debt through labour.98 For instance, a worker may incur a debt in order to pay for transportation by a contractor or agent to a factory location. The debt often escalates as excessive payments are

98 International Labour Organization (ILO), The Cost of Coercion: Global report under the follow-up to the ILO Declaration on Fundamental Principles and Rights at Work, 2009.
required for housing and food, and high interest rates compound with the initial amount. Required payments exceed the low wages received by workers, which leads them to be enduringly unable to pay off their debts. In these circumstances workers find themselves trapped and tied indefinitely to their contractors.\textsuperscript{99} In the second place, and apart from the context of sweatshops, reports also show that goods sold in Europe are made by slaves, for instance by child slaves on cacao plantations in Ivory Coast, the largest world producer of cacao and main supplier to the world’s chocolate industry.\textsuperscript{100} Chocolate production depends on labour intensive cacao production and children are trafficked from neighbouring countries into Ivory Coast to work on cacao farms.

Thus, although a categorical distinction maintains between slavery and sweatshops with respect to the question regarding moral status, they both exist in supply chains of goods sold in Europe. Moreover, in light of modern conceptions of forced labour, forms of slavery may also overlap, as factual descriptions of sweatshops illustrate. Thus, for the purposes of this book, one could apply equally the question of contract law regarding validity to the example of transactions for goods made by slaves (including child slaves), as a replacement for the hypothetical case study of sweatshops (see Chapter 4). However, this book deals with the latter, more controversial example, because it brings to the fore more readily the potentially salient elements regarding questions of contractual immorality. By doing so, the book engages in the debate on the moral status of sweatshops that stands in contrast to the universal condemnation of slavery. The abolition of slavery and its universal illegality was established after debate regarding its moral status, and only after that the idea took hold, by now ubiquitously shared, that slavery is immoral. Unlike sweatshops, slavery has moved beyond debates in which its (economic)


CHAPTER 3

benefits are put to the fore as a contribution to a defence for permissibility.\footnote{Even though arguments could be articulated for the economic efficiency of slavery, for instance: Gray, L.C., ‘Economic Efficiency and Competitive Advantage of Slavery under the Plantation System’ (1930) 4 Agricultural History 31-47. "Obviously, this question involved neither the ethical aspects of slavery (...). Unfortunately however, the consideration of the economic aspects of slavery as a competitive institution have been largely mixed up with these broader considerations(...)". p. 33.}

3.4.2. Sweatshops and slavery as externalities?
The potential difficulties of a categorical distinction between various forms of forced labour and sweatshops are taken as a point of departure in the following discussion on contractual externalities. The distinction is further based on a formal conception of consent, which points to the absence of physical force or coercion.

The link between sweatshop conditions and transactions for sweatshop goods has been described in economic terms: the former are identified as negative externalities of the latter.\footnote{For instance: Lipschutz, R.D., ‘Sweating It out: NGO Campaigns and Trade Union Empowerment’ (2004) 14 Development in Practice 197-209, p.197.} The term externality is described in economics as a direct effect (either positive or negative) of an actor’s action on the welfare of another actor, without the effect being incorporated in the market price.\footnote{Varian, H.R., Microeconomic Analysis (W.W. Norton & Company, New York 2006), chapter 24; Katz, M.L. and H.S. Rosen, Microeconomics, 2nd Edition (Irwin, Boston 2009), chapter 17; Baye, M.R., Managerial Economic and Business Stategy, 4th International Edition (McGraw-Hill, New York 2002), p.508-510.} Externalities can cause efficiency problems and represent market failure, since the price paid for a good does not reflect the costs that are necessary for the production thereof.\footnote{Baye (2002), p.510.} Environmental damage caused in the course of production is the archetypical example of a negative externality. If the costs associated with environmental damage are not transmitted as production costs throughout the supply chain, these costs are externalized and incurred by others who are affected by the environmental damage, but remain nevertheless uncompensated. Similarly, sweatshop conditions are identified as costs incurred by those who work in sweatshops. Namely, those who engage in transactions for
goods made in sweatshops need not pay the price for safe production conditions, decent wages or overtime compensation. Instead such costs are imposed on those who produce them through substandard working conditions.

This line of reasoning imports into the economic definition of externalities, normative standards about what a ‘decent’ wage would be or what ‘substandard’ conditions are. However, in a strict definition of externalities such normativity is to be found in the choice made by individuals themselves. That is to say, whatever wage or working conditions one accepts as compensation is to be taken for granted; the market establishes what is adequate compensation, as opposed to a level of wage or working conditions labelled ‘decent’ or ‘substandard’ respectively. Consequently, whatever the sweatshop workers accept as compensation is equivalent to the costs incorporated within the total production costs. Those who work in sweatshops define for themselves what adequate compensation is — expressed by their voluntary acceptance — and thus they do not incur any residual costs. In short, sweatshop conditions are not negative externalities of the activities of others and do not represent market failure because workers can adjust their conduct. It is for this reason that modern forms of slavery in supply chains can and should be considered as negative externalities, since voluntary acceptance is absent and slaves are not compensated for the costs they incur in the course of production. It follows from this view that the price of goods made by slaves does not reflect all production costs, whereas the price of goods made in sweatshops does.\textsuperscript{105} Therefore, in terms of efficiency and market functioning, modern forms of slavery are deemed problematic, whereas sweatshops are not.

Taken on their own, however, the morally problematic aspects of lowering working conditions to sweatshop conditions need not be insignificant to consider the negative externalities of transactions for goods made in sweatshops. Namely, if one considers sweatshop conditions as acceptable this may be seen as reflective of lowering standards regarding the respect for human life, which is in turn associated with social costs of increased

\textsuperscript{105} In other words slavery as an externality reveals market failure, whereas sweatshops do not.
criminality and violence, i.e. the deterioration of social life. The erosion of standards of respect for human life is described as a possible negative externality, and can be seen as an externality of transactions for goods, which are made under sweatshop conditions in supply chains. In such a case it is not the sweatshop conditions that represent external costs of transactions, but rather the negative effects on society, namely the lowered standards of respect for human life and associated social costs.

3.4.3. Contractual externalities: a capabilities perspective
As articulated in the previous chapter, sweatshop conditions and the context in which they are embedded do not escape critical scrutiny from a capabilities perspective. To the extent that sweatshops are not identified as problematic on the basis of workers’ acceptance of sweatshop conditions this view is incompatible with a capabilities perspective of which the focus is on the individuals’ substantive ability to choose. In asking what individuals are able to be and do in their lives, the capabilities approach points to the salience of the absence of valuable alternatives in the lives of those who work in sweatshops. From a capabilities perspective, the arguments brought forward to substantiate the moral legitimacy of sweatshops do not have a transformative effect on the concerns that come to the fore in terms of basic capabilities pertaining to minimum justice. Namely, in a context of absent valuable alternatives and exit options, individuals do not have the basic capabilities, i.e. the substantive freedom to choose.

Thus, firstly the ‘it’s a choice’ argument fails for being based on a formal conception of choice that neglects the consideration of the impediments in the broader context that

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107 People with excellent life chances do no work in sweatshops (see section 3.3.5). In today's world many people travel for professional and other reasons, but well-off people do not pursue sweatshop job opportunities. Even as opportunities to spend some time abroad, sweatshops do not appear to be among a range of valuable options, as for instance agricultural labour is (e.g. apple picking). Sweatshops as valuable research opportunities appear to be the exception, i.e. the experience of working in a sweatshop provides valuable input. See: Fries, M., ‘Stressforscher im Sweatshop’ Zeit Online <www.zeit.de/studium/uni-leben/2011-02/interview-bangladesch> accessed 7 November 2012.
constrain individuals’ abilities to choose.\textsuperscript{108} Secondly, the ‘better-than-nothing’ argument does not engage the normative claim based on minimum justice that translates into fundamental entitlements of basic capabilities for individuals. Thirdly, the impossibility argument does not work, as considerations regarding global redistribution, normatively supported by a capabilities approach to minimum justice would counter the impossibility of improvement. Moreover, where the impossibility argument identifies corporate economic impossibility, the argument becomes irrelevant, as the survival of a corporation does not represent a fundamental entitlement based on minimum justice.\textsuperscript{109} And lastly, a capabilities perspective counters the argument from relativism by defending the universal status of basic capabilities.\textsuperscript{110} One may debate about the appropriate threshold level of the central capabilities as they would be defined locally, but the argument that sweatshops could be compatible with any threshold level is difficult to sustain.

From a capabilities perspective, a sweatshop’s objectionability is found in the absence of the social preconditions necessary for individuals to be able to make substantive choices in important areas of human functioning, i.e. the basic capabilities on Nussbaum’s list. In that context, sweatshop conditions impair workers abilities “to work as human beings, exercising practical reason and entering into meaningful relationships of mutual recognition with other workers”.\textsuperscript{111} Sweatshop conditions do not escape critical scrutiny on the basis of Nussbaum’s capabilities approach, because they cannot be separated from the background conditions in which sweatshop workers accept them. A capabilities perspective treats sweatshop conditions and the overall (global) context in which they are embedded as inseparable for its normative judgments.\textsuperscript{112}

\textsuperscript{109} Similarly, Nussbaum (2006a), p. 394.
\textsuperscript{110} This universalist spirit is captured in the question: “Why should we follow the local ideas, rather than the best ideas we can find?, Nussbaum (2000a), p.49.
\textsuperscript{111} As articulated on Nussbaum’s list (under 10 b), which reflects the central importance of the architectonic capability of practical reason and the capability of affiliation. See section (2.1.1).
\textsuperscript{112} Arguably, such direct scrutiny of sweatshop conditions would escape from a capabilities perspective as articulated by Sen in the absence of a list of specific capabilities. On this point: Bagchi, A.K., ‘Freedom and Development as End of
sweatshop conditions, and to the overall context that sustains them, which includes parts of domestic basic structures of society.\textsuperscript{113}

Of particular concern for this book are the ways in which contract law in Europe regulates market exchanges that create advantages to those in affluent regions of the world, which are only possible in light of the costs (impairment of basic capabilities) borne by others in less affluent regions. From a capabilities perspective, there are normative reasons why sweatshops should be taken into account within the realm of relevant costs of transactions for goods made in sweatshops. As such, this represents a perspective on externalities that should be counted as problematic contractual externalities.

3.4.4. \textit{Raising the question of contractual immorality in Europe}

The question of contractual invalidity and immorality in Europe (subsequent chapters) follows both from the existence of the debate on the moral status of sweatshops in public space, as well as from the identification of sweatshops as costs imposed on others (externalities) elsewhere through market activities. To start with the latter, the concept of externalities represents a potential normative justification for denying the binding force of an agreement, i.e. the existence of a valid contract.\textsuperscript{114} The previous sections showed that the identification of the costs that are taken into account as externalities depends on the underlying normativity that is captured in the application of the notion of voluntary choice. The economic interpretation of externalities in section 3.4.2 would likely distinguish between forms of forced labour (slavery) and sweatshop conditions identifying only the former as problematic in that context. Conversely, a capabilities perspective (section 3.4.3) would include the critical assessment of both.

\textsuperscript{113} See section 2.1.4.

In addition, and beyond the concept of externalities, the question of contractual immorality and invalidity also arises in light of the focus on sweatshops as a subject of public scrutiny and sweatshops as a topic of debate in academia. First, to the extent that contractual immorality reflects public morality, developments in the latter are of relevance to questions of contract law. Second, as the attention for deplorable production conditions of goods sold on the market in Europe increases as a subject of critical scrutiny, the awareness of market participants also increases. The question remains to what extent these developments are relevant under rules of contract law in Europe.