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Hermeneutical Injustice, Contract Law, and Global Value Chains

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Abstract: Global value chains (GVCs) resist dominant contract framing, because presumptions about contract's bilateral structure and party autonomy fail to capture the complex interconnections between private exchange relations. Contract law seems to obscure, rather than capture, the ways in which the relationships and experiences of various actors in GVCs are linked. This article argues that, in doing so, contract law contributes to systemic hermeneutical injustice. Systemic hermeneutical injustice captures how shared interpretative resources can render those in disadvantaged positions of social power unable to make intelligible that what is in their interest to render intelligible. The article's primary aim is to show how this form of injustice bears on contract law and how it can function as an independent normative constraint on the institution of contract law.

Résumé: Les chaînes de valeur globales (CVG) résistent à l'encadrement du droit contractuel tel qu'on le conçoit habituellement, car les présomptions relatives à la structure bilatérale des contrats et à l'autonomie des parties ne parviennent pas à capter les interconnexions complexes entre des relations d'échange privées. Le droit des contrats ne capte pas, mais obscurcit la manière dont les relations et expériences de nombreux acteurs dans des CVG sont liés. Cet article soutient qu'en faisant cela, le droit des contrats participe à une injustice herméneutique systémique. L'injustice herméneutique systémique capte la manière dont les ressources interprétatives partagées peuvent rendre ceux qui sont dans une position désavantageuse du point de vue du pouvoir social incapables à comprendre ce qui est dans leur intérêt. Le but premier de cet article est de montrer comment cette forme d'injustice est produite en droit des contrats et comment elle peut fonctionner comme une contrainte normative indépendante sur l'institution du droit des contrats.

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Zusammenfassung: Globale Wertschöpfungsketten (global value chains – GVCs) entziehen sich einer angemessenen vertragsrechtlichen Erfassung, da die komplexen Zusammenhänge zwischen privaten Austauschbeziehungen durch die Vermutung der bilateralen Vertragsstruktur und der Parteiautonomie nicht erfasst werden. Das Vertragsrecht scheint die Art und Weise, in der die Beziehungen und Erfahrungen der verschiedenen Akteure in den GVCs miteinander verknüpft sind, eher zu verschleiern als in den Blick zu nehmen. Dieser Beitrag argumentiert, dass das Vertragsrecht dabei zu systemischer hermeneutischer Ungerechtigkeit beiträgt. Solche systemische hermeneutische Ungerechtigkeit entsteht, wenn geteilte Deutungsressourcen diejenigen in benachteiligten Positionen der sozialen Macht unfähig machen, ihre Interessen zu artikulieren. Der Beitrag soll vor allem zeigen, wie diese Form der Ungerechtigkeit auf das Vertragsrecht wirkt und wie sie als unabhängige normative Einschränkung der Institution des Vertrags funktionieren kann.

Introduction

Contract law governs private exchange relationships and contributes to our collective understanding of people’s experiences of private exchange. It produces authoritative, evaluative judgements about how parties are to conduct themselves when engaging in transactional activity and interpretations regarding the legitimacy and acceptability of transactional interactions and their outcomes. Dominant understandings of contract law assert the normative significance of the bilateral structure of contract and often exclude dimensions of systemic injustice from contract’s normative account.¹ Some theories of contract, and private law more broadly, even argue that contractual justice solely revolves around what is just in the bilateral relationships between parties.² Yet, contract’s normative foundations stand in tension with the characteristic ‘chain structure’ of Global Value Chains (GVCs).³ While contract law can be described as the social institution of

1 G. Klass, G. Letsas and P. Saprai (eds), *Philosophical Foundations of Contract Law* (Oxford: Oxford University Press, 2014); D. Caruso, ‘Private Law and State-Making in the Age of Globalization’ 39 *International Law and Politics* (2006) 1–74.

2 E.J. Weinrib, *The Idea of Private Law* (Cambridge: Harvard University Press, 1995).

3 F. Cafaggi and P. Iamiceli, ‘Supply chains, contractual governance and certification regimes’ 37 *European Journal of Law and Economics* (2014) 131–173; K. Sobel-Read, G. Anderson and J. Salminen, ‘Recalibrating Contract Law: Choses in Action, Global Value Chains and the Enforcement of Obligations Outside of Privity’ 93 *Tulane Law Review* (2018).

GVCs, it fails to capture the complex interconnections between private relations within GVCs.

Contract law seems to obscure, rather than capture, the characteristic interconnectedness between contractual relations in GVCs and between the experiences of various actors in such chains. In doing so, contract law may contribute to and perpetuate a particular form of systemic injustice, namely hermeneutical injustice. Systemic hermeneutical injustice, as developed by Miranda Fricker, captures ‘*the injustice of having some significant area of one’s social experience obscured from collective understanding owing to a structural identity prejudice in the collective hermeneutical resource.*’⁴ The harm and associated ramifications of systemic hermeneutical injustice can create significant disadvantages for those who are already in disadvantaged positions of social power. The primary harm entails the inability to make intelligible that what is in their interest to render intelligible. Systemic hermeneutical injustice concerns their standing as equal knowers and impacts their ability to make claims of injustice. Important ramifications include obstacles that stand in their way to pursue prevention or access remedies for mistreatment.

This paper aims to show how contract law contributes to systemic hermeneutical injustice. To illustrate this point, this article examines the way in which contract law frames and seeks to address issues around exploitative production conditions in GVCs. At the intersection of contract law and Global Value Chains (GVCs), various strategies have been developed to address the tension between contract’s normative foundations and GVC characteristics. For instance, in contract, the notion of contractual privity—as an expression of party autonomy—is often understood to capture the significance of contract’s bilateral nature. Consequently, contractual rights and obligations are limited to the parties who have consented to contract: only they can pursue remedies for breach or seek to enforcement. In efforts to capture the interconnectedness between contractual rights and obligations across GVCs and overcome potential obstacles to address GVC exploitation, privity has been a focal point for analysis.⁵ This article illustrates how *both* contract’s failure to capture the complex interconnections between private relations within GVCs, *and* contractual strategies to overcome potential obstacles to address GVC exploitation, contribute to systemic hermeneutical injustice.

4 M. Fricker, *Epistemic Injustice: Power and the Ethics of Knowing* (Oxford: Oxford University Press, 2007) 156. For the generic definition that includes hermeneutical injustices that are non-systemic see, see 159: ‘the injustice of having some significant area of one’s social experience obscured from collective understanding owing to hermeneutical marginalization.’

5 Sobel-Read, Anderson and Salminen, n 3 above; Cafaggi and Iamiceli, n 3 above, 149.

The article is structured in two main parts. Section I assesses the underlying assumptions and collective understandings that frame contractual strategies to address and overcome exploitative production conditions in GVCs. Some strategies seek to overcome privity constraints and establish pathways towards compliance and enforcement of obligations across the chain. Such strategies generally take contracts and their obligations for granted under the assumption that enforcement will produce overall desirable outcomes.

On the one hand, this assumption is coupled with the idea that corporations should (be able to) take responsibility, and be held responsible, for production conditions in their GVCs. This idea reflects the common understanding that exploitative production conditions in GVCs are mainly an issue of irresponsible corporate conduct and complicity. On the other hand, the assumption of the benign nature of contracts and their enforcement, alongside the narrative of corporate complicity, is accompanied by the view that consumers are weak parties in need of legal protection from irresponsible corporate conduct. Contract law's dominant framing of the problem of deplorable production conditions in GVCs contributes to our collective understanding about GVC relations—their social acceptability and legal permissibility—and the respective roles that consumers and corporations play. Importantly, it frames how we think of the respective relationships between consumer and corporate conduct, on the one hand, and the exploitative production conditions that impact the experiences of workers in GVCs on the other hand.

Section II of this article examines contract law's framing from the perspective of systemic hermeneutical injustice. As contract law shapes our understandings of exploitative production conditions in GVCs, does it obscure from collective understanding something of significance to the experiences of actors who lack, or are in disadvantaged positions of, social power in the chain, in particular those who are subject to exploitation? The analysis in this section proceeds in four steps. First, it focuses on and shows how contract law functions as a collective hermeneutical resource. Second, it examines how a contractual lacuna could obscure the experiences of those who lack, or are in disadvantaged positions of, social power. Does contract law's dominant framing of the problem of deplorable production conditions in GVCs fail to capture something that could be of significance to the experiences of workers who are subject to exploitation? Third, does the contractual lacuna simultaneously create an unfair disadvantage for those who lack social power and a corollary advantage for those with social power? And lastly, can the lacuna in contract law be explained as a result of the denial of hermeneutical participation by those who lack social power? Taken together these four parts address the question whether or not contract law suffers from structural prejudice because those with social power are disproportionately able

to influence how we collectively frame and understand the experiences of workers subject to exploitative production conditions in GVCs?

By focusing on contract law's framing of exploitative production conditions in GVCs, this article can contribute to the broader examination of the proper role of contract law as the social institution of GVCs. However, the ultimate aim of this article is to begin to show how considerations of systemic hermeneutical injustice bear on contract law generally. The article aims to establish systemic hermeneutical injustice as an independent and normatively significant consideration for contract law, which may constrain our choices for alternative contractual regimes, rules and their interpretations and justifications beyond the scope of discussions of contractual governance of GVCs.

I Contract Law and Global Value Chains

At the intersection of contract law and GVCs, privity has been a focal point of analysis.⁶ Privity, as an expression of party autonomy, is often understood to capture the significance of contract's bilateral nature. Contractual rights and duties are limited to the parties who have consented to the contract: only they can pursue remedies for breach or seek enforcement. The constraints that privity places on how parties can exert legal control through contract are of particular significance for those concerned with production conditions in GVCs. Deplorable production conditions in GVCs have long been a target of criticism. Corporate social responsibility (CSR) initiatives and codes of conduct are presented as one strategy to address them. In contract law's context, the question arises how actors can overcome privity constraints and secure compliance beyond bilateral relationships and across the entire chain. Efforts in contract law, and private law broadly, have focused on overcoming the constraints of privity in order to align the legal institution with the characteristic 'chain structure' of global value chains.⁷ Some of the strategies that are developed in this context share underlying assumptions and collective understandings that frame how the issue of exploitative production conditions in GVCs is understood. These include contractual strategies that revolve around images of the irresponsible corporation and the weak consumer, as well as those that take for granted the rights and obligations between parties,

⁶ Sobel-Read, Anderson and Salminen, n 3 above; Cafaggi and Iamiceli, n 3 above, 149.

⁷ See for instance Sobel-Read, Anderson and Salminen, n 3 above. See for an overview of alternative pathways in tort also A. Bagchi, 'Production Liability' 87 *Fordham Law Review* (2019) 2501–2538.

thereby sidestepping the question of the legal permissibility of the terms and relationships that structure GVCs (see section I.1.).

1 The Dominant Contractual Frame: Corporate Complicity and Consumer Weakness

By and large, the collective story around exploitative production conditions in GVCs revolves around big corporations and suppliers who are at fault and responsible for sustaining them. In particular, the image of GVC-sweatshops is intimately tied to corporations' moral complicity for pursuing production relations on the basis of terms and conditions that ultimately sustain, if not require, exploitation in their GVCs. In the legal realm, activists, legislators, and scholars alike have sought avenues to give legal significance to corporate responsibility for exploitative conditions. Their efforts have focused on overcoming the legal obstacles to telling the story of corporate responsibility for sweatshop exploitation in GVCs. And legal scholarship has focused on the question of how to give legal significance to corporate social responsibility standards and codes of conduct.⁸

Strategies in private law, and contract law specifically, are no exception.⁹ The dominant private legal narrative echoes and retells the story of the irresponsible or even malicious corporation, ie the corporation who acts only to maximize their own profits regardless of potential harm to others. How private law tells the story of corporate complicity contributes to our collective understanding of relationships and experiences within GVCs. Private law's inquiries produce resourceful pathways towards establishing corporate legal responsibility and accountability. One strand of inquiry focuses on overcoming potential obstacles of private law that hinder corporations in pursuing supplier compliance with corporate social responsibility standards and codes of conduct. Some have suggested that corporations may use choses in action doctrine to overcome the obstacle that privity

⁸ See for instance: A. Beckers, *Enforcing Corporate Social Responsibility Codes. On Global Self-Regulation and National Private Law* (Oxford: Hart Publishing, 2015); D. McBarnet, 'Corporate Social Responsibility Beyond Law, Through Law, for Law: The New Corporate Accountability', in D. McBarnet, A. Voiculescu and T. Campbell (eds), *The New Corporate Accountability: Corporate Social Responsibility and the Law* (Oxford: Oxford University Press, 2007).

⁹ See for instance: Bagchi, n 7 above; L. Vytöpil, *Contractual Control in the Supply Chain* (The Hague: Eleven International Publishing, 2015); E. Tjong Tjin Tai, *TFE, Over de grenzen van het privaatrecht* (Tilburg: Tilburg University, 2011); A.G. Castermans, *De burger in het burgerlijk recht. Of de eigenschappen van perensap* (The Hague: Boom Juridische Uitgevers, 2009); C. Van Dam, *Onderneming en Mensenrechten* (The Hague: Boom Juridische Uitgevers, 2008).

poses to enforcement of obligations throughout the value chain.¹⁰ To the extent that such inquiries suggest that corporations use the privity doctrine as a reason to refrain from taking responsibility and further action, they invoke the image of the irresponsible corporation.

What is more, to the extent that legal strategies seek to overcome privity and ensure compliance, such efforts take for granted the rights and obligations that contracts aim to impose between parties. Namely, the question of how parties in the chain can ensure enforcement or pursue liability for breach of obligations that arise from contracts they are not party to, presumes the benign character of the contract and its terms. Efforts to overcome obstacles to enforcement take for granted the compatibility of contractual obligations with CSR compliance. The object of inquiry—the contract—is presumed to pursue and result in desirable and beneficial outcomes. The pursuit of contractual compliance sidesteps the question whether simultaneous compliance with CSR standards or codes of conduct is possible.¹¹ In some instances, corporations may be able to impose and dictate terms throughout the GVC that are in fact not compatible with responsible production conditions.¹² In other words, even where legal strategies successfully overcome legal obstacles—such as privity—to achieve enforcement and compliance throughout the chain, they do not necessarily mitigate corporate complicity.

The image of the irresponsible corporation is made explicit in inquiries that focus on how and by whom corporations can be held liable for exploitative production conditions of their suppliers and subsidiaries.¹³ For instance, should sweatshop workers be able to claim damages directly from lead firms or are other

10 Sobel-Read, Anderson and Salminen, n 3 above.

11 Research suggests this is not necessarily the case. See for instance, J. Phillips and S.-J. Lim, 'Their Brothers' Keeper: Global Buyers and the Legal Duty to Protect Suppliers' Employees' 61 *Rutgers Law Review* 61 (2009), 333–379 ('When we have to meet a production schedule and the code is prohibiting us from meeting the target, the buyer often turns his head and pretends not to see. With tacit consent from the buyer, we will bring in outside workers, subcontract to another factory (whose labor standards we have no idea about), or ask our workers to do overtime that exceed the country labor law. These activities to meet a production schedule are considered "normal" in our industry. (...) These interviews are consistent with research demonstrating the conflict between code compliance and the market pressure buyers sometimes place on suppliers.' See 372).

12 See for instance: R. Ross, *Slaves to Fashion* (Ann Arbor: University of Michigan Press, 2004) 129–130; R. Armbruster-Sandoval, *Globalization and Cross-border Labor Solidarity in the Americas: the Anti-Sweatshop Movement and the Struggle for Social Justice* (New-York: Routledge, 2005) 7.

13 See for instance, A.G. Castermans and J.A. van der Weide, 'The Legal Liability of Dutch Parent Companies for Subsidiaries' Involvement in Violations of Fundamental, Internationally Recognized Rights' (Commissioned by the Dutch Ministry of Economic Affairs, 2009).

parties, such as consumers, more favorably positioned to hold corporations liable?¹⁴

Alternative strategies have suggested ways to offer legal protection to consumers against corporate transgressions. For instance, in instances where corporations explicitly brand and market their products as produced under responsible production conditions some have suggested that consumers may rely on fraud or misrepresentation.¹⁵ Similarly, some contract scholars have focused on ways in which consumers may invoke non-conformity of goods to rescind from sales contracts, if the goods don't meet their reasonable expectations that they are produced under decent production conditions.¹⁶

Together these approaches complement the image of the complicit corporation with the idea of consumers as weaker parties deserving and in need of legal protection. The contractual lens reinforces our collective understanding that the issue of exploitation in GVCs is first and foremost one of corporate irresponsibility and complicity, sometimes supplemented by suppliers' misbehavior that corporate actors ought to control and correct. It adds to this narrative, the idea that consumers are well-intentioned, benevolent actors. They care about the lives that others are able to live elsewhere as demonstrated by their preferences for consumer goods that are produced under responsible production conditions. Ultimately, the contractual narrative relies on the idea that consumers do not want to buy products produced in sweatshops and that responsible production is an important consumer consideration and reasonable expectation. As such, contract law's role is understood as protecting consumers from their unknowing and unwilling complicity by allowing them, for instance, to rely on misrepresentation or non-conformity. Contract law understands consumers as weaker parties who are potentially duped by corporations into buying goods that are made in sweatshops. The law ought to protect their reasonable expectations for responsibly made goods.

In short, the available dominant contractual narrative about exploitation in GVCs is one of corporate transgression and consumer weakness, one in which the consumer is duped into buying goods produced in GVC sweatshops. As we have seen, the narrative relies on two familiar images. First, on the familiar and broadly established image of the socially irresponsible, profit seeking corporation. Corporations are morally complicit in GVC exploitation of workers and the law ought

¹⁴ See for instance, Tjong Tjin Tai, n 9 above. Castermans, n 9 above; and Bagchi, n 7 above who argues for corporate production liability enforced by public means.

¹⁵ See Bagchi, n 7 above, discussion at 2532.

¹⁶ T. Wilhelmsson, 'Varieties of Welfarism in European Contract Law' 10 *European Law Journal* (2004) 712–733; H. Collins, 'Conformity of Goods, the Network Society, and the Ethical Consumer' 22 *European Review of Private Law* (2014) 619–640.

to hold them accountable. And second, the contractual narrative relies on the familiar image of the weak, vulnerable, benevolent consumer whom the law ought to protect and empower. Consumer choices are viewed charitably such that their conduct does not invoke the idea of moral complicity for exploitation in GVCs. To the extent that consumers are viewed as morally implicated, such implications do not have legal significance. What is more, the narrative assumes that consumers are entitled to seek out low priced, quickly produced consumer goods, even if they are aware of, or would have a preference for, sweatshop produced goods. From a contractual lens, such consumer behavior by and large falls within the range of normal transactional activity and this view aligns with the general presumption that contractual enforcement—in this case of consumer sales contracts—in GVCs is benign.¹⁷ Consumers who are aware of exploitative production conditions of consumer goods can generally rely on ordinary contractual recognition and enforcement mechanisms, while consumers who reasonably expected their goods to be produced under responsible conditions can invoke legal protection such as non-conformity.

2 An Alternative Story: Consumer Complicity in GVC Exploitation

However, consumer practices generally do not warrant optimism about the significance of exploitative production conditions of consumer goods. Awareness about sweatshop exploitation in GVCs is prevalent in the minds of consumers.¹⁸ Moral outrage occasionally surfaces in response to disasters that occur as a result of dangerous production conditions, such as the collapse of the Rana Plaza in Bangladesh in 2013. Abiding concerns about production conditions and their impact on those who are exposed to them have led to a multitude of responses and initiatives, but this has not significantly impacted consumer demand for sweatshop produced goods.¹⁹ Corporations are not the only actors for whom prefer-

¹⁷ L.K.L. Tjon Soei Len, *Minimum Contract Justice. A Capabilities Perspective on Sweatshops and Consumer Contracts* (Oxford: Hart, 2017).

¹⁸ See also Bagchi, n 7 above: ‘The problem is not really that consumers are unaware of dangerous working conditions so much as the sheer pervasiveness of those conditions raises the cost of deliberately avoiding such goods beyond the price many consumers are apparently willing to pay.’ See 2513.

¹⁹ See for a comparison between two initiatives in response to the collapse: J. Salminen, ‘The Accord on Fire and Building Safety in Bangladesh: A New Paradigm for Limiting Buyers’ Liability in Global Supply Chains?’ 66 *American Journal of Comparative Law* (2018) 411–451.

ences regarding low costs determine conduct and contractual choices: despite awareness about exploitative GVC conditions, consumers seek out low priced products and continue to buy sweatshop produced goods. The dominant contractual narrative, however, does not capture potential consumer complicity in contributing to and perpetuating GVC sweatshop exploitation. Each of the discussed private law strategies either does not attribute legal significance to the role of consumers or leaves them out of the analysis entirely. In doing so, the connection between consumer sales for sweatshop goods and sweatshop exploitation is left out of the contractual narrative: contract law makes invisible how consumer choices maintain sweatshop exploitation in GVCs and how consumers profit from efforts to produce goods under low cost conditions. Consumer preferences for low prices and the fast availability of trendy goods (eg fast fashion) do not prioritize or take account of the financial burdens and constraints that are associated with decent production conditions. An alternative narrative of consumer complicity reconfigures our understanding of the relationship between consumer demand, ie sales contracts, and exploitative GVC conditions.

Central features that make up the descriptive core of sweatshop exploitation are connected to consumer sales terms. Exploitative GVC conditions involve various deplorable practices and conditions such as low wages, long working days, health and safety hazards, elements of force and coercion, and degrading practices.²⁰ These features exist and persist in segments of the garment industry that are engaged in fast fashion strategies. Fast fashion evolves around the ability of corporations to provide consumers with the latest trends at low costs. It requires that corporations are able to tap into quickly shifting trends and consumer demand that is driven by fashion influencers and trend setters. It requires supply factors that are capable of responding to unpredictable, fast-shifting consumer demand, which includes high flexibility and short lead-times at low production costs. Unpredictable consumer demand is part of the type of market dynamics that incentivizes exploitative production conditions that enable short lead-times and low cost production.

An alternative narrative about consumer choices would not only shift our understanding of consumer complicity, but would also show that it can be a mistake to take contractual rights and obligations for granted under the assumption that contractual enforcement and compliance across GVCs will produce overall desirable outcomes. The assumption downplays the real possibility that contractual

²⁰ See for an overview: P. Varley, *et al*, *The Sweatshop Quandary: Corporate Responsibility on the Global Frontier* (Investor Responsibility Research Center, 1998); D.G. Arnold and N.E. Bowie, 'Sweatshops and Respect for Persons' 13 *Business Ethics Quarterly* (2003) 221–242; Ross, n 12 above.

terms—in consumer sales contracts as well as across a GVC—are counterproductive and incompatible with CSR codes and responsible production conditions generally.

This alternative understanding can be captured by contract law if it allows space to depart from the image that consumers are benevolent actors in need of legal protection and no longer takes contractual rights and obligations for granted. Specifically, in cases where it is evident that consumers are aware of exploitative GVC conditions and prefer and pursue low cost, quickly produced goods, contract law can capture consumer complicity by deeming such contracts immoral and therefore invalid.²¹ This form of legal recognition of consumer complicity would bar any benefits they would receive as a result of contractual enforcement or consumer protection. A similar contractual approach can be taken in relation to other GVC contracts the terms of which are incompatible with responsible production conditions. Through legal immorality, contract law can contribute to our collective understanding of the occurrence and perpetuation of exploitative conditions in GVCs that are maintained, not only because corporations impose terms in GVC that seek to maximize corporate profit, but because consumers continue to buy sweatshop produced goods in spite of awareness about exploitative production conditions in GVCs.²²

II Hermeneutical Injustice

This article argues that it matters, in terms of systemic hermeneutical justice, how contract law frames the roles that GVC actors play in maintaining exploitative production conditions. Contract law contributes to a specific type of epistemic injustice, ie systemic hermeneutical injustice, by masking the relationship between the consumption of sweatshop goods and their production.²³ Contract law

21 Tjon Soei Len, n 17 above, and L.K.L. Tjon Soei Len, *Capabilities, Contract, and Causality: The Case of Sweatshop Goods in Langille, The Capabilities Approach to Labour Law* (Oxford: Oxford University Press, 2019). The claim is not that this alternative framing of consumers (as complicit actors) should always replace the existing contract frame. Rather, the point is merely to show that, as it stands, the dominant contract frame by and large does not make space for this alternative understanding of consumers.

22 The argument regarding contractual immorality first and foremost applies to cases where consumers are aware, or ought to be aware, of the exploitative GVC conditions. See for a more detailed discussion: Tjon Soei Len, n 17 and n 21 above.

23 This article only focuses on systemic hermeneutical injustice, as opposed to incidental types of hermeneutical injustice that hold no connection to identity prejudice, social powerlessness, or social power inequalities, See Fricker, n 4 above, 157–159. See also M. Fricker, ‘Epistemic Injustice

obscures an important aspect of the experience of sweatshop workers in GVCs, in particular our collective understanding of who is complicit in their exploitation.

This section details the idea of hermeneutical injustice as a systemic instance of epistemic justice, as advanced by Miranda Fricker, and extends the idea to the realm of contract law. It analyses and situates contract law's dominant narrative about of exploitation in GVCs through the idea of hermeneutical injustice and asks how, if at all, contract law obscures from collective understanding the social experiences of persons in socially disadvantaged positions of power.

In Epistemic Injustice, Fricker identifies a manifestation of hermeneutical injustice that is institutional and systemic in nature. Fricker defines the systemic manifestation of hermeneutical injustice as:

*'the injustice of having some significant area of one's social experience obscured from collective understanding owing to a structural identity prejudice in the collective hermeneutical resource.'*²⁴

Systemic hermeneutical injustice helps identify the ways in which inequalities in social power produce inequalities in the structuring of collective social understanding. Inequality in the ability to structure collective social understanding matters, because it may render some unable to make intelligible that what is in their interest to render intelligible.²⁵ This is what Fricker describes as the primary harm of hermeneutical injustice. The primary harm of hermeneutical injustice can have various ramifications. For instance, valuable opportunities may be unavailable as a result of one's social experience being obscured from collective understanding, material disadvantage may follow, or one may experience epistemic disadvantages (eg obstacles to gaining knowledge) as a result of loss of epistemic confidence.²⁶ As we will see later, potential ramifications of hermeneutical injustice produced by contract law in the context of GVC exploitation may be articulated in a variety of ways, though some important disadvantages include the lack of pathways to prevention or available remedies.

In order to understand systemic hermeneutical injustice and the way in which the structural inequality arises it is helpful to examine an example. Fricker's

and the Preservation of Ignorance', in R. Peels and M. Blauw (eds), *The Epistemic Dimensions of Ignorance* (Cambridge: Cambridge University Press, 2016).

²⁴ Fricker, n 4 above. For the generic definition that includes hermeneutical injustices that are non-systemic see, Fricker, n 4 above, 159: 'the injustice of having some significant area of one's social experience obscured from collective understanding owing to hermeneutical marginalization.'

²⁵ Fricker, n 4 above, 163.

²⁶ Fricker, n 4 above, 164.

prime illustration of systemic hermeneutical injustice regards the lacuna in the collective resource that existed prior to the recognition and labeling of the social practice and experience of sexual harassment. In the absence of proper collective recognition of sexual harassment, women's experiences remained 'obscure, even unspeakable, for the isolated individual'.²⁷ Prior to the conceptualization of sexual harassment and its social recognition, individual women 'did not know why [they] had been singled out, or indeed if [they] had been singled out'.²⁸ In the absence of the concept and recognition of sexual harassment as a form of gender discrimination, women may have wondered if their own behavior invited the mistreatment, if their individual characteristics or choices may have invited the unwelcome 'advances', 'flirtations', or 'jokes' (eg behavior, style of dress, appearance). They may even have wondered if they were 'overly sensitive' in their experiences of discomfort and hostility.²⁹ In the sexual harassment example, it is clear that the unintelligibility of women's experience affected both the harassee and harasser. While the harassees wondered about how their own behavior contributed or invited mistreatment, harassers often did not perceive themselves as mistreating others. Their behavior seemed to fit within the sphere of normal social interaction and therefore no compelling reason pressed for change in their behavior.

The illustration of sexual harassment is one where the proper meaning of women's treatment remained obscured for both harasses and harassers, as well as from collective understanding. However, what is crucial to systemic hermeneutical injustice, is not the fact that *none* of the parties recognized the meaning of sexual harassment,³⁰ but that the hermeneutical lacuna made it impossible for

²⁷ Fricker, n 4 above, 149.

²⁸ Fricker, n 4 above, 150–151 who cites the experience of Carmita Wood as told by Brownmiller.

²⁹ Some women today may still be in doubt and wonder about whether their experiences could be properly understood as normal and acceptable forms of social interaction or as forms of discriminatory mistreatment (eg more recent debates about catcalling and street-harassment signify a shift in social understanding in some social contexts in this regard). Yet in the realm of sexual harassment such doubt may merely amount to a misunderstanding of what sexual harassment looks like, rather than the absence of a collective resource, ie the concept of sexual harassment itself, that could make it collectively intelligible.

³⁰ Hermeneutical injustice occurs in divers forms and, within Fricker's account, can range from 'a "maximal" and a "minimal" case—that is, between a case where the individual was not in a position to make proper sense of her own experience even to herself; and, by contrast, a case where the individual could make perfect sense of it, and could have communicated it to almost any social other except the particular social others he specially needed to communicate it to.' See Fricker, n 23 above, 6. See different T.S. Goetze, 'Hermeneutical Dissent and the Species of Hermeneutical Injustice' 133 *Hypatia* (2018) 73–90.

women to communicate their experience intelligibly to relevant others. Even in instances where those who were harassed would have perfectly understood their own experience, the lacuna in the collective resource presented a significant disadvantage to them as their experience could not be communicated intelligibly to the relevant others, ie those with the power to prevent the mistreatment or provide effective remedies. The harms of the hermeneutical injustice in the case of sexual harassment consisted of both primary and secondary harms. The hermeneutical injustice rendered women unable to make intelligible that what was in their interest to render intelligible. It harmed them in their interests to understand their own experience and to communicate those experiences to others in order to pursue different, better treatment. The injustice created obstacles for women to pursue effective pathways for prevention and remedies and it blocked their ability to hold harassers accountable.³¹ Moreover, the harm of the hermeneutical injustice could also be articulated as a loss of epistemic confidence, contributing to obstacles for women to see and position themselves as knowers and to pursue knowledge. In this sense, the harms of hermeneutical injustice can also be articulated as constraints on individual self-development and self-determination.

The example of sexual harassment illustrates how the hermeneutical lacuna harmed those in disadvantaged positions of social power by subjecting them to discriminatory and unfair disadvantage. It presents a systemic hermeneutical injustice, not merely because the knowledge obscured resulted in unfair disadvantage and harm, but because it arose from structural inequality of social power. Those affected lacked the social power to properly influence the collective tools for social understanding to begin with. In the case of sexual harassment, women were disproportionately underrepresented in positions of power that could have affected and raised collective consciousness. As Fricker describes, the injustice is informed by the fact that the disadvantaged group is ‘persistently denied full hermeneutical participation’.³² That is to say, the absence of collective knowing and recognition results from unfair structural background social conditions that create social powerlessness or social power inequalities and prevent participation in collective knowledge production. Relevant power inequalities may result from aspects of material and economic inequalities, as well as identity power.³³ Fricker captures the structural nature of the injustice as follows:

³¹ Fricker, n 4 above, 152–153.

³² Fricker, n 4 above, 154 who refers to this phenomenon as hermeneutical marginalization, ie the instance where structural social powerlessness or unequal power relations prevent hermeneutical participation or exclude those who are disadvantages from collective knowledge production.

³³ Fricker, n 4 above, 155 and 157–159.

‘[the denial of participation in collective knowledge production] renders the collective hermeneutical resource structurally prejudiced, for it will tend to issue interpretations of that group’s social experience that are biased because insufficiently influenced by the subject group, and therefore unduly influenced by more hermeneutically powerful groups (...).’³⁴

In other words, systemic hermeneutical injustice captures the discriminatory nature of the resources itself, such that those in disadvantaged positions are unable to make their experience collectively intelligible. This harms them not only in their status as knowers, but also in their ability to claim standing in making claims of injustice and in their ability to prevent and pursue proper remedies to their mistreatment. Systemic hermeneutical injustice shows how those already disadvantaged in terms of structural inequalities in social power may be harmed as a result of structural inequalities in hermeneutical participation and power.

1 Contract Law as a Hermeneutical Resource

Does contract law function as a collective hermeneutical resource in a meaningful way and produce collective knowledge and understanding? Generally speaking, legal institutions offer authoritative interpretations and evaluations regarding the legal significance of social conduct and often function as authoritative tools for assessments of the social (im)permissibility of conduct itself. As such, legal institutions play an important role in producing collective knowledge and shaping shared interpretations about social interactions and experiences. How we understand contract law’s role in contributing to collective knowledge depends on what we consider to be contract law’s proper scope. Depending on context, ‘contract law’ may have various narrow interpretations that rely, for instance, on the particular origin of rules: one may only refer to the common law of contracts (as opposed to statutes) or only to rules of national origin (as opposed to transnational or international instruments). Yet a broad interpretation understands contract law to be the law governing relationships of private exchange, such that a wide range of legal instruments can be considered to fall within its scope. When referring to contract law for the purpose of analyzing systemic hermeneutical injustice, I mean to use this inclusive, broad view.

Contract law, understood as the law governing private exchange, plays an important role in generating collective knowledge. Contract law informs how we think of and understand relationships of private exchange, market relations, and how we assess the justice of market outcomes. For instance, are disadvantageous

³⁴ Fricker, n 4 above, 156.

market outcomes the result of individual choices, impermissible conduct and market practices, or institutional failures? Who should bear responsibility and what avenues for prevention and remedy ought to be available to amend unfavorable outcomes, if any? As the foundational legal institution of the market, contract law influences how we think of what a fair and just market order looks like and how we understand the role of particular market participants and the limits of permissible conduct.³⁵

The market, moreover, plays an important role in people's lives and private exchange relations make up a meaningful set of the interactions that we engage in with other people. Contract law thus produces collective knowledge about an important area of social experience, and it functions as shared tool for social interpretation of the ways in which we experience market participation and its outcomes. The institution of contract law thus functions as an important hermeneutical resource by issuing interpretations about our market experiences.

To illustrate how contract law can contribute to systemic hermeneutical injustice the following section will analyze contractual interpretations of GVC exploitation. As contract law shapes our understandings of exploitative production conditions in GVCs, how does it obscure from collective understanding something of significance to the experiences of actors who lack, or are in disadvantaged positions of, social power in the chain? The analysis in this section proceeds in four steps and describes how 1) contract law functions as a shared tool for social interpretation; 2) a lacuna in contract law's tools for interpretation obscures the experiences of those who lack, or are in disadvantaged positions of, social power; 3) the lacuna simultaneously creates an unfair disadvantage for those who lack social power and the correlative advantage for those with social power; and 4) contract law may exhibit structural prejudice as a result of the denial of hermeneutical participation by those who lack social power.

2 Contract Law and Hermeneutical Injustice

To see how contract law may produce and contribute to systemic hermeneutical injustice it is helpful to recall contract law's dominant narrative as it relates to our understanding of sweatshop exploitation in GVCs and the available alternatives. In section (I), we have seen how the dominant contractual narrative frames our

³⁵ It does so in conjunction with other areas of private law such as tort and property law. J. W. Singer, 'Things that We Would Like to Take for Granted: Minimum Standards for the Legal Framework of a Free and Democratic Society' 139 *Harvard Law & Policy Review* (2008) 139–159.

understanding of consumer conduct. The contractual lens issues a charitable interpretation of consumers in the context of GVCs: they are benevolent, weaker parties who the law ought to protect against corporate actors who seek to sell consumers goods, which are produced under exploitative conditions. The contractual narrative taps into the moral and public outrage that occasionally surfaces in response to events that reveal the devastating ramifications of exploitative production conditions, such as the collapse of the Rana Plaza. The outrage is generally directed at corporate conduct and reflects only marginally, if at all, on consumer conduct. While initiatives aimed at corporate responsibility are numerous, there is no significant effort directed at altering consumer conduct or at articulating standards around ‘consumer responsibility’. Moreover, any moral outrage expressed by consumers themselves has little effect on their conduct and on overall consumer demand for goods produced in sweatshops.

Contract law either makes the role that consumers play in sustaining demand for sweatshop produced goods and thus their moral complicity invisible, or it distorts their role by framing them as weaker parties who are duped by corporations. In doing so, contract law obscures from our collective understanding the fact that consumer demand sustains cheap production and fails to capture the moral complicity of consumers who knowingly choose to buy sweatshop produced goods. The point is not that contract law ought to reflect uniform moral complicity between corporations and consumers (or across other participants in a GVC),³⁶ but rather that contract’s interpretation of the role of consumers distorts our collective understanding of sweatshop exploitation by leaving out the possibility to capture consumer complicity. Contract’s frame leaves insufficient space for an alternative understanding of consumer complicity. In particular, it obscures from our understanding the idea that the exploitative experiences to which sweatshop workers are subjected in GVCs are not merely the result of the actions of suppliers and corporate actors to maximize profit, but also sustained by consumer choices. By taking the social acceptability and legal permissibility of consumer contracts for granted, contract law obscures the fact that consumers *can* act in undesirable and irresponsible ways and that they may bear responsibility for disadvantageous market outcomes to which they contribute.

Adding to the contractual narrative the idea of consumer moral complicity matters, because it shifts our collective understanding of sweatshop exploitation in several ways. It may shift how sweatshop workers think of their own experi-

³⁶ I agree with Bagchi n 7 above, that not all GVC members share equal fault: (‘Even if the supply chain were to be regarded as a group, members do not share equal fault because they contribute differently to the harm at issue. In fact, we might attempt to set up a sliding scale of complicity from copartners to noncausal participation or unknowing contribution.’ See 2523).

ences in GVCs, about who is complicit in their exploitation and who profits from it. It may also shift how consumers think of their own choices and responsibilities. In particular, it can create avenues for action, prevention and remedy that would otherwise remain unavailable. For instance, as suggested above and elsewhere,³⁷ if consumers are morally complicit in sweatshop exploitation, this can alter contractual evaluations of consumer sales contracts. Whereas currently, contracts for sweatshop produced goods fall within the sphere of normal transactional activity, a more activist judicial approach to contractual interpretation could capture consumer complicity, at least in some cases, by denying contractual validity of consumer sales through contractual immorality. What is more, if contract law were to capture the idea of consumer complicity this would contribute to a more critical perspective on consumer privilege and entitlement generally: under which conditions, if at all, are consumers entitled to low priced goods and maintain their lifestyles? It is relevant that consumers of sweatshop goods and sweatshop workers are not randomly located across the globe, but that their positions reflect broader patterns of global inequality. While the category of consumers is internally diverse, and consumers have different reasons to seek out low priced goods (ie ranging from fulfilling basic needs to sustaining privileged lifestyles with quickly rotating, disposable goods), a substantial portion of sweatshop production takes place in GVC of relatively luxury goods, such as smartphones and fast fashion. For these goods, claims that revolve around consumers' basic needs lack credibility. In cases where consumers directly profit from exploitative production conditions in GVCs (for instance through lower prices or availability of products due to short lead-times), it is unclear why consumers would be entitled to such benefits.

Ultimately, the lacuna in contract law around the role that consumers play in GVC exploitation contributes to an unfair disadvantage for sweatshop workers and a correlative advantage for consumers. Some sweatshop workers may not view their experiences in terms of exploitation at all, particularly if exploitative production conditions are prevalent and viewed as the best option given available alternatives. It may be more difficult for sweatshop workers to identify the systemic nature of their exploitation if complicity is solely articulated in relation to corporate greed or supplier mistreatment. They may wonder if their working conditions are determined by a particular supplier or a particular buyer, ie lead firm, and thus as a result of relative misfortune rather than systemic global exploitation. Importantly, in the absence of understanding their experience, it becomes more difficult to determine who has power and control to affect change and how change can be pursued and achieved.

³⁷ Tjon Soei Len, n 17 above.

Alternatively, even if sweatshop workers do understand their experience as one of systemic exploitation, they may be disadvantaged if complicity and responsibility of various actors in their exploitation is obscured, in particular, they may wonder about the various roles that the various GVC actors play. Even in the absence of a hermeneutical lacuna in their own understanding, sweatshop workers are faced with obstacles to communicate intelligibly their experience of exploitation in the absence of our collective understanding of consumer complicity in GVC exploitation. Collective understanding regarding the moral status of sweatshops remains contested and a variety of arguments prevail in terms of interpreting experiences in GVCs. Notable examples include arguments that rely on the understanding that sweatshop work is an individual choice, better than available alternatives, and even framed as a ‘dream’ compared to other forms of available labor.³⁸ This understanding of sweatshop conditions undermines one’s standing in making claims about mistreatment or injustice and can weaken a shared sense of the necessity for change. Concretely, this understanding represents an obstacle to developing potential avenues for action, prevention and remedy and disadvantages sweatshop workers in their ability to address mistreatment.

On the other hand, for consumers in particular, the hermeneutical lacuna in contract law creates advantages that consist of their ability to continue to buy sweatshop goods in the absence of experiencing a moral burden about their complicity. Consumers are free from the burden of perceiving themselves as being complicit in the mistreatment of others, because they will understand their own choices for sweatshop produced goods within the sphere of normal transactional activity. They also remain free from the burden of others’ judgment, who may otherwise have viewed them as complicit. More importantly, they can continue to rely on assistance from the state for contractual recognition and enforcement, and potentially even invoke consumer legal protection (eg non-conformity), in attempts to pursue their own private interests through contract.

The example of how contract law understands exploitation in GVCs shows how it can maintain and produce seemingly uncontroversial interpretations of private exchange practices and experiences and, in the absence of alternative interpretations, can obscure important aspects of GVC experiences. In maintaining that there is no legal significance to consumer knowledge about sweatshop production; to their continued demand for sweatshop produced goods; and to the

38 See for an overview of arguments on the moral status of sweatshops: Tjon Soei Len, n 17 above, 68–79. And N.D. Kristof, ‘Where Sweatshops Are a Dream’ *The New York Times Online Edition* <https://www.nytimes.com/2009/01/15/opinion/15kristof.html>, accessed 21 July 2019.

interconnectedness of consumer choice and exploitative production conditions, contract law does not produce a compelling reason for consumers to change their behavior as they suffer no risk of legal accountability.

The fact that the current contractual understanding of exploitation in GVCs appears entirely reasonable and uncontroversial is not surprising. The recognition that this understanding seems reasonable and uncontroversial likely follows from the fact that it is produced through mechanisms of power and privilege: those who enjoy social power have unduly influenced the social understanding that we have come to share. Namely, it is important to note that patterns of global inequality not only reflect unfair distributive advantage and disadvantage that determine whether one is more likely to consume or produce sweatshop goods, but also reflect inequalities in hermeneutical power and participation. Consumers in affluent countries have more power to influence collective understanding regarding GVC exploitation upon which regulatory initiatives rely and which impact how GVCs are governed. In particular, consumers have more hermeneutical power compared to sweatshop workers in their ability to participate in knowledge production that impacts on how consumer contracts for sweatshop goods are governed and how GVCs are governed generally. In particular, nationality or immigration status largely correlate with whether one consumes or produces sweatshop goods. While nationality or immigration status renders individuals at risk of exploitative practices in GVCs, they also determine whether one is more likely to find oneself in a position to influence the legal instruments, rules and interpretations and justifications that govern and structure GVC experiences. As such, not only does contract law hold the potential to obscure from social understanding something of meaning to those in disadvantaged positions of power, the existence of the relevant lacuna may be impacted by the fact that the affected group lacks the hermeneutical power to properly influence the collective understanding. One may ask to what extent those who are likely to work in sweatshops are represented within positions of power that affect the type of knowledge produced by contract law (eg judiciaries, arbiters, legal scholars etc). The absence of their hermeneutical participation may render contractual tools for interpretation structurally prejudiced, because the collective interpretations produced by contract law about experiences of exploitation in GVCs are insufficiently influenced by the group subjected to exploitation.

Concluding Remarks

This article has argued that contract law is a shared interpretive resource that contributes to our collective understanding of experiences of private exchange

within the context of GVCs. It has shown how, in obscuring the interconnectedness between relationships in GVCs—notably between consumer choices and exploitative production conditions—contract law contributes to systemic hermeneutical injustice. Namely, contract law obscures from collective understanding the ways in which consumers can be complicit in exploitation. In doing so, contract law's framing renders those subjected to exploitation unable to make intelligible that what is in their interest to render intelligible. One has a direct hermeneutical interest in properly understanding one's own experience of mistreatment—who contributes to, profits from, and bears responsibility for exploitation. Additionally, the ability to communicate one's experience intelligibly to others is also important for status as a knower and for one's standing when making claims of mistreatment and injustice to relevant others. The latter is particularly important as it relates to the availability of avenues to prevent future mistreatment and remedy already manifested harms.

While the responsibilities for systemic hermeneutical injustice and its constraints for social institutions are still to be developed fully, this article aims to establish a compelling case for why systemic hermeneutical injustice should be regarded as an independent normative consideration for how we evaluate alternative contract regimes, rules, interpretations, and justifications. Although some of the reasons why systemic hermeneutical injustice matters can be articulated in material terms, its importance is not only captured as a matter of inequality between distributed advantages and disadvantages of various actors. While it is beyond the scope of this article to detail how systemic hermeneutical injustice relates to other forms of injustice that are more widely theorized as being within the proper normative scheme of contract's consideration, I hope this paper supports a compelling case for further exploration of this dimension of injustice in the realm of contract law scholarship.