

Varieties of Welfarism in European Contract Law

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Abstract: *A scheme describing six welfarist directions in modern contract law is used to assess the extent to which current European measures that affect contract law have embraced these welfarist developments. Although some EC legislation may be interpreted as possessing elements of a limited welfarist perspective, it is concluded that bolder welfarist strands have proved largely absent. A European civil code or contract code would prove too static an instrument to promote the evolution of further welfarist developments.*

I Blunt Dichotomies on Contractual Values

The issue of social justice in contract law has finally been brought more clearly back on the agenda in the debate on harmonisation of European contract law. As such, the social justice issue is of course not new. Even contract literature from decades ago swells with descriptions and analyses of the changes in contract law towards a greater inclusion of other social values than purely market-oriented, liberal ones. In the present situation, those old ideas, as well as more recent reformulations, retain their actuality. The focus on harmonisation in the debate of today, however, requires a representation of the ideas in some new clothing.

In the analyses of what, very generally, could be called social justice in contract law, the change is often pictured by the help of dichotomies like freedom versus solidarity,¹ individualism versus altruism,² and market-individualism versus consumer-welfarism,³ to mention but only a few.⁴ The new phenomena have also been described with the help of concepts like ‘social contract law’⁵ and ‘contractual solidarity’⁶ as well as principles like ‘the principle of regard and fairness’.⁷ In the European setting these dichotomies

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¹ R. M. Unger, ‘The Critical Legal Studies Movement’, (1983) 96 *Harvard Law Review* 561, 616 *et seq.*

² D. Kennedy, ‘Form and Substance in Private Law Adjudication’, (1976) 89 *Harvard Law Review* 1685.

³ J. Adams and R. Brownsword, *Understanding Contract Law* (Fontana, 1987), p. 52 *et seq.*

⁴ Many more examples from that period can be found in the collection of essays, T. Wilhelmsson (ed.), *Perspectives of Critical Contract Law* (Dartmouth, 1993).

⁵ See e.g. T. Wilhelmsson, *Social Contract Law and European Integration* (Dartmouth, 1995), in which I tried to bring the issue of social justice on the then rather premature harmonisation agenda.

⁶ B. Lurger, *Vertragliche Solidarität* (Nomos, 1998).

⁷ B. Lurger, ‘The “Social” Side of Contract Law and the New Principle of Regard and Fairness’, in A. Hartkamp *et al.* (eds), *Towards a European Civil Code*, 3rd edn (Kluwer Law International, 2004), also criticising the use of the concept ‘social’ as misleading (referring to social policy).

and new concepts, which typically refer to the growth of mandatory rules protecting weaker parties like consumers in the contractual relationship, can be said to reflect the intrusion of the values of the welfare state into the market-oriented structure of traditional contract law. Therefore the new features are also called 'welfarism in contract law' for short.⁸

With the European perspective in the harmonisation debate in mind, I will here use this term for the general issue. The choice of 'welfarism' does not in itself reflect any deeper choice of perspective, save my belief that the new approaches in contract law are to a large extent connected with the values of the welfare state. I could equally well use the still more vague term 'social justice',⁹ in line with the phrase 'social contract law' that I have used before, and occasionally I will indeed speak about social justice for the sake of linguistic variation.

Dichotomies and concepts like the ones mentioned above are useful as tools in a general debate on contract law. They focus our attention on the broad perspectives of development and make it possible to defend and criticise those features. They also offer means to proclaim the social/political perspective adopted by the discussant.

However, just as there various understandings of the 'good',¹⁰ one may suspect there to be various understandings of 'welfarism'. The operationalisation of the welfarist approach on the concrete level of legal rules is not self-evident, as various visions of social justice may justify quite different results. It has been said that the new approach is 'unlikely ever to attain the consistency of its market-individualist rival.'¹¹ Comparative studies have shown how rules that may appear as welfarist in one jurisdiction are regarded as fairly traditional in another.¹²

It is also easy to present examples concerning the existence of internal conflicts within the welfarist perspective. What from one point of view may be clearly seen as a welfarist measure, may from some other point of view be regarded as fairly doubtful example. For example, rules obliging a bank to give certain information to consumers when concluding credit contracts may be seen as welfarist, as they at least to some extent do strengthen the position of the weaker party in relation to the creditor. At the same time, however, from the point of view of distributive justice, such information rules are problematic, as they tend to improve the position of strong consumers, whilst offering little help to the more vulnerable ones. Studies concerning truth-in-lending regulation show that the improvement, if any, of the awareness of interest rates due to such regulation seems to be concentrated in higher-income groups,¹³ and shopping for best credit induced by such regulation also seems to occur to a greater extent among higher income groups.¹⁴ In other words, disclosure regulation in practice may benefit the rich more than the poor, and thereby be counterproductive in a distributive welfarist sense.

Therefore, even though a dichotomy-based approach like those described above is useful in many kinds of discussions, it seems too blunt as a tool for analysing various

⁸ R. Brownsword, G. Howells and T. Wilhelmsson (eds), *Welfarism in Contract Law* (Dartmouth, 1994).

⁹ of the Manifesto on 'Social Justice in European Contract Law', published in this volume, above p. 653–674.

¹⁰ G. H. von Wright, *The Varieties of Goodness* (Routledge, 1963).

¹¹ J. Adams and R. Brownsword, *op. cit.* note 3 *supra*, at 165.

¹² Several examples are analysed in R. Brownsword, G. Howells and T. Wilhelmsson, *op. cit.* note 8 *supra*.

¹³ W. C. Whitford, 'The Function of Disclosure Regulation in Consumer Transactions', (1973) 2 *Wisconsin Law Review* 400, 414.

¹⁴ Whitford, *op. cit.* note 13 *supra*, 418, 420.

aspects of law in a detailed manner. In this paper I attempt to substantiate the thesis that ‘welfarism’—or ‘social justice’—in contract law does not represent a coherent structure of ideas that as such could be used as a basis for a coherent assessment and development of European contract law. We need a more analytical scheme comprising various understandings of welfarism in contract law. I will here elaborate such a scheme.

At the outset, the need for a more analytical approach already seems particularly obvious with regard to assessments of the existing *acquis communautaire* in the area of contract law. If welfarism is understood as signifying mandatory rules protecting the alleged weaker party to the contract, including a fairness principle giving the courts and other decision-makers the right to interfere against unfair contract terms, then practically the whole contract law *acquis* is of this kind, the most important examples being the Consumer Sales Directive¹⁵ and the Unfair Contract Terms Directive.¹⁶ An assessment of the *acquis* from a welfarist point of view that would state more than the obvious therefore cannot avoid questions such as: welfarist in what respect, from what point of view?

When discussing the future of European contract law, and assessing the proposals that will emerge from the various academic and other groups working in the area at the moment, the use of a dichotomy of the said character does not seem to bring us very far either. It leaves us with discussing the general direction of the forecasted or wished development—the empirical and the normative viewpoint by necessity have to be intertwined—formulated in questions such as: more welfarist elements or a turning back to more liberalism?¹⁷ Despite the undeniable value of such general questions, more thorough assessments in this context require that the variations of social justice used in contract law should be analysed in more detail. If we want a greater inclusion of welfarism in European contract law—as I do—we should be able to speak very clearly about the kind(s) of justice we have in mind.

The fact that welfarism or social justice cannot be reduced to any coherent formula may be considered disturbing from the point of view of those defending a very systematic development of European contract law. However, such an outlook on the future of European contract law is not necessary. In fact, welfarism may be better off in a more fragmented and multi-layered vision¹⁸ of European contract law.

II The Elusive Value-Structure of the Welfare State

Speaking about welfarism focuses our attention on the relationship between contract law and the philosophy of the welfare state. Could the latter not offer a basis on which to build a coherent welfarist contract law, just as liberal ideals have structured traditional contract law? From a welfarist point of view, this proposal would seem to be the ideal solution.

There are, however, several serious obstacles to such a solution, especially in relation to the issue of European harmonisation. First, the philosophy of welfarism itself does

¹⁵ Dir 99/44.

¹⁶ Dir 93/13.

¹⁷ See on the latter e.g. P. S. Atiyah, *Freedom of Contract and the New Right* (Juridiska fakulteten vid Stockholms universitet, 1989).

¹⁸ See e.g. Ch. Joerges, ‘Zur Legitimität der Europäisierung des Privatrechts. Überlegungen zu einem Rechtfertigungs-Recht für das Mehrebenensystem der EU’, in Ch. Joerges and G. Teubner (eds), *Rechtsverfassungsrecht. Recht-Fertigung zwischen Privatrechtsdogmatik und Gesellschaftstheorie* (Nomos, 2003).

not have a very clear content, mixing several elements, such as guaranteeing the members of the society a minimum standard of income, protecting them against some of the uncertainties in life, and offering them some social services.¹⁹ These elements appear in different blends in different European countries, some of them—such as the Scandinavian countries—traditionally being public service states, whilst others have been primarily transfer states, laying stronger emphasis on income transfers.²⁰ Therefore, in Europe there is perhaps no general concept of a welfare state, but only a situation of family resemblance between the welfarist Member States. There is no common European philosophy of welfarism, except at a very general level.

Second, during the last decade(s), there has been a profound re-organisation of the relationship between state, market, and civil society in many Member States, reducing the impact of welfarism or at least changing it. Through various methods of privatisation or marketisation, public functions have been relocated to private bodies, and economic result-orientation and other market-oriented mechanisms have been introduced in the public sector, resulting in a disintegrated and partially privatised welfare system, sometimes called a welfare mix or a welfare pluralism. The welfare states, even at the outset, appear more and more fragmented, and lacking a basic philosophy that would offer guidance for attempts to build a coherent welfarist contract law. Private law scholars have also drawn very different conclusions regarding the pressures on private law from the alleged dismantling of the welfare state.²¹

Third, even if one could overcome these difficulties and construct a coherent European vision of the values of the welfare state, the implications for contract law of such a vision are not self-evident. This follows from an inherent and inevitable tension in the welfare-state concept itself, which in principle makes it possible to deduce all types of contractual régimes—from extremely libertarian to extremely interventionist—from this general concept. The tension referred to lies in the fact that the welfare state, on the one hand, believes in market forces and private enterprise as the instrument of creating the economic basis of the welfare, and, on the other hand, intervenes in the market forces in order to secure goals connected with redistribution and social security. In other words, the welfare state is characterised by a continuous balancing between market-oriented efficiency and solidarity-based interventions of the state. The idea of the welfare state does not specify where and how these interventions should be made. One may therefore very well imagine a developed welfare state that tries to reach the welfarist goals by, for example, a market-oriented traditional contract law, believed to produce efficiency, combined with a strongly redistributive social security and tax legislation. Only if one assumes that individuals have a strong dual responsibility, that is they have a welfarist responsibility not only towards the state but also towards other individuals,²² can one speak about a distinct welfarist contract law. This assumption is by no means self-evident.

¹⁹ R. Eräsaari, *Sosiaalivaltio ja sosiaalipolitiikan itseyttäminen* [The Social State and the Self-Understanding of Social Policy] (Sosiaalipoliittinen yhdistys, 1984), at 113.

²⁰ A detailed discussion concerning the different welfare state models can be found e.g. in P. Kosonen, *European Integration: A Welfare State Perspective* (University of Helsinki Sociology of Law Series 8, 1994), at 60 *et seq.*

²¹ See e.g. the collection of essays, T. Wilhelmsson and S. Hurri (eds), *From Dissonance to Sense: Welfare State Expectations, Privatisation and Private Law* (Ashgate, 1999).

²² See R. Brownsword, 'The Philosophy of Welfarism and its Emergence in the Modern English Law of Contract', in R. Brownsword, G. Howells and T. Wilhelmsson (eds), *Welfarism in Contract Law* (Dartmouth, 1994), 21, 31–32.

The philosophy of the welfare state, in other words, is too vague and contradictory, has different connotations in different countries, and points at measures so far away from the regulation of contracts, that it does not furnish us with the tools needed for discussing welfarism in contract law in a more analytical manner. It leaves room for many types of welfarist contract laws. It accepts a large spectre of varieties of welfarism in contract law.

As the philosophy of the welfare state does not provide sufficient analytical tools for the purposes of this paper, we have to return to contract law theory more or less empty-handed. Can we find any guidance there, in the abundant discussions on social and welfarist contract law from the last few decades?

III Dichotomies within the Welfarist Paradigm

The discussion within contract law theory concerning the welfarist features of contract law has of course not limited itself to presentations of those general dichotomies mentioned above and analyses of the development of the law within the framework of these dichotomies. Many have gone further in their analyses, by classifying the welfarist elements in groups of various kinds. The conceptual tools used in such analyses are often presented in the form of new dichotomies. In this section I will look at some of the most important dichotomies of this kind, as materials for the welfarist assessment scheme I will develop in the next section.

In contract doctrine, many other classifications have been presented in addition to the dichotomies I will mention in this section. I think, however, that most such classifications, at least to some extent, can be reformulated in the terms used here. For example, when Duncan Kennedy has spoken about distributive and paternalist motives in contract law,²³ the examples used for distributive motives cover both internal and external distributive effects as described below, and the paternalist motives are a rather limited category containing some examples that belong here under the heading of commutative justice. And when Roger Brownsword distinguishes between the three categories of minimal, maximal, and personal welfarism,²⁴ those categories at least partially reflect the intensity of the intervention rather than as clear-cut opposites. In a historical perspective, looking at the periodisation of the order in which new elements have emerged in the welfarist picture, yet other classifications are possible.²⁵

The classifications that I discuss in the following section are somehow related to the depth of the welfarist approach. The first concept in each dichotomy is often regarded as more in line with 'traditional' contract law, whilst the second one is seen as more radically welfarist. In relation to each pair of concepts, I will briefly explain why I think this is the case.

A Commutative and Distributive Justice

A natural starting point when analysing the varieties of welfarist contract law is to look at the basic conceptions of justice that underlie various kinds of rules. This brings the Aristotelian distinction between commutative justice (also called corrective justice) and

²³ D. Kennedy, 'Distributive and Paternalist Motives in Contract and Tort Law, With Special Reference to Compulsory Terms and Unequal Bargaining Power', (1982) 41 *Maryland Law Review* 563.

²⁴ R. Brownsword, *op. cit.* note 22 *supra*.

²⁵ An example may be found in Brownsword, Howells and Wilhelmsson, *op. cit.* note 8 *supra*, at 86 *et seq.*

distributive justice onto the agenda. As is well known, the first kind of justice is defined as 'that virtue whose object is to render to every one what belongs to him, as nearly as may be, or that which governs contracts'.²⁶ In the legal setting, it often focuses on the need to correct situations that have emerged as a consequence of behaviour that is not considered acceptable. Distributive justice, on the other hand, looks at the distribution of benefits and disadvantages. In a societal, welfarist perspective, its focus is on the allocation and reallocation of resources within a population.

Obviously, contract law seeks to realise commutative justice and seeks its patterns of justification in this form of justice. This is true for traditionalist as well as welfarist contract law. Much mandatory contract law can naturally be explained by reference to commutative justice, aiming, as it does, at correcting consequences of unacceptable behaviour and rendering to the parties what justifiably belongs to them.

However, in the social-justice-in-contract-law talk explicit references to distributive justice are often made. Some of the authors analysing contract law from a social justice point of view have very clearly emphasised distributive justice as the form of justice that underlies these aspects of contract law or even the whole purpose of contract law. One of the best-known proponents of the idea that contract law plays and should play a role with respect to distributive justice is Anthony Kronman's classic paper 'Contract Law and Distributive Justice', in which the author defends 'the view that rules of contract law should be used to implement distributional goals whenever alternative ways of doing so are likely to be more costly or intrusive'.²⁷ Distributive effects are attributed to usury laws, warranties of quality or habitability, and minimum wage laws.²⁸ Many others, classics as well, have emphasised the role of distributive justice in contract law in a similar fashion.²⁹ Hugh Collins has even considered the distributive impact to be so important that the '[l]aw of contract would perform a central role in achieving the ideals of socialism'.³⁰

Discussions concerning the distributive impact of law often relate to consumer credit law. The protection of debtors is seen as a mechanism for changing the distribution of benefits between the debtor and creditor classes. Credit and debt law is given the important goal 'to redistribute power and resources generally from creditors to consumers'.³¹

Scholars analysing distributive justice in contract law of course do not present this as the only form of justice in that field of law. Both conceptions of justice are intertwined in many cases, and it is a matter of interpretation how one likes to understand a specific regulative measure in relation to this dichotomy. In fact the dichotomy rather reflects a choice of perspective on the regulatory materials rather than a classification, as all regulations may be analysed from either a commutative or a distributive justice point of view. Those who choose the second one usually wish to emphasise the role of law in the distribution of benefits (and disadvantages) within society, whilst the commutative perspective sees law as a tool for enforcing decent behaviour in a society,

²⁶ Cited through <<http://legal-dictionary.thefreedictionary.com/>> as well as <<http://www.lectlaw.com/def/j056.htm>>

²⁷ A. Kronman, 'Contract Law and Distributive Justice', (1980) 89 *Yale Law Journal* 472, 474.

²⁸ Kronman, *op. cit.* note 27 *supra*, at 473.

²⁹ E.g. D. Kennedy, *op. cit.* note 23 *supra*.

³⁰ H. Collins, 'Social Market and the Law of Contract', *ARSP-Beiheft* 49 (Franz Steiner Verlag, 1992), 85, 87.

³¹ I. Ramsay, 'Consumer Credit Law, Distributive Justice and the Welfare State' (1995) 15 *Oxford Journal of Legal Studies* 177, at 181.

and—what also is important—as a reflection of what society considers to be decent behaviour.

Social justice, in the welfarist sense, is strongly concerned with the distribution of benefits within a social system. The welfare state is interested in the equality of the distribution of wealth, especially with regard to the object of assuring all citizens a minimum level of subsistence. In a regulatory perspective, a central welfarist issue is the redistribution of benefits (in comparison with the situation that would prevail without the regulation) in favour of a (in some way) disadvantaged group of persons. Therefore, from the point of view of welfarism, the instances of such redistributive justice in contract law at least in principle are more far-reaching than those only protecting the realisation of commutative justice.

When discussing the existence of such redistributive justice in contract law, one should distinguish between the justification and the effects of a certain regulation. It seems that those emphasising distributive justice often look rather on possible effects than on the express or apparent justifications. Possible redistributive effects, however, can often not be measured in a convincing way. For example, mandatory consumer law can easily be assumed to have some redistributive effects. Particularly when looking at the cumulative effects of many protective measures, which analysed one by one may seem to have a relatively small weight, some redistribution of benefits from the supply side to the consumers seems obvious. The businesses may, however, be in a position to balance the protective rules with corresponding price rises, so that in general, and in the long run, the economic outcome of the bargains, as between the business and the consumers as a group, is the same as it would have been without the mandatory regulation. It is an empirical question to what extent various consumer protection measures can in this way be nullified from the point of view of distributive justice. More pervasive redistributive effects, when looked at on an aggregate level, would probably often require a systematic use of measures like compulsory contracts and price controls.

In the following discussion, when I use the pair of concepts distributive and commutative justice as a tool for classifying rules, I refer to justifications rather than effects. The levels of distributive justice in my proposed assessment scheme contain measures that are intended to have (socially positive) redistributive effects, or at least logically have to include such effects. In general, one may assume that regulations concerning the main subject matter of contracts are more openly attempting to achieve redistributive effects than regulations of side issues.

B Market-Rational and Market-Rectifying Regulation

The basic forms of justice are not the only conceptual tools that have been used in the analysis of welfarism in contract law. Another way of approaching the issue is to position various types of regulations with regard to their presumed role in the economic system. The focus is then on their purpose in the regulatory structure of a market economy.

In consumer law discourse, for example, a distinction can be made between market-rational and market-rectifying regulation. In this dichotomy, market-rational refers to measures aimed at improving the function of the market mechanism, whilst market-rectifying points at regulation through which the outcome of the market mechanism is corrected, or the drawbacks of the market mechanism are remedied. Therefore, obviously, a market-rational regulation appears as more acceptable from a traditional contract law point of view than a market-rectifying one.

The concept market-rational is often used to refer to provisions that create precontractual information duties on the supplier towards consumers and other contract parties. Such provisions can be seen as attempts to strengthen and take seriously traditional party autonomy.³² They aim at improving the possibilities of the rational consumer to make the right choices in the marketplace, to function in the rational way required by market theory. In addition to information duties, even some cooperation duties may appear as market-rational in the present network-type of market.

The choice between market-rational and market-rectifying regulation is connected to different understandings of human nature. Obviously the more one believes in the ability and willingness of the individual to act rationally in the market, the more natural it becomes to turn to market-rational contract law solutions. The distinction between market-rational and market-rectifying measures therefore is close to the contrast drawn in debates within consumer law about the rational information-seeking consumer, actively using the opportunities of the internal market, as the leading image of consumer law on the one hand, and the more vulnerable, passive browsers (*flüchtige Verbraucher*)³³ as the main subjects of protection on the other.

Market-rational regulation usually focuses on procedural justice rather than on substantive justice. In fact, instead of the pair of market-rational/market-rectifying concepts, one often encounters the juxtaposition of information rules versus mandatory substantive rules.³⁴ However, the concept of market-rationality may also be used in a somewhat broader sense, covering some substantive regulation that appears to be in line with the basic starting points of market-oriented thinking.³⁵

Anyway, typical market-rectifying rules are mandatory rules concerning the substantive content of the contract as well as contractual fairness rules. There is, however, no precise line between the parts of the dichotomy. Rather, here again one should emphasise the intertwinement of both approaches in practice—fairness rules referring both to procedural and substantive justice offer the best example of such intertwinement—and understand the dichotomy as a very simplified tool for analysing the legal phenomena.

C *The Internal and the External Perspective*

As one leaves conceptions of justice and understandings of market regulation and moves closer to more ‘juridical’ perspectives, new distinctions appear. A pair of concepts embedded in the deep-structure of contractual thinking is the one concerning the internal relationship between the contract parties, on the one hand, and the external relationship to persons outside the contractual relationship, on the other hand.

The traditional notion of contract law—in line with the traditional notion of private law in general with its focus on the individual legal relationship—is atomistic, as it concentrates on the relationship between the two parties to the contract. The significance of the contract in a larger contractual field is normally not discussed. Welfarist

³² See the collection of essays, S. Grundmann, W. Kerber and S. Weatherill (eds), *Party Autonomy and the Role of Information in the Internal Market* (Walter de Gruyter, 2001).

³³ A. H. Meyer, ‘Das Verbraucherleitbild des Europäischen Gerichtshofs—Abkehr vom “flüchtigen Verbraucher”’ (1993) 39 *Wettbewerb in Recht und Praxis* 215.

³⁴ This juxtaposition runs through the collection of essays mentioned in footnote 32.

³⁵ See T. Wilhelmsson, *Social Contract Law and European Integration*, *op. cit.* note 5 *supra*, 183–184.

contract law, in contrast, to some extent looks beyond the individual relationship. To the internal perspective is added an external perspective.

Somehow the internal/external dichotomy is related to another much-used distinction, that is between individual and collective contract law. The most typical, and from a practical point of view very important, examples of collective contract law are labour law collective agreements and the collective control of the terms of consumer contracts. However, even though such enforcement mechanisms are collective and therefore look outside the atomist singular contractual relationship, in the substantive sense most of the discussions on welfarism and social justice in contract law carry on the traditional internal perspective on contract law. The aim of protective legislation in the consumer area, for example, is understood to be a correcting of the imbalances between the contract parties. The weaker party in the contractual relationship is protected against the stronger one. This perspective usually does not change when the enforcement measures are collectivised. Even in cases where the Consumer Ombudsman, the Office of Fair Trading, or a consumer association asks for injunctions against unfair terms,³⁶ the purpose is to prevent the businesses from causing imbalances in individual contracts between consumers and businesses by the use of such terms.

Even those defending the idea of contract law as a distributive mechanism often adopt a kind of collectivised, but internal perspective on contract law. The rules on contract are seen to control the distributive consequences of market transactions in the relationship between the classes to which the parties belong as contract parties (e.g. between the classes of creditors and debtors). However, on the welfarist agenda, the internal perspective on contracts should be supplemented by an external one. In such an external perspective, one does not only look at the balance between the classes of parties to a certain type of contract, but at the effects of contracts and contractual regulation on the distribution of benefits between different groups of people, different groups of consumers. One compares the contractual position of a party not only to that of his or her counter-party, but also with other individuals in the same contractual situation. The position of the consumer is compared to the position of other consumers, and the position of the employee is compared to the position of other employees.

Sometimes general rules on consumer protection are aimed at having external effects in this sense. General rules that make the prevailing standard obligatory might have as their purpose the prevention of development of special low-quality markets for poor consumers,³⁷ and thereby strengthen their position in comparison with consumers who are better off. Rules on maximum interest rates may be especially designed to counteract usurious transactions with disadvantaged consumers. This is the case especially when the interest-rate ceilings are moderately high, clearly affecting only the special markets for low-income consumers.³⁸ Such rules are aimed at promoting the position of disadvantaged consumers—and may have such effects, if they do not force those consumers out of the credit market.³⁹

In some special cases, law is directly and openly engaged in the removal of discrimination. Most countries have rules, based on international human rights principles,

³⁶ Art 7, Dir 93/13.

³⁷ This effect of consumer law is strongly emphasised by U. Reifner and M. Volkmer, *Neue Formen der Verbraucherrechtsberatung* (Campus Verlag, 1988), at 21 *et seq.*

³⁸ I. Ramsay, *op. cit.* note 31 *supra*, 191 *et seq.*

³⁹ See, especially, M. J. Trebilcock, *The Limits to Freedom of Contract* (Harvard University Press, 1994).

forbidding discrimination on the basis of race, religion, and similar criteria. Gender discrimination usually also, to some extent, belongs to the forbidden zone. To the extent that rules on equality and non-discrimination have relevance in contract law, they clearly reflect an external perspective on the contract. A breach of a non-discrimination provision cannot be established in the internal relationship alone, but such a breach always presupposes the comparison of the contract under scrutiny with other contracts made by the same business or contractor. Therefore, the function of a principle of non-discrimination is also closely connected with a demand for transparency: discrimination can be detected only if one knows on what conditions contracts are made with others.

Such an external perspective, focusing on the relationship between various groups of members of society (consumers), is important when discussing welfarism in contract law, as the promotion of equality most certainly is a key welfarist goal. Especially in a discussion of redistributive justice in contract law, we should not only look at the intended distributive effects in the internal relationship. To some extent one should see businesses as institutions for distributing benefits and disadvantages between various groups of their customers. As, after all, people and not institutions do matter most when speaking about distributive justice, on a welfarist agenda one should not omit the issue concerning what kind of distributive effects contract law is intended to have as between various groups of consumers or as between various groups of other kinds of contract parties.

From a distributive point of view, a principle of non-discrimination that focuses only on racial, gender-related, and similar forms of discrimination—although this certainly is an important issue in many central areas⁴⁰—only addresses a small part of the problem of discrimination in the marketplace. A developed welfarist approach should also react against discrimination on economic grounds, in the light of the well-known fact that ‘the poor pay more’,⁴¹ or that they are denied access to parts of the market altogether. Such a reaction is difficult, because economic discrimination, as seen from a purely market-rational perspective, is often well founded. However, despite the difficulties, in a truly welfarist approach one should also keep in mind the effects of contract law on economically disadvantaged contract parties as compared with others.

D Ability-Orientation and Need-Orientation

This brings our focus from the contractual relationship to the subjects of that relationship. One of the most important features of welfarist private law, noted by many, is the change in the descriptions of the subjects of private law relationships. To some extent welfarist contract law thinks in social roles. Man no longer appears in law only as an abstract person, but as employer or employee, as consumer or business, and as expert or inexperienced person, to mention only a few examples. Such person-related concepts have often been introduced in the legal system with the aim of protecting the ‘weaker party’ in a legal relation. As welfarism in contract law to a large extent means protecting the weaker party, this focus on the variety of persons is very typical in the welfarist perspective.

⁴⁰ See for example I. Ramsay and T. Williams, ‘Inequality, Market Discrimination, and Credit Markets’, in I. Ramsay (ed.), *Consumer Law in the Global Economy* (Dartmouth, 1997).

⁴¹ D. Caplovitz, *The Poor Pay More. Consumer Practices of Low Income Families* (Free Press, 1963).

In legal doctrine, the examples of personal differentiation are often presented relatively unanalytically. However, behind the weaker-party roles one finds an interesting dichotomy that reflects deeper differences in the conceptions of justice on which the protection is built.

In some cases, importance is attached to certain properties of a person, because these give him a certain ability, or, in the case of weaker parties, lack of ability. In other cases, however, certain properties of a person are taken into account, because they reflect some special need of that person. In other words, one may distinguish between ability-oriented protection and need-oriented protection. Misusing a well-known phrase, one could say that the former is connected with the first part and the latter with the second part of the principle that everyone should be judged according to his ability and rewarded according to his needs.

Ability-oriented protection is well known, even in traditional contract law. The notions of *culpa* and *bona fides* as well as other similar concepts cannot be applied to a concrete case without some reference to the abilities of the party whose behaviour is being judged. The welfarist development of private law has given more strength and visibility to arguments involving such ability orientation. To take just two examples: the rules in many legal systems concerning incorporation of standard clauses in a contract, as well as those concerning the duties of a party to give information to the other party when concluding a contract, distinguish between inexperienced persons and experts.

Need-oriented protection, on the other hand, does not focus on the behaviour of a party, e.g. when concluding a contract. Rather, it points out a special need of the party as the ground for granting the party legal protection. As examples of need-oriented concepts, one could mention poverty, low income, unemployment, and illness.⁴² A focus on need, which is in line with the distributive strands of welfarism, obviously is more odd for traditional private law—based on the principle ‘*Geld muss man haben*’⁴³—than the orientation towards ability. However, in the welfarist era one may discern also strands of need-rationality in contract law. One much-used example is the appearance of rules concerning *social force majeure*, protecting debtors against sanctions that are too harsh if they are unable to pay debts in time because of illness, unemployment, or similar reasons.

The difference between ability-orientation and need-orientation is clearly discernible in relation to person-related concepts like those mentioned above. However, much of the weaker party protection offered by welfarist contract law is delimited with the help of abstract concepts like consumer and tenant, comprising all persons, regardless of their abilities and needs, entering into a relationship of the specified kind. In such instances, the ability-orientation and need-orientation is intertwined; and both kinds of justifications may be recognised behind the regulations. In most areas, like consumer law, the ability-orientation is dominant, whilst need-orientation in some countries has got a relatively prominent role in regulations of the contract of tenancy.

⁴² T. Wilhelmsson, *Critical Studies in Private Law. A Treatise on Need-Rational Principles in Modern Law* (Kluwer, 1992) analyses such need-rational concepts in contract law (including *social force majeure*).

⁴³ ‘You’ve got to have money’, D. Medicus, “‘Geld muss man haben’”. Unvermögen und Schuldnerverzug bei Geldmangel’, (1988) 188 *Archiv für die civilistische Praxis* 489.

E Protection of Parties and Protection of Other Values

Finally, the external perspective can be extended to cover other interests than those of the contract parties. Then we encounter yet another dichotomy within welfarist contract law, that is the dichotomy between the protection of the parties on the one hand—which is the aim of traditional contract law as well as also the bulk of welfarist contract law—and the protection of interests not directly related to those of the parties on the other hand.

The most prominent examples of such other values that may in some ways be protected, or at least considered relevant, by welfarist contract law are ecological values.⁴⁴ Such values play some role in consumer law and elsewhere, as there may exist information requirements relating to environmental issues, and it may also be possible to use, for example, sales law remedies in certain situations, if the goods bought do not fulfil environmental standards. The conceptions of justice behind such measures may vary. The ecological values may be protected in their own right, but the protection may also be looked at as a question of distributive justice, related to the distribution of benefits between present and future generations.

Environmental values are, of course, not the only values not directly related to the parties of the contract that may be given relevance in contract law. The need to protect human rights and to defend poor people in developing countries may be brought in as a relevant factor, for example, in a consumer contract relationship. The fact that an article bought by a consumer is revealed to be made by child labour can be understood as a situation of non-conformity that gives the consumer the right to cancel the contract.⁴⁵ Examples of such provisions and rulings are, however, usually very scarce.

IV Suggestion for a Welfarist Assessment Scheme

The varieties of welfarism were above described with the help of five dichotomies, in which the latter part usually implies a move further away from traditional contract law towards more express welfarism than the first part:

- commutative justice/distributive justice;
- market-rational regulation/market-rectifying regulation;
- internal perspective/external perspective;
- ability-orientation/need-orientation;
- protection of parties/protection of other values.

The relationship between these dichotomies, used by different authors in different contexts, is not uncomplicated. In part, they refer to different types of qualities of welfarist contract law and are in that sense independent from each other; and in part, they are overlapping.

It is obvious, for example, that the pair of concepts involving protection of parties and protection of other values refers to an issue other than the other dichotomies, as these basically concern different perspectives on the protection of the parties. As a case

⁴⁴ G. Winter (ed.), *Perspektiven des Umweltrechts* (Köln, 1988), at 665, speaks of an ecological infection of contract law.

⁴⁵ J. Kihlman, *Fel* (MerkurIUS, 1999), at 109.

of partial overlap, one could, on the other hand, mention the relationship between need-orientation and distributive justice, the former most certainly being an example—but not the only example—of the latter. Ability-orientation, again, is often founded on views concerning commutative justice, but it may be analysed in the light of distributive justice as well, as a mechanism for (re)distribution of benefits between the experienced and the inexperienced.

The five dichotomies emphasise different variations in the welfarist approach. They all reflect features that have been and are important in the development of welfarist contract law. Therefore, despite the complicated and unclear relationships between the various dichotomies, they should all be taken into account when one attempts to build a comprehensive scheme for assessing the varieties of welfarism within the prevailing European *acquis* and for discussing the directions of development of future European contract law. I will here elaborate a proposal for such a welfarist assessment scheme of contract law.

In doing this, I will first look at the deeper levels of legal and societal thinking, where more basic distinctions can be found, and from there proceed towards the more concrete dichotomies related directly to contract law experience. A natural point of departure is the distinction between commutative and distributive justice. The approach that is more in line with traditional thinking is to judge the acceptability of behaviour related to contract with reference to some kind of commutative understanding of justice, whilst a more distinctly welfarist way of using contract regulation is as an instrument of distribution. As the latter approach in a welfarist sense implies redistribution in favour of a disadvantaged group of persons, I will here speak about redistributive justice.

Turning then to the next dichotomy, that between market-rational and market-rectifying regulation, this pair of concepts seems useful primarily within the commutative agenda. The discussion on market-rational and market-rectifying measures is usually related to the question of just behaviour in a contractual relationship, although the dichotomy occasionally may be used to analyse distributive effects within contractual relationships as well. Leaving the latter cases aside, I propose to use the paired concepts of market-rational/market-rectifying as a useful sub-grouping on the commutative end of the scale. In order to underline the commutative focus, I have in the following used the term market-correcting—derived from corrective justice—rather than market-rectifying.

The distinction between the internal and the external perspective again is most interesting when speaking about issues concerning redistributive justice. Here the direction of comparison becomes very important. Do we discuss redistribution between businesses and consumers, or between various groups of consumers? The more traditional discussion chooses the internal perspective, whilst a deeply welfarist conception proceeds to include as well the latter externally redistributive perspective.

The externally redistributive welfarism may be based on various conceptions of the purpose of contract law regulation. Usually the aim is to create a situation of material (as opposed to formal) equality in the contractual sphere. Various contract parties should be treated in the same way regardless of the differences between them, that is irrespective of their gender, race, or religion. The perspective of this kind of welfarism, though being external, is limited to the world of contracts; one contract is compared with other contracts. However, as the above-mentioned concept of need-rationality shows, one may even proceed a step further, from defending the contractual equality of the disadvantaged towards favouring the disadvantaged. This step in fact requires the application of a double external perspective: one does not only look outside the

contractual relationship under scrutiny towards other contractual relationships of the same kind, but in addition one looks outside the contractual sphere altogether, in order to find the justification for going beyond equality and favouring the disadvantaged. It is a matter of taste whether such need-rational approaches, rare as they are, should be separated from other instances of redistributive welfarism. Both because of the symbolic radicalism of such approaches, and because of my personal interest in these cases, I have here added a separate category of need-rational welfarism to my list of varieties of welfarism.

Lastly, the distinction between protection of parties and protection of other values adds another dimension to the scheme, in which the above-mentioned categories basically concern various purposes and ways of protecting parties in contractual relationships. I have here called the other dimension, that is the dimension reflecting on the relevance of ecology, human rights, and similar values in contract law, 'public values welfarism'.

The above analysis leaves us with six main types of welfarism in contract law:

Table 1. The six main types of welfarism in contract law.

1. Market-rational welfarism	Regulation aimed at improving party autonomy and the function of the market mechanism (e.g. information rules)
2. Market-correcting welfarism	Regulation aimed at rectifying outcomes of the market mechanism in order to promote acceptable contractual behaviour (e.g. substantive fairness rules)
3. Internally redistributive welfarism	Regulation aimed at redistributing benefits in favour of a group of weaker parties in a contractual relationship (e.g. rules affecting main subject matter of contract)
4. Externally redistributive welfarism	Regulation aimed at redistributing benefits in favour of the disadvantaged within a group of contract parties in similar situations (e.g. equality rules)
5. Need-rational welfarism	Regulation aimed at giving benefits to parties with special needs in comparison with other parties in similar situations (e.g. rules on <i>social force majeure</i>)
6. Public values welfarism	Regulation aimed at giving contract law protection to interests and values not related to the parties (e.g. protection of environmental values and human rights)

As I have previously explained, the order of the list is not arbitrary. It starts from the type of welfarism that is most closely linked to traditional contract thinking, in fact so closely tied that it is impossible to draw any clear line between traditional information regulation, under headings like fraud, and new welfarist rules. Proceeding further down on the list, the distance to traditional contract law thinking grows, and the welfarist approach becomes more specific. In this sense, the list can function as a kind of basic assessment scheme when discussing the level of welfarist achievements in European contract law and the direction of future development.

However, this by no means implies that a measure of a type closer to the end of the list always would be 'more welfarist' than one higher up. Most certainly the 'intensity'

or 'size' of a measure is very relevant as well when discussing the level of welfarism in contract law. A 'small' measure in the later categories may very well be less welfarist than a thorough one in the first ones. A very stringent market-rational rule, setting strict demands on the content of information to be given, and perhaps in addition requiring explanation of the information to inexperienced customers, may have more welfarist effects than, for example, an equality rule with insufficient remedies, and this may also have been the intention of the legislator. The assessment scheme, therefore, can only be used as a starting point, not as a tool providing final answers to questions regarding prevailing levels of welfarism.

A truly welfarist contract law requires measures on all levels of the scheme. A demand for 'more welfarism', therefore, does not necessarily imply any claim for abandonment of the 'lower' levels of welfarism in favour of the 'higher' levels. Sometimes a relationship of this kind does exist: market-rational information regulation may in certain cases be superseded by market-correcting mandatory regulation. In most cases, however, a deepening welfarism means rather adding layers of regulation of the types closer to the end of the list to the more traditional ones.

Lastly, one should note that the welfarist assessment of a rule belonging to the public values welfarism type most certainly depends on what values the rule promotes. Ecology and human rights are easy to accept from a welfarist point of view, but is, for example, mandatory regulation of the use of price indexation clauses, which is aimed at combating inflation,⁴⁶ to be considered welfarist?

V Assessing European Contract Law

With the help of the assessment scheme developed above, we can get a somewhat more analytical picture of the welfarism of European contract law. I will use the six categories mentioned above to assess the welfarism in European contract law as it is expressed by the *acquis*. This analysis provides a platform for some predictions as well as recommendations concerning the future of European contract law in the final section of the paper.

The main bulk of the European contract law *acquis* is related to consumer protection. Measures to protect the consumer are also, of course, a central concern of welfarist contract law. Therefore, much of the analysis of the present stand of common European contract law addresses consumer law rules. However, other contract law regulation is mentioned as well, as far as such regulation exists.

A Market-Rational Welfarism

Traditionally, based on the ideology of the four freedoms, EC law has strongly emphasised the freedom of choice of the European citizens, and this emphasis has been reflected in the fairly market-rational starting points of EC consumer law, which even have been said to reveal 'a succession of victories for the free marketeers'.⁴⁷ This starting point has found its expressions not only in much of the EC legislation, but also in the practice and decisions of the European Court of Justice concerning the rules on

⁴⁶ Finland has for a long time had such legislation, the present act is *Laki indeksiehdon käytön rajoittamisesta* (1195/2000).

⁴⁷ H. Collins, 'Good Faith in European Contract Law', (1994) 14 *Oxford Journal of Legal Studies* 229, 237.

barriers to trade as well as those on competition.⁴⁸ The Court of Justice has expressly, with reference to the consumer protection programmes, stated that ‘under Community law concerning consumer protection the provision of information to the consumer is considered one of the principal requirements’.⁴⁹

Despite the fact that more recent EC consumer policy has produced important substantive regulation, information requirements are still dominating the European contract legislation. Such important areas as, for example, consumer credit regulation in the Consumer Credit Directives,⁵⁰ and the contract-related insurance regulation in the Third Life Assurance and Non-life Insurance Directives,⁵¹ basically contain only detailed duties to inform. Also, some other consumer contract law directives, such as the Distance Contracts Directive,⁵² the Financial Services Distance Marketing Directive,⁵³ and the Timeshare Directive,⁵⁴ rely heavily on information as a means of improving the position of the consumer. In addition to consumer law, the emphasis on information also influences EC labour law, with the Employment Information Directive⁵⁵ as the main example. Good examples on information regulation can also be found in the area of securities regulation—some even see possibilities for drawing a synthesis of the information requirements in European capital markets law and European consumer law.⁵⁶ To the list of directives establishing information duties in EC law, one could also add some directives with a more general scope, such as the Electronic Commerce Directive.⁵⁷

Therefore, recent legal doctrine also recognises the very strong position of information rules in EC contract law.⁵⁸ It is still fairly obvious that the bulk of welfarist contract law regulation in the EC is of the market-rational type. The rational consumer is the dominant consumer image in EC consumer law.

The picture of EC contract law welfarism as a market-rational welfarism is further underlined by the existence of directives using the right of cancellation as the consumer’s main remedy. One of the first consumer law directives, the Doorstep Selling Directive, was of this kind.⁵⁹ The next steps in this development were represented by the Timeshare Directive, the Distance Contracts Directive, and the Financial Services Distance Marketing Directive. In these directives, the market-rational character of the regulation has become especially apparent through the combination of information and cancellation rules. Although the cancellation rules clearly represent market-rational thinking, by attempting to improve the opportunity for consumers to make rational choices in the marketplace, they illustrate the fact that even market-rational welfarism

⁴⁸ See a good analysis by S. Weatherill, ‘The Role of the Informed Consumer in European Community Law and Policy’ (1994) 2 *Consumer Law Journal* 49.

⁴⁹ Case 362/88 *GB-INNO-BM v. Confédération du commerce luxembourgeois* [1990] ECR 667, 689.

⁵⁰ Dir 87/102, amended by Dir 90/88 and Dir 98/7.

⁵¹ Art 31, Dir 92/96 and Art 31, Dir 92/49.

⁵² Art 4–5, Dir 97/7.

⁵³ Art 3–5, Dir 2002/65.

⁵⁴ Art 3, Dir 94/47.

⁵⁵ Dir 91/533.

⁵⁶ H. Fleischer, ‘Informationspflichten im Europäischen Kapitalmarkt- und Verbraucherschutzrecht—Versuch einer Synthese’, in H. Schulte-Nölke and R. Schulze (eds), *Europäisches Vertragsrecht im Gemeinschaftsrecht* (Bundesanzeiger, 2002).

⁵⁷ Art 5, 6 and 10, Dir 2000/31.

⁵⁸ S. Grundmann, W. Kerber and S. Weatherill (eds), *op. cit.* note 32 *supra*.

⁵⁹ Art 5, Dir 85/577.

may occasionally be moving relatively far away from traditional contract thinking. After all, they overcome traditional notions of the binding force of contract, in which the contract comes into being at one ‘magic moment’, and import a certain amount of new reflexivity in contract law.

B Market-Correcting Welfarism

As already mentioned, EC consumer law has succeeded in bringing certain elements of market-correcting welfarism into European contract law as well. Some of the directives of this kind, especially the Unfair Contract Terms Directive and the Consumer Sales Directive, have stepped directly into the heartland of contract law.

Although those directives in many ways reflected collective European experience, at the same time, at least for some of the Member States, they meant relatively radical new steps in the welfarist direction. Probably the best-known examples were the introduction of the fairness rule, the good faith requirement, into English contract law, as well as the thorough modernisation of German sales law. The discussion concerning ‘good faith’ has boomed in English legal literature,⁶⁰ as this concept was seen as ‘mysterious and exciting to an English lawyer’,⁶¹ and the German provisions on sales—both consumer sales and other sales—in the *Bürgerliches Gesetzbuch* were reformed along the lines of the Consumer Sales Directive. In both countries, the directives had an impact on the general contract law culture, despite the formal limitation of their scope to consumer contracts.

Outside the realm of consumer law, there is one important example of a fairly detailed market-correcting European contract law measure that should not be overlooked in this context—the Commercial Agency Directive.⁶²

C Internally Redistributive Welfarism

It is unclear to what extent consumer law really has redistributive effects in the relationship between consumers and enterprises. To a large extent, it depends on the conditions prevailing in the relevant market, as these determine the possibilities for enterprises to pass on their losses to the consumer collective. As mentioned above, claims concerning redistributive effects are therefore difficult to substantiate. Usually, the express justifications for EC consumer law as well as other EC contract law measures do not emphasise the possible redistributive effects either.

Indeed, one could even claim that EC contract law shows a relatively negative attitude towards attempts to achieve internally redistributive welfarism through contractual regulation. This comes very clearly to the fore in the limitation of the scope of the Unfair Contract Terms Directive, as it expressly states that the assessment of the unfair nature of the terms shall relate neither to the definition of the main subject matter of the contract nor to the adequacy of the price or remuneration. This delineation, which was not included in the Directive until the final preparatory stages, is based on the thought that the relationship between the price and the performance of the contract

⁶⁰ See e.g. R. Brownsword, N. J. Hird and G. Howells, *Good Faith in Contract. Concept and Context* (Dartmouth, 1999).

⁶¹ H. Collins, *op. cit.* note 47 *supra*, at 249.

⁶² Dir 86/653.

has to be determined by the market mechanism and not through regulation.⁶³ As the Directive does not aim at regulating the balance between performance and price, leaving it to be determined by the market mechanism, it explicitly excludes attempts to achieve internally redistributive goals from its scope.

In stark contrast to consumer law, EC competition law naturally does not limit its contractual focus to side issues. Therefore, if one looks at relations between businesses, this branch of the law may, of course, occasionally have even a strong redistributive impact. The rules on misuse of dominant position do not refrain from intervening against the price and the main subject matter of the contract—on the contrary they rather focus on such issues.

D Externally Redistributive Welfarism

Externally redistributive welfarism in EC law most clearly comes to the fore in a relatively strong—compared to many Member States—emphasis on the principle of equality. In the area of gender equality especially, the EC material is relatively dense. In the field of labour law there is already a relatively long history of directives,⁶⁴ and court practice,⁶⁵ designed to promote gender equality. This emphasis on equality has been reinforced by Article 13 of the Amsterdam Treaty, according to which the EC ‘may take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation’. On the basis of this article, the Commission has attempted to carry the gender equality issue outside the sphere of labour contracts, issuing a proposal for a Directive to implement the principle of equal treatment between women and men in the access to and supply of goods and services.⁶⁶ It has been shown that gender equality problems do also exist in this area.⁶⁷ As regards discrimination based on race, religion, disability, age, and sexual orientation, directives covering both the employment contract and partially other relations as well have already been adopted.⁶⁸

The EC materials in this area are so dense that, even at an early stage, the possibility of developing a private law principle of non-discrimination on the basis of these materials was discussed.⁶⁹ Recently, Dagmar Schiek thoroughly analysed the idea of such a principle of non-discrimination and the suitability of contract law for community tasks such as combating discrimination based on characteristics like race, ethnic origin, gender, and disability in contracting.⁷⁰ She called for private law to offer protection against discrimination, as the market mechanism could not guarantee the

⁶³ The Commission in this respect took into account the criticism against earlier proposals, see especially the criticism by H. E. Brandner and P. Ulmer, ‘The Community directive on unfair terms in consumer contracts: some critical remarks on the proposal submitted by the EC Commission’, (1991) 28 *Common Market Law Review* 647, 656.

⁶⁴ Starting with the Equal Pay Directive, Dir 75/117, and the Equal Treatment Directive, Dir 76/207 (amended by Dir 2002/73).

⁶⁵ Including the landmark decision on effective judicial protection: Case 14/83 *Von Colson & Kamann v Land Nordrhein-Westfalen* [1984] ECR 1891.

⁶⁶ COM(2003) 657 final.

⁶⁷ R. Nielsen, *Gender Equality in European Contract Law* (DJØF Publishing, 2004), 19 *et seq.*

⁶⁸ The Race Discrimination Directive, Dir 2000/43, and the Framework Employment Directive, Dir 2000/78.

⁶⁹ See T. Wilhelmsson, *Social Contract Law and European Integration*, *op. cit.* note 5 *supra*, at 203 *et seq.*

⁷⁰ D. Schiek, *Differenzierte Gerechtigkeit* (Nomos, 2000) and in English D. Schiek, ‘Contract Law, Discrimination and European Integration’, in T. Wilhelmsson and S. Hurri (eds), *op. cit.* note 21 *supra*.

removal of discriminatory practices, but she did not, however, find European contract law at that stage well-equipped to fulfil this task, despite the fact that EC law contained several, but inconsistent prohibitions against personal discrimination. Still, one may claim that EC law has played a relatively progressive role when it comes to introducing measures against gender, racial, and similar forms of personal discrimination in contract law.

However, when turning to the important issue of economic discrimination—the problem of ‘the poor pay more’—EC law has not much to offer. In some areas, such as the regulation of services of general interest, at least the problem is expressly recognised. For example, in the Commission report on the state of the liberalisation of the energy markets, Member State measures requiring supply of electricity to geographically isolated consumers and to sick and disabled consumers were expressly accepted.⁷¹ The Commission extended this idea in a Communication on services of general interest in Europe, where it noted the concerns regarding both ‘specific needs of certain categories of the population, such as the handicapped and those on low income’, and ‘complete territorial coverage of essential services in remote or inaccessible areas’.⁷² In relation to financial services, the Commission has also noted the problem of access for low-income people and has expressed support for action at the national level to solve it.⁷³ In later communications on financial services, however, this issue has been omitted. The position of EC with regard to the need to prohibit discrimination against low-income citizens therefore amounts to, even in the realm of services of general interest, at best a passive acceptance of national measures, but not the adoption or promotion of European ones.

E Need-Rational Welfarism

As a principle of non-discrimination of the economically weak has not been acknowledged in EC contract law, it is self-evident that any signs of a need-rational welfarism that would accept more favourable treatment of the economically weak actors than others are lacking as well.

In at least some Member States there is a practically important type of regulation that may include at least a nuance of need-rational welfarism,⁷⁴ namely the consumer bankruptcy schemes.⁷⁵ Consumer bankruptcy rules can be understood as implying a kind of partial private responsibility of the creditor(s) for the social security of the debtor. However, although some interest has been devoted to this issue on the EC level,⁷⁶ no concrete measures have emerged so far. The fact that the above-mentioned principle of social *force majeure*, according to which the contractual consequences of

⁷¹ COM(1999) 198 final, at 10.

⁷² COM(2000) 580 final, at 7.

⁷³ COM(1997) 309 final, at 7–8.

⁷⁴ However, consumer bankruptcy regulation may also be built on a market-rational fresh-start pattern of justification, emphasising the need to have the consumer back on the market.

⁷⁵ Though the introduction of such schemes may be used as an argument to diminish welfarism in contract law proper, see U. Reifner, ‘“Thou shalt pay thy debts” Personal Bankruptcy Law and Inclusive Contract Law’ in J. Niemi-Kiesiläinen, I. Ramsay and W. C. Whitford (eds), *Consumer Bankruptcy in Global Perspective* (Hart Publishing, 2003), 143, 151.

⁷⁶ N. Huls *et al.*, *Overindebtedness of Consumers in the EC Member States: Facts and Search for Solutions* (European Communities, Kluwer, 1994). More generally on European insolvency law see P. J. Omar, *European Insolvency Law* (Ashgate, 2004).

over-indebtedness should be mitigated whenever the condition has been caused by unemployment, illness, or other similar occurrences, has emerged in some Member States has not found any reflections on the European legislative level either, although the principle has been mentioned in European welfarist doctrine.⁷⁷

F Public Values Welfarism

As mentioned before, examples of an explicit public values welfarism in contract law are fairly rare in the Member States, and therefore they cannot be expected to flood European contract law either. There are, however, express and implied rules that in a market-rational spirit make it possible for those who regard environmental or similar values important to have regard to them in the pre-contractual stage or rely on them in post-contractual disputes. The Community eco-label award scheme⁷⁸ is the main example of the former kind of rule. The latter kind of rule is reflected in the discussion of whether ecologically negative properties of goods sold can be regarded as defects when applying sale-of-goods rules. This development would mean that buyers could make use of contractual remedies against the seller in such a case, if they so wished. There are good arguments for a standpoint according to which at least misleading environmental claims given in marketing can lead to non-conformity according to the Consumer Sales Directive. In the same vein, if a marketing claim is made that the product has not been produced by using child labour or that it has been produced in factories where fundamental workers' rights are respected, one should understand the situation as a case of non-conformity of the goods, if the claim is not true. In addition, it is possible that strong environmental or human rights reasons may be used to constitute non-conformity even in some cases where no explicit marketing claims have been made.⁷⁹

VI Conclusion: Consequences for Harmonisation

I have here attempted to show the abundant varieties of welfarism in contemporary contract law. The types of regulation are multifarious, and even on a more theoretical level, one encounters a multiplicity of dichotomies and other classifications, most of which appear as well-founded as they reflect some essential feature of the development.

In order to access the existing European *acquis* and to have a frame of reference for the discussion concerning a possible welfarist future of European contract law, I have constructed, on the basis of various dichotomies expressed in contract law doctrine, a welfarist assessment scheme, distinguishing six types of contract law welfarism. It starts from market-rational welfarism, that being quite close to the rationality of traditional contract law, and it proceeds further away from the traditional patterns through market-correcting welfarism, internally redistributive welfarism, and externally redistributive welfarism, and ends in the categories of need-rational welfarism and public values

⁷⁷ The principle has been characterised as an expression of a solidarity contract law by B. Lurger, *op. cit.* note 6 *supra*, at 133.

⁷⁸ Reg 1980/2000.

⁷⁹ On the discussion concerning these issues see my paper, T. Wilhelmsson, 'Contract Law Enforcement of Provisions on Marketing: The Solution of the Consumer Sales Directive', in H. Collins (ed.), *The Forthcoming EC Directive on Unfair and Commercial Practices* (Kluwer Law International, 2004), 233–235.

welfarism. A truly welfarist contract law obviously must contain rules of all these kinds of welfarism.

Looking at the present *acquis* through this lens, it is easy to discern its emphasis on market-rational welfarism. It is obviously more market-rational than the national contract law of at least some of the Member States (like the Nordic Member States). In this sense EC law should not be praised (or criticised, depending on the values of those making the assessment) as being very strongly welfarist. It is to a large extent situated on the first, least radical level of the assessment scheme. However, the complete picture is not one-dimensional. There are important examples of market-correcting welfarism as well, and some of them even affect the heartland of contract law. They have had a clear welfarist impact on at least some national laws.

Moving further from the two first levels of welfarism, the elements of the *acquis* that belong on the other levels are scarce. EC contract law is not interested in internally redistributive justice, that is for example in the general price/quality ratio of contracts, neither in externally redistributive justice, that is in promoting access and non-discrimination of economically less advantaged persons. Only in the case of promoting gender equality and combating racial and similar discrimination is EC regulation more dense on the level of externally redistributive welfarism. In promoting this and similar kinds of equality, EC law has indeed been able to add some welfarism to the European contract landscape.

Needless to say, need-rational welfarism as well as public values welfarism has not gained much attention in EC law.

Looking at the future of European contract law from a normative point of view—of a person that believes in the need for more welfarism—the above assessment at least shows some areas in which there is room for advancement, in addition to the more generally accepted improvement of market-rational and market-correcting measures. In the internally redistributive perspective, European contract law could more boldly dare to intervene in the main subject matter of the contract and the price/quality ratio in cases where such intervention is needed. The development of externally redistributive welfarism again requires more discussion concerning the question to what extent the non-discrimination principle of EC law could be broadened to cover discrimination also on economic grounds, in order to improve the relative position of economically weak persons, and what mechanisms one could efficiently use for this purpose. Lastly, at least some infusion of need-rationality in the system would be most welcome, from a perspective that takes the ideology of welfarism seriously.

This is not to say that all these improvements should necessarily be made with the help of EC law. The analysis of the varieties of welfarism highlights the problems connected with suggestions concerning large European codifications of contract law that seek to appear as coherent.⁸⁰ Although the assessment scheme presented here starts from regulations that seem to be relatively well in line with traditional contract thinking, and proceeds towards more expressly welfarist solutions, it does not reflect a linear scale on which one could choose a suitable point from which one could construct a coherent welfarist system of contract law. Welfarist regulations of various types need to be combined, and within each type one finds a very broad variation in the intensity

⁸⁰ The same problems are related to the recent attempts of the Commission to turn the traditional minimum consumer protection policy of the EC into a harmonisation policy. For a more general criticism of these attempts, see G. Howells and T. Wilhelmsson, 'EC Consumer Law: Has it Come of Age?' (2003) 28 *European Law Review* 370.

of the regulations. In other words, there is no coherent system of values behind the present welfarism of the contract laws of the EC and the Member States, and I believe that it is not even possible to combine the varieties of welfarism in any coherent system. Therefore, one needs to take a stand on various questions on an issue-by-issue and case-by-case basis. The variety, in other words, implies that the solutions are necessarily too political, too decisionistic, to be carved in stone once and for all. A general European civil code, contract code or consumer code—at least if it would comprise not merely a minimal code⁸¹—would probably be too static an instrument to allow sufficient space for a welfarist, more scattered and decisionistic, improvement of the rules. In order to safeguard the legitimacy of the decisions—as the legitimacy cannot be sought in the idea of a coherent system—there should be sufficient room for continuous development at national level in addition to the required EC measures. Welfarism requires a constantly learning law. This view rather speaks for a process of Europeanisation through a free movement of legal ideas and doctrines,⁸² across the borders, as well as between the national and EC levels, than for a once-and-for-all codification of broad areas of private law.

⁸¹ Cf U. Mattei, 'Hard Minimal Code Now!—a Critique of 'Softness' and a Plea for Responsibility in the European Debate over Codification', in S. Grundmann and J. Stuyck (eds), *An Academic Green Paper on European Contract Law* (Kluwer Law International, 2002).

⁸² See T. Wilhelmsson, 'Private Law in the EU: Harmonised or Fragmented Europeanisation?' (2002) 10 *European Private Law Review* 77.