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DIALOGUE AND DEBATE: SYMPOSIUM ON COMMODIFICATION AND EU LAW

Alienation commodification: a critique of the role of EU consumer law

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Abstract

This paper offers a critique of European Union (EU) consumer law's role in commodification. Arguing that commodification is best understood as a normatively dependent concept, it contrasts two very different strands of commodification critique. While teleological critique refers to conceptions of the good life, authenticity, or the corruption of human essence, deontological critique relies on conceptions of right and wrong, justice, and human dignity. The paper argues for a specific, Kantian–Marxian version of the latter, proposing to understand commodification as a moral wrong when it leads to legal–political alienation. Such legal–political alienation occurs when someone becomes disconnected or feels dissociated from the political community and its political institutions because its laws treat that person as a mere means, not also an end. The only way to overcome such alienating commodification, the paper argues, is through a dialectic of individual and collective self-determination. On this normative basis, the paper, then, critiques core instances where EU consumer law wrongs its addressees through alienating commodification, including its acceptance of personal data as consideration, its encouragement of consumer resilience, and its privatisation of social justice through ethical consumerism.

Keywords: European consumer law; European private law; commodification; alienation; critical theory

1. Introduction

Why should we be concerned about commodification? What exactly is wrong with it? In this paper, I will argue for a specific normative view, which draws both on Marxian and on neo-Kantian thought and which, therefore, I will refer to as a Kantian–Marxian (or left–Kantian) view.[1] On this view, we should understand commodification as a moral wrong when it leads to legal–political alienation. Legal–political alienation in the sense intended here occurs when someone becomes disconnected or feels dissociated from their political community and its political institutions because its laws treat that person as a mere means, not also as an end. The (only) way to overcome such alienating commodification is through a dialectic of individual and collective self-determination.

On this Kantian–Marxian normative basis, I will show how European private law (EPL), in particular EU consumer law, wrongs its addressees by contributing to alienation through commodification. To this end, I will present a critique of core instances of alienating commodification

[1]As will become clear, the label refers to a specific Kantian–Marxian view and does not constitute a wholesale validation of Kant's or Marx's thought. Indeed, Kant's view of people of colour (in his anthropology) and Marx's view of women (in *Capital*) have been rightly critiqued as racist and sexist, respectively. Moreover, they are also politically alienating exactly in the sense intended here.

by EU consumer law, including the acceptance of personal data as consideration, the encouragement of consumer resilience, and the privatisation of social justice through ethical consumerism. In doing so, I aim to make two main contributions: first, to the critical-normative theory of alienation and commodification, by offering an account of what exactly is wrong with commodification; secondly, to the political practice of European consumer law, by showing where EU consumer law wrongs its addressees through alienating commodification.

Throughout, the focus will be on alienation through law (ie public alienation), and on society's – or rather, the political community's – collective responsibility for it, as opposed, in particular, to the individual private parties' moral responsibilities for wrongfully creating and maintaining alienating relationship governed by private law. In other words, at the centre of attention here is not the fact that one person instrumentalises another by treating them as a commodity but the fact that the political community, through its laws, makes such transactions legally enforceable. It is the alienating effect of the public recognition and enforcement of commodifying transactions, which fails to recognise all addressees of such contract law rules as equal justificatory authorities with human dignity (that is, as ends in themselves), that will be the main object of critique. Put differently, this paper presents a critique of EU consumer law, not of EU consumer transactions.

The argument builds up as follows. First, I discuss and contrast two quite different understandings of what is wrong with commodification (Section 2). Then, I proceed by developing and defending one particular view, that is, a Kantian–Marxian conception of alienating commodification as a moral wrong (Section 3). Subsequently, I critique EU consumer law commodification in terms of that conception (Section 4). Finally, I briefly discuss some obstacles to overcoming alienating EPL-commodification (Section 5).

2. Commodification

A. The fact of commodification

In principle, the term 'commodification' could be used in a merely descriptive sense, to refer to instances where something is turned into a commodity. Commodities are fungible goods, which means that in the eyes of the market there is no difference between specific instantiations of the good; they are all interchangeable and have the same market price, which is determined by (aggregate) supply and demand. Thus, the notion of commodification is closely related to markets. Indeed, commodification is a form of marketisation.[2] Market agents have treated not only certain goods, such as grain, gold, and oil, as commodities, but also certain services. Karl Marx famously demonstrated how in the capitalist economies of the 19th century labour-power, and hence workers, came to be understood as fungible:[3] the human commodity (*Menschenware*).[4] The literature on commodification has pointed to many contemporary instances of commodification, underscoring the ever-expanding role of markets in our lives. Classical and more recent instances of commodification discussed in the literature include human blood, human milk,[5]

[2]Marketisation is the wider term since it refers not only to commodity markets but also to markets for unique goods. For example, art markets typically do not treat paintings as interchangeable.

[3]K Marx, *Capital: A Critique of Political Economy*, Vol 1 [1867] (Penguin 1990), Ch 4 ('The fetishism of commodities and its secrets') and passim. The contemporary use of 'commodification' as a wider concept goes back to Polanyi, who analysed the 'great transformation', where not only labour but also land and money, that hitherto had been understood as deeply embedded in various forms of life, came to be regarded as fungible, indeed as commodities. See K Polanyi, *The Great Transformation: The Political and Economic Origins of Our Time* [1944] (Beacon Press 2001), esp Ch 6 (arguing that labour, land, and money are 'obviously not commodities', and therefore merely 'fictitious commodities', because they are not produced for sale).

[4]K Marx, 'Economic and Philosophical Manuscripts' in *Early Writings* (Penguin 1992) 336: 'human commodity, man in the form of a *commodity*'. (original: '*Menschenware*, den Menschen in der Bestimmung der *Ware*') (emphasis in original).

[5]See M Cohen, 'Regulating Milk: Women and Cows in France and the United States' 65 (2017) American Journal of Comparative Law 469–526.

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human organs, sex (sexual services), pregnancy (surrogacy), safety (security services), public space (shopping malls), news, education (private schools), legal scholarship,[6] passports, a right to jump the queue (fast lanes), a right to pollute (emission trading schemes), personal data, and law (regulatory competition),[7] among many others.[8]

B. The law of commodification

The legal constitution of commodities through private law

Commodification depends on law. This is so in the first place because modern markets generally depend on law.[9] This is the case not only for 'regulated' markets but also for so-called 'free' markets.[10] Markets are constituted and shaped by law.[11] A key role is played, in this regard, by general private law, in particular property law (which shapes and protects ownership in the commodity), contract law (which enables the exchange of the commodity against money), and company law (which ensures that not only natural persons but also legal persons can own commodities and trade them).

Successful commodification depends, in particular, on the legal recognition of the commodifying transaction.[12] No successful commodification occurs without the legal recognition – and, if necessary, enforcement – of the market exchange which constitutes a certain specific thing or activity as a commodity. Note, however, that in modern legal orders the recognition and enforceability of commodifying transactions is the default position.[13] This goes under the general banner of 'freedom of contract'. No specific permission from any public authority is required, in principle, for commodification. To the contrary, the very idea of freedom of contract is that the legal order generally recognises, as legally enforceable, any transaction independent of its nature, content, object, or purpose, and will provide contract law remedies for breach of contract upon request. It is decommodification which requires a specific legal intervention.[14] In other words, modern contract law provides a blanket permission, in principle, for commodification. Moreover, it structurally

[6]A Somek, 'Two Times Two Temperaments of Legal Scholarship and the Question of Commodification' 1 (2022) European Law Open 627–34.

[7]J Stark, *Law for Sale: A Philosophical Critique of Regulatory Competition* (Oxford University Press 2019).

[8]See eg E Anderson, *Value in Ethics and Economics* (Harvard University Press 1993); MJ Radin, *Contested Commodities: The Trouble with Trade in Sex, Children, Body Parts, and Other Things* (Harvard University Press 1996); M Sandel, *What Money Can't Buy: The Moral Limits of Markets* (Penguin 2012). For intersectional critique of the feminist critique of commodification of women's bodies, see D Roberts, *Killing the Black Body: Race Reproduction, and the Meaning of Liberty* (Vintage 1999) 383–7, arguing, with reference to Anderson and Radin, that 'feminist opponents of surrogacy miss an important aspect of the practice when they criticise it for treating women as *fungible* commodities. A Black surrogate is not exchangeable for a white one.' (Ibid., 387 (emphasis in original).

[9]K Pistor, *The Code of Capital: How the Law Creates Wealth and Inequality* (Princeton University Press 2019).

[10]RL Hale, 'Coercion and Distribution in a Supposedly Non-Coercive State' 38 (1923) Political Science Quarterly 470–94.

[11]J Habermas, *Between Fact and Norms: Contributions to a Discourse Theory of Law and Democracy* (Polity Press 1996), 117.

[12]EB Pashukanis, *Law and Marxism: A General Theory* [1924] (Pluto Press 1989) regarded the commodity form and the modern legal form (in particular private law with its abstract conceptions of persons, rights, and obligations) as co-original, ie as mutually presupposing each other (no commodity markets without general private law and no use for general private law without commodity markets), thus explicitly rejecting the orthodox Marxist understanding of private law as mere ideology.

[13]In pre-modern times only a limited set of transaction types, each with its own specific *causa*, were legally recognised as enforceable. The idea that mere agreements had to be observed (*nuda pacta servanda sunt*) is an early modern one. See R Zimmermann, *The Law of Obligations; Roman Foundations of the Civilian Tradition* (Clarendon Press 1996), Ch 17; J Gordley, *The Philosophical Origins of Modern Contract Doctrine* (Clarendon Press 1991).

[14]Note the parallel with the language of free markets versus regulation. However, just like the language of 'freedom of contract' so too is the language of 'free markets' misleading, because both depend on force, ie the binding force and legal enforceability of contracts. This is usually overlooked in naturalising libertarian accounts of contracts and markets. See further MW Hesselink, *Justifying Contract in Europe: Political Philosophies of European Contract Law* (Oxford University Press 2022), Ch 5, esp sections 1.A and 4.A.

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facilitates and sponsors commodification by offering contract law remedies backed up by a publicly funded judicial system.

Decommodification has occurred historically through contract law doctrines of invalidity. These include, in particular, the voidness (or nullity) of contracts that are – or whose '*causa*' is – deemed contrary to good morals or public policy.[15] In addition to contractual immorality there has been contractual illegality as another ground for contractual invalidity, where a contract is held void when a statute prohibits its conclusion or performance. Later, this came to be referred as 'regulation', especially when other forms of intervention were introduced than the all-or-nothing legal consequence of full-blown legal invalidity. Margaret Jane Radin, a pioneer of the subject, refers to such more nuanced forms of regulation as instances of 'incomplete commodification'.[16]

Constitutional pressure from EU internal market law

Within the European Union, the general rules of property, contract, and company law have remained national. This means that commodification in the EU's internal market depends, in principle, on national law. Without the national systems of private law the internal market could not properly function – indeed could not even exist. Conscious of this fact, EU internal market law, in particular the market freedoms, exerts a constant constitutional pressure on national private laws towards further commodification through the legal recognition as commodities of certain things and activities, understood by primary EU law as the removal of obstacles to the free movement of goods, services, capital, and persons across the EU internal market. It is true that the Court of Justice has accepted that respect for human dignity can pose certain limits to internal market commodification.[17] On the other hand, however, the Court has accepted that the so-called freedom to conduct a business, which is protected by the Charter on Fundamental Rights of the EU, also 'covers' (quite generically) 'freedom of contract'.[18] While *Alemo* might be read as proclaiming the European constitutionalisation of freedom of contract, which could provide EU constitutional backing for various instances of internal market commodification, so far, the Court has never repeated this doubtful ruling or even referred to it. Therefore, it is probably best regarded as a one-off aberration.[19]

C. What is wrong with commodification

The term 'commodification' is not usually used in a merely descriptive sense. Rather, when a practice or phenomenon is referred to as 'commodification' the implication is normally that there is something wrong with it. The idea is that a thing or activity is brought to the market and traded there for money that *ought not* to be exchanged for money (because money cannot capture its value), or be understood as fungible (because it is unique), or be considered a good or service (because it is not an object, but a subject, or a part or aspect of them). This raises the normative question of what, if anything, is wrong with commodification. Very different answers have been given.

[15]The doctrines of illicit *causa* are the modern residue, after the establishment of the principle of *pacta sunt servanda*, of the premodern causal principle pursuant to which only transactions with a recognised cause could give rise to legal remedies.

[16]MJ Radin, 'Market-inalienability' 100 (1987) Harvard Law Review 1849–937, 1917ff; idem, *Contested commodities*, Ch 7.

[17]See Case C-36/02, *Omega*, ECLI:EU:C:2004:614, where the Court held that respect for human dignity may limit the right to free movement of services, thus allowing national authorities to prohibit 'the commercial exploitation of games simulating acts of homicide' – ie the commodification of playing at killing people (laser tag) – for the reason that such an activity is 'an affront to human dignity'.

[18]See Case C-426/11, *Alemo-Herron and Others*, ECLI:EU:C:2013:521, paras. 31–32, interpreting Art 16 CFREU.

[19]In this sense, S Weatherill, 'Use and Abuse of the EU's Charter of Fundamental Rights: On the Improper Veneration of "Freedom of Contract"', 10 (2014) European Review of Contract Law 167–82. For further criticism, see M Bartl and C Leone, 'Minimum Harmonisation after Alemo-Herron: The Janus Face of EU Fundamental Rights Review' 11 (2015) European Constitutional Law Review 140–54; MW Hesselink, 'The Justice Dimensions of the Relationship between Fundamental Rights and Private Law' in H Collins (ed), *European Contract Law and the Charter of Fundamental Rights* (Intersentia 2018) 167–96.

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Laissez faire

One possible response to this question is: there is nothing wrong with it at all. As long as all parties concerned agree freely (understood as: without any external interference) to the transaction then there is no reason to object against the market sale of human blood, human organs, or sexual services, to name but a few familiar examples of contested commodities. For example, Charles Fried (who served as the US Solicitor General under President Ronald Reagan) is quite dismissive of what he calls 'the complaint that goes under the nonsense tag "commodification"'.[20] We can refer to this response as the libertarian view of commodification. It is usually bound up with highly contested Lockean-Nozickean notions of 'original ownership' ('*res nullius*'), in the case of goods, and of 'self-ownership', in the case of services, and with the idea of a pre-institutional (indeed pre-societal) individual natural right to liberty (understood as non-interference, ie negative liberty). Here, I will not further discuss the *laissez-faire* view of commodification.[21]

No direct concern, only via preferences

Another possible answer is: that depends on people's preferences. Whether certain instances of commodification should be rejected or supported by the law depends entirely on the preferences that the members of a given society happen to have. If people hold a preference for commodification, or more likely, for the legally recognised and enforced possibility to buy and sell certain things or activities on a market as generic goods and services then that is all that matters. In the likely event of disagreement, on this view, a calculus should be undertaken, where preferences for and against a certain instance of commodification are aggregated, and the outcome of such a cost-benefit analysis, being the most 'efficient' solution, should be promoted by the law. In this welfarist view, for example, human dignity, human rights, or notions of right and wrong, are not directly considered, eg as trump cards or veto rights, or as reasons of particular import, but only indirectly, to the (exact) extent that any preferences happen to exist in society for the legal consideration of such reasons (eg a taste for human rights protection or a distaste for alienation).[22] Here, I will also not further discuss this agnostic view on commodification.[23]

The teleological critique of commodification

When it comes, then, to the critical use of the term commodification,[24] we can distinguish two different types of critique,[25] which I will refer to as teleological and deontological, respectively.[26]

[20]C Fried, *Modern Liberty and the Limits of Government* (Norton 2007) 74.

[21]For a critique, see Hesselink, *Justifying Contract in Europe*, Ch 7, esp section 4, with further references.

[22]See L Kaplow and S Shavell, *Fairness versus Welfare* (Harvard University Press 2002) 21, on a 'taste for fairness'.

[23]For a critique, see Hesselink, *Justifying Contract in Europe*, Ch 7, section 3, with further references.

[24]Commodification critique deals in part with the same problems as reification critique in classical critical theory. See eg R Jaeggi, *Alienation* (Columbia University Press 2014).

[25]C Hermann, *The Critique of Commodification: Contours of a Post-Capitalist Society* (Oxford University Press 2021) recently presented a 'materialist' critique of commodification. However, in reality his account is consequentialist, focusing as it does on the negative consequences of commodification for people and the environment, and idealist–perfectionist, in as far as it outlines a better society, based on the optimal satisfaction of 'essential human needs' rather than on making profit, and, therefore, amounts to a form teleological critique of commodification as understood here.

[26]For most purposes the distinction can also be referred to as the one between ethical and moral critiques of commodification. The former view – ie ethical critique of commodification – tends to be wide, on the one hand, in that it refers to thick, substantive conceptions of the good life and of the human person, and to substantive ethical values, but is also narrow, on the other hand, in that it tends to refer to the values, self-understanding, and the common good of a specific ethical community (for example, the national community or the community of EU citizens). The latter view – ie moral critique of commodification – tends to be narrow, on the one hand, in that it focuses exclusively on a (thin) moral (typically, neo-Kantian) conception of right and wrong, the person as a moral agent, and moral norms, but, on the other hand, it is wider in that it considers moral norms to be universal (ie as referring to what we owe to each other as human beings). Here I use the (closely related) distinction between teleological and deontological views because, in addition to the normative, it also captures the ontological dimensions of these respective sets of views.

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Teleological (purpose-oriented) critiques of commodification criticise certain instances of commodification for being incompatible with certain ends. They typically are grounded in an ethical conception of the individual or common good. The individual good may refer to a specific understanding of a meaningful, fulfilling, or otherwise good life. However, the conception may also be metaphysical, referring to human nature or to essential aspects of a truly human life. In this regard, the language of corruption is often used.[27] Moreover, it may also include the lives of non-human animals and non-animal subjects (their value, their essence). Think, for example, of the critique of the commodification of animals (as meat) and of rainforests (as timber). The common good may refer – in the first-person plural – to the values, culture, or heritage of 'our' society (understood as a community), or to 'our' truths (think, for example, of epistemologies of the South).[28] Again, the community of reference does not need to be limited to humans.

In the literature on commodification we find various instances of what ought not to be for sale as a commodity on the market because of its corrupting effect, for example human labour, human blood, gestational services, sexual services, a right to jump the queue, a right to emit CO_2, given 'our' understanding of the good life or the good society.[29]

Teleological conceptions of commodification refer to what gives meaning to life. The problem is that in pluralist societies individuals and groups adhere to different conceptions of the good. Ultimate values, worldviews, and forms of life may point in opposing directions or may even be incommensurable. As John Rawls put it, with reference to Isaiah Berlin, 'no society can include within itself all forms of life.'[30] Therefore, if a pluralist society adopts a conception of commodification grounded in one of the substantive conceptions of the good held by some members of that society (in a democracy, typically the majority), then it will, by definition, reject the understanding of the meaning of life of other members (typically minority groups).

The deontological critique of commodification

By contrast, deontological (duty-oriented) critiques of commodification criticise certain instances of commodification for wronging certain persons or groups. They typically are grounded in a (moral) conception of the right, expressed in principles of right and wrong, human rights, and justice. The conception of the right may be metaphysical (Kant's categorical imperative) or non-metaphysical (various forms of moral constructivism, especially). They too may include non-human animals, as subjects with rights. The deontological (or moral) critique of commodification refers to moral norms, and to a conception of the person as a moral agent, which claim universal application, expressing what we owe to each other as human beings. Think, in particular, of commodification critiques in terms of human rights, human capabilities, relational justice, and social justice.

[27]For example, Stark, *Law for Sale*, Ch 5, argues for the case of regulatory competition, in particular the idea of a law market, where law is considered a product, that such a commodification of law itself may lead to the corruption of the very notion of law, because when law is understood as being 'for sale', then we value law 'in the wrong way'. For the ideas of a law market and law as product, see EA O'Hara and LE Ribstein, *The Law Market* (OUP 2009); H Eidenmüller, 'Recht als Produkt' 64 (2009) *JuristenZeitung* 641–53.

[28]B de Sousa Santo, *Epistemologies of the South: Justice Against Epistemicide* (Routledge 2014).

[29]For these examples and others, see eg E Anderson, *Value in Ethics and Economics*; M Sandel, *What Money Can't Buy: The Moral Limits of Markets*. The 'corruption objection', as M Sandel calls it, is directed against the commodification of goods that should not be sold on the market even in a more egalitarian society because of the corrosive tendency of markets: certain goods are tainted, demeaned, and degraded when turned into commodities. See M Sandel, *What Money Can't Buy: The Moral Limits of Markets* (Penguin 2012) 9–10. See also MJ Sandel, 'What Money Can't Buy: The Moral Limits of Markets' in *The Tanner Lectures on Human Values*, delivered at Brasenose College, Oxford May 11 and 12, 1998, 94: 'the argument from corruption cannot be met by establishing fair bargaining conditions. If the sale of human body parts is intrinsically degrading, a violation of the sanctity of the human body, then kidney sales would be wrong for rich and poor alike. The objection would hold even without the coercive effect of crushing poverty.' Sandel's notion of corruption strongly builds upon Anderson's idea of proper valuation.

[30]J Rawls, *Political Liberalism*, expanded ed (Columbia University Press 2005) 197–8. See I Berlin, 'The Pursuit of the Ideal' in H Hardy and R Hauseer (eds), *The Proper Study of Mankind: An Anthology of Essays* (Pimlico 1998) 1–16, 10–11: 'Some of the Great Goods cannot live together. This is a conceptual truth. We are doomed to choose, and every choice may entail an irreparable loss.'

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In the following, I will develop a specific version of this latter – ie deontological (moral) – type of commodification critique, proposing to understand commodification as a moral wrong whenever it leads to alienation, itself to be understood as a moral wrong.

Commodification as a normatively dependent concept

This brief overview has shown that if we want to make sense of commodification critique, to assess the merits of the various strands in it, and to endorse or reject one or more of them, we best understand commodification as a normatively dependent concept, which means a concept that derives its substance from other norms or values.[31] In particular, it makes an important difference whether one regards what is wrong with commodification in the teleological terms of ethical values, the good life, and thick conceptions of what it means to live a truly human life, where commodification leads to an inauthentic, corrupted, or miserable life, on the one hand, or in deontological terms of moral norms, human dignity, and moral agency, where commodification constitutes a moral wrong, in particular a social or interpersonal injustice, on the other.[32]

3. Alienating commodification

A. Alienation through commodification

Before further outlining and defending a specific version of deontological (moral) critique of commodification, I will now point to a further layer of moral complexity by briefly addressing the normative links between commodification and alienation.

A person may have become alienated when they experience a sense of disconnectedness from, as the case may be, the society they are part of (social alienation), the polity or political community to which they belong (political alienation), the laws that claim to apply to them (legal alienation), specific others (relational alienation), or from themselves (self-alienation). These different instances of alienation may overlap, and one of them may also lead to another. In particular, self-alienation, where one experiences oneself as alien, is usually a consequence of social, political, or legal alienation.[33]

Just like commodification, also alienation could be understood, in principle, as a purely descriptive concept, referring in this case to a state of mind or mental condition. However, alienation, as well as its (near) synonym estrangement, is not normally understood as a state of mind any person would ever wish to be in, or one it would be good or right for anyone to be in – quite the contrary. Usually – and especially in critique –, the term is used to express indignation with regard to a specific instance of human suffering, which may be manifested in apathy or despair.[34] As we will see, just like commodification so too alienation is best understood as a normatively dependent concept.[35]

[31]On the idea of a normatively dependent concept, arguing for the concepts of tolerance, legitimacy, and democracy that they each depend normatively on the concept of justice, see R Forst, *Normativity and Power: Analyzing Social Orders of Justification* (Oxford University Press 2017) 78, 132, and 135, respectively.

[32]One important difference is that while (ethical) values can be balanced, the (deontological) right has categorical priority over the good. This means that to the extent that alienating commodification constitutes an injustice, and hence a moral wrong, any considerations as to how useful, beneficial or valuable commodification might otherwise be should not override the prevention of this wrong.

[33]For this reason, Forst refers to social alienation as 'first-order' and to self-alienation as 'second-order' alienation. R Forst, 'Noumenal alienation: Rousseau, Kant and Marx on the dialectics of self-determination', 22 (2017) Kantian Review 523–551.

[34]See A Allen and B O'Connor, 'Introduction' in A Allen and B O'Connor (eds), *Transitional Subjects: Critical Theory and Object Relations* (Columbia University Press 2019) 1–20, 1–2, pointing to the strong theoretical alliance between the original Frankfurt School and psychoanalysis. See also S Ndlovu, 'Race and the Coloniality of Being: The Concept of Alienation in the Existential Thought of Frantz Fanon' 45 (2020) Journal of Eastern Caribbean Studies 1–16, showing how for Frantz Fanon despair became the overall manifestation of alienation.

[35]See Forst, 'Noumenal alienation' (n 33) 546.

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In Karl Marx's thought, alienation is inextricably linked to commodification: alienating labour is commodified labour. The young Marx set out his ideas on alienated labour in what are usually referred to as the Economic and Philosophical Manuscripts.[36] In the capitalist system, where workers exchange their labour for wages, as a commodity on the labour market, they come to understand their labour,[37] and the product of it, and indeed themselves, as a thing external to them, as an alien object. In other words, the very understanding of labour as a commodity entails the alienation and estrangement of workers from their labour, from the products of their labour, from each other, and from themselves.

It is not difficult to see how other instances of commodification can lead to similar patterns of alienation. If a person 'sells' their blood, their kidney, their 'gestational service', their 'sexual service', or their personal data on the market, as a generic good or service – a commodity –, then they are likely not only to see these 'goods' and 'services' as things external to them, but they may also become estranged and alienated from themselves and from the society that understands these practices as market exchanges of commodities against money, and from the polity that enables and supports such instances of commodification.

Just like in the case of commodification, as said, there is a descriptive side to alienation: how individuals and groups (or even society as a whole) come to understand themselves and each other. And just like in the case of commodification, alienation too has an important structural component, which is sustained by institutions such as law, including private law (and vice versa).[38] However, also just like in the case of commodification, here too the usual understanding is that alienation is not a mere neutral fact. Rather, there is something profoundly wrong with it.

Therefore, here too the question arises: what exactly is wrong with alienation? And here too – in addition to the libertarian view that alienation is not a moral or political problem, given that no one is interfering with anyone's freedom, and the welfarist–utilitarian account, which is willing to count alienation as a problem only to the extent that people prefer themselves or others not to become alienated (which frankly sounds quite alienating in itself) –, among the political views that do consider alienation problematic we can distinguish, again, between teleological and deontological accounts.[39]

B. The teleological critique of alienation

As to teleological conceptions, they understand alienation in terms of impeded or otherwise failed self-realisation, self-authorship, or achievement of a meaningful, authentic, or otherwise good life.[40] On such views, alienation occurs when someone is not 'truly' or 'authentically' themselves, based on some substantive conception of the good or authentic life, is impeded in the ethical ideal of self-realisation or self-authorship, or stands in no meaningful relationship to oneself or others.

[36]K Marx, *Economic and Philosophical Manuscripts* (n 4). While Marx wrote these manuscripts in 1844 (at the age of 26) they were first published only in 1932.

[37]Later Marx introduces the specific term 'labour-power'. See Capital, Ch 6 ('The sale and purchase of labour power').

[38]See Marx, ibid: 'Wages are an immediate consequence of alienated labour and alienated labour is the immediate consequence of private property. Thus, the disappearance of the one entails also the disappearance of the other.'

[39]D Enoch, 'Autonomy as Non-Alienation, Autonomy as Sovereignty, and Politics' 30 (2022) Journal of Political Philosophy 143, distinguishes between autonomy as non-alienation and autonomy as sovereignty, and argues that, while the former is normatively prior, the latter is understandably dominant in political contexts. Note, however, that Enoch understands 'non-alienation' in political contexts as the situation where matters are decided in accordance with one's values and deep commitments, and 'sovereignty' as political agency – in other words as what I call teleological and deontological accounts of alienation, respectively. As a result, his (teleological) argument for the political priority of 'sovereignty' over 'non-alienation' is akin to my (deontological) argument (below) for public autonomy as crucial in overcoming public alienation (de-alienation through emancipation).

[40]See eg Jaeggi, (n 24), who understands alienation in terms of the absence of meaningful relationships to oneself and others (while avoiding strongly essentialist or otherwise metaphysical presuppositions (Ibid., 32)).

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Often such views are metaphysical (in particular, ontological) in that they rely on some understanding of human essence.

Some of Marx' writing suggests a commitment to such a teleological (in his case, ontologising) conception.[41] For example, when he writes that 'labour belongs to man's essence', that 'he confirms himself in his work', and that 'alienated labour alienates man from his vital activity',[42] then these passages seem to imply a certain ethical conception of the good life or a metaphysical conception of human nature.[43]

As it was the case for ethical-teleological understandings of commodification, here too, with regard to ethical-teleological notions of alienation, in pluralist societies like our own, where people adhere to divergent worldviews and pursue diverse ways of life, if we ended up taking one such conception as the basis for public policies and for generally applicable and enforceable laws – whether public or private laws –, then, insofar, citizens rejecting that particular conception might rightly understand themselves as being dominated by those policies and laws, which would constitute an injustice towards them.[44] In addition – and that is the point to be added here –, they risk becoming alienated by such laws which, for good reason, they fail to consider reasonably justifiable (legal–political or public alienation).[45]

C. Alienating commodification as a moral wrong: a Kantian–Marxian view

By contrast, on a deontological view alienation must be understood as a moral wrong (which may be relational or social or both). On this view, the point is not that alienated persons and groups live miserable lives (although this will often be the case) but that they have a right for individuals (in the case of relational alienation) or society (in the case of social alienation), to avoid, and as the case may be, stop causing the alienation. In the latter case of social alienation, this may require (structural) institutional change, which may include private law reform as well.

The core idea here is to understand alienation in terms of the categorical imperative, as formulated by Immanuel Kant in the formula of humanity.[46] On this view, alienation, as a moral wrong, results from instrumentalisation. This may be the instrumentalisation either of others or of

[41]According to S Lukes, *Marxism and Morality* (Oxford University Press 1987) 87 'it is the teleological, Aristotelian, perfectionist Marx we must follow' if we want to grasp Marx's understanding of emancipation from alienation under communism.

[42]Marx (n 4). Critically, Michel Foucault, "Truth and Juridical Forms"' [1973] in *Power: Essential Works 1954–84* (Penguin 2020): 'in point of fact, labor is absolutely not man's concrete essence'.

[43]See, especially, E Fromm, *Marx's Concept of Man* [1961] (Bloomsbury 2013), who emphasises Marx's humanist naturalism (and the continuity in Marx's thought in this regard, thus rejecting the 'strawman' idea of a 'split' between a young humanist Marx and an old scientific Marx of *Capital*). In the same sense eg M C Nussbaum, *Frontiers of Justice: Disability, Nationality, Species Membership* (Belknap Press 2006), Ch 1, § vii, who reads Marx' humanist account of human dignity in the 'Economic and philosophical manuscripts' as a comprehensive doctrine of human life (whereas she herself, while drawing on Marx' conception of life worth of human dignity, turns it into a political conception in the Rawlsian sense, ie one that citizens can endorse from within their various otherwise divergent and perhaps even incommensurable comprehensive doctrines). See also H Collins, *Marxism and Law* (Oxford University Press 1982) 119 ('metaphysical assumptions about the essence of man'). For the view of a 'radical break' (in 1845) by Marx with humanism following his 'scientific discovery' of historical materialism and its corollary, ie the understanding of humanism and its concepts – first and foremost, alienation – as ideology (part of the superstructure), thus becoming an anti-humanist, see L Althusser, *For Marx* [1965] (Verso 2005) ch 7.

[44]On the injustice of domination through European private law, see MW Hesselink, 'EU Private Law Injustices' 41 (2022) Yearbook of European Law 1.

[45]I will come back to public alienation in the next section.

[46]I Kant, *Groundwork of the Metaphysics of Morals*' in M Gregor and J Timmermann (eds) [1786] (Cambridge University Press 2012) § 4:429: 'So act that you use humanity, in your own person as well as in the person of any other, always at the same time as an end, never merely as a means.' D Markovits, 'Contract and Collaboration' 113 (2004) Yale Law Journal 1417, sees the binding force of contract as grounded in the categorical imperative (the humanity formula): by breaching their promise the promisor ignores the promisee's ends, thus merely using the other as a means for their own ends, and in doing so the promisor betrays their respectful community as a result of which the parties become estranged.

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oneself. When one treats another person or oneself as a mere means, and not also as an end, this may result, respectively, in relational, social, and self-alienation. And whenever one instrumentalises another person or oneself then insofar one does not respect them as an autonomous person. In other words, on this Kantian view alienation should be understood as a particular form of heteronomy.[47] Or to be more precise, making a more limited claim, alienation through instrumentalisation constitutes a core case of alienation.[48]

The treatment of a person as a mere means to one's own ends, that is the failure to respect them as an end in themselves, is not an empirical phenomenon, an observable fact. Rather, this kind of alienation occurs in the normative space of reasons. It happens when one's reasons are ignored, indeed when a person is denied standing as a normative authority, when they are not properly considered as a person with moral agency, as a reason-giving authority. This is why Rainer Forst refers to this kind of alienation as 'noumenal alienation'.[49] As he puts it, 'noumenal alienation results from a lack of being recognized or a lack of recognizing yourself as an agent of justification equal to others, as having an equal right to justification. In this sense, alienation violates the dignity of humans as moral and political lawgivers.'[50]

While, as said, some of Marx's writing on alienated work suggests a teleological–ethical conception of alienation, various other passages clearly express a deontological view, for example when he writes that 'alienated labour degrades man's own free activity to a means'.[51] Through alienating, objectified, indeed commodified labour, workers become mere means to the end of their own physical survival and to the capitalists' end of maximising their profits. On this view, what is wrong with the commodification of labour, that is the objectification and externalisation of one's labour through market exchange as an object of property, is the denial of the human dignity of the worker. And as Kant put it, while things only have a *market price*, persons have *dignity*.[52] Therefore, when a person's work is reduced to a commodity then that person's inalienable right to dignity is denied. As Rainer Forst submits, 'the Kantian moral conception of the equal dignity and inalienable authority of persons is not just obviously at work [in the Economic and Philosophical Manuscripts], but also every form of alienation is noumenal because in every one of these forms humans misrecognise each other and themselves as part of a structured social process of reified agents producing and exchanging 'things'.'[53]

There is, thus, an important cognitive aspect to the deontological understanding of alienation. Alienation occurs through cognition – miscognition and misrecognition to be more precise. A person is denied the equal standing as a moral authority and the human dignity *they have*. In other words, contributing to someone's alienation does not only constitute a moral wrong but also a cognitive mistake. Understanding another person (or oneself) as a mere means to the ends of others is a mistake about that person's – indeed any human being's – moral status, their unalienable moral worth.[54]

[47]Forst 'Noumenal alienation' (n 33).

[48]This leaves open the possibility of other types of alienation. However, that question is beyond the scope of this paper. Against the reduction of alienation to cases of heteronomy, see Jaeggi, *Alienation* (n 24), 200 (arguing that alienation is not coextensive with heteronomy).

[49]Forst 'Noumenal alienation' (n 33).

[50]Ibid., 525.

[51]Marx, 'Economic and Philosophical Manuscripts' (n 4). See from, *Marx's Concept of Man*, 45: 'Marx's concept [of alienation] touches here the Kantian principle that man must always be an end in himself, and never a means to an end.' (This should be corrected: never *merely* a means to an end.)

[52]Kant *Groundwork of the Metaphysics of Morals* (n 46), § 4:434–4:435: 'What refers to general human inclinations and needs has a *market price* . . . but what constitutes the condition under which alone something can be an end in itself does not merely have a relative worth, ie a price, but an inner worth, ie *dignity*.'

[53]Forst, 'Noumenal alienation' (n 33) 541.

[54]There is an analogy here with Miranda Fricker's idea of epistemic injustice (M Fricker, *Epistemic Injustice: Power and the Ethics of Knowing* (Oxford University Press 2007)), at least on a (doubly) deontological reading of that concept, as being concerned with the moral epistemology of deontological morality. On such a neo-Kantian reading, testimonial injustice and

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In the following, I will rely on such a Kantian-Marxian deontological reading of alienation. The focus here will be on alienation through European private law, that is on the moral-political violation of the dignity of European private law's addressees as political co-lawgivers. Obviously, a Kantian-Marxian conception of alienating commodification does not furnish any immediate clearcut answers in concrete cases (in spite of it providing a categorical standard). However, it does afford clear guidance as to which kinds of reasons to consider (moral agency, human dignity, self-determination, non-instrumentalisation, non-domination) and which ones not (self-authorship, authentic self-realisation, living a life true to one's values, traditions or culture) in normative thinking about the private law of commodification. On the view defended here, alienating commodification constitutes an injustice. Put differently, the right to justification entails a right to non-commodification – or to be more precise, a right against alienating commodification.

D. Overcoming alienation: the dialectics of private and public autonomy

Alienation may be personal (alienation from specific individuals, including oneself), social (alienation from the social group or society one belongs to), political (alienation from one's political community) and legal (alienation from one's legal order).

On the neo-Kantian view defended here, these are closely connected to personal, social, political, and legal heteronomy, respectively. This means, in turn, that overcoming alienation means, respectively, (re)gaining personal, social, political, and legal autonomy.

If, in addition, we understand personal (or private) autonomy and political–legal (or public) autonomy as co-original, standing in a dialectic relationship to each other (which means that they mutually presuppose each other, as two sides of the same coin – one cannot be had without the other),[55] then it follows: 1) that personal (private) and political–legal (public) alienation also stand in a (in this case, negative) dialectic relation to each other, and that 2) overcoming alienation requires a (positive) dialectic between private and public autonomy, and between their respective legal–political forms, ie subjective rights and democracy.

As Cristina Lafont has pointed out, political–legal (or: public) alienation may occur whenever there exists a structural disconnect between the interests, reasons and ideas of citizens and the legal order that claims application to them.[56] In such cases, citizens may become estranged from these laws and from their political community, because as addressees of these laws they are unable to understand themselves as their co-authors. Such 'political alienation', as she calls it, and what I would call legal–political alienation (because this better captures the connection between the co-author and addressee perspectives on non-alienation under democratic law) may result from what she calls 'democratic shortcuts', which are instances where lawmakers try to bypass the public sphere, which is the forum for public opinion and will formation, to enact laws that citizens cannot recognise as justifiable with plausible reasons. As a result, citizens may become estranged

hermeneutical injustice can be understood, respectively, as the moral wrong done to a person who is denied equal moral standing as an authority with regard to what amounts to a moral wrong or an injustice (testimonial injustice), and the moral wrong done to a person when political institutions are set up in such a way that they cannot make sense of their place in society, in particular they cannot recognise structural (interpersonal or social) injustices affecting them (hermeneutical injustice). Both types of epistemic injustice, ie testimonial and hermeneutical, are bound to lead to alienation. There is another possible analogy, ie with the understanding of Eurocentrism as a form of cognitive injustice, especially on a deontological reading of Eurocentrism as an epistemic injustice. Admittedly, the universalism of such a deontological view of epistemic injustice is likely to be rejected by decolonial critics (especially pluriversalists) as being eminently Eurocentric itself. For a defence of non-unilateral moral universalism, see R Forst, 'The Justification of Progress and the Progress of Justification' in A Allen and E Mendieta (eds), *Justification and Emancipation: The Critical Theory of Rainer Forst* (Pennsylvania State University Press 2019) Ch 2, 15, and with specific reference to European contract law, MW Hesselink, 'Progress in EU Contract Law' 18 (2022) European Review of Contract Law 281.

[55]See Hesselink 'EU Private Law Injustices' (n 44), section II.D, with further references.

[56]C Lafont, *Democracy without Shortcuts: A Participatory Conception of Deliberative Democracy* (Oxford University Press 2020) 19ff.

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from these laws, from the law-making process, and indeed from the political community in general.

Lafont distinguishes two different types or aspects of political alienation, which she calls, respectively, the identitarian and the justice aspects of political alienation. With regard to the former, she affirms that in pluralist societies identarian alienation cannot be avoided. Nor do democratic citizens have a right to see all their interests, reasons, and ideas expressed in the laws that apply to them. However, she underlines, the situation is different when laws that citizens are subject to are structurally disconnected from their considered judgement about justice. And democratic participation in law-making is essential to prevent an alienating disconnect between the laws to which citizens are subject and their collective considered judgement about justice. Only when citizens can take ownership of the laws that apply to them can the alienating experience be prevented of regarding these as made by others, whose political decisions they are expected to blindly defer to. It will be clear that Lafont's distinction between the identarian and justice aspects (or types) of political alienation aligns with the distinction between the ethical–teleological and moral–deontological understandings of commodification and alienation discussed above.

Another well-known source of legal–political (or public) alienation in this Kantian sense is the instrumental nature of EU law,[57] in particular internal market instrumentalism.[58] As Gareth Davies points out, the over-instrumentalisation of EU law, following from the narrow functional competences in the treaties, alienates the European public.[59] At the same time, the instrumental nature of EU law, and in particular the internal market instrumentality of European private law, also risks engendering relational (or private) alienation. It is important to be precise here and not to overstate the point. The problem is not that eg contractual relationships, or contracting parties, or EU consumer contract law should never be instrumentalised. National private laws too have legitimately done so for more than a century.[60] Contrary to what is sometimes claimed,[61] modern private law is legitimately informed by other considerations than formal corrective justice.[62] Private law does not go ultra vires merely because it refuses to limit itself to the implementation of morality. The deontological point is rather that the right (interpersonal justice, distributive justice, horizontal human rights) should always retain priority over the good (eg welfare, be it general welfare or specifically consumer welfare),[63] and – most relevant here – that the use of the contractual relationship should not be *merely* instrumental.[64] And indeed the familiar protection

[57]G Davies, 'Democracy and Legitimacy in the Shadow of Purposive Competence' 21 (2015) European Law Journal 2.

[58]On EU private law instrumentalism, see M Bartl, 'Internal Market Rationality, Private Law and the Direction of the Union: Resuscitating the Market as the Object of the Political' 21 (2015) European Law Journal 572; CU Schmid, *Die Instrumentalisierung des Privatrechts durch die Europäische Union: Privatrecht und Privatrechtskonzeptionen in der Entwicklung der Europäischen Integrationsverfassung* (Nomos 2010); and MW Hesselink, 'European Contract Law: A Matter of Consumer Protection, Citizenship, or Justice?' 15 (2007) European Review of Private Law 323.

[59]Davies, 'Democracy and Legitimacy in the Shadow of Purposive Competence' (n 57) 14: 'EU law is over-instrumental and lacks expressive qualities, alienating the public'.

[60]See Micklitz, *The Politics of Justice in European Private Law* (n 24), 33; MW Hesselink, *CFR & Social Justice* (Sellier 2008), section 3.1.

[61]See T Gutmann, 'Some Preliminary Remarks on a Liberal Theory of Contract' 76 (2013) Law and Contemporary Problems 39; A Ripstein, *Force and Freedom: Kant's Legal and Political Philosophy* (Harvard University Press 2009); EJ Weinrib, *The Idea of Private Law* (Harvard University Press 1995).

[62]See Habermas, *Between Fact and Norms* (n 11), section 4.B.

[63]CL de Almeida and F Esposito, 'In Search of a Grand Theory of European Private Law: Social Justice, Access Justice, Societal Justice and Energy Markets' in L de Almeida, M Cantero Gamito, M Durovic and KP Purnhagen (eds), *The Transformation of Economic Law: Essays in Honour of Hans-W Micklitz*, (Hart Publishing 2019), 153.

[64]This would be the case eg if the maximisation of consumer welfare was understood to be the sole or primary objective of EU consumer law. For the claim that the EU legal order is best understood as meant to allocate resources efficiently in accordance with the consumer welfare standard, see F Esposito, *The Consumer Welfare Hypothesis in Law and Economics: Towards a Synthesis for the 21st Century* (Edward Elgar 2022) 3 and *passim*.

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of various categories of weaker contracting parties (employees, tenants, consumers) typically can be justified not only with social justice but also with interpersonal justice reasons (as long as these are understood in a thoroughly substantive, or 'materialised', sense). Quite similarly, where EU consumer contract law is justifiable also in terms of substantive interpersonal justice, as is often the case and as tends to be even the Court of Justice's principal reading,[65] then insofar the instrumentalisation by EU consumer contract law of contracting parties and their relationships is not problematic. Having said that, it is not enough from the point of view of Kantian–Marxian non-alienation that EU consumer law merely *could* be justified also in terms of substantive interpersonal justice. The right to justification requires that – and alienation can only be prevented when – adequate – in this case, non-alienating, hence non-instrumental, – justifications are in fact forthcoming. This is indeed what the Court of Justice has been ensuring in its case law on EU consumer contract law at least since *Mostaza Claro*.[66] Yet, there is yet one further requirement, crucial in order to prevent political alienation, as we saw. That is: the addressees of EU consumer contract law, and of its official justificatory discourses, must be able to regard themselves also as its co-authors. In this latter, democratic respect judicial justification by the Court of Justice of the European Union (CJEU) remains second best at best.[67]

In such cases (and others), persons come to have subjective rights and obligations, which ensure and define their private autonomy (individual self-determination), which they cannot meaningfully (that is: more than nominally) understand as grounded in their public autonomy (collective self-determination).

Given that, as said, alienation should be understood as a denial of one's moral–political standing as an autonomous agent, the only way to overcome it is through a positive dialectic of private and public autonomy.[68] By the latter I mean: the determination of private autonomy and its limits (individual self-determination), as expressed in private law rights and obligations, through the exercise of public autonomy (collective self-determination), both to be understood in a thoroughly substantive (as opposed to merely formal) sense. Only then will the addressees of legal norms be able to understand themselves as their co-authors, which is a precondition for a private and political life without alienation.[69] Elsewhere, I have argued that various forms of participatory democracy could contribute to strengthening collective self-determination, and hence, overcoming public alienation through European private law.[70]

4. The role of European consumer law

What does this neo-Kantian-Marxian understanding of alienating commodification entail for the role of European private law? Here I will critique several core cases where EPL-commodification risks alienating its addressees. The focus will be mainly on EU consumer law.

[65]G Bacharis and S Osmola, 'Rethinking the Instrumentality of European Private Law' 30 (2022) European Review of Private Law 457–80; C Leone, *The Missing Stone in the Cathedral: Of Unfair Terms in Employment Contracts and Coexisting Rationalities in European Contract Law* (doctoral thesis University of Amsterdam, 2020); MW Hesselink, 'Unjust Conduct in the Internal Market: On the Role of European Private Law in the Division of Moral Responsibility between the EU, Its Member States and Their Citizens' 35 (2016) Yearbook of European Law 410–52.

[66]Case C-168/05, *Mostaza Claro* ECLI:EU:C:2006:675, para 36. More recently, see eg Case C-725/19, *Impuls Leasing România* ECLI:EU:C:2022:396, para 40. See further, MW Hesselink 'EU Private Law Injustices' (n 44), Section IV.B.iii.

[67]See further, Hesselink, 'EU Private Law Injustices' (n 44), section III.B.

[68]Forst 'Noumenal Alienation' (n 33).

[69]Note that here the Kantian and the Marxian views come apart, given that Marx saw no role (other than transitory) for political institutions.

[70]MW Hesselink, 'Private Law Subjects in Citizens' Assemblies: on the Dialectics of Private and Public Autonomy in the EU' <https://ssrn.com/abstract=4244684>.

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A. Personal data as consideration

Perhaps the most widely discussed instance of EU private law commodification is the recognition in 2019 of personal data as currency in consumer contracts for digital content and digital services.[71] The explicit denial by the European legislator will only further alienate European citizens. See the preliminary recital:[72]

> Digital content or digital services are often supplied also where the consumer does not pay a price but provides personal data to the trader. Such business models are used in different forms in a considerable part of the market. While fully recognising that the protection of personal data is a fundamental right and that therefore personal data cannot be considered as a commodity, this Directive should ensure that consumers are, in the context of such business models, entitled to contractual remedies.

The claim that 'such business models are used in different forms in a considerable part of the market' naturalises markets. Instead, it is a crucial role of the directive itself that it co-constitutes the market – in this case a market for personal data. Without legal recognition of personal data as currency or consideration, such contracts would be void and the relevant 'considerable part of the market' would not exist (or at best would be a black market, which in this case, however, would not seem a viable one). And the recognition that 'the protection of personal data is a fundamental right and that therefore personal data cannot be considered as a commodity' is in flat contradiction with the explicit legal recognition by the directive of personal data as a valid counter-performance, ie of its consideration as a commodity. Indeed, the well-known phrase that 'when something online is free, you're not the customer, you're the product' catches the commodification of the person much better. Further alienation may follow from the reference in the directive to 'the consumer's personal data'. This would be personal data that someone has in their capacity as a consumer. However, that capacity seems hardly personal, indeed the opposite: from the perspective of sellers and service providers any consumer is as good as any other, as long as they are willing to pay in whichever way is most profitable.

The stated rationale, ie that the directive 'should ensure that consumers are, in the context of such business models, entitled to contractual remedies', does, of course, get things backward. These business models are neither a natural fact nor inevitable. And while it is undeniable that they yield massive profits for businesses, and that consumers will obtain the digital services and content they want without having to pay any money, this comes at the price of the commodification of European citizens' personal data in the guise of consumer protection. This seems a striking case of alienating EPL-commodification. And any 'consent' given by the consumer, even when legally valid,[73] does not change this, not only because private autonomy can never replace public autonomy, but also – and most to the point here – because alienated consent expresses alienation rather than making up for it.

Interestingly, in a recent 'consumer questionnaire', where the Commission inquired whether consumers experienced certain specific problems online, one possible problem suggested by the Commission was: 'My personal data was misused (or used unfairly) to personalise commercial offers (eg the company seemed to use information about my specific weaknesses and vulnerabilities when showing me personalised content).'[74] The idea that personal data can be misused (or used unfairly) in this way suggests a possible instance of what one might call

[71]See Directive 2019/770 of 20 May 2019 on certain aspects concerning contracts for the supply of digital content and digital services, Art 3 (Scope).

[72]Recital 24.

[73]The directive does not regulate the validity of the consent given. See Recital 38.

[74]Public consultation for the Fitness Check of EU consumer law on digital fairness (DigitalFairnessPC_29_11_2022_EN.pdf).

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'miscommodification', which might give rise eventually, ie in the context of the 'fitness' review (on which below), to partial decommodification, leading to a mixed regime of regulated or 'incomplete' commodification.

B. Vulnerable consumers of essential services

When public utilities were privatised into 'market sectors', such as telecommunications, energy, and transport, that were deemed in need of 'liberalisation', this turned citizens, with a right to a public service (not for profit), into consumers of private services (for profit), with a right to consumer protection. Moreover, these services, which were formerly understood to be essentially public services were now seen as essential private services, with a need to protect the 'vulnerable consumer' thereof against the powerful and ruthlessly profit-seeking market players on whom they had now come to depend.[75]

It is not difficult to see how the commodification of large sections of the public service into private services that citizens now had to buy as consumer on the market, coupled with the protection of vulnerable consumers of essential services, resulting in the legal transformation of citizens, who are owed equal concern and respect, into vulnerable consumers, who are granted consumer rights and remedies, was bound to have significant alienating effects on persons subject to the European legal order.[76] The privatisation of public services, the marketisation of society, the consumerisation of citizenship, and the vulnerabilisation of equal respect, are different aspects of alienating commodification through European private law.

C. Consumer resilience

The 'New consumer agenda: strengthening consumer resilience for sustainable recovery', that the European Commission published in 2020, expressed a very specific conception of the person, ie as a 'resilient consumer'.[77] This understanding of persons by the European executive and co-legislator may be rightly experienced by European citizens as politically alienating in various respects.[78]

First, citizens may not see or even wish to see themselves as resilient. They may well understand themselves as fragile, helpless, or inflexible. They may or may not be pleased with how they are, but at least some European citizens – and perhaps many – may experience it as profoundly alienating for the European Commission to have an agenda to strengthen their resilience. Indeed, they may well think – and with good reason – that it is none of the EU's business whether or not they are – or wish to be – a resilient person.

Secondly, it may be even more disorienting, and indeed alienating, for European citizens to learn that the Commission aims to strengthen their 'resilience' and to 'empower' them in their specific capacity as consumers – or even more specifically, as 'energy consumers' (which means, as persons trying to keep their homes warm).[79]

[75]On the private law consequences of the liberalisation and privatisation of former public utilities, see Micklitz, *The Politics of Justice in European Private Law* (n 24), 236ff. On universal service obligations, see ibid., 288ff.

[76]A European Commission survey in 2018 found that as many as 43 per cent of EU citizens considered themselves vulnerable as consumers for one or more aspects mainly linked to their socio-demographic status. See *Survey on consumers attitudes towards cross-border and consumer-related issues 2018 – Final Report*, 198.

[77]Commission communication 'New Consumer Agenda: Strengthening Consumer Resilience for Sustainable Recovery' Brussels, 13.11.2020 COM(2020) 696 final.

[78]The Commission is a co-legislator because it has the exclusive right of initiative and withdrawal of legislative proposals: without Commission initiatives there is no (secondary) EU law. See Art 17 TEU, Para 2, and for the ordinary legislative procedure, Art 289 Para 1 TFEU.

[79]European Commission (n 77), 17.

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Finally, throughout the same document (as well as in others)[80] the Commission also refers to the resilience of the European Union, sometimes in the same sentence.[81] This suggest that the EU, in typical welfarist (ie utilitarian) vein, fails to take seriously the distinction between persons.[82] This is bound to alienate European citizens and others subject to the EU's laws and policies. Here, European citizens (and, wider, persons affected by EU laws and policies), risk becoming, as 'resilient consumers', mere means to the ends of the EU and its resilience, which they may well experience as alienating for the double reason that they are treated as means rather than as ends in themselves, and as fungible instead of unique.

It is true that in this case the alienating effect of European private law does not derive directly from commodification. However, arguably, here the instrumentalisation of persons by EU law risks reaching a point where consumer resilience obtains certain properties of a commodity (the resilient consumer as product) to be traded in the internal market with a view to the EU's economic recovery. If something is a mere means, it is indifferent, replaceable, that is, fungible.[83] And treating a person as a mere means to an end (in this case, a collective end) means turning them from a person into a fungible thing, a commodity.

D. Ethical consumerism and the privatisation of social justice

EU law increasingly understands citizens as willing to pursue sustainability goals in their capacity of consumers. In other words, sustainability goals are commodified, turned into something consumers buy on the market. Such ethical consumerism may be alienating in at least two respects.

First, it is not clear that citizens should understand their sustainability concerns as concerns they have *as* consumers, rather than as political concerns they do have but which are in direct *conflict* with their interests as consumers (ie more products to choose from and lower prices).[84] Indeed, arguably these concerns are best understood as justice concerns, which should have *priority* over consumer interests, and which are not even commensurable with them. It is only in a welfarist conception where principles, values, and other human motivations are reduced to so-called 'consumer preferences', that these various concerns become commensurable, through money ('willingness to pay' on the market), ie as a commodity. However, arguably the concept of consumer preferences is misleading exactly in this respect: it suggests commensurability – and hence the possibility of trade-offs – between concerns that *ought not* to be traded off against one another, because of the categorical moral demand to understand them as incommensurable. Human rights and climate justice should not be traded off against consumer surplus. It makes an important difference whether we understand sustainable consumption as a matter of empirical preferences (for a sustainable lifestyle), ethical values and group identity (adherence to the value of sustainability, identification with a sustainable form of life), or universal moral principles (a moral

[80]See eg *Commission Work Programme 2022: Making Europe Stronger Together* (Strasbourg 19.10.2021 COM(2021) 645 final), 2 ('boost our economy and rebuild a post COVID-19 Europe that is greener, fairer, more digital and more resilient').

[81]See eg European Commission (n 77), 2020, 4 ('take into account data and evidence from research on consumers' behaviour when assessing the resilience of the EU to future shocks') and Ibid., 21 ('contribute as a key driver for a sustainable recovery and resilience of the EU economy and consumers').

[82]See J Rawls, *A Theory of Justice* (Harvard University Press 1971) 27 ('Utilitarianism does not take seriously the distinction between persons').

[83]See Jaeggi (n 24), 208.

[84]See T Judt, *Ill Fares the Land: A Treatise on Our Present Discontent* (Allen Lane 2010) 135: 'In our political as in our economic lives, we have become consumers'.

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duty – and a corresponding right – not to harm workers, future generations, or nature as such). And the misrecognition of moral duties as consumer preferences alienates moral agents.[85]

Secondly, even when EU consumer law facilitates virtuous consumers in their attempts at sustainable consumption, they are faced with a massive collective action problem. And as Aditi Bagchi has recently argued, when it is unlikely that others will behave virtuously it cannot be expected from an individual to do so either.[86] Defending what she calls a 'no-martyr principle,' she argues that we should 'use mandatory rules issued by the state rather than moral exhortation of individuals to solve moral collective action problems'. She offers the example of corporate social responsibility, suggesting that 'we might expend less energy exhorting corporations to behave well and invest political resources in mandatory rules'. While conscious of the fact that the corporate social responsibility movement has been a response to existing political obstacles to public law reform, she argues, nevertheless, and plausibly in my view,[87] that 'nothing short of public law is likely to be successful.'[88] Similarly, I would add, legal facilitation by private law, or even private law nudges ('choice architecture', where the socially desirable option is presented as the default) are not the right response to such moral collective action problems.[89] What is needed is hard regulation, which altogether removes the socially undesirable options from the consumer's menu,[90] or to make the sustainable one become non-optional (eg a mandatory consumer right to repair with a view to strengthening the circular economy).[91] Given that we are talking here about fundamental rights (to safe and dignified working conditions) and distributive justice (the distribution of the costs of combating climate change, between present and future generations, between the global north and the global south, and between rich and poor consumers) such regulation (when likely effective and proportionate), it seems, would easily meet the threshold of

[85]The otherwise excellent and inspiring manifesto on law and political economy (LPE) (J Britton-Purdy, DS Grewal, A Kapczynski and KS Rahman, 'Building a Law-and-Political-Economy Framework: Beyond the Twentieth-Century Synthesis' 129 (2020) Yale Law Journal 1785), discusses neither commodification nor alienation. This seems significant. While constituting a direct (and wholly pertinent) attack on the (welfarist) law-and-economics paradigm of efficiency, the manifesto shares with law and economics an undue focus on the economy (in this case political economy rather than welfare economics). Yet, what we need today, if we want to fight political alienation, is a critique of economic reductionism. And LPE will remain an economically reductionist approach to law, albeit a much more appealing one (because it proposes to democratise the laws constitutive of the economy), if it fails to recognise the (self-)understanding of human agents, in at least some political contexts (and perhaps in many), as political agents without being in those contexts also economic agents. Critique today should aim at a more radical change of discourse, away from the economic fetish. Similarly, C Hermann, *The Critique of Commodification*, while announcing the 'contours of a post-capitalist *society*' proposes the 'democratisation of the *economy*' (see, respectively, the subtitle of the book and p 153; emphasis added). But should not a use-value society (ibid., 152ff) entail a turn away from economic understandings of value in society? Indeed, should not the critique of economic reductionism be at the heart of commodification critique? And is not the reduction of society to the economy profoundly alienating?

[86]A Bagchi, 'Law and the Moral Dynamics of Collective Action' 53 (2022) Seton Hall Law Review 149. Similar, A Ripstein 'Rationality and Alienation' 19 (1989) Canadian Journal of Philosophy Supplementary Volume 15, 449.

[87]With the clarification that in the civil law tradition mandatory private law rules would not be considered 'public law'.

[88]Ibid., 196–7.

[89]RH Thaler and CR Sunstein, *Nudge: Improving Decisions about Health, Wealth and Happiness* (Penguin 2009).

[90]Similar, LKL Tjon Soei Len, *Minimum Contract Justice: A Capabilities Perspective on Sweatshops and Consumer Contracts* (Hart Publishing 2017), arguing that consumer contracts for goods produced in sweatshops should be void.

[91]The recent Commission proposal for a directive on common rules promoting the repair of goods (Brussels, 22.3.2023 COM(2023) 155 final) preserves the consumer's right towards the seller, in case of non-conformity, to opt for replacement rather than repair whenever replacement is 'cheaper' (see ibid., Art 12, p 13, and recital 28). Presumably 'cheaper' here refers only to the cost to the consumer, not overall social cost (which would include environmental harm). Beyond non-conformity cases, the proposal introduces a mandatory obligation for the producer to repair certain goods (Art 5). Even though the producer can require payment (ibid.), the mandatory availability of a repair option may still increase the life cycle of certain consumer goods and may thus contribute somewhat towards a more circular economy. However, overall the proposed directive mostly opts for incentives for ethical consumption rather than removal of non-sustainable options.

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reasonable non-rejectability which is a (neo-Kantian) precondition for non-dominating law.[92] The point most relevant here, however, is that private law rules grounded in a martyr principle are politically alienating. They alienate European citizens and other EPL-addressees because they present as a consumer option what is in fact a moral-political demand. The (neoliberal) privatisation of sustainability and social justice responsibilities through EU consumer law is another instance of alienating commodification.

E. Consumer law's colour blindness

EU consumer law's blindness towards specific lived experiences, including consumer experiences, of persons of colour and of persons belonging to ethnic minorities is bound to be experienced as alienating by many addressees of European private law. A colour-blind EU consumer law de facto normalises and valorises the experience of the ethnic and racial majority.[93] Black alienation,[94] intersectional alienation,[95] and more generally the alienation of oppressed and marginalised subjects, have been documented for decades. Overcoming alienation through European private law must, therefore, prominently include overcoming the whiteness of EU consumer law.[96]

5. EPL-decommodification: the dialectics of private and public autonomy

What, if anything, can be done about commodification through EU consumer law – and wider, EPL-commodification? As said, there exists a negative dialectic relationship between private alienation (relational and self-alienation) and public alienation (political and legal alienation), and a corresponding positive dialectic relationship between private autonomy (or individual self-determination) and public autonomy (or collective self-determination). Hence, the only viable way to overcome alienating EPL-commodification is through radically democratic EPL-making, in particular, through the systematic inclusion in the centre of EPL-making of all those who are currently legal–politically marginalised and alienated.[97] In other words, only a radically democratic European private law can bring emancipation from alienating commodification through EU consumer law.[98] In conclusion, two caveats are in order.

First, the deontological Kantian-Marxian view of commodification and alienation defended here is not limited to relational or interpersonal injustices. Quite the contrary: it focuses strongly on structural aspects, in particular intersecting structures of oppression and marginalisation such as sexism, racism, ableism, homo- and transphobia, ageism, and classism, understanding these as social injustices, for which society (ie citizens collectively) is responsible, and which may require

[92]On this threshold, see R Forst, *The Right to Justification: Elements of a Constructivist Theory of Justice* (Columbia University Press 2007), and with specific reference to European private law, Hesselink 'EU Private Law Injustices' (n 44).

[93]KW Crenshaw, LC Harris, DM HoSang and G Lipsitz, *Seeing Race Again: Countering Colorblindness across the Disciplines* (University of California Press 2019).

[94]See F Fanon, *The Wretched of the Earth* [1961] (Penguin 2001).

[95]See A Lorde, *Sister Outsider* (Penguin Books 1984). More recently, see eg Dasgupta et al, 'Axes of Alienation: Applying an Intersectional Lens on the Social Contract during the Pandemic Response to Protect Sexual and Reproductive Rights and Health' 19 (2020) International Journal for Equity in Health 130, discussing differential access to sexual and reproductive health rights during the Covid-19 pandemic from an intersectional perspective and delineating intersecting 'axes of alienation' within communities, and between communities and state actors.

[96]Seminal on the whiteness of the CJEU and how this undermines its legitimacy, I Solanke, 'Diversity and Independence in the European Court of Justice' 15 (2008) Columbia Journal of European Law 89. For a critique of the whiteness of EU private law, see Hesselink 'EU Private Law Injustices' (n 44) Section II.

[97]For a very different approach to democratic decommodification, see Hermann, *The Critique of Commodification*, 139–44 (focusing on the democratic determination of use-value and essential human needs through a stakeholder-participation model).

[98]On radically democratic European private law making, see MW Hesselink, 'Private Law Subjects in Citizens' Assemblies: On the Dialectics of Private and Public Autonomy in the EU' <https://ssrn.com/abstract=4244684>.

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radical reform, also in the field of (European) private law. Having said that, there exists a possible tension in this regard – or perhaps a dialectic relationship – between the Kantian and the Marxian side of the present argument.

Secondly, I have not said much about self-denial, loss of self-respect, lack of self-recognition – in sum, self-alienation, in particular the question of where a person who denies their own standing as a moral and political equal can find the resources to overcome alienation through individual and collective self-determination.[99] Clearly, paternalism or saviourism are not the solution by definition. However, radical critique and allyship, it seems, can contribute to preparing the ground, by removing obstacles, for overcoming self-alienation through self-determination.

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[99]On self-alienation, see especially Jaeggi, *Alienation* (n 24), who rightly emphasises that self-alienation always also has important social (including institutional) dimensions (ibid., xxii–iii, 219). Insofar, self-alienation would even seem a misnomer.

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