



2023

## EQUITY AND EXPEDITION IN CONSUMER LAW AND JUSTICE: SOME THORETICAL REFLECTIONS AND PRACTICAL CONCERNS

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### Recommended Citation

Baxi, Prof. Upendra (2023) "EQUITY AND EXPEDITION IN CONSUMER LAW AND JUSTICE: SOME THORETICAL REFLECTIONS AND PRACTICAL CONCERNS," *International Journal on Consumer Law and Practice*: Vol. 11, Article 2.

Available at: <https://repository.nls.ac.in/ijclp/vol11/iss1/2>

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# EQUITY AND EXPEDITION IN CONSUMER LAW AND JUSTICE: SOME THORETICAL REFLECTIONS AND PRACTICAL CONCERNS

—Prof. Upendra Baxi\*

**Abstract** *This essay examines the notions of consumer in various incarnations as Grahak and Upbhokta, ethical consumer, alienated consumer, and the involuntary consumer in the context of consumer law and justice (CLJ) and consumer education. In many senses, the idea of ‘consumer’ is a recent idea as a market subject both to necessary and unnecessary market evils and modern law enacts ‘consumer protection’ as reform and rationalization of the market leaving intact the mode of production or the structures of the economy. That tension is aggravated by the further questions as to whether consumer rights are human rights. And these may remain marginal parts of conversations about consumer law but constitute almost the whole realms of consumer education, ethics, and justice. The paper focuses, in many ways, on this creative tension.*

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## I. LANDSCAPES OF ENQUIRY

I have been like an extinct volcano on consumer law and justice [CLJ, hereafter] movement, ever since I ended my association, in late eighties, with CERC “Consumer Education and Research Centre”, Ahmedabad and its

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charismatic dynamic founder Professor Manubhai Shah. He came to CAJ from industry, being a long-time manager of Arvind Mills in Ahmedabad and a visiting professor in the Indian Institute of Management there. Over time, he mobilized the support of eminent law teachers and researchers, senior lawyers and justices, financial journalists, legislators including veteran parliamentarians, social movement workers towards the consumer causes in the seminars/symposia, and even the Board of Trustees. The CERC went comparative in many ways, drawing interest and association by many consumer advocacy groups world wide. And although he led the CERC to engage in research and education, Manubhai showed an abiding interest in judicial activism: how CLJ movement intersects, and promotes, adjudicatory leadership in India is a fascinating story, yet to be narrated; both were intertwined, right from their origin. CERC has given equal attention to both law and justice- education and research were co-equal central concerns with law of consumer protection. In many ways, Manubhai emerged, as I used to say, as the Ralph Nader of India (an accolade which he happily shared with Shri H. D. Shourie, who founded the 'Common Cause,' which developed the momentum for appellate litigation for consumer causes).<sup>1</sup>

The late 80s, and early 90s, were halcyon days of legislative and judicial activism in India. They saw a kind of populism that accorded the dignity of rapid political and adjudicative attention to grassroots voices and movements. In a sense, it was post-emergency activism, a typically Indian way of saying 'never again' to the type of emergency excesses of flouting the values and visions, and the promise of Indian constitutionalism.<sup>2</sup>

Undoubtedly, nascent forms of new constitutional judicial review (CJR, hereafter) dawned thanks to a new partnership of professions and social movements and an incremental, even when ever so slight, radicalization of the media, middle classes, and section of Indian populace.<sup>3</sup> This is manifest in the crosscurrents of OSM [old social movements] and NSM [new social movements] in their distinct relations to law and to the scenario of Indian consumer

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<sup>1</sup> See the Website of the Consumer Education and Research Center, Ahmedabad, at [cercindia.org](http://cercindia.org). Not many people know of the intense association between the Center and tall Indian Academics, such as Professor D. N. Saraf, who wrote an authoritative treatise on consumer law in India while at the center, Dr. Vasudha Dhagamwar of Pune University, and Professor S. N. Jain, the then Director of the Indian Law Institute. I was privileged to have an intimate association with CERC and its various initiatives, till Professor Shah's unfortunate departure from it (in the eighties) and we together shaped many a contour for the struggles for consumer education and justice. I was, I think, able to moderate Manubhai's excessive regard for the US consumer law and administration and towards some attention to involuntary consumers of goods and services, a category I explain later in this paper.

<sup>2</sup> Gyan Prakash, *Emergency Chronicles: Indira Gandhi and Democracy's Turning Point* (NJ, Princeton University Press, 2019).

<sup>3</sup> Upendra Baxi, *The Indian Supreme Court, and Politics* (Lucknow, Eastern Book Co., 1980).

movements were launched and developed - a task still for the national agenda of critical and comparative consumer studies. While the labor movement, for example, can be described as a classic example of OSM, the NSMs include many diasporic movements - for example, movements such as for human rights of impoverished and marginalized peoples, the feminist movements, the anti-largadam movements, the consumer rights movement, the nascent environmental and ecological struggles, the right to information struggles, movements for reclaiming democratization of judicial standing and directed to people's right to constitutional remedies.

All these can be understood as social justice and human rights movements aspiring to a new constitutionalism, but each has a specific social identity, autonomy, and interests (to use categories of capitalism — entrepreneurship, arenas, clientele, and ideologies/mentalities of their own). How these dovetailed and where they differed — in sum, how they related mutually, is a question that ought to engage CLJ studies and social action. However, the mutuality of interaction as well as relative autonomy — of social fields, agendas, and collective social action may not be any longer ignored. in the Indian CLJ studies and social action.

## II. MANY IMAGES OF A CONSUMER: CAJ – FROM GRAHAK TO UPBHOKTA (MODERN CONSUMER)?

Many images of a consumer crowd the landscape of consumer protection and welfare. It has not always been a modern notion of a market-based and operated being. The word 'consumer' has been used for 'Grahak', 'Upbhokta', 'ethical consumer', 'alienated consumer', and 'involuntary consumer.' In the contemporary world, it has also been used in the context of offline and online consumers. The law has little or no use for any wider notion than consumer of goods and services in market, product liability, and defective services that result in 'injury' or 'harm' to 'consumer.' In this sense, the distinction between 'consumer protection' realms are maintained, leaving ethical and social notion of 'consumer' to the spheres of education and civic morals.

We will not pursue here the question: Who is not to be regarded as consumer by the law on consumer protection? Nevertheless, some exclusions seem *prima facie* arbitrary: for example, not all the reasons given by the appellate consumer forums or Courts are cogent for the exclusion of government employees who do not receive superannuation benefits from Hyper - legalism, as the Supreme Court of India has often held, is not authorized in reading what in effect is a legislative welfare measure.

This section briefly traces the movement of thought from the notion of *Grahak* (customer) to that of *Upbhokta* (consumer). These Hindi/Sanskrit words perhaps do not articulate a conceptual *diffrend*, when they seek to express a difference between the two as comprising in the idea of an end-user. A consumer is one who consumes the product or services; in contrast, the client refers to a person who looks for professional service from the business. Both rely on trust and loyalty permeated increasingly by new social media and branding sciences and strategies. But the forms in which a customer loyalty is manifested remain different from client loyalty; it is different, and business/industry use terms ‘thick’ and ‘thin’ uses’;<sup>4</sup> one also speaks about operating in business-to-business and business-to-consumer markets. We should appreciate the fact that consumer loyalty articulates itself differently according to markets and each different market itself creates different classes of consumer loyalties although the law uses a general term for all markets – namely, service providers. Indeed, the law creates a new social identity– ‘consumer’ to whom the service-providers remain liable for ‘defective’ or ‘deficient’ goods and services,’ as described or defined to enumerate, under Chapter VI of the CPA (Consumer Protection Act, 2019, and consumer responsibilities for compensation for a product liability action for ‘harm’ caused by a ‘defective’ product “*manufactured by a product manufacturer or serviced by a product service provider or sold by a product seller*”.

### III. CONSUMER RIGHTS AND DUTIES

Of course, we all know tidbits of history or as often called the bare facts: the Consumers Association of India which was established in 1959 (ensuing the resolutions of 1958 Indian Standards Institute a Convention at New Delhi) followed by the 1996 Consumer Guidance Society of India, Mumbai (aiming to protect consumers amidst the rising prices of essential commodities), and the Council for Fair Business Practices was formed (the same year) by J.R.D Tata and other leading industrialists, Indian Consumer Union (1971) which included offering legal advice, testing facilities, arranging lectures and seminars and the establishment of CERC (1978) at Ahmedabad.

The story of origins also included consumer co-operative societies (like *Grahak Panchayat* and Government Employees Consumer Stores, etc.) which are also formed to protect consumers, to make their purchases directly from producers and sell them at reasonable price to members. We also know from such narratives that early consumer movements were at best rurrban (signifying both rural and urban) movements (these occurred in some cities such as

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<sup>4</sup> In so far as I can understand this, refers to computer science and is all a matter of data access on digital platforms, especially on types of access to the stored data, or ways of storage.

Mumbai, Delhi, Kolkata, Ahmedabad etc., and their immediate vicinage) and their equivalents were scarcely and sparsely reported from rural areas. We also know that the movements itineraries are an aspect of industry coalitions and semi-governmental auspices.<sup>5</sup>

But the term ‘consumer’ is used differently in social theory and ethical philosophy. And in multiple senses of that term the consumer was a truly an alienated figuration, despite the frequently quoted words of Mohandas Karamchand Gandhi: “*A customer is the most important visitor on our premises. He is not dependent on us. We are dependent on him. He is not interested in our work. He is the purpose of it. He is not an outsider in our business. He is part of it. We are not doing him a favour.*” My internet search does not reveal the source of this quote, but he, or his close followers, seem to have most likely said it. In any case, the significant point is that the observation does not refer to ‘consumer’ at all but a ‘customer.’ The question that still awaits research studies relate to the outlines of the transition from customer to consumer, and the difference this may make or map.<sup>6</sup>

We must start by noting the international aspects of the world consumer movement and later the anti-consumerism movement. The patterns of international cooperation are usually traced with the establishment of the IOCU (International Organization of Consumer Unions, in 1960) renamed, and

<sup>5</sup> See, Satya Sunderam. *Consumer Protection in India*, (B.R. Publishing Corporation, New Delhi. 1985); D. P. S. Verma, “Developments in Consumer Protection in India” *Journal of Consumer Policy*, 25:17–123 (2002); A.R. Prasad “Historical Evolution of Consumer Protection and Law in India”, *Journal of Texas Consumer Law*, 1:13: 132-136, (2008). However, one scraps the proverbial barrel even to find even a bare mention of social histories of being, or bring called a consumer. I would be happy to be proved wrong but there are no specific histories from the subaltern voices: feminist, Dalit, people living with disability, indigenous peoples, and other marginalized and oppressed communities.

However, as “*Consumer Voice*,” founded by Professor Sriram Khanna, says: “*The adoption of the Consumer Protection Act on December 24, 1986 ...was a major impetus for the Modern Consumer Movement in India. Because of such a revolutionary Act, India observes December 24 as National Consumer Day. However, even after ten years, there were less than 800 NGOs, most of which had minimal budgets and relied on government handouts. There are currently roughly 2000 NGOs, the majority of which exist simply on paper.*” See “*Rise and decline of the Consumer Movement in India*”, <<https://consumer-voice.org/.../rise-and-fall-of-consumer-movement-in-india>>(accessed 08.06.2023).

<sup>6</sup> And the expression ‘customer’ was very common then as in the maxim “*Customer is the King*”. But close etymological roots point to early 15th century as an agent noun from “one who squanders or wastes,” and later a sense in which since 1745 economic theory used it-- as “one who uses up goods or articles, one who destroys the exchangeable value”, of a commodity by using it” (opposite of producer) ...”This last is a crucial element for the concept of a consumer as a being who does not consume the exchange value of goods and services. Surely, though loosely used as an alternative to “capitalism” (in the competing vocabularies of socialism, and communism, in the early Cold War era) ‘consumerism’ as ideology and consumer as a being entail an active pursuit of consumption as a matter of an aggressive economic policy and organization.

re-tooled, as Consumer International. The latter formulated the Charter for Consumer Action.<sup>7</sup> Its mnemonic abbreviation – ‘CASES,’ stands for addresses many facets of morality,

- *Critical awareness* and learning how to distinguish *needs* from *wants*, or at least “*how to ask informed questions about price, availability and quality of goods and services*”;
- *Action and involvement* (the development of capacity to of consumers to act singly or in concert, “backed up by the confidence of knowledge and learning how to get a “*fair deal*”;
- *Social responsibility* concerns consumers awareness, concern, and sensibility, particularly with a grasp of impact on co-citizens, and especially on disadvantaged groups;
- *Ecological responsibility* as consumers thinking with the effects of their decisions on the physical environment, aware of the possible conflict between their “*desire to own things and the spoiling of this environment*”; and
- *Solidarity* with co-consumers as an ethical obligation shaped by sharing of common information (emphasis added).

But consumers in the marketplace are not concerned with their responsibilities as citizens, of the globe and the galaxy as much as their rights within a national legal order. True, the very first duty of critical awareness speaks to consumers minimal reflexive obligations within a national legal order. Their organizations also may pursue aspects of transactional justice. The positive law of consumer protection elaborates these duties. But the rest of responsibilities in the above listing are much extended, indeed to a point reaching the being of an ethical consumer, a persona which we locate briefly later in this essay.

Each moral duty is important but also deeply intertwined and entailing what are called in ethical theory (as well models of computer programming) as nested concepts, structures of meaning, and representations of signs and sense underlying the wider social structures. Perhaps, the most important message I that of co-constitution of the consumers as a market entity, human beings. and even as citizens of a territorially bounded State and a citizen of the world.

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<sup>7</sup> See, International Organization of Consumers Unions). Consumer Action in Developing countries — A consumer Action Charter [Consumer craft 1; Penang: IOCU (1980). See also Sue L. T. Mc Gregorm, “Consumer Responsibilities,” In: Emilien, G., Weitkunat, R., Lüdicke, F. (eds), *Consumer Perception of Product Risks and Benefits*, 527–545 (Springer, Cham. [https://doi.org/10.1007/978-3-319-50530-5\\_28](https://doi.org/10.1007/978-3-319-50530-5_28) (2017). It was also featured in an Indian website of Indira Gandhi Open University course pack UNIT 31 International Organizations: <http://egyankosh.ac.in/handle/123456789/13522>. The words in quote marks in the text are from the last source.

There is also, in the Indian context the issue of how far these international duties may be reading these duties not just *alongside* but *into* Part IV — A Fundamental Duties.

The IOCU also emphasized the need to recognize the rights of consumers of the consumers globally and to promote social justice though “*fairness in the marketplace*”. It crystallized the consumer rights as follows:

- (1) *the right to safety* (from production process and services (which are in the short or long term “*hazardous to health or life*”);
- (2) *the right to be adequately informed* (to make an informed choice or decision);
- (3) *the right to choose*, reformulated as to read: the “*right to basic goods and services*”;
- (4) *the right to be heard* (now broadened to right to be represented so that consumers’ interests receive “*full and sympathetic consideration in the formulation and execution of economic policy*” and “*a right to be heard and represented in the development of products and services before they are produced or a representation*”, not only in government policies, but also in “*those of other economic powers*”;
- (5) *the right to be redressed*, a right to a fair settlement of just claims, (involving the “*right to receive compensation*” for “*misrepresentation or shoddy goods or services, and where needed, free legal aid*”);
- (6) *the right to consumer education* (the right to acquire the knowledge and skills to be an informed consumer throughout life); and
- (7) *the right to a physical environment that will enhance the quality of life* (including protection against environmental problems “*over which the individual consumer has no control*” and of improvements in the “*environment for present and future generations*”.

This is now the new agenda for consumer rights, and it would be very crucial to identify how far the CAP 2019, and its jurisprudence, nuances these rights, and consumer responsibilities, in the changing scenarios of development, governance, rights, and justice. Equally important is the wider dimension which insists that regardless of the essence of the term ‘consumer’ in the Constitution of India, fundamental rights, duties, and some directive principles of state policy (Parts III, IV, and IV-A) extend to consumers, and business, as legal persons, or citizens. In reading these, as immanent in Indian constitutional orderings, we need to consider how far these rights may be already recognized by adjudicative interpretation or more widely as demosprudence,



as I call it) versus the need for further interpretation/action to incorporate these rights. Clearly, the Bhopal settlement orders by the Supreme Court of India violated almost all the rights in the above listing<sup>8</sup> The state acting as *parens patriae* under the Bhopal Act at least was morally bound to consider these issues as paramount, at least in considering the category and concept of a ‘involuntary consumer’ (an aspect we develop in Section VI below).

Finally, and very briefly stated here, we do not have many studies adopting this framework, nor that of the United Nations Guidelines for Consumer Protection (UNGCP). These were first adopted by the General Assembly in resolution,<sup>9</sup> later expanded by the Economic and Social Council in resolution<sup>10</sup> on the 26th of July 1999, and recently revised by the General Assembly<sup>11</sup> on 22 December 2015.

Equally critical for this purpose is its Section H urging particularly the Governments in developing countries, to “*give priority to areas of essential concern for the health of the consumer, such as food, water, and pharmaceuticals. Policies should be adopted or maintained for product quality control, adequate and secure distribution facilities, standardized international labelling and information, as well as education and research programs in these areas*”.<sup>12</sup> It is significant that equal attention is given to education as well as to social action (right to remedies) but standard accounts of consumer protection accentuate how consumer law and policy in India follow these standards, and relatively ignore professional ethics (civic education) and public morals (to retrieve a lost phrase of Emile Durkheim)<sup>13</sup> innovate these, yet remains a

<sup>8</sup> See, *Union Carbide Corporation v. Union of India*, (1989) SSC (2) 450. See also, Upendra Baxi, “Human Rights Responsibility of Multinational Corporations, Political Ecology of Injustice: Learning from Bhopal Thirty Plus? *Business and Human Rights Journal*, 1:01: 21-40 (2016); *ibid*, “Disasters, Catastrophes, and Oblivion: A TWAIL Perspective”, *Yearbook of International Disaster Law*, 72-86 (2019).

<sup>9</sup> The UNGCP are “a valuable set of principles for setting out the main characteristics of effective consumer protection legislation, enforcement institutions and redress systems and for assisting interested Member States in formulating and enforcing domestic and regional laws, rules and regulations that are suitable to their own economic and social and environmental circumstances, as well as promoting international enforcement cooperation among Member States and encouraging the sharing of experiences in consumer protection.” See, UNCTAD. [https://unctad.org/system/files/official\\_document/disciple](https://unctad.org/system/files/official_document/disciple).

<sup>10</sup> UNGA Resolution 39/ 248 of 16 April guidelines were first adopted by the General Assembly in resolution 39/248 of 16 April 1985, later expanded by the Economic and Social Council in resolution E/1999/INF/2/Add.2 of 26 July 1995.

<sup>11</sup> UNGA resolution 70/186 of 22 December 2015.

<sup>12</sup> *ibid*, 56.

<sup>13</sup> Emile Durkheim, *Professional Ethics and Civic Morals* (New York, The Free Press, 1958). It is a posthumous selection of sociology lectures given by Durkheim at the University of Bordeaux between 1890 and 1900 and repeated in Paris Sorbonne university in 1904. But see, Jürgen Mackert, “Reorganisation and tabilization: Social Mechanisms in Emile Durkheim’s Professional Ethics and Civic Morals: A Contribution to the Explanation of Social Processes,” *Journal of Classical Sociology*, 4, 311 – 336 (2004).

subject of intensive historical and sociological research, especially if now a fundamental right to education (Article 21-A) is to be regarded (as it must) to embrace consumer education as an aspect of human rights learning.

#### IV. ANTI-CONSUMPTION MOVEMENT

It is important to acknowledge that alongside the discourse on the rights of the consumers was that of the duties and responsibilities of the consumer. We have seen a glimmer of the latter when we looked at the international coding and the emphasis all along on ‘education’ of consumers. That education is directed to Anti-consumption in the Anthropocene era. However, Rohit Varman and Russell W. Belk have redirected attention to the Swadeshi movement in the struggle for national independence,<sup>14</sup> which castigated “*products from outside India*” as sinful “*in the Gandhian worldview, real swaraj, or positive freedom in Berlin’s ... interpretation was not possible without moral development, in which resisting modernity was foundational*”.<sup>15</sup> A defining feature of this identity politics of swadeshi nationalism movement was an “*attempt to sublimate conflicting, multiple solidarities based on caste, religion, and n regional affiliation under the unifying rubric of nationhood*”.<sup>16</sup> They trace the post-colonial avatar of *Swadeshi* in the various struggles against the Coca Cola cultures.<sup>17</sup> The message is, shortly put, nationalist ideologies policies and politics often determine the shape of anti-consumption policy and social action may take. What then may be the interaction between the levels of anthropogenic harm and global action for social change?

One way is to think about the consumers as an enlightened humans who rethink “*the effects that a purchasing choice has, not only on themselves, but also on the external world*”.<sup>18</sup> Another way is simply to say that all consumers have a duty/responsibility to do so, as the CPA says. This specifically takes the

<sup>14</sup> Rohit Varman and Russell W. Belk, “Nationalism and Ideology in an Anticonsumption Movement,” *Journal of Consumer Research*, 36, 686-700 (2009).

<sup>15</sup> *id.*, at 687.

<sup>16</sup> *ibid.*

<sup>17</sup> *supra* Note 13 at 689-698. See also, Rohit Varman and Ismael Al-Amoudi, “Accumulation Through Derealization: How Corporate Violence Remains Unchecked,” *Human Relations*, 69:10, 1909–1935 (2016).

<sup>18</sup> Rob Harrison, Terry Newhalem & Deirdre Shaw, “Pressure Groups, Campaigns and Consumers,” in Harrison, R., Newholm, T. and Shaw, D. (Eds), *The Ethical Consumer*, London (Sage, London. 2005). One may also identify consumer resistance in “three ways (3 I’s)”: “intentional non-consumption” resulting from a decision not to consume something; “incidental non-consumption” resulting from choice towards a preferred alternative (e.g. when a person chooses one brand over others, non-consumption of those unconsidered brands occurs), and “ineligible non-consumption” that results when a person cannot act as a consumer for a particular product (e.g. an “under age person not eligible for certain types product/services”).

choice-making out of the way least as imposing obligations of just sustainability that are non-derogable.

Taking a different approach, and preserving some element of choice, is offered what is called “*environmentally oriented anti-consumption*” (EOA)-at micro, meso, and macro levels-defined “*as acts directed against any form of consumption, with the specific aim of protecting the environment*”; a EOA behavior “*has to be directed against consumption—such as consumption reduction, avoidance, or rejection—and needs to be driven by environmental motivations or concerns*”.<sup>19</sup> How are the movements of degrowth and anti-extractive capitalism to be related to anti-consumption ways remains a relatively open question.<sup>20</sup>

## V. THE MYTH OF THE ‘ETHICAL CONSUMER’?

While the notion of an ‘ethical consumer’ is attractive, and even ethically fascinates many, it has not found much attention in business ethics and CLJ, where the discourse is virtually devoid, at least in India, of this idea at the level of litigation and adjudication. Anyway, a recent empirical exploration fore grounds declaration “*the ethical consumer is perhaps doomed to fail despite the nobility of the cause*”.<sup>21</sup> While the authors criticize the term ‘ethical’ as being “*too broad, too loose for operationalization, and too moralistic*”, they suggest an additional concept of  $C_NSR$  to the usually known one of CSR (corporate social responsibility). The  $C_NSR$  is “*the conscious and deliberate choice to make certain consumption choices based on personal and moral beliefs*” and one useful “*component of purchase decision*”.<sup>22</sup> On the other hand, it remains boldly stated that the “*ethical consumerism isn’t necessarily a lost cause*”.<sup>23</sup> The latter observation strikes as totally unreal when we study multinational corporate governance from the perspectives of people whose core

<sup>19</sup> Nieves García-de-Frutos, José Manuel Ortega-Egea, and Javier Martínez-del-Río. “Anti-consumption for Environmental Sustainability: Conceptualization, Review, and Multilevel Research Directions,” *J Bus Ethics* 148, 411–435 (2018) at 413.

<sup>20</sup> See as concerns degrowth movements, Giorgos Kallis, Vasilis Kostakis, Steffen Lange, Barbara Muraca, Susan Paulson, and Matthias Schmelzer, “Annual Review of Environment and Resources: Research on Degrowth,” *Annu. Rev. Environ. Resour.* 43:291–316 (2018); Arturo Escobar, “Degrowth, Post development, and Transitions: A Preliminary Conversation” *Sustainability Science* 10:451–462 (2015). As regards extractive capitalism, see Henry Veltmeyer, “Extractive Capital, the State and the Resistance in Latin America,” *Sociology and Anthropology* 4:8: 774–784, (2016); Sandro Mezzadra & Brett Neilson, “On the Multiple Frontiers of Extraction: Excavating Contemporary Capitalism”, <https://www.tandfonline.com/journals/rcus20> (2017).

<sup>21</sup> Timothy M. Devinney, Pat Auger and Giana M. Eckhardt, *The Myth of the Ethical Consumer*, 4 (Cambridge: Cambridge University Press, 2010).

<sup>22</sup> *ibid*, at 9.

<sup>23</sup> Paul Kim, “Ethical consumerism: Spending Money on Your Values,” [www.businessinsider.com/personal](http://www.businessinsider.com/personal) (19 February, 2022).

human rights stand violated by toxic torts, nuclear waste dumping, mass disasters, and climate change and global warming catastrophes.<sup>24</sup>

In any event, it is amazing that Michel Foucault's throwaway observation concerning 'consumer self' has now occupied great heights in business ethics, brand advertising research, and digital technology for surveillance and individuation of identities, social and individual.<sup>25</sup> For example, Ashlee Humphreys notably invites our attention to the consumer as a Foucauldian "*object of knowledge*" by comparing 'prisoners' and 'consumers' paradigms.<sup>26</sup> In the consumer paradigm, there is "*a less normative claim attached to deviance from the norm because of the paradigm shift now from 'disobeying machine' to 'desiring machine'*". Second, and especially from the "*stance of 'liberatory postmodernism'*" we perceive the "*dialectical co-constitution of ontology as it is formed by both marketers and consumers together*". We see "*how surveillance, although always ever-present, can be used for consumer ends (e.g., play) and marketer ends (e.g., profit)*". This, in turn, "*produces practices of consumer resistance*" in a "*rhizome-like*" fashion. The making/unmaking of individual and social identities though algorithmic corporate digital governance warrants attention as produces practices of consumer resistance constitute always the 'Other' of market dominance. How does the consumer desire to see affect her or his own desire to be seen? How may we grasp surveillance and capturing important aspects of the marketer–consumer relationship that may be unavailable to an analysis of discourse?

Humphreys suggests that Foucault's theory of "*embedded agency is uncannily applicable to the domain of consumer behavior as it regards the mechanisms of individuation, surveillance, and consumer resistance*". Still, further work in the Foucauldian vein should "*the more liberatory stance of consumer co-constitution in everyday practice*", always remembering that "*the specific mechanisms of knowledge-power are created for a variety of non-coordinated, non-conspiratorial reasons*", entailing "*subjugation or resistance at every step in their institution.*" And, because these reasons are not totalizing, "*they can be individually and then collectively resisted*" and "*changed*".<sup>27</sup> I have here merely outlined a rich development of Foucauldian bequest of implications for CLJ studies. For example, one may ask further if the normative overload the

<sup>24</sup> See, Upendra Baxi, *The Future of Human Rights*, Chapter 9 (*in press*, Oxford University Press); see also, *ibid*, "Disasters, Catastrophes, and Oblivion: A TWAIL Perspective", *Yearbook of Disaster Law*, 2:29-86 (2019).

<sup>25</sup> See, for Example Edward L. Grubb and Harrison L. Grathwohl, What, "Consumer Self-Concept, The" Symbolism and Market Behavior: A Theoretical Approach." *Journal of Marketing*, 31(4, PT. 1), 22–27 (1967).

<sup>26</sup> Ashlee Humphreys, "The Consumer as Foucauldian "Object of Knowledge," *Social Science Computer Review*, 24:3,3, 296-309 at 308 (2006).

<sup>27</sup> Humphreys, *op.cit*, at 308.

only? Is maker of difference between the between ‘prison’ and ‘markets? May consumers not be thought of, much the same way, as a prisoner of the market institutions? Is the saying correct that it is the market which *decides* what to sell from which a consumer may *choose*? Or are the consumer markets sovereign agents of both the decision and choice? Further, how far this co-constitution of domination and resistance may affect juridical and legislative domains, and these in turn may be affected by the equivalence between prisoners and consumers? What role accentuating their social responsibilities may be envisaged for the individual and associational consumer?

## VI. CLJ IN INDIA

It is always difficult to ascertain the ‘goal’ of consumer legislation, as indeed of any legislation. Pluralization remains very important for legislative design and detail. A legislation rarely pursues a single goal, it remains ‘polycentric’ (to borrow from Lon Fuller) and has thus multiple goals. Often, it is difficult to say whose, and what, purpose constitutes legislative intent, even when we may move away from ‘goals’ and speak merely of the legislative ‘intention’. This does not help analysis much: is then the intention – that of the drafts persons, mover of the bill, the intentions of a committee of legislature to whom the bill is referred to, movers of various amendments, or those present and voting? And in this context, I always recall two readings while a student in Bombay University postgraduate (in 1963-64) law department. The first was the writing of Morris Cohen, an eminent legal philosopher, who used to say that all legislation is essentially a ‘treaty of peace’ among warring interests. And the second was Hans Kelsen, who asked us to believe that what passes off as a finding of ‘legislative intention’ is act of retroactive *imputation* of intention (that is what the law is made to mean to say).<sup>28</sup>

How then may we impute legislative goals/intentions the consumer protection laws in India? Professor (Dr.) Ashok Patil’s anthology entitled *Landmark Judgments on Consumer Law and Practice 2008-2020*, presents a rich resource providing imputations of legislative intent.<sup>29</sup> But we must start with the foreword written by Justice R.K. Agarwal (a former Judge of the Supreme Court of India, and currently the President of the National 2020 Consumer Disputes Redressal Commission). His first sentence is: “*The consumer is the forgotten man of the Indian economy*”. This observation may be read at the level of

<sup>28</sup> I have said all this trifle elaborately in relation to agrarian relations and the law in my *Towards a Sociology of Indian Law* (New Delhi, Savanah/ICSSR, 1986).

<sup>29</sup> This work, running into 26 Chapters with edited text and commentaries is co-published by Ministry of Consumer Affairs, Food & Public Distribution, Government of India, New Delhi & Chair on Consumer Law and Practice, National Law School of India University, Bengaluru, Karnataka, (2021).

memory and forgetfulness. The law sometimes decrees even forgiving (as is the experience of many truths and reconciliation commission or of industrial mass disasters); it also secures a 'right to be forgotten as a facet of the core right to privacy, in some intellectual property rights contexts. As against this, the learned Justice rightly articulates at the outset the right of the marginalized consumer not to be forgotten during market development. Implicit also remains his urging us to read consumer struggles and movements as acts of memory/memorialization; the consumer law and jurisprudence then is the living history of the common and helpless citizen 'forgotten' by the economy.

But who is this forgotten man? It is here that the plot thickens when the learned Justice conveys the powerful image of the consumer as besieged by "*illiteracy, poverty, ignorance of consumer rights, and lack of organized efforts to check market evils*". These suggest structural limits on law such that the law and regulation may only allow a marginal role against market evils. That role may be ameliorative for some individuals, but they would be collectively always disempowered. What beyond CLJ may then be required to combat 'market evils'?

A basic question is: Will any market survive if we were to cleanse it of all evils? Much here depends on what we consider to be market evils. Capitalism thrives on the ideas and institutions of free markets, free transactions, profits as lawfully permitted social and moral norms, but the idea of social progress ensures, often over long stretches of time, that what once law once permitted to be harmless is no longer so. As concerns CLJ consumer protection is now considered necessary for avoiding certain types of harms arising from the economic system of doing trade, commerce, and industry. Dr. Patil proceeds to address these harms sectorally in airlines, banking, drugs and cosmetics, e-commerce, education, legal metrology, motor vehicles, digital transactions, railway claims, real estate, Reserve Bank of India, telecom Regulations, electricity, food, hotels and restaurants, insurance, health, medicines, medical, and postal services.

One can see that the CAP area is thus, very vast and so is the regulatory and jurisdictional reach. It is also very difficult, if not impossible, to make an overall decision as to whether consumer protection law has succeeded or failed. Dr. Patil, if one may say so, brings in the anthology, both fairy tales and horror stories. How does make any genre of narratives to determine the overall impact of consumer protection law and justice? If the question is measurement of legal impact, one may only say that abundant detailed micro-sociolegal studies will enable one to make assuredly as judgment concerning the behavioral, institutional, and symbolic, impact of CLJ. It is, however, clear, that CLJ is meant for a whole variety of consumers and there would be trickle-down

impact of decisions in favor of the high class/caste consumers to less privileged ones over a period. We have yet no measure, how it occurs over time and who at the lower class/caste/gender axis does indeed benefit. The problems are compounded by the discourse concerning consumer 'injury' and 'deficiency' of 'service,' as the work by Dr. Patil verily illustrates.

Inevitable is the fact and fate of small consumers, and others, being locked into the labyrinth of law! We all the time hear about the proverbial law's delays but it is not sufficiently realized, that time-consumption in hearing and disposing cases, is an ineluctable aspect of law; you take away the necessary time-consumption for the application of legal norms and together with it the idea of fair hearing and open trail and the ideas of legality and rule of law. What is difficult to determine then is what may constitute 'delay.' I have found through empirical and theoretical research that there are divergent positions held by the operatives of the system (the Bench and the Bar), the litigants, the law reformers, the legislators, and the police enforcement agencies (that hold the view that the penal process is the punishment). I have found it the safest to adopt the internal limit of time regarded as fair by adjudicator because that at least provides a measure of additional time consumed in disposal as excessive and transgressive. Frankly, I do not know how the bright lines are drawn for different types of consumer cases. But I know that the outer limit for different types of adjudication is well-established in these matters. I also do not know the differences of 'staying power' between an individual consumer litigant and a corporation or any other formation of trade, commerce, and industry. But I can, like anyone else, and despite many a telling success story of valiant individual consumers winning a large award after surviving long delays, say that the situation of proverbial 'delays' (inter-generational delay periods, continue to haunt us. In this sense, the consumer remains a forgotten figure. There is no justifiable reason for excessive time consumption of judicial hearings and disposal.

## VII. INVOLUNTARY CONSUMERS

From the standpoint of consumer protection regime, it certainly makes little sense to speak of this category. Only those when be brought within the ambit of voluntary and consensual transactions in an open market can be characterized as consumers. Yet involuntary consumers exist -people who experience an injury from deficient goods and services which they must consume because there is no other alternative before them. Both State run and privately owned production (and joint enterprises) produce every day and extraordinary injuries to citizens, persons, and nature. The everyday involves the familiar production of pollution, as documented in several right to breathe movements; water

and sanitation crisis are a common experience; so are deforestation, desertification, and drought. The situation of huge and hazardous waste management is also well-known. The extraordinary challenges are presented with emergence of nuclear energy and management of toxic nuclear waste;<sup>30</sup> the advancing and accelerating harms of the Anthropocene are always upon us. And one may finally mention the environmental, human, and species harm caused by defense industries and production. In each instance, the costs of development thus incurred are always horizontal: they affect intra, and inter-generationally many humans, other species, and objects in nature. This illustrative, and very brief, narrative is in aid of understanding the phenomenon of 'involuntary consumer.' Such infliction is normally outside consumer protection laws. Several weighty arguments may be urged. First, voluntary consumption respects both the individual choice and ways in which market freedoms are structured, Second, consumer legislation alone may not serve all the constituencies of hurt and harm, Third, and related, one may sensibly say that different, and even special, regimes of law extend to regulate such harms and consumer protection laws may not extend to every injury. For example, while everyday incidents may be redressed by law of torts, product liability, and the like, injuries to the victims of mass industrial disasters and catastrophes may be treated by legal jurisprudence (manifest, for example, in *parens patriae* role that the Union of India adopted in the Bhopal Act) and adjudication (as the device of judicial settlement between the offending corporation and the Government of India suggests). But even granting these arguments, would it be too much to expect that CLJ play a subsidiary and supplemental yet a vital, role by recognizing the violated peoples as 'involuntary' consumers at least in extraordinary situations with a view to achieve the goals expeditious and effective justice?

### VIII. CONCLUSION

All this in conclusion leads to a significant question: Are consumer protection rights human rights? Is consumer protection law soft law or is it law sufficiently hardened? Can it be amended away or may the *douche* of basic structure (enunciated in in *Kesavananda*) and its progeny extend to it? What may, in the Indian consumer law correspond/extend to certain emanations from the provision and the principles enunciating basic structure and essential features of the Constitution?

On the dimension of public international law, there is no doubt that the UN Consumer Guidelines have been acted upon, in very large measure, by a large

<sup>30</sup> See, the discussion of the UN report on illicit trafficking in ultra hazardous waste dumping, now regarded by the Organization African Unity as a 'crime against humanity,' Upendra Baxi, *The Future of Human Rights, Chapter 8*, (Oxford University Press, 4th edition, now in press).



number of states. But do its norms count in international as human rights? Have some of these become central parts of customary international law so as bind state conduct? Are certain consumer rights human now core human rights which may not be derogated from? Which are these?

On all these and related matters, there is considerable contention. For example, it has been contended that *“when attempting descriptions of consumer rights as a collective conceptual category we must remember that they are part of the classic (general) human rights. They are a kind of their complement, having not only subsidiary character, but first and foremost, strengthening the legal protection of the individual.”* It has also been maintained that consumer rights are human rights by way of emanation from the human right to dignity: thus, in a ‘consumer society,’ a person’s dignity stands disregarded when her rights to fair trade, to a fair contract, and the right of access to courts are disregarded: *“At the end of the day, these rights are no less important than other human rights”*.<sup>31</sup>

On the other hand, it has been said that the UN Guidelines are best regarded as an arch example of a widely administered aspect of international law. The advantage of *“a kind of a codex of fundamentally recognized consumer rights”* and its *“soft law character ...may be even recognized as its positive characteristic, securing its completeness and its dynamic character, and capacity to adapt more easily to the changes than in case if it was a binding legal document.”* Further, these norms *“were used as an inspiration and model for many of the world’s countries to develop their national systems of consumer protection”* ... and *“some countries have even incorporated the achievement of a high level of consumer protection into their national Constitutions”*. Even so, the question as to whether consumer rights are (as Bob Dylan in a popular protest song used to say) *“The answer is blowing in the wind....”*

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<sup>31</sup> See, Deutch, Sinai “Are consumer Rights Human Rights?” Osgoode Hall Law Journal 32.3 (1994): 537-557, at 552.