

MY BROTHER'S KEEPER - THE GENESIS AND ETHICAL BASIS OF CONSUMER LAW (NOTES FROM A MALTESE PERSPECTIVE)¹

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*"Justice and the interests of society are furthered when the law to some extent ranges itself upon the side of the party who for some reason or another is unable properly to safeguard his own interests."*²

Consumer Law - An Introduction and a Tentative Definition

Consumer law may be loosely described as the various laws and regulations which through private and public law mechanisms provide some safeguards to ordinary consumers in their daily transactions and relationships with traders. Consumer protection legislation seeks to prevent the abuse and exploitation of consumers, viewed as the weaker party in the business transaction. This objective necessarily implies that consumer legislation also regulates certain aspects of business practices and commercial conduct. It guards against unjustified enrichment through unacceptable and unfair trading practices. Directly or indirectly, consumer legislation establishes minimum standards of conduct which business operators have to respect in their relationship with their customers.

The White Paper, *Rights for the Consumer*³, published in August 1991 proposed this tentative description: "Consumer law is...another convenient term that embodies all those various laws and regulations that deal directly with the consumer's legal rights and remedies."⁴ later adding: "The law must concentrate on the prevention of malpractices, of economic and physical harm to consumers."⁵

¹ This paper is a very selective interpretation and does not claim to be a comprehensive study of any of the subjects under review.
² Havinghurst, *The Nature of Contract*, Evanston, 1961.
³ Government of Malta, Department of Information, 1991.
⁴ Para 12.
⁵ Para 148.

Consumers have often found their weaker bargaining power and lack of information exploited by traders who are more skilful, knowledgeable and sometimes unscrupulous. Consumer protection is therefore unavoidably founded on an ethical concern that the superior knowledge and political and economic power of business may be used to exploit consumers, usually less knowledgeable, prepared and organized. Consumer protection can make little sense in the absence of an underpinning philosophical justification which recognizes that consumers may in certain instances merit special legal safeguards because in transactions with business they have less bargaining power, knowledge and skills. Here law and ethics share the same concern to avoid exploitation and to ensure that consumers obtain fair value and are not cheated.⁶

Legal developments in the field of consumer protection may be an excellent place to explore how the proper and ethical use of law can promote the general good, ensure justice and improve the lives of ordinary people in a tangible manner.

A Bit of Interesting History - Tables, Codes and Kings

Law is a marvellous human achievement; evidence - if any was needed - that man is capable of greatness. This paper attempts to place the recent phenomenon of consumer law within the context of what may be described as the civilizing influence and potential of law.⁷ The idea of law is often taken for granted, as if it has always been there in the form now familiar to us.

Law is also an ancient phenomenon. At the Louvre Museum in Paris stands a remarkable and huge black basalt rock on which considerable Babylonian ancient text is inscribed. The Hammurabi Code was adopted in 1700 BC (making it hundreds of years older than the Ten Commandments) and was a massive legislative achievement for its time. It deserves a special mention in this paper due to King Hammurabi's magnificent exhortation to his subjects. It is worth recalling:

".. let the oppressed, who have case at law, come to stand before this my image as king of righteousness; let him read the inscription, and understand my precious words: the inscription will explain his case to him; he will find out what is just, and his heart will be glad..."⁸

Much later, between 451 and 450 BC, Twelve Tables were inscribed on bronze plates and placed in the Roman forum. For the first time, Roman law was taken away from the monopoly of the patrician-priest class, put in writing and displayed for all to see. In that way, law and its interpretation and application became less arbitrary.⁹ Like the Hammurabi

⁶ The Molony Report 1962 (Chapter 2, para 21) reported to the UK Parliament that " 'Consumer protection' is an amorphous conception that cannot be defined.", but then went on to say that "From another viewpoint, 'consumer protection' may be regarded as those measures which contribute.....to the consumer's assurance that he will buy goods of suitable quality appropriate to his purpose; that they will give him reasonable use, and that if he has just complaint there will be a means of redress."

⁷ History also shows that, in the wrong hands, law can become an instrument of oppression, but this paper will not delve into that aspect.

⁸ Trans L.W King, 1910, © Richard Hooker.

⁹ This raises the problem of illiteracy and the need to improve educational facilities to enable more people to read.

Code before it, the Twelve Tables did not contain any consumer protection provisions. Despite adopting a still primitive approach, particularly to matters of crime and punishment,¹⁰ and applying the *lex talionis*, both efforts constituted significant progressive legal reforms of the highest order. They are part of the history of law as we now know it. A common objective lay behind these landmark endeavours, and once again King Hammurabi's own description is very eloquent:

“to bring about the rule of righteousness in the land, to destroy the wicked and the evil-doers; so that the strong will not harm the weak...”

These words set the scene for the next part of this paper. After briefly exploring the basic principles and objectives of consumer law and placing them within a historical context, this paper can now proceed to trace business-related messages and ethical warnings in the Old and New Testaments and in selected Roman writings and legislation.¹¹

Genesis - Things Start Badly, then Get Worse

Genesis may seem an unlikely place in an investigation covering law and consumer protection. According to the biblical texts, we are the imperfect descendants of imperfect first humans. Genesis describes how left to his own devices to enjoy a paradise on earth, original man could not contain his acquisitive nature and soon tried to outsmart his trusting Master and Creator. He broke the one rule given to him. The first humans, we are told, used inside information to try to outwit their Creator. Adam and Eve did not play by the rules, but with Cain, things degenerated even more dramatically. Despite God's warning, Cain revealed a violent streak and commits the first murder. His victim was Abel, a meek person and also Cain's own younger brother. He was no stranger or intruder. Being his older brother, Cain was his keeper. If out of a fit of jealousy, Cain could murder his decent younger brother, what would he, now exposed as a resourceful and dangerous creature, not do to complete strangers?¹²

Man's guilt and consequent exile from Eden constituted a very bad advert for self-regulation and voluntary standards. It symbolized the dangerous new world where people are henceforth obliged to look over their shoulders. If people were to live together and cooperate in communities and engage in various forms of relationships and transactions, some new effective device was required to guide human conduct and to restrain excesses. Persons can only live together in some harmony as a community if they share some

¹⁰ The Code introduced by the Greek king Draco in 621 BC outdid them both by severely extending the death penalty to many minor crimes. The law was eventually revised (and tempered) by the great Solon who in 550 BC introduced many reforms in favour of the poor against the depredations of the rich. Solon's laws were placed for public viewing on boards.

¹¹ This approach is justified on the grounds that the Christian religion has traditionally represented a significant moral benchmark against which our personal conduct is tested. Consumer law is not based on a religious text or preference but clearly it tries to clarify what is to be considered as fair and honest and acceptable business practices on the one side, as against unfair, dishonest and unacceptable business practices on the other. Roman law is relevant as it has been the main source of our civil law and has for centuries served as a useful intellectual reference point in the interpretation and application of law.

¹² The performance of the serpent itself seems to anticipate the often seedy and manipulative manner in which some persons will conduct themselves in the future, especially in business and politics.

common platform of values. Accordingly, it is suggested, law is most effective when it succeeds in reflecting these shared values. In the Genesis narratives, God intervened directly to restore order, mete out a divine form of justice and punish the guilty. But this was not a practical or sustainable way forward. So an idea of law was eventually conceived and lines started being drawn between unacceptable and acceptable behaviour and activities and to preserve a minimum of public order and predictability, discouraging inclinations towards use of force, exploitation and arbitrariness. This is a function that the law was good at. But it involved a long process.

The Old Testament - Stern Warnings and a Fig-Growing Prophet

It comes as no surprise that the Bible does not lay down a comprehensive code of business conduct. Through a number of often disjointed but clear statements on the subject, the Bible seems to convey an overall negative attitude towards trade and traders. There is even evidence, in some places, of contempt for merchants who enrich themselves through ambiguous trade practices. The broad moral message is that business should be carried out honestly and that cheating is unacceptable, that excessive profit should not be sought, that the poor and weak should not be exploited. Interesting ethical statements may be traced to the Old Testament and this paper will focus on certain rules and warnings in various books including Deuteronomy, Proverbs, Leviticus and Amos. In their own way and to different degrees, these books examine certain aspects of business ethics.

In various places, the Bible condemns the imposing of interest charges on loans made to persons in difficulty,¹³ of charging exorbitant prices,¹⁴ of generally mistreating and exploiting the weakness of debtors, of exploiting the poor, widows, orphans and strangers.¹⁵ Leviticus contains a whole section dedicated to the obligation to care for the poor and for strangers, with the order "*Do not take advantage of them by charging any kind of interest or selling them food for profit...So obey me, and don't be cruel to the poor.*"¹⁶

One of the Ten Commandments¹⁷ ordered "*Thou shalt not steal*", which may be interpreted as prohibiting all forms of financial cheating, fraud and misappropriation, as well as charging excessive profits and interests. Indeed, in Leviticus 19, we find a more extensive re-statement of this command: "*Do not steal or tell lies or cheat others.....Do not steal anything or cheat anyone.....Use honest scales and don't cheat when you weigh or measure anything.*" Similar concerns are found in Proverbs 20 where again God twice expresses his "*hate*" for dishonest scales and measures while adding that "*Cheating to get rich is a foolish dream and no less than suicide*" and again "*Don't take advantage of the poor.....and what you do to them, He will do to you.*"¹⁸

In Ezekiel 45.10-12, God actually establishes standard weights and measures in some detail and orders "*So from now on, you must use honest weights and measures*".¹⁹ In various

¹³ Proverbs 22.7 : "*The poor are ruled by the rich, and those who borrow are slaves of moneylenders.*"

¹⁴ Proverbs 11.26: "*Charge too much for grain, and you shall be cursed; sell it at a fair price.*"

¹⁵ See generally Exodus 22.21 to 23.9 and Proverbs 19 to 22.

¹⁶ Leviticus 25.35-43.

¹⁷ c. 1300 BC. See Exodus 20 and Deuteronomy 5.

¹⁸ Proverbs 22.22.

¹⁹ See also Micah 6.6 "*....I, the Lord, will punish you for cheating with weights and with measures.*"

books in the Old Testament, written in different historical periods, one finds this stern unambiguous condemnation against the use of dodgy weights and measures. This sharp practice must have been rampant in the largely agricultural society to which it was addressed, causing much distress especially to the needy.²⁰

The short but impressive Book of Amos is a fine text with which to conclude this look at the Old Testament. Amos was a reluctant part-time prophet who preferred to work as a shepherd and grow sycamore fig trees.²¹ Born around 750 BC, he was clearly a very clever and perceptive man living at a time when the divide between rich and poor had greatly widened. His warnings are direct and straightforward, particularly when he condemns the rich and powerful merchants for living in luxury while exploiting the poor and reducing them to slavery. In Amos 8.4-6, we find this endearing prophet condemning various business practices exercised by the merchants of his day. His powerful and beautifully phrased statement, effectively encapsulating all the bad things in business that the Bible condemned, deserves to be quoted in full:

*You people crush those in need
and wipe out the poor.
You say to yourselves,
"How much longer before the end
of the New Moon Festival?
When will the Sabbath be over?
Our wheat is ready,
and we want to sell it now.
We can't wait to cheat
and charge high prices
for the grain we sell.
We will use dishonest scales
and mix dust in the grain.
Those who are needy and poor
don't have any money.
We will make them our slaves
for the price
of a pair of sandals."*

The New Testament - Lynch Mobs and a Soothsaying Slave-Girl

As recorded in the New Testament, Christ always kept himself focussed on the needs and concerns of the poor, the meek and the down-trodden. The Sermon on the Mount²² is a remarkable expression of his identification with the under-privileged classes. He also

²⁰ These instruments were essential for establishing the correct price based on manual calculation of quantity, measurement and weight for the purpose of sale and bartering deals especially with regard to farming produce. Today, in an ironic twist, the authorities seem to be looking the other way and are taking no action to enforce the law. The 1910 Weights and Measures Ordinance was recently replaced by a new more sophisticated Metrology Act that had been kept in abeyance and ignored for almost five years.

²¹ Amos 7.14.

²² Matthew 5-7.

remarked how difficult it would be for rich men to match up to his ethical standards or to enter Heaven.

Although Christ has unfortunately been traditionally pictured as a rather bland ethereal person,²³ the Gospels tell of a truly remarkable incident where an outraged Christ passionately whips away the sellers of oxen, doves and the money-changers from the Jerusalem Temple entrance. These were conducting business deals and reaping exorbitant profits from pilgrims who in their thousands were visiting the Temple for the Passover.²⁴

Another revealing incident is recorded by St Luke.²⁵ He narrates how St Paul was chased by a rioting mob enraged at his sermons against the goddess Artemis whose temple adorned the great city of Ephesus. The silversmiths of that great city got together and chased St Paul away from their city under threats of physical violence. They feared his sermons would prejudice their profitable sales of silver statues of the goddess to pilgrims and tourists.²⁶

St Luke narrates another nasty incident involving a very peculiar business venture.²⁷ In Philippi, St Paul²⁸ was beaten up and whipped by the authorities and made to spend the night in prison after he had cured a slave-girl who, being possessed by an evil spirit, used to foretell the future. The owners who had been reaping profits out of their slave girl's prophecies were very upset that this meddling foreign preacher had destroyed their lucrative enterprise.

Collectively, these incidents reveal a rather negative opinion of traders; indeed again contempt is shown towards certain types of commerce and profit-making. Businessmen do not look good here, whether they are making money from a slave girl in Philippi, selling small silver statues to tourists in Ephesus or offering unattractive foreign exchange deals to weary pilgrims in Jerusalem.

The Gospels are not neutral and one cannot doubt which side they are on. Despite the teaching in other contexts that God has no favourites, the poor, the weak and the meek are the apple of his eye.²⁹

²³ A depiction which ignores his determined character, charismatic leadership and the uncompromising forcefulness of his message.

²⁴ Matthew 21: 12, - 13; John 2: 13 - 16.

²⁵ Acts 19.24-41.

²⁶ The rioting silversmiths of Ephesus are interesting for another reason. They were quite capable of organizing themselves into, in modern terminology, an effective lobby and, with the help of the local authorities, succeeded in chasing the meddling preacher from their territory, thereby safeguarding their lucrative merchandizing of religious articles. Demetrius had incited his fellow silversmiths and workers in these terms: "*Friends, you know we make a good living at this...this man Paul is upsetting a lot of people... everybody will start saying terrible things about our business.*" (Acts 19.24).

²⁷ Acts 16. 16-22.

²⁸ In this series of unfortunate events, St Paul was accompanied by Silas.

²⁹ The Gospels also show favour towards "*the sick, blind, lame and crippled*", as in John 5.4. St Paul reports what St James and St Peter told him after the Council of Jerusalem, "*They asked only one thing, that we remember the poor, which was actually what I was eager to do.*" (Gal. 2.10) Was this just another exhortation to collect charity for the poor in Jerusalem, or was it also a friendly but pointed reminder to keep his mission focussed on the poor and the under-privileged? A final parting plea, perhaps, to their adventurous colleague, to resist the temptation of adjusting Christ's radical teachings to accommodate the wealthy new converts in different exotic cities he was visiting.

The rich merchants and the powerful are instead suspect, seen as corrupt persons who exploit the poor and steal from widows and orphans.

Roman Law - The Great Cicero and a Good Warranty

Roman law was another huge legal achievement. It was built and refined over many centuries. The Roman law of sale was highly developed and many of the principles and concepts are still found in civil law jurisdictions, like Malta. Not surprisingly, the Roman jurists did not advance to the point of recognizing the figure of the consumer; but they did identify who was starting to enjoy the upper hand in the market place. Accordingly, "*Caveat emptor!*", shoppers were warned.

Roman law did not develop sufficiently as to arrive at a conceptual distinction between private and non-private purchasers, which is an essential feature in modern consumer law. The Code Napoleon, another remarkable legislative and codifying achievement and much inspired by Roman law, also failed to make this distinction, although it is known that the issue had started being eagerly discussed by some French jurists commenting on the law of sale in the new Code.

Neither Roman law nor the Code Napoleon regulated the phenomenon of pre-formulated standard contracts. The Industrial Revolution allowed more mass produced goods to be produced for a mass market of consumers. Mass produced goods led to the standardization of contracts and to excesses in contractual and information inequalities. Standard form contracts excluded purchasers from participating in the drawing up of the contract, whose terms were unfavourably loaded against consumers.³⁰

Our Civil Code still does not provide general rules for the regulation of standard form contracts. Nor does it distinguish between private and commercial (or professional) buyers and sellers for the purposes of the law of sale, and it simply places weak and strong parties in contractual relationships on the same plane. The role of consumer law has in part been to step in to remedy these deficiencies.

What is of interest to modern consumers is that the ancient Roman law warranty against latent defects has survived to this day in our Civil Code. It all started with the *curule aediles*, who as magistrates or superintendents of the markets in Rome, were instrumental in the introduction and development of new legal safeguards in favour of buyers when goods bought proved defective.³¹ The warranty provided an automatic guarantee to purchasers against hidden defects in items they purchased. Our Civil Code, following Roman law, distinguishes between sellers in good faith and sellers in bad faith. The latter are also responsible for damages caused by the defect.³²

³⁰ This inequality of arms and abuse of the contractual process was only remedied in Maltese legislation by the recent transposition of the European Union Directive on unfair terms in consumer contracts. Council Directive 93/13/EEC of 5 April 1993 was transposed by Part VI of the Consumer Affairs Act in 2000.

³¹ Nicholas B, *An Introduction to Roman Law*, 3rd Edit, Clarendon, p 5, 181 -182.

³² Articles 1424 - 1432 of the Civil Code.

The great orator and writer Cicero was very evidently keen on this subject and in his *On Duties: Is honesty always necessary?*, he poses this question:

*“And then, if a man knows that the wine he sells is going bad, ought he to disclose the fact? Diogenes says he need not; Antipater thinks that an honest man should. The Stoics discuss problems of this kind like disputed points of law. Again, ‘when you are selling a slave ought his defects to be declared - not only those which there is a legal obligation to declare (otherwise the transaction is liable to be cancelled), but also the fact that he is a liar or gambler or thief or inebriate?’ One of the philosophers maintains that you ought to declare such facts, the other says you need not.”*³³

Cicero also discloses a case of fraudulent sale where a respected Roman gentleman, Gaius Canius, was conned by a Syracusan banker named Pythius into buying an expensive property in Syracuse following an elaborately staged piece of trickery.³⁴

These legal-ethical debates are still valid today. Maltese courts have had to determine hundreds of claims by purchasers under this warranty. While far from a perfect and comprehensive remedy, it has guaranteed a measure of protection to buyers who discover hidden defects in acquired goods. Indeed, this warranty remains probably the private law institute most popular with Maltese consumers.

What may not be so well known is that Cicero spent one year, 69 BC, as a *curule aedile*. This was an elected post and the holder held the post for one year. Cicero and other great jurists like Ulpian³⁵ were accustomed to reflect on the nature of law in words which, to our more cynical twenty-first century ears, sound almost poetic and idealistic. It would be fitting to conclude this unduly brief reference to the Romans and their achievements, by quoting some of the opening words from Justinian’s Digest.³⁶ This famous text starts with a discussion by Ulpian on the nature of law. He quotes these words from Celsus, very relevant to the topic of this paper:

*“...the law is the art of the good and the fair and ...we (jurists) cultivate the virtue of justice and claim awareness of what is good and fair, discriminating between fair and unfair...”*³⁷

Few have ever expressed it so well.

³³ Cicero - Selected Works, trans M Grant, p 192-5, Penguin Classics, 1960, p 168. This extract also serves to recall that, at this stage, slaves were treated at law as mere things, like animals. The civilizing reform which led to the abolition of slavery came much later. In Malta, slavery was only abolished following the arrival of Napoleon in 1798.

³⁴ Cicero: *Selected Works, On Duties*, p180. Cicero describes Pythius as “ill-intentioned, faithless and dishonest.”

³⁵ Both Ulpian and Cicero were assassinated, in different times and circumstances, mainly for things that they had said and written.

³⁶ Book 1, Justice and the Law.

³⁷ *ibid.*

The Law, Freedom of Contract and the Consumer

The Maltese legal system sets out several instances where the law intervenes to prevent the exploitation of the weak by the strong. Through company law, the law has protected the legitimate rights of investors and minority shareholders against possible abuse and oppression by company directors and majority shareholders. The Malta Financial Services Authority Act³⁸ has set up special structures and safeguards for private consumers of financial services³⁹. Employment law has shielded ordinary workers against possible abuse by their employers with their greater economic and bargaining power.

In the Civil Code, the law of obligations makes several references to good faith, and persons in bad faith are not looked upon favourably by the law; and this is how it should be. Article 993 stipulates that contracts should be executed in good faith, while article 985 invalidates contracts relating to *"things...which are contrary to morals"*. Contract law also grants protection to minors⁴⁰ and to persons whose good faith has been abused by fraud or by physical or moral violence.⁴¹

Shipping matters are hardly of consumer interest. Yet, the Merchant Shipping Act⁴² may add a useful contribution to the present discussion. Articles 342 to 345, which regulate salvage, intervene to prevent the possible illegitimate abuse by a salvor of the desperate situation of a vessel owner in distress. The law allows the court to rescind or modify a salvage agreement if it considers the terms are *"disproportionate"*, had been *"agreed upon under the influence of danger.."* and are *"not equitable"* or are *"vitiating by fraud or concealment"*.

These cases seem to adequately show that both law and morality, in their own way, require that the vulnerable members of society or the weaker party to a transaction, may merit special attention. In such instances, freedom of contract may have to give way in the best interests of justice. Similarly, consumer legislation has deemed it sound that small private consumers should be able to benefit from special rules to protect them from exorbitant prices and fraudulent and misleading trading practices and to ensure they obtain fair value and a reasonably good deal.

The real problem was not lost on the Molony Committee which commented:

*"We have not overlooked the consideration that it is the least intelligent and discerning shopper who is the one most likely to be victimized.; and that such a person may not perceive that he has given good money for bad goods. Or if he does, may not be capable of making effective complaint in any direction."*⁴³

The law favours the weaker party in the transaction and in fact gives protection primarily to the private consumer. The non-private consumer may avail himself of the general protection

³⁸ Chapter 330 of the Laws of Malta.

³⁹ See in particular articles 4 and 20.

⁴⁰ Articles 967 to 970.

⁴¹ Articles 974 to 981.

⁴² Chapter 234 of the Laws of Malta.

⁴³ Para 15, p 6.

and rights arising under the Civil Code. The exclusion of the non-private consumer from the protection of the legislation has itself an ethical basis. Consumer laws require administrative structures for their proper implementation. As their resources and capabilities are inevitably scarce, they need to be harnessed primarily to protect the weak and less prepared consumers. The risk of spreading scarce resources too thinly by extending precious time and attention also to the needs of non-private consumers should not be underestimated. Professional persons and businessmen can reasonably be expected to be able to fend for themselves, out of their own resources. Allocating scarce public administration resources to non-private investors would not be proper as consequently less would be available to the categories of consumers who really require assistance.

Prior to 1994, the only two consumer protection laws available regulated doorstep contracts and trade descriptions. The Trade Descriptions Act 1986, though notorious for its ineffectiveness over the years, sought to protect consumers from the false and misleading description of goods and services offered in the course of trade. Traders who describe their goods and services falsely may be subject to criminal prosecution. The Act also prohibits the offering of false or misleading bargains or gift offers. The Doorstep Contracts Act of 1987 was intended to introduce some order and equity to doorstep contracts at a time when abuse of lesser educated customers had become a matter of public concern. The law protected consumers from salesmen who appeared out of nowhere to badger and harass them into buying goods which were often useless and too expensive and which the purchaser did not really need or understand and in many cases could hardly afford.

One of the first documents to deal with Maltese consumer legislation, the White Paper, *Rights for the Consumer*, contained this statement:

“The law must accommodate new principles which safeguard the consumer and which redress the imbalance existing between the individual consumer and manufacturers, suppliers and other traders. It must guarantee adequate remedy to an injured user of a defective product and punish fraudulent tradesmen; but more importantly it must increase the sense of responsibility.....of the manufacturer, the supplier and other traders who provide services to consumers, and reduce the risk of defective products, accidents, contractual injustices or basic poor value for money. The law must concentrate on the prevention of malpractices, of economic and physical harm to consumers.”⁴⁴

Since 1991, the law has been reformed beyond recognition as a result of the combined efforts of locally-made law, primarily the Consumer Affairs Act adopted in 1994,⁴⁵ and the transposition of the EU consumer protection *acquis*, mostly between 2000 and 2002.

Consumer law is also founded on the observation that traders are usually well-organized and are often well represented at all level of political discussions and lobbying, whereas consumers are weak and disorganized, demonstrated by the slow and often inconspicuous existence of our single Consumers Union. Through the structures established by the Consumer Affairs Act, the law has intervened to try to give a voice to consumers in an

⁴⁴ See no. 3, para 148.

⁴⁵ Chapter 378, Laws of Malta.

attempt to balance the superior armoury and political clout of the trading sectors. This concern is stated specifically in the 1993 White Paper, *Fair Trading: the next step forward...*,⁴⁶ when it explains the suggested role of the new Consumer Affairs Council:

*“The Council shall therefore be in a position to represent the consumer’s point of view at high national levels. As active spokesman for the consumer, it shall be expected to act as the instigator of future developments and improvements in consumer legislation.”*⁴⁷

Consumer law may also be considered an integral part of commercial law. Establishing the rules, restrictions and parameters under which traders have to operate their relationship particularly with retail customers, consumer law regulates trading practices in the same way as the Commercial Code. Regrettably, and perhaps also amazingly, two major Codes of private law to this day fail to recognise or offer a minimal reference to consumers’ rights or to traders’ obligations to consumers. This failure undermines any claim that the two Codes still adequately reflect modern day business realities.

Ethical Concepts and Terminology in the Consumer Affairs Act 1994

Ethical concepts and terminology are intrinsic to local consumer law. Our consumer law, largely introduced during these past fifteen years, is replete with terms that would fit comfortably in an ethics discussion; concepts like fairness and equity, like assuring compensation to persons injured by defective products and the broad underlying aim of avoiding the exploitation of the weak by the strong. The concept of the private consumer, the ordinary buyer, is now part of our law. Several aspects of the Consumer Affairs Act directly reflect ethical values. Nowhere is this perhaps clearer than in the novel and welcome list of consumer rights,⁴⁸ in the regulation of unfair trade practices and contract terms⁴⁹ and in the EU-inspired product liability rules.⁵⁰

Below are but a few examples of ethical terms and concepts one finds in the 1994 Act. For manageability purposes, this exercise is restricted to the original version of the Act which came into force in January 1996.

⁴⁶ Government of Malta, Department of Information, November 1993, p 10:

⁴⁷ Despite these promising words, the Council has proved a very silent and ineffective spokesman; but that is another story. Ethics do not and cannot dictate what administrative structures, if any, government should set up to safeguard consumer rights. In many countries, no administrative structures exist and consumer issues are dealt with by the ordinary private and criminal law processes. It is suggested that once it was considered necessary to establish such structures, government’s duty is to ensure they function effectively. This does not seem the case today where only half-hearted official support is given to consumer welfare and where the administrative structures foreseen in the two White Papers of 1991 and 1993 have lacked bark, bite and direction. The Ephesian silversmiths were a more effective lobby.

⁴⁸ *Declaration of principles*, Part V.

⁴⁹ *Unfair practices*, Part VI.

⁵⁰ *Liability for defective products*, Part VII.

- S. 8(2) *"principles of fairness and objectivity"*
- S. 8(3) *"in good faith"*
- S. 14(1) *"moral damages"*
- S. 19 *"without delay, with impartiality, and equity according to law"*
- S. 21 *"according to the substantive merits and justice of the case and in accordance with equity"*
- S. 21(2) *"moral damages"*
- S. 22(2) *"rules of natural justice"*
- S. 23 *"best suited to the ends of justice in accordance with the rules of natural justice"*
- S. 26 *"fairly and impartially according to law"*
- S. 36(1) *"bona fide"*
- S. 36(2) *"bona fide"*
 "not undertaken recklessly or maliciously"
 "adheres to the principles of fairness and objectivity"

Ethical principles of fairness and decency lie at the basis of consumer protection. Whereas it might not be the legitimate purpose of law to impose any particular moral code, and certainly it is not the function of law to impose a religion, moral principles can never be too distant.

Consumer Protection - So Is It Really Necessary?

The pioneering work by G. Borrie and A. Diamond, *The Consumer, Society and the Law*, first published in 1964 starts with this pointed fundamental question: *Is there any real need for consumer protection?*" Their conclusion is that in the modern world, *"far greater consumer protection is called for..."* and *"legal rules are required to redress the imbalance between the individual consumer and Them"* adding that *"It is no longer possible or desirable for the law to affirm its strict neutrality."*⁵¹

Neither the Old nor the New Testament developed any concept of consumer or provided a concrete conceptual basis for consumer protection except in the very broad sense that exploiting the poor, vulnerable and the weak is wrong and sinful. Old Roman law and the 19th century legal masterpiece, the Napoleonic Code, failed to recognize the consumer and therefore did not have the conceptual platform on which to establish special safeguards to redress his weaker economic and bargaining position. In Malta it was only in the nineties

⁵¹ Penguin, 3rd edit, 1973, p 328.

that the authorities finally found the time and the political will to approach consumer protection in a structured coherent manner, and actually started doing something about it. The Consumer Affairs Act of 1994 was both a significant legal development as well as an ethical milestone. I say this for two reasons. First, the 1994 Act was a completely home-grown effort and was not adopted because of external pressures or requirements. It sought to provide tailor-made remedies to local problems and circumstances. Secondly, the Act was constructed around a new definition of who is a “consumer” and clearly distinguished him from other categories of persons who could safely remain protected by current private law.

As is the case with various parts of employment law, financial services law and company law and other areas of our legal system, consumer law seeks to protect the interests of persons who may have their weaker or disadvantaged position exploited by persons who enjoy a stronger bargaining position, and who may be more organized and knowledgeable. It is the function of law to intervene in situations of inequality in order to prevent illegitimate and unjustified enrichment and abuse by the strong, the ambitious and powerful at the expense of the meek, weak, the poor and the disadvantaged.

In ethics and law, there can be no real choice between: honest dealing as against dishonest dealing; correct trade descriptions as against false trade descriptions; fair value as against poor value; fair trading practices as against unfair practices; fair balanced contracts as against unfair unbalanced contracts; correct weights and measures as against false weights and measures; safe products as against unsafe products.

Maltese consumer law has incorporated several ethical principles and has integrated much ethical language. This is no accident because consumer law is a good example of law and ethics interacting in an area which concerns the fundamental issue of what is right or wrong. Consumer law establishes a series of rules that indicate which conduct is acceptable and which is not, and aimed at preventing the abuse of the good faith and potential inferiority of ordinary consumers through sharp business practices.

Ethics and Consumer Law - A Tentative Conclusion

Law represents choices and affects human conduct, establishing borderlines between the acceptable and the unacceptable on the basis of justice, fairness and decency. Similarly, biblical texts, as we have seen, condemn the “*greed is good*” and the “*business is business*” mentality and warn traders against the temptation of excluding a role for morality in the market.

Consumer protection is a very recent phenomenon and Maltese law only started giving legal recognition and rights to consumers during these past twenty years. Consumer protection is an area of law which incorporates a significant ethical content. The law has progressed considerably during these past twenty years and one may now safely say that consumer protection is an integral part of our law; proof of the civilizing influence and ethical potential of law.

In many countries, law was considered as part and parcel of religious beliefs and it was administered by a priestly class. Very often law was kept secret and was passed on orally.

This often gave rise to suspicion of abuse, eventually building up pressure to have the laws published and administered more transparently. The civilizing influence of law cannot be adequately stressed, but it must be acknowledged that even law itself has had to undergo a process of civilization. Indeed, law itself had to undergo an evolutionary process whereby it gradually became more humane and increasingly respectful of new and higher public expectations.

Law exists not only because man is capable of greatness but also because it is necessary. Just as law does not develop in a historical, social or economic vacuum, consumer legislation cannot flourish in a moral vacuum, and it appears unreal to divorce consumer legislation from the general ethical aim of law to protect the weak and the vulnerable from exploitation and oppression. The growth of consumer law, and its increasing effectiveness and sophistication, may be seen as an example of a legal reform and evolutionary process mirroring the needs and realities of an increasingly informed, civilized and ethical community.

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The Magna Carta (1225 AD).

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Consumer Affairs Act 1994 (Laws of Malta Chapter 378).

Doorstep Contracts Act 1987 (Laws of Malta Chapter 317).

The Civil Code (Laws of Malta Chapter 16).

The Commercial Code (Laws of Malta Chapter 13).

Trade Descriptions Act 1986 (Laws of Malta Chapter 313).

Weights and Measures Ordinance 1910 (repealed).

Internet Websites

For texts like the Bible and ancient legislation, several websites provide several useful translations, commentaries and perspectives. Numerous other websites tackle ethical issues. As in all matters, some are better than others. The following is just a selection.

www.acton.org

www.angelfire.com

www.bible-history.com

www.bibleresourcecentre.org

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www.bible.cc

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