Institut EDS
Institut Hydro-Québec en environnement, développement et société de l'Université Laval

Les Cahiers de l'Institut EDS

Février 2015

Prolegomena to the Development of Constitutional Consumocratic Law

P. Martin Dumas, B.A., M.A., LL.B., Ph.D. (LSE)
Professeur agrégé
Directeur, Chaire Marcelle-Mallet
Pôles Droit, philantropie et développement
FSS, Université Laval, Québec, Canada

UNIVERSITÉ LAVAL

Institut
EDS Institut Hydro-Québec en environnement, développement et société de l'Université Laval

L'Institut Hydro-Québec en environnement, développement et société (Institut EDS) regroupe des membres de la communauté universitaire, provenant aussi bien de sciences sociales que de sciences pures ou appliquées, qui partagent un intérêt commun pour la recherche et la formation en environnement, développement et société.

Le mandat de l'Institut est de soutenir la recherche pluridisciplinaire et les synergies entre spécialistes, et de promouvoir une vision d'ensemble sur les questions d'environnement dans la société. L'Institut réalise ou facilite des activités visant l'approfondissement et la diffusion des connaissances, dans le domaine de l'environnement et du développement durable. Afin de faciliter l'atteinte de ces objectifs, la structure se veut souple, rassembleuse et ouverte.

Coordonnées de l'Institut EDS
Institut Hydro-Québec en environnement, développement et société
2440, Pavillon des Services
Boul. Hochelaga, local 3800
Université Laval, Québec, G1V 0A6

Téléphone : (418) 656-2723
Télécopieur : (418) 656-7330

Courriel : ihqeds@ihqeds.ulaval.ca
Site Internet : www.ihqeds.ulaval.ca

Édition : Mylène Bergeron

Patrice Martin Dumas

Avocat et chercheur, Patrice Martin Dumas a étudié le droit et les sciences sociales à Toronto, Oxford et Québec avant d'exercer le droit du travail et des affaires à Montréal et Toronto entre 1997 et 2001, à divers titres. Il a œuvré, de 2002 à 2005, à titre de conseiller international en matière de travail auprès du secrétariat institué en vertu de l'Accord nord-américain de coopération dans le domaine du travail (Canada/États-Unis/Mexique) à Washington D.C. Il préside *Filos Mundi*, une société vouée à la promotion de la philanthropie et du cosmopolitanisme, et conseille diverses organisations nationales et internationales.

Lauréat de la Fondation du Commonwealth, il est titulaire depuis 2010 d'un doctorat en droit de la *London School of Economics and Political Science*. Dans le cadre de travaux interdisciplinaires, il développe une plateforme constitutionnelle destinée à mieux encadrer le travail d'enfants sud-asiatiques, sous la sanction du droit consumocratique. On prévoit l'extension du rayon d'action d'une plateforme similaire à l'encadrement d'autres activités, en collaboration avec l'alliance *ISEAL* (*International Social and Environmental Accreditation and Labelling Alliance*).

Patrice Martin a siégé au Conseil directeur et scientifique de l'*Institut Hydro-Québec en Environnement, Développement et Société* (EDS) (2010-2012) et de l'Institut Mallet (2015 -) et fut invité à se joindre au *Centre de recherche interuniversitaire sur la mondialisation et le travail* (CRIMT) ainsi qu'au *Indian Labour Institute*. Il est récipiendaire de divers prix et distinctions scientifiques, juridiques et littéraires. Enseignant à l'Université Laval depuis 2009 et professeur invité au George Washington University (Washington D.C.), à l'Université Lumière Lyon II (France) et au G.B. Pant Social Science Institute, Uttar Pradesh (Inde). Depuis 2015, il occupe en outre les fonctions de vice-président du syndicat des professeurs et professeures de l'Université Laval et de Directeur de la Chaire Marcelle-Mallet, sous les pôles de recherche *Droit, philanthropie et développement*.

Prolegomena to the Development of Constitutional Consumocratic Law

On the basis of an in-depth case study of a market-driven governance scheme – *Rugmark* (now *GoodWeave*), designed to fight child labour in South Asia – I will identify and describe a number of characteristics peculiar to the *consumocratic* system of regulation, before analysing the delicate role of transparency modulation within it. A non-paternalist, pragmatic analysis of transparency as a regulatory tool, it will be shown, leads to recognising the utility of constitutionalising transnational consumocratic activity on original foundations, before envisaging the development of increasingly transparent and efficient tools.

Introduction

In comparing the ability of consumers to force corporations to review their policies or practices with that of the state, Max Weber prefiguratively concluded that "[t]he case of conventional guarantee of an order which most closely approaches the legal, is the application of a formally threatened and organized boycott. For terminological purposes, this is best considered a form of legal compulsion".[1] Unlike sanctions known under state and private customary law, positive and negative consumocratic sanctions operate directly through private markets, linking a critical mass of consumers (the sanctioners) to more or less distant market enterprises (the sanctioned).[2] This is done, transnationally, through the operation of codes of conduct the enforcement of which is signaled to consumers via a more or less transparent form of societal marketing. A variety of impacts ensue with a degree of directness the state could hardly approach.[3] On the basis of a paradigmatic and longitudinal case study on Rugmark (now GoodWeave), a consumer labeling initiative dedicated to the fight against child labour in South Asia, I will explain why, in our view, a pragmatic approach should govern the development of consumocratic (labour) law.

To this end, I have shown elsewhere,[4] (a) that this 'form of legal compulsion' – *consumocratic law*[5] – may indeed prove highly compelling; (b) that seeking formal conformity with predefined (state or consumocratic) standards may complicate the achievements of the aims these standards were designed to attain; (c) and, therefore, that the quality and transparency of the societal information transmitted to consumers should not eclipse issues concerning the quality of the debates this information is likely to engender. Against this backdrop, I will also argue that the development of a proper and efficient regulatory platform for deliberation and understanding between local regulators and consumers is necessary before more transparency is injected into the system. That is, before revealing a priori discomforting information to consumers, and without, insofar as

[1] MAX WEBER, THE THEORY OF SOCIAL AND ECONOMIC ORGANIZATION 168 (1st ed. 1964).

[2] This by no means signifies that a corporation cannot in turn seek to manipulate, influence external groups, or make strategic use of contradictory demands in order to reinforce its autonomy. *See* Christine Oliver, Strategic Responses to Institutional Processes, 16 ACADEMY OF MANAGEMENT REVIEW 145, 157 (1991).

[3] In the works of regulatory cost-benefit analysis proponents, consumer choices in fact do not lay themselves wide open to bureaucratic inefficiencies, agency capture, and paternalism – at least not as openly as political action through voting does. *See* Daphna Zamir, Consumer Preferences, Citizen Preferences, and the Provision of Public Goods, 108 YALE LAW JOURNAL 377 (1998).

[4] Martin Dumas, Three Misunderstandings about Consumocratic Labor Law, 3 COMPARATIVE LABOR LAW & POLICY JOURNAL, 67 (2013).

[5] From *consummare* (Lat.), to consume, and *kratos* (Gr.), authority.

possible, hurting the targeted population. It appears then that one should plead in support of a (temporary) role for regulatory opacity, and in favour of the universality of some values, though expressed differently across cultures.

The pragmatic approach retained is paradoxically inspired by a rather ambitious vision of social realities. Contrary to the Platonic or Hobbesian ideas of the value of transparency and truth in popular society,[6] it takes for granted that consumers may care about what is signaled to them in relation to non-intrinsic attributes of consumer goods.[7] It is therefore articulated around the need for gradually arbitrating complex polemics on the transnational scene (3.). It also sheds light on conditions propitious to the arbitration of such polemics within a gradually more transparent consumocratic framework (4.). A few preliminary words on Rugmark (2.1) and some peculiarities of consumocratic law (2.2) may be useful before addressing these issues.

Rugmark, before *GoodWeave*

The mission of Rugmark is officially to eliminate illegal child labour in Southern Asia (most notably within the Indian 'carpet belt') and offer educational opportunities to children, including those removed from the looms. In its attempt to progressively eliminate child labour, the organisation: (a) certifies to consumers that carpets bearing the Rugmark label are child-labour free; (b) rehabilitates former child weavers found by its inspectors; and (c) manages free schools – within the Indian carpet belt principally. While manufacturers and exporters of certified carpets are asked by inspectors to reveal the conditions under which weavers are working or to ensure free access to the work sites, it is through Rugmark that such information is transmitted to consumers, under the apparent control of the organisation.

In the Summer of 2009, a new brand name was created ('GoodWeave'), indicating that Rugmark intended to phase out its label and logo. The Rugmark Foundation, India, still resists the change, as appears from its website.[8] In fact, the Rugmark organisation has gradually split into two disconnected networks: Rugmark India and the new GoodWeave, which encompasses the entire spectrum of the former network of organisations, with the exception of the local Rugmark team based in India.[9] A manager once dismissed by Rugmark India currently oversees the operation of GoodWeave India in the carpet belt. Since most of the facts on which this paper is based have been collected during or immediately before these changes, they will be considered as attached to the operations of Rugmark, even though our conclusions also hold for the new GoodWeave. Our own fieldwork was accomplished between September 2006 and March 2007, with some update work in the winters of 2012 and 2013.[10]

---

[6] In spite of Plato's general quest for truthfulness, it is in fact a rather pessimistic conception of the common man's relationship to it that underpins a central conclusion of *The Allegory of the Cave* (i.e., people would not wish to hear the truth; they would rather be prepared to kill its messenger) *in* PLATO, GREAT DIALOGUES OF PLATO, 315 (1st ed. 1956). Hobbes' view, although opposite to Plato's in that it hinges on a satisfaction with indifferent truth, proves no less cynical "[f]or such Truth, as opposeth no mans profit, nor pleasure, is to all men welcome". *See* THOMAS HOBBES, LEVIATHAN, 491 (1st ed. 1996).

[7] Martin Dumas, The Missing Link between Property Law and Consumocratic Law (*XXVI World Congress of Philosophy of Law ed.* 2014).

[8] cf. http://www.rugmarkindia.org.

[9] cf. http://goodweave.org/home.php.

[10] Fieldwork was undertaken and completed with the financial support of generous fellowship plans – from the Commonwealth Foundation and the Fonds de recherche Société et Culture (Québec).

Some Peculiarities of Consumocratic Law

I have explained elsewhere,[11] in light of a critique of Charles Taylor's own critique of modernity, that the consumocratic system may mark the development of modern societies in four notable ways. First, by inviting the individual – i.e. the consumocrat[12] – to inject 'meaning' into the socket of the liberal order itself, and offering an ordering of values in which the sense of indifference is posited below that of social responsibility, *prior to choice*. Second, by effectively soliciting rational *and* other-regarding behavior, while ensuring that instrumental reason does not obligatorily take precedence over finalities on the market place. Third, by giving politically disenchanted consumers the opportunity to exert new authority outside the traditional spheres of consumer influence, generally shaped by a deficient ideology – one under which *it is (wrongly) assumed that market mechanisms are inherently guided by the solicitation of consumers' individualistic concerns.* Fourth, by concretely challenging the common perception that the failure by the state to correct economic externalities in markets leads to undesirable results that are inevitable. It was shown that a nascent consumocracy[13] is opening promising spheres of influence in the field of socio-environmental regulation, without direct state intervention – a state of affairs which may prove critical in the face of coming social and environmental crises.

Understandably, in spite of its emancipatory capacities, the consumocratic regulation faces problems of qualitative legitimacy. The absence of closer interactions between a vast diaspora of consumers and the communities targeted by means of societal marketing indeed reveals a correlated and potential flaw in the current design of consumocratic instruments.[14] One must note however that, unlike democratic powers, the power to 'judge' under consumocracy ultimately rests with the masses; and the power to 'legislate', with the expert few.[15] In the absence of democratic legislative voting, it is therefore from highly diversified sanctions, expressed along transnational production chains, that such regulation instruments may derive a different type of legitimacy.[16]

---

[11] Martin Dumas, The Malaise of Modernity under Consumocratic Order, 5 *ECONOMICS & SOCIOLOGY*, 75 (2013).

[12] A *consumocrat* is a consumer who pays attention to the societal attributes of goods or services, via societal marketing.

[13] *Consumocracy* is the system by which consumers can exert more authority on market enterprises through the broadening of what qualifies as a desirable consumer good or service.

[14] This flaw may be conceived of as a lack of consensualism: "The informed consensus approach seeks to go beyond a collection of individual expert judgments by providing a collective response from a concerned community of citizens seeking to determine the practical values of the proposed decisions and solutions. It acts as a group judgment, of which each element has been informed; and essentially it is this that confers it a *qualitative* legitimacy." *See* ALEXANDRA GIRAUD & DOMINIQUE JOLLY, LE CONSENSUS EN MÉDECINE 1 (1st ed. 1991).

[15] This does not prevent consumer associations from intervening in the drafting of market-sanctioned codes of conduct, but such intervention need not constitute a *sine qua non* condition for legitimacy.

[16] This type of legitimacy should be subtly contrasted with Habermas' vision of legal legitimacy (and state political force): "informal public opinion-formation generates 'influence'; influence is transformed into 'communicative power' through the channels of political elections; and communicative power is again transformed into 'administrative power' through legislation. This influence, carried forward by communicative power, gives law its legitimacy, and thereby provides the political power of the state its binding force." *See* JÜRGEN HABERMAS, BETWEEN FACTS AND NORMS: CONTRIBUTION TO A DISCOURSE

Moreover, private labelling scheme rules do not involve governmental action and, in principle, do not conflict with those of international economic law.[17] This independence is reflected in the operation of the two regulation systems. We observe that even government sponsored schemes, posited between state protective law and private labelling scheme rules, may cause deviations from the course of state policy. It is meant by this, for instance, that a government sponsored scheme intended to reassure consumers as to the presence of genetically modified ingredients in their food products (via a label deemed comforting) could well cause a negative impact on the sales of such products, in accordance with the aggregate effects of consumers' own appreciation of the state's message. Although a state judge can force the introduction of a potentially controversial government label – a remarkably unilateral decision in comparison to the action of a plurality of buyers in a position to determine whether or not a label should be 'active' on the market – the ultimate power of appraisal and sanction indeed rests in the hands of buyers. This is so insofar as it is through private markets that the societal value of a product is ascertained (the exception being found in public procurements)[18] and, by ricochet, that a penalty is inflicted on some producers while others are encouraged. Also, while a segment of the market may support a given label, others do not and may favour, if anything, a competing or even conflicting one.[19] There is no single framework, be it private or public, within which the outcomes of existing labelling schemes are to be achieved.[20] However, as already hinted, this absence does not necessarily impinge on the effectivity of labelling schemes within their own market niche. It is possibly for these reasons that authors suggest, 'with caution', that the domain of what is known as global administrative law (GAL)[21] be extended to activities identical or analogous to those

THEORY OF LAW AND DEMOCRACY 28 (1st ed. 1996).

[17] It is not contested that the state may have jurisdiction over certain activities conducted under private labelling schemes – under the TBT Agreement (cf. article 8), in particular, which obligates nations to supervise the design and implementation of even private, non-governmental labelling schemes. *See* Atsuko Okubo, Environmental Labeling Programs and the GATT/WTO Regime, 11 GEORGETOWN INTERNATIONAL ENVIRONMENTAL LAW REVIEW 599, 605, 633-34 (1999). But the position that any transnational private sponsored labelling scheme would probably conflict with WTO rules is more easily challengeable, and not least so in the broader politico-economic sphere. Government-sponsored schemes, on the contrary, share a more uncertain status in relation to free trade (and mandatory ones in particular) insofar as a governmental measure that required blocking entry to unlabeled products would be tantamount to an import ban to be justified under article XX of the GATT, if at all. *See* ARTHUR E. APPLETON, ENVIRONMENTAL LABELLING PROGRAMMES: INTERNATIONAL TRADE LAW IMPLICATIONS 161 (1st ed. 1997).

[18] For a thorough review of issues related to the influence of social policy on the spending power of states, see Christopher McCrudden, Corporate Social Responsibility and Public Procurement, in THE NEW CORPORATE ACCOUNTABILITY: CORPORATE SOCIAL RESPONSIBILITY AND THE LAW 93, 93 (Doreen J. McBarnet, Aurora Voiculescu and Tom Campbell ed., 2007).

[19] The prospects of investigating such competing labelling schemes, within a pre-designed comparative perspective, do raise interesting 'competition for regulatory share' issues. *See* Julia Black, Legitimacy and the Competition for Regulatory Share (Jul. 23, 2009), http://eprints.lse.ac.uk/24559/.

[20] The work achieved by the International Social and Environmental Accreditation and Labelling Alliance represents a first step towards the constitution of such a general framework. The ISEAL Alliance is an international non-profit organisation that codifies best practice for the design and implementation of social and environmental standards initiatives.

[21] Global administrative law can be defined "as comprising the structures, procedures and normative standards for regulatory decision-making including transparency, participation, and review, and the rule-governed mechanisms for implementing these standards, that are applicable to formal intergovernmental regulatory bodies; (…) and to hybrid public-private *or private transnational bodies*." (Kingsbury, Krisch and

involving the design and implementation of private labelling initiatives. Such caution is in order. Not only because the consumer-sanctioned law develops on multiple regulatory platforms,[22] but because its particular mode of sanction calls for a distinct analysis of the values and principles that underpin it.[23] Such is the case with regard to transparency, arguably one of the most central elements to be considered in the development of consumocratic regimes.

(Anti-)Machiavellianism and the Arbitration of Complex Polemics

Absent an appropriate regulatory framework for public debates, transparent practices in matters of societal marketing are vulnerable from an instrumentalist point of view. And regulatory opacity could engender beneficial results, to a certain extent, within a scenario which for concision is coined the 'Machiavellian scenario'. Largely ignored in the relevant literature, it suggests that the communication of accurate facts to a critical mass of people may turn out to compromise the achievement of nonetheless well-intentioned objectives, and that regulators may instead dissimulate or alter some potentially controversial information so as to comfort consumers. Sheer disagreement about the means retained for reaching such objectives plays a central role in it.

In the absence of contextualised information being exchanged between consumocrats and local regulators, such disagreement (local and global) may reveal itself along several dimensions. On the Rugmark field, whether within hand-made carpet production units or communities assembled in villages and their surroundings, at least three zones of tension could embrace them. That is, tensions between (a) the interest of a parent and that of a child; (b) the right to education, and the right to bodily health; (c) the interests of the Hindu community and those of the Muslim community or between secular and religious values. Let us consider these zones in more detail.

As regards conflicts among actors (adults vs children), our study reveals that appropriate consumocratic action may require the use of physical force (and thus the collaboration of state agents and the recourse to state law) when parents and carpet loom owners refuse to give their consent to the rehabilitation of children. It is recalled that the interests of parents and those of their children may enter into conflict and, accordingly, that the interests of the child must prevail in such case.[24] However, an effective enforcement of the founding principle of the rights of children may require the organisation of raids by inspectors – not without generating some unintentional consequences.

In fact, since the start of their mission in 1995, zealous Rugmark inspectors have paradoxically and involuntarily contributed to the clandestineness of child labour in Uttar Pradesh, for instance.

Stewart 2005: 17) (our emphasis). Benedict Kingsbury, Nico Krisch & Richard B. Stewart, The Emergence of Global Administrative Law, 68 LAW AND CONTEMPORARY PROBLEMS, 15, 17 (2005).

[22] The programme of ISEAL offers a large range of private labelling initiatives the opportunity to gather around a common procedural platform, in parallel with the ISO model (cf. www.isealalliance.org).

[23] The GAL doctrine has been criticised for its Occidentalism and lack of regard for local diversity and pluralism: *see* Carol Harlow, Global Administrative Law: The Quest for Principles and Values, 17 EUROPEAN JOURNAL OF INTERNATIONAL LAW 187 (2006). As regards the principle of transparency, the occidentalisation thesis is founded on the assumption that it be applied uniformly, with no space for asymmetric treatment. A differentiated application of the principle of transparency in international public reports is nonetheless precisely what should be contemplated under the approach advocated here.

[24] Particularly troubling is the situation of 'the sacrificed child' – i.e., the child who works in order to help his brothers and sisters in the pursuit of their own studies, among other reasons provided by parents.

Before the creation of Rugmark, the child labour phenomenon was manifest and prevalent in the carpet manufacturing industry.[25] Because the employment of child weavers was then broadly accepted by the local population, it was relatively easy to discover its worst forms. The progressive recognition of the illegality of child labour in the region was paralleled with efforts to hide it, to inspectors' discontent. One major unintentional consequence of Rugmark's action, then, consisted in the further development of interlope practices. To better prevent the dangers of clandestineness, preference was eventually given to obtaining the consent of parents and employers over the organisation of such raids, unbeknown to consumers.

The tension between adults and children is nonetheless exacerbated by the fact that recalcitrant adults are those more likely to abuse working children. It is suggested then that Rugmark inspectors should be entitled to use physical force, with the collaboration of state agencies, when it appears that adults turn blind eyes to some of the worst forms of child labour. This goes along the lines of answering calls for a better adequacy between state protective legislation and the private regulation of production (Lang 2010)[26]. We note that what is predominantly at stake in this arbitrage between agents is obligatorily based on a system of valuation – of needs and beliefs, among other possible loci of tension.

As regards conflicts among needs (bodily and mental), the analysis reveals that the principle that all human rights are interlinked and of equal importance[27] does not always serve children well, whether under state or consumocratic law. The right to survival and the right to education may not necessarily conflict, but one can seriously question the absolute nature of their equivalence under conditions found to be relatively common in some parts of the world. A distinction between short term and long term perspectives does not suffice to clarify the problem. The direction of causality is reported to remain ambiguous, for instance, in the correlation between schooling and health outcomes (Grabner 2009)[28], as if one should regard hunger (while at school) and child work (while delaying school entry) as functionally equivalent sacrifices on the road to improved living conditions. The question of whether a problem relating namely to the safety, health, or diet of a family could legitimise the (temporary or part-time) work of a school-aged child can hardly escape the controversy exposed earlier. Notwithstanding this controversy, the reality of inspection work demands that the problem be effectively addressed on a daily basis. Social and environmental inspections mandated under a consumocratic regime often take place within faulty state institutions and inspectors must therefore attempt to compose with the latter in ways deemed appropriate within a short term perspective. This may require resorting to the Machiavellian scenario, if it is determined that convincing distant consumers of the existence of acceptable forms of child labour is too risky an operation.

With regard to the question of whether or not to authorise certain forms of child labour officially, the (more educative) anti-Machiavellian scenario would likely entail more or less implicit reference to the greater pragmatism of consumocratic law over state law in the pursuit of children's rights.

[25] ALAKH SHARMA, CHILD LABOUR IN CARPET INDUSTRY (1st ed. 2004).

[26] Andrew Lang, Trade Agreements, Business and Human Rights: The case of export processing zones (Apr. 1, 2010), http://www.hks.harvard.edu/m-rcbg/CSRI/pub_main.html.

[27] The founding principle is notably proclaimed in the preamble of *The International Covenant on Economic, Social and Cultural Rights*. It applies to all 'men and women' and, by implication, to children.

[28] Mickael Grabner, The Impact of Education on Health Using Compulsory Schooling Laws (Apr. 1, 2009), http://dx.doi.org/10.2139/ssrn.1505076.

Even though the task of legitimizing the use of child labour outside the purview of the family unit may represent a serious challenge, it is suggested here that it be attempted, publicly and prudently, within an appropriate framework for exchanges between consumers and producers. The long-term vulnerability of the Machiavellian scenario and a serious concern for the long-term efficiency of consumocratic law, whether social or environmental, do militate in favour of such openness.

As regards conflicts among beliefs, the analysis reveals that unknown conflicts first considered as parochial could develop transnationally and emerge out of more transparent societal communications between producers and consumers. Such conflicts may appear foreseeable to the reader of this text, and yet they remain largely undetected by proponents of greater transparency in the operation of consumocratic regulation. The irony can be explained by the fact that we do not adequately apprehend the telescopic nature of requirements underlying a more transparent consumocratic scheme. One should for instance foresee the likely consequences of the revelation to world consumers, secular and religious, of the fact that Rugmark schools (useful in preventing child labour) tend to discriminate against Muslim communities (teachers and students alike). Some significant advantages can be derived from the covering of such differentiated treatment to avoid a blanket boycott of Asian carpets. Under existing conditions and in order to ensure the short and middle term stability of Rugmark's educational activities, it is perhaps necessary to temporarily veil these discrimination issues to consumers. First, because such discrimination, if not contextualised, would most likely be perceived negatively by those who effectively sanction the Rugmark initiative, namely non Pro-Hindu consumers from Europe and North-America. It is recalled in this context that roughly 50% of artisanal work performed in the carpet belt is that of Muslims, thus adding to the problem. This community is in fact more 'represented' within the carpet belt of India, where Rugmark is active, than it is in the country as a whole, where it accounts for approximately 13% of the population. On the secular side, Rugmark can temporarily free itself of the particular difficulty posed by the secular sight of (mostly occidental) consumers on religious issues, as they are debated in India. For Indian secularism presents some distinctive features. Even though the 42nd Amendment Act inserted the word 'secular' into the Preamble of the Indian Constitution, it remains that secularism is not as neutral towards religion as it could be since "[this secularism] makes no room for non believers" (Prasad De 1977: 132)[29].

As Gajendragadkar puts it "[i]t is necessary to emphasize that Indian secularism (…) recognizes both the relevance and validity of religion in human life." (1970: 71).[30] In this context, it is unclear whether (mostly occidental) consumocrats would be legitimately placed, under current conditions, to influence such issues as amending the school curriculum in Rugmark schools. To determine, in particular, whether one or several religions (or history thereof), or none of them, should be taught in these private schools; or whether the role of many local *madrasas* (Islamic schools) should be downplayed in the examination of the management of consumer-sponsored schools. Considering the often tense situation in which Muslim and Hindu communities evolve in the region, one would then run the risk that an ill-prepared intervention in such affairs might aggravate existing tensions. In spite of the fact that consumers are sponsoring Rugmark schools, one could well argue that, absent a proper platform for deliberation and understanding, consumers should not be informed

[29] KRISHNA DE PRASAD, RELIGIOUS FREEDOM UNDER THE INDIAN CONSTITUTION, 132 (1st ed. 1977).

[30] Pralhad Balacharya Gajendragadka, The Concept of Secularism in Secular Democracy, NEW DELHI WEEKLY, Special Issue, 70-90 (1970).

of all they may naturally be curious about the people they purport to help and, more precisely, about some important details of how help is brought to people.

The same reasoning applies to other problematical issues revealed in the course of fieldwork, such as difficulties deriving from the admission that state and consumocratic standards may differ, or else revealed through analytical interpretation, such as difficulties to expect from tensions between different regions of the world in the development of other labelling schemes. This brings us to examining certain regulatory principles propitious to the formation of a more transparent scenario with respect to the issues discussed above.

In Search for Meta-Arbitration Principles: A Pragmatic Horizon

Difficult local choices under global scrutiny give rise to various scenarios of governance and, necessarily, to different ways of mediating between principles involved in the enforcement of state law and consumocratic law. Revealing certain truths, in all transparency, and not others, is one such general principle. Even though a 'cultural gap' may exist between consumocrats and their target populations, it does not follow that Machiavellianism or gap camouflaging is the only solution for maintaining consumocratic initiatives alive. Under certain conditions, professionalism or gap bridging could arguably prove more stable and valuable. Let us turn to examine some of these conditions.

Even though academic experts appear to disagree on the theorisation of child labour issues, divergences among sociologists, economists, and other specialists are not irreconcilable at the empirical level.[31] The potential benefits of part-time child labour, before or after schooling hours, exemplifies one possible juncture between advocations in favour of child labour abolition versus regulation. This is not to imply that abolitionists and regulationalists would in fact agree with this possibility; it is rather inferred that there are good grounds for enabling the achievement of plausible compromises between them. An essential ingredient in envisaging such compromises lies not in the search for true laws in social sciences, but in the search for (smaller-scale) mechanisms likely to favour the attainment of desirable objectives – such as the gradual elimination of the worst forms of child labour. In other words, the adoption of a pragmatic approach towards the solution of child labour issues, in our view, is more likely to engender promising initiatives than approaches based on the strict adherence to a given theory. Within a consumocratic setting, this certainly involves education efforts with consumers who, as pointed earlier, may also entertain strict views in regards to child labour issues.

Pragmatism towards the solution of child labour issues may also be in order as regards the valuations of religious beliefs and their expected impact on the survival of consumer-sponsored schools. It has been demonstrated that a more transparent development of child labour consumocratic law would expose instances of religious discrimination in the administration of these schools and, most plausibly, raise the question of whether or not consumers should be

[31] The *Foundation for International Research on Working Children* (IREWOC) summarises the clash between these groups as follows: "Abolitionists are accused of taking a moralist stance toward the issue, whereas regulationalists are critiqued for their application of a double standard, whereby they advocate child labour as a suitable household strategy for the poor on one hand, yet reserve the right to full-time (and quality) education for the children of the middle and upper class on the other." *See* INTERNATIONAL RESEARCH ON WORKING CHILDREN (IREWOC), Working Children's Organisations in India (May, 2007), www.cccindia.co/corecentre/.../children_india.pdf.

sponsoring religious schooling. Controversies may therefore not only arise in relation to what consumers and scientists believe children should be doing, but also on what they believe children should be taught. Paradoxically, the fact that an overwhelming majority of scientists appear to concur on the impossibility to reconcile 'scientific truths' with 'religious truths' does not simplify the problem, but rather makes it more complex.

It must be first noted that inter-religious exchanges and those involving believers and non-believers frame the issue in different fashions.[32] If discrimination towards Muslim students could simply be eliminated by providing more school seats to Muslims, it is very unclear whether Rugmark school regulators could likewise solve the problem by offering both secular and religious curricula to all their students, without discrimination at entry level. It is not our task here to discuss at length the content of plausible arrangements between producers and consumers;[33] what is of principal interest is rather the identification of a governing principle under which exchanges among believers and non-believers may prove fruitful within the consumocratic system. To that end, one should consider the interest of children first and foremost, and justifying the content of any school curriculum by the latter. The approach, once again, is pragmatic in that it focuses the attention on the attainment of locally valued ends, beneficial to the targeted children. Solutions and compromises conducive to social order among differentiated communities would likely be given precedence over others. Unlike the spirit underlying firm adherence to religious or secular schools of thought, pragmatism in the guidance of communications between producers and consumers would reduce the risk of paralysing original consumocratic schemes, although it could not eliminate that risk.[34]

If the acceptance of common goals and recognition of limited understanding – in preference to adversarial rejections – are to guide potentially polemic exchanges between Rugmark's demand and supply-side market agents, the organisation will have improved on the existing (and rather opaque) scheme. We have examined some regulatory conditions related to the solution of

[32] Two forms of expressing fundamental rights are nonetheless equally at stake. Under article 18 of the Universal Declaration of Human Rights (UDHR), everyone has the right to freedom of thought, conscience and religion, it being understood that this includes the right not to entertain religious beliefs. Article 3 further provides that everyone is entitled to all the rights and freedoms set forth in the UDHR, without distinction of any kind, such as religion and political or other opinion.

[33] Another plausible approach to facilitating exchanges between believers and non-believers is probabilistic. Under this approach, it is presumed that the existence of God may not be determinable through human reasoning and, therefore, that there is a possibility, perhaps infinitesimal, for it to exist – note that this probabilistic stance was first introduced by Pascal when discussing his famous wager in *Pensées* (#233). It is suggested, in this regard, that fructuous exchanges are more likely to take place between people regarded as having or not having a penchant for believing in the unlikely and improbable, than between people implicitly or explicitly qualified as either lucid vs. narrow-minded. It is interesting to note in this respect that American courts have considered arguments based on the intelligent design theory to be plausible – they "may be true" – while stressing clearly that they run counter to scientific evidence (cf. note 34).

[34] The raging debate in the U.S. between proponents and opponents of the intelligent design (ID) theory may serve as a warning example. In response to attempts to introduce the teaching of this theory in public school biology classes, the U.S. District Court for the Middle District of Pennsylvania stated the following in Tammy Kitzmiller, et al. v. Dover Area School District, et al.: "After a searching review of the record and applicable case law, we find that while ID arguments may be true, a proposition on which the Court takes no position, ID is not science. We find that ID fails on three different levels, any one of which is sufficient to preclude a determination that ID is science." [400 F. Supp. 2d 707 (M.D. Pa. 2005) 64].

tensions defined at the micro level – in the demand, in particular, for respect towards what one may see as legitimate *local expressions* of morality in human affairs.[35] However, a better guided diffusion of (potentially) controversial societal information between producers and consumers does not guarantee that such diffusion, by consumocratic regulators, will never hamper the protection of children's rights. One should not disregard the possibility that persistent and conflicting expectations emerging from these groups defy protection mechanisms established under a more refined and transparent regime. It is in this context that one may be well advised to provide for a 'Machiavellian clause' within an original constitutional platform for consumocratic law, in order to suspend the release of societal information when it is established, for instance, that conflicting expectations held by consumocrats and local producers would, following such release, most likely hamper the protection of children's fundamental rights. The development of existing religious labels (e.g., *Kosher* and *Halal*), and of transnational labelling schemes more generally, is not invulnerable to this higher-order problem of transparency.[36]

In conclusion, it is crucial for the development of consumocratic law that consumocrats and cooperating producers agree on the ultimate goals set by it. They may not agree on certain means (e.g., the strict prohibition of any child labour), but they should for instance support the general quest for human survival under decent conditions – with the collaboration of the state when necessary. Moreover, a consumocratic charter of rights is a prerequisite for the transparent diffusion of a priori discomforting information and the prevention of ill-intentioned consumocratic experiments, on the margin of international state law.[37] Such a regulatory platform could better frame polemic (re)actions expected to occur at the transnational level. The challenge would indeed consist in abandoning the comfort of opacity to meet that of anti-Machivellianism. Only then can sensible communications take place between consumer-judges and distant producers over the appropriateness of chosen means towards the accomplishment of shared goals. It is within such communicative framework that one could better appreciate the consensual character of the principle governing child protection rules, namely that the interests of the child are paramount over those of the parents.

[35] Most notably here are tensions between children's rights to be guaranteed, subject only to such reasonable limits to be prescribed, as could be demonstrably justified under a careful appreciation of *local* beliefs, motivations, and opportunity sets.

[36] See the work of the ISEAL Alliance in this regard: Errol Meidinger, Emerging Trans-Sectoral Regulatory Structures in Global Civil Society: The Case of ISEAL (Jan. 18, 2001), http://law.buffalo.edu/homepage/eemeid/scholarship/ISEAL.pdf.

[37] Some analysts may not agree with this position. They argue that consumers may view consumption choices as moral acts that have personal significance irrespective of their instrumental or expressive effects, and that liberal theory should embrace the principle of "equal respect for the differing preferences and visions of the good life with which individual consumers and producers approach the market". *See* Robin L. West, Liberalism Rediscovered: A Pragmatic Definition of the Liberal Vision, 46 UNIVERSITY OF PITTSBURG LAW REVIEW 673, 673 (1985). Such a non-instrumentalist approach would arguably run counter to the search for regulatory tools designed to counteract the possible emergence of ill-intentioned groups of consumers. I wish to thank Dunkan Kennedy for raising this issue.

Remerciements

Ce projet a été rendu possible grâce au soutien financier de l'Institut Hydro-Québec en environnement, développement et société et du Fonds de recherche Société et culture du Québec.

Institut EDS Institut Hydro-Québec en environnement, développement et société de l'Université Laval

Fonds de recherche Société et culture Québec