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WHOSE SOCIAL EUROPE?

The Laval/Viking judgments and the prosperity gap

A talk presented at a conference “Developing Europe: Regional Policy and Free Markets in European Legal Discourse”

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I would like to address three myths, that I believe are deeply embedded in the consciousness of lawyers when speaking about “Central Europe”, development and human rights in the European Union legal discourse.

Myth number 1

There is a myth that a distinction between what we today understand as Eastern and Western Europe, has been with us forever. This distinction is deeply embedded in the consciousness of the post - World War 2 generations who have lived with it most of their lives.

Some of the legal academics in Europe and in the United States from across the entire political spectrum orientalize Eastern and Central Europe to an extent unthinkable when they speak about other regions of the world. Some of the handful of Eastern legal academics who have succeeded in the “West” are even making a career out of this orientalization.

But the differences within what is today understood as Eastern Europe and within what is today understood as Western Europe are often much larger than those between Eastern and Western Europe.

I would highly suggest reading “The Tragedy of Central Europe” by Milan Kundera to anyone embarking on any project connected with Central Europe. I am not surprised it was written by a Czech author, as I will explain in a minute.

What we understand as West and East in Europe today was determined by three people negotiating in Jalta in 1945. The geographic scope of the term “Eastern Europe” used today

depended on how far the Soviet troops came westwards and on the strategic preferences of the three negotiators – Churchill, Roosevelt and Stalin.

The Greeks lucked out, because Churchill wanted to have Greece in the Western sphere. The Austrians also lucked out. The East Germans did not. Prussia, a former center of the center, is today, except for Berlin, a depopulated and much less developed part of Germany. Many young people move to the West. It is ridden with frustration. Statistics consistently show that at least a third of former East Germans wish the wall was still standing. The former center of Europe's GDP per capita in 1991 was only 30 per cent of the EU average and in 2000, 50 per cent of the EU average. Soviet domination left behind enormous economic, and other, devastation.

The Slovenians partly lucked out, as Yugoslavia was split up fifty per cent/ fifty per cent in Jalta, which determined its development and political orientation for the next forty five years. Slovenia in 1990 was much more developed than the Czech Republic and it still is. This was never the case before 1945. Czechoslovakia, which was in the interwar period at least as developed as Austria, Norway or Sweden is now very far behind the levels of development of these countries. It is also behind many other parts of "Western European" periphery, which developed only late in the twentieth century. A comparison between the economic development of Estonia and Finland, the development gap seen in the Viking judgment discussed today, would bring us to the same result as a comparison between the Czech Republic and Austria - the huge development gap today, which never existed before 1945.

Today's Austrians, Czechs and Slovenians shared history for about a millennium. They formed the central part of the Habsburg Empire – Inner Austria. The Czechs were the most affluent in the empire. Only the capital of the empire itself, Vienna, could compare with their wealth. Slovenians admired Czechs and aspired to be like them in different historic periods. We admired their wealth and their organization, they were our role model. By the time I was a child, in the 1980s, in Slovenia the word "czech" became a synonym for bad quality or even an insult. This is the tragedy of Central Europe.

This review brings me to **Myth number 2**: The common sense today is that the new, Central European, Member States of the European Union receive large sums of money from the EU budget. And that it is paid for primarily by the West European tax-payers.

This is not true. Spain alone receives more money from the structural and cohesion funds than all the 2004 EU entrants together. Furthermore, Slovenia and Cyprus, the most developed new Member States, are net-contributors to the EU budget. This is the case even though their GDP per capita exceeds only Portugal's, which is the poorest old Member State. Nonetheless, Greece, Portugal, Spain, Ireland and Belgium are net receivers from the EU budget.

Professor Rumsford will probably highlight in more detail the ideology behind the allocation of funds, but the ideology seems to be skewed against less prosperous areas. As Rumsford explains in his book, there is a persistent idea that money will be better spent in areas of prosperity than in less prosperous areas supposedly plagued by inefficiency. The assumption is that investing

money in the areas of greater wealth will be more efficient and that this wealth will eventually trickle down to less developed areas. This mentality is bound to further reproduce the existing distribution of resources in the Union.

To conclude, the idea that the new, less prosperous entrants to the EU are receiving large amounts of money from “Western” Europe is a pure but a widespread myth.

Myth number 3

The third myth and its implications need to be understood within the framework of the first two myths. The third myth is that in the Laval judgment the choice was between a move towards a more equitable level of wages for all workers, i.e. protection of social rights irrespective of the nationality of workers, and the “race to the bottom” caused by the language of free movement.

In the Laval case, industrial action by Swedish unions against a Latvian company physically prevented the company from performing the works contract and intended to force it to enter negotiations on conditions of pay. Swedish law allows unions to block anyone who does not pay the Swedish minimum wage. The European Court of Justice concluded that such collective action by Swedish unions violated the free movement provisions.

I reject the overwhelming disagreement of the (almost exclusively core West European) legal academia with the outcome of the Laval judgment on the basis that the European Court of Justice gave preference to economic rights over social rights. In fact, like Wittgenstein’s duck-rabbit picture, what appears as economic is social and what is social is economic, depending on the angle from which we see the dilemma. The debate could just as well be framed in terms of social rights of Latvian workers against the Swedish interpretation of the freedom of movement provisions which ignores their realization. What appears as an economic freedom in the dominant EU legal discourse could thus just as well be a social right of the Latvian workers who are struggling to improve their livelihood – in the register of the Charter – their right to dignity and just working conditions.

Both the Laval and Viking cases concern questions of cheap labor and comparative advantage of some East European (and inevitably, of the Western European periphery) companies in specific competitions for public contracts or for attracting foreign companies to employ its labor force. In both cases the question is, which scheme is normal? Along the lines of Coase, is it normal to grow wheat or to have a railway? In the Laval judgment, the real question is whether a Latvian company can use its comparative advantage and post its workers to perform work in Sweden, where wages and social contributions are much higher, or not. Will the workers be employed under Latvian or Swedish law? Whose comparative advantage will be diminished?

This will be a political decision about the allocation of costs. The principle of non-discrimination cannot camouflage or resolve this political question. Either way someone will be discriminated against – either the Latvian company and Latvian workers, who will not be able to use their competitive advantage or the Swedish company which could not perform its work, due to a

cheaper competitor, because of high employment standards in Sweden and the belief that workers should receive a fair minimum wage.

The mainstream perception is that the rhetoric of social rights will always protect the workers or weaker interests and the rhetoric of economic rights and free movement of services will always protect capital or stronger interests in the Union. This is the way the dilemmas are structured in the existing European Union legal discourse, driven by the legal academia and the legal profession. This perception is mirrored in optimism about the introduction of social rights in the Human Rights Charter, which is supposed to produce a more social Europe.

I do not see how the protection of social rights in Europe could benefit all the workers in the European Union. Let's imagine the Court stating that the Latvian company cannot perform work in Sweden unless it abides by the Swedish labor laws. A plausible consequence is that Latvian workers would be sent home and Swedish workers would perform the work. How this result will lead to a more equitable level of wages for all workers irrespective of their nationality is beyond me. If companies from less developed Eastern European countries cannot use their comparative advantage when competing for public contracts or for getting a ship flagged in their jurisdiction, how will an equitable level of wages irrespective of the nationality of workers be achieved?

Once we see the issue from the distributional perspective, i.e. who wins and who loses in a particular case, the economic becomes social and the social becomes economic. My take on the mainstream debate is from the perspective of not allowing some Eastern European countries and interests to take advantage of their comparative advantage against the backdrop of huge economic disparity, lack of redistribution in the European Union economic policy and overall structural domination.

Furthermore, the dilemma should be seen against the backdrop of a possibly problematic economic adjustment to the membership of the European Union. For instance, professor David Kennedy has suggested that Eastern European industry has been restructured to suit foreign direct investment instead of increasing production capacity. To portray the picture, five per cent of the Czech GDP and almost seven per cent of the Hungarian GDP goes abroad in capital gains from foreign direct investment. This is almost like a seven per cent tax on EU membership.

So I agree with the outcome in Laval – that the Latvian company should be allowed to perform work in Sweden under the Latvian contracts and conditions. However, I strongly disagree with the justification for the judgment. First, it is again structured in the language of social rights versus free movement. Second, it forecloses any discourse of economic development and the problem of different comparative advantages. The discourse of addressing the immense prosperity gap and developmental needs of some Eastern European countries was clearly dismissed. One can speculate whether the Court actually had in mind such considerations. However, its express condemnation of social dumping confirms that this debate was foreclosed.

Social dumping has become a part of the EU legal vocabulary. There is no set definition of the expression in the literature, but it generally means using lower labor standards to undercut competition. Despite the unanimous and vocal rejection of social dumping, I have not heard EU legal academics complaining about goods dumping.

It is no secret that many goods, not just luxury goods, are cheaper in Eastern Europe than in Western Europe. Western European companies are able to segment markets, undercut Eastern European competition and dump goods in Eastern Europe, where the elasticity of demand is higher. The fact that the core of the old Member States has a stronger industry and the symbolic power of their brands give them a significant comparative advantage. The symbolic power of Eastern European industry and products is reduced further by the first myth I explained in the beginning.

Moreover, it is no secret that many Western European companies sell, under their brand, products of a lesser quality on Eastern European markets. This practice enables them to further cut prices. These products are most often produced using cheaper labor in Eastern Europe.

The European Union vigorously fights any goods dumping coming from outside of the Union. Inside the Union, goods dumping is not a part of the legal vocabulary, as it is allowed under the free movement of goods. This situation significantly entrenches the advantage of core Western European companies.

Yet, European Union legal rhetoric provides no vocabulary to argue the problem of goods dumping. Those of you working on competition law know that the prohibition against predatory pricing also does not cover this widespread practice.

To conclude: Interestingly, the language of free movement can sometimes favor the weakest, not the rhetoric of social rights. Furthermore, it is difficult to understand how the actual inclusion of social rights into the EU human rights charter could entail a sharp interpretative shift in the European Court of Justice's jurisprudence. Consciousness of social concerns has been with us from the beginning of European integration and European Union legal profession – judges, legal secretaries of the Court, members of the European Commission's Legal service - has taken pride in taking into account the social concerns of Europeans. In addition, Article 2 of the Treaty has contained the notion of solidarity for some time now. I therefore do not believe an explicit enumeration of social rights in the Charter could meet the optimistic transformative expectations of EU legal rhetoric and create an interpretative shift in the European Court of Justice's reasoning.

I am therefore much less optimistic about the introduction and excitement about the new social rights introduced in the Charter of fundamental rights. Enforcement of these rights certainly cannot mean a social Europe for everyone. Whose social Europe will it be? Do we risk perpetuating the tragedy of Central Europe?

