EUROPEAN LAW JOURNAL
Review of European Law in Context

European Law Journal, Vol. 21, No. 3, May 2015, pp. 406–428.
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and 350 Main Street, Malden, MA 02148, USA

Law and the Periphery

*Damjan Kukovec**

Abstract: *The Euro crisis brought to the fore a larger and hitherto invisible structural problem as to the relationship between the European Union's centre and its periphery. I am arguing that the concerns of the peripheral EU countries, of their workers and companies are difficult to argue in the existing ideology and that this contributes to the reproduction of the existing hierarchies in the EU. The ideology of the EU legal profession is one of the centre of the EU, and this importantly determines how harm is understood in EU law and which doctrines are present in legal thinking. For example, there is a presence of social dumping, but an absence of goods dumping in the EU legal vernacular. I argue that the centre-periphery relationship is structured by legal entitlements, that the overtly political discourse of left and right is analytically insufficient and explain the phenomenon of conceptualism of contemporary legal thought.*

* S.J.D Candidate, Harvard Law School, Lewis 447, 1775 Massachusetts Avenue, Cambridge 02138, Massachusetts, USA, Email: dkukovec@sjd.law.harvard.edu. Dipl. Iur. (University of Ljubljana, 01), LL.M. (02), S.J.D. candidate (Harvard). I would like to thank Gráinne de Búrca, Duncan Kennedy, Lewis Sargentich, Roberto Unger, Samuli Sepännen, Frank Michelman, Bill Davies, Alexander Somek, Peter Skott, Martti Koskenniemi, Horatia Muir Watt, Miguel Maduro, Joanne Scott, William Alford, Sheila Jasannof, Chris Taggart, Hani Sayed, Peter Gordon, Marija Bartl, David Wilkins, Lucy White, Janet Halley, Damien Chalmers, Fernanda Nicola, Daniela Caruso, Peter Lindseth, Chris Rumford, Susan Rose Ackerman, David Trubek and Gerald Frug for their comments, challenges and critiques. The original version of this thinking was presented as 'Whose Social Europe?' at the conference 'Developing Europe—Regional Policy and Free Markets in European Legal Discourse' at Harvard Law School on 16 April 2010. The present article mostly reflects the paper entitled 'A Critique of the Rhetoric of Common Interest in the EU Legal Discourse' presented at the conference 'The European Legal Project: New Approaches' at Harvard Law School on 13 April 2012; it reflects my paper 'Taking Change Seriously, A Discourse of Justice and The Reproduction of the Status Quo' presented at the conference on Justice at London School of Economics in London on 22 September 2012, my unpublished manuscript on hold with the Graduate program at Harvard Law School, 22 November 2011, my unpublished manuscript on hold with Duncan Kennedy, Gráinne de Búrca, David Kennedy and Daniela Caruso of 26 December 2012, and my S.J.D. dissertation at Harvard Law School. Several versions and varieties of this work were presented at conferences and workshops at Vienna Law School in May 2011, at Harvard Law School in June 2011 and in November 2011, at the American University College of Law in June 2011, at Harvard Law School discussion between Alexander Somek and myself, 'Equality and Social Justice in the European Union' on 9 March 2012, as well as at Yale Law School in December 2012 and at the Institute for Global Law of Policy workshop in Doha in January 2013. I would like to thank the participants of these conferences and workshops for their critiques, comments and advice. Errors are mine.

I Introduction

The EU has been a remarkable achievement in many respects—in terms of stability, war prevention and also in terms of ensuring prosperity. Certainly, the promotion of the common interest as envisioned by Ernst Hass[1] has contributed to European stability. Still, in the European legal discourse[2] and in contemporary legal thought in general,[3] the existence of certain conflicts has been widely acknowledged. One particular conflict inherent to the structure of the EU has not received its share of attention in the legal discourse, especially in light of the recent and ongoing Euro crisis: the conflicts between the EU's 'centre' and 'periphery.'

As a result, there has been no discussion about the distribution between actors located in different countries and regions in the EU through daily legal reasoning, such as the distribution through free movement law or competition law. The discussion of distribution between countries and regions in the EU has generally been limited to issues of institutional representation and participation on the one hand and to transfers through the budget on the other.

Moreover, the common intuition has been that the EU takes in poor countries and turns them into high-income countries and that likewise, the interests 'of the other' are taken into account in EU legal discourse, and that all nations are in control of the larger processes of the Union. This intuition has been fuelled by EU legal scholarship and by legal thinking in contemporary legal thought.

However, my own intuition, ever since I started practising EU law many years ago, has been that the interests and concerns of the new Eastern countries were difficult to express in the existing legal discourse and that this crucially influences their position in the EU. The current Euro crisis thus simply brought to the fore a larger and hitherto invisible structural problem as to the relationship between the EU's centre and its periphery.[4]

None of the existing discourses in the EU—such as the constitutional discourse, the discourse of free movement and its opposite or the overtly political debate—adequately addresses the power dynamics in the EU. Subsequently, the existing

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[1] See E. B. Haas, *The Uniting of Europe: Political, Social, and Economic Forces, 1950–1957* (Stanford University Press, 1968), at 335; E. B. Haas, 'International Integration: The European and the Universal Process', (1961) 15 *International Organization* 366.

[2] See, for example, C. Joerges, 'Re-Conceptualising European Law as Conflicts Law, the ECJ's Labour Law Jurisprudence and Germany's Federal Constitutional Court', in B. Verschraegen (ed), *Interdisciplinary Studies of Comparative and Private International Law (Vol. I)* (Jan Sramek Verlag, 2010), at 7–18.

[3] See D. Kennedy, 'Three Globalizations of Law and Legal Thought: 1850–2000', in D. M. Trubek and A. Santos (eds), *The New Law and Economic Development: A Critical Appraisal* (Cambridge University Press, 2006), at 19.

[4] See D. Kukovec, 'Whose Social Europe?—The Laval/Viking Judgments and the Prosperity Gap' (16 April 2010), available at http://ssrn.com/abstract=1800922; D. Kukovec, 'A Critique of the Rhetoric of Common Interest in the EU Legal Discourse', (13 April 2012) available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2178332; D. Kukovec, 'Taking Change Seriously, A Discourse of Justice and The Reproduction of the Status Quo' (22 September 2012), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2302389; D. Kukovec, 'A Critique of the Rhetoric of Common Interest in the EU Legal Discourse' (26 December 2012) (on file with David Kennedy, Duncan Kennedy, Gráinne de Búrca and Daniela Caruso); D. Kukovec, 'Taking Change Seriously, The Rhetoric of Justice and the Reproduction of the Status Quo', in G. de Búrca, D. Kochenov and A. Williams (eds), *Europe's Justice Deficit?* (Hart Publishing, Oxford, 2014); D. Kukovec, 'Hierarchies as Law', (2014) 21 *Columbia Journal of European Law*; D. Kukovec, 'Hierarchies as Law' (SJD dissertation, Harvard Law School).

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discourses fail to portray a convincing picture of the state of the EU. The omission of centre–periphery dynamic in both legal and political discourse has led to the current situation in which the very integration of the Union has been put in danger, and (at least partial) exit of one of the peripheral Member States, Greece, was under serious consideration for the first time in the history of the EU.

II The Tragedy of the Periphery

I come from Slovenia, and I share Milan Kundera's view of the tragedy of Central Europe. The latter came about as a result of the Yalta agreement in 1945, which created the East/West divide in Europe as we still understand it today. The East/West divide in Europe often results in orientalisation of the East also often with dire distributional consequences. For example, brand building and orientalisation do not go hand in hand. But the structure at play in the EU goes beyond the East/West divide. The centre–periphery distinction better describes the dynamics of the Union. Eastern Central Europe where I come from first tragically ended up on the Eastern side of the Yalta agreement in 1945, which devastated it economically and otherwise; then in the 1990s, it ended up in a world of antistructural reformism of the EU.

What do I mean by this? The way we European lawyers speak and think about Europe reproduces the existing hierarchies and entrenches the centre's domination over the periphery. The EU legal system prides itself in diversity, in pluralism, in inclusion of the other,[5] in constitutional tolerance,[6] participation and in taking everyone's interests into account.[7] However, the position of the EU's periphery is not reflected in the existing EU legal discourse. First, the way the EU is structured and the way issues are framed for discussion makes it difficult to notice and address distributional consequences of the EU legal structure between the centre and the periphery. Second, many of the periphery's aspirations and claims for protection against harm are foreclosed from operating powerfully in the Union.

What is the centre and what the periphery of the EU? The centre countries or regions are those with a much higher gross domestic product (GDP) per capita than the regions of the periphery; they invest more money in research and development and have the best universities; they have more capital and more ingoing and outgoing foreign direct investment (FDI). Their actors, products and services have more prestige. Internationally recognised brands come from the centre, which gives the companies owning them a significant power on the market. Branded firms enjoy higher margins and more loyal customers, who will also not switch to another brand despite a price increase.[8] Generally, companies of the centre find themselves higher in European and

[5] See J. H. H. Weiler, 'Federalism and Constitutionalism: Europe's Sonderweg', (2000) Harvard Jean Monnet Working Paper 10/00.

[6] See J. H. H. Weiler, 'Europe's Sonderweg', n 5 *supra*; M. P. Maduro, 'Three Claims of Constitutional Pluralism', in M. Avbelj and J. Komárek (eds), *Constitutional Pluralism in the European Union and Beyond* (Hart, 2012), at 67–84.

[7] See C. Joerges and F. Rödl, 'Informal Politics, Formalised Law and the "Social Deficit" of European Integration: Reflections after the Judgments of the ECJ in Viking and Laval', (2009) 15(1) *European Law Journal* 1; M. P. Maduro, *We the Court* (Hart Publishing, 1998), at 173.

[8] Non-branded companies typically earn gross margins of 3–8% and are constantly at risk of being undercut by cheaper rivals. Branded firms enjoy fatter margins (15% or more) and more loyal customers. See 'Brand New: Emerging-Market Companies Are Trying to Build Global Brands', (4 August 2012) *The Economist*, available at http://www.economist.com/node/21559894.

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global production chains.[9] The centre exports final products and is the seat of powerful corporations and law firms. Countries of the centre are, for example, Germany, France, the Netherlands, Austria, Sweden, Finland and the United Kingdom.

The periphery has much weaker industry and a less efficient agricultural sector. It has no (or very few) brands known beyond its borders. Non-branded companies typically earn lower margins and are constantly at risk of being undercut by cheaper rivals.[10] Some of the few famous brands of Eastern Europe have in fact been bought by established companies of the centre.[11] Regions of the periphery have a lower GDP per capita, and the actors, products and services from the periphery have much less prestige. They often produce semi-final products or final products for a brand of the centre. Generally, companies of the periphery find themselves lower in European and global production chains[12]. The wages are lower than in the centre, and often (with the exception of the European south) the life expectancy is lower. Countries of the periphery are, for example, Hungary, Portugal, Greece, Bulgaria, Cyprus, Latvia, Poland, Slovenia and Estonia.

Spain and Italy could in some respects be considered as countries of the centre[13] and in other respects as countries of the periphery.[14] This is why semi-periphery might be a pertinent description of their position.[15] In the case of Italy, for example, the internal regional fragmentation is possibly more important for the purposes of this categorisation, with the north as a part of EU's centre and the south of Italy as a part of the periphery.[16]

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[9] For the definition of global value chains, see G. Gereffi, J. Humphrey, R. Kaplinsky and T. J. Sturgeon,'Globalisation, Value Chains and Development', (2001) 32(3) *Institute of Development Studies Bulletin*, available at http://www.ids.ac.uk/files/dmfile/gereffietal323.pdf.

[10] Branded firms enjoy fatter margins (15% or more) and more loyal customers. See 'Brand New: Emerging-Market Companies Are Trying to Build Global Brands', (4 August 2012) *The Economist*, available at http://www.economist.com/node/21559894.

[11] For example, the Czech car company Škoda was bought by the Volkswagen group, which is seen as a success story. See, for example, 'Volkswagen's Acquisition of Skoda Auto: A Central European Success Story', (2007) *ICMR Case Studies Collection*, available at http://www.icmrindia.org/casestudies/catalogue/Business%20Strategy/BSTR262.htm.

[12] See G. Gereffi, J. Humphrey, R. Kaplinsky and T. J. Sturgeon, 'Globalisation, Value Chains and Development', n 9 *supra*.

[13] Most brands registered with The Office for Harmonization in the Internal Market (OHIM) are from the companies of the centre. One can note the high number of brands registered with the OHIM by Italian and Spanish companies. See Statistics of Community Trademarks, available at https://oami.europa.eu/tunnel-web/secure/webdav/guest/document_library/contentPdfs/about_ohim/the_office/SSC009-Statistics_of_Community_Trade_Marks-2014_en.pdf. The EU's most valuable brands indeed come from the centre. See http://www.eurobrand.cc/studien-rankings/eurobrand-2012/; http://brandirectory.com/brands/continent/europe; http://www.rdtrustedbrands.com/_media/pdf/etb13-release_brands.pdf.

[14] Italy and Spain are at a GDP per capita level just below the EU-27 average. See http://epp.eurostat.ec.europa.eu/statistics_explained/index.php/GDP_per_capita,_consumption_per_capita_and_price_level_indices. Also, for example, Patrick Actis Perinetto has argued that economically, Italy is more a country of dumpers than of dumped in the context of labour relations. He draws this conclusion on the basis of the figure that salaries in Italy are 32.3% lower than the average of the 15 more industrialised countries in Europe and on the basis of the Lindsey Oil Dispute. See P. A. Perinetto, 'Viking and Laval: An Italian Perspective, A Case of No Impact', (2012) 3 *European Labour Law Journal* 270, 299.

[15] For the definition of semi-periphery see, for example, T. R. Shannon, *An Introduction to the World System Perspective* (Westview Press, 1989), at 89.

[16] The relationship between the developed industrial north and the poorer agrarian south of Italy is, for example, portrayed by Antonio Gramsci. See A. Gramsci, 'Some Aspects of the Southern Question

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The centre–periphery dynamics has been used in economic thinking about the EU.[17] However, my goal is to introduce the centre–periphery relationship in the daily work and decision making of lawyers. When I first introduced the centre–periphery dynamic as a mode of legal thought[18], it was not meant to be an introduction of another dichotomy. Rather, the static picture of what is centre and what is a periphery in every moment in time should rather be seen on a spectrum of choices. Furthermore, the centre–periphery relationship as described in terms of countries serves only as a model to visualise the dynamics of domination in the EU legal structure. Moreover, there are further hierarchies within countries. The centre–periphery relationship is reproduced within every country, province etc., and the structural hierarchy of centre and periphery is just one example of countless other hierarchies in our societies.

Furthermore, the relationship between the centre and periphery as I propose it is not simply an analysis of an economic relationship between rich countries and poor countries, nor is the argumentation based on nationalist grounds. The centre and periphery do not necessarily start and end precisely at national borders, despite the fact that there might be an overlap. The claim is that there is a deeper structure at play that goes beyond the boundaries of particular countries or regions, that there is hierarchical subordination and structural disadvantage of the actors of the periphery in the particular constellation of the social and economic structure.[19]

We are faced with a massive inequality of wealth between regions in the EU, which goes unrecognised by law and lawyers. This, however, gives only a picture of the static structure. The dynamics by which the economic dominance of developed regions is established and perpetuated was proposed by the Swedish economist Gunnar Myrdal. He has argued that, as to different regions, economic development and regression do not happen on two separate tracks. Rather, there is a structural relationship between them. The main idea is that the play of forces in the market normally tends to increase rather than decrease the inequalities between regions. He has argued that the play of market forces works towards regional inequality, with a downward spiral for the less developed regions and the upward spiral for the developed regions.[20]

In fact, to a limited extent, his findings were actually taken into account in the construction of Europe. Cohesion funds and other redistribution through the EU budget are a reflection of the acknowledgement of this dynamic.

However, the perception is that the EU's new Central European Member States have been receiving large sums of money from the EU budget. I will argue that this

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(1926)', in A. Gramsci, *Selections from Political Writings (1921–1926)* (Lawrence and Wishart, 1978), available at http://www.uky.edu/~tmute2/geography_methods/readingPDFs/gramsci-southern-question1926.pdf. The social relationships and changes to the social structure ensuing from the process of the Italian unification are portrayed by Giuseppe Tomasi di Lampedusa. See G. Tomasi di Lampedusa, *The Leopard* (Feltrinelli, 1958).

[17] See, for example, M. De Cecco (ed) *International Economic Adjustment: Small Countries and the European Monetary System* (St Martin's Press, 1983); A. Bagnai, *Il Tramonto dell'euro* (Imprimatur, 2012); A. Bagnai, 'Il romanzo di centro e di periferia' (21 November 2012), available at http://goofynomics.blogspot.be/2012/11/il-romanzo-di-centro-e-di-periferia.html.

[18] D. Kukovec, 'A Critique of the Rhetoric of Common Interest' (13 April 2012) n 4 *supra*.

[19] I depart from dependency theorists inasmuch as they structured the domination of the centre in terms of capitalism. See, for example, F. H. Cardozo, *Dependency and Development in Latin America* (University of California Press, 1979). I rather argue that the relationship between the centre and periphery is structured by countless specific hierarchical legal relationships.

[20] See G. Myrdal, *Economic Theory and Underdeveloped Regions* (G. Duckworth, 1957).

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is a myth. There was an immense fear of the financial cost of enlarging to the East. The EU budget was agreed upon by the old Member States in the Berlin European Council of 1999, five years before the Eastern enlargement, importantly limiting the possibilities of redistribution to the East through the EU budget.[21] The framework, which on top of all confirmed the competitive distortion in favour of old Member States' farmers through direct subsidies was very bad news indeed for the Eastern candidate countries.[22] As a result, Spain, an old Member State with a population of 45 million people, has alone many years received more money from the EU budget than all the 2004 EU entrants (whose population totals 75 million people) combined[23]. Furthermore, at least Cyprus[24], the most developed new Member State with a living standard comparable to Greece and Portugal, has also been net a contributor to the EU budget. Meanwhile, many 'Western' European countries with a higher living standard, like Spain or Ireland, have been net receivers.[25]

Moreover, focusing on redistribution through the EU budget does not at all give us a full picture of distribution within the EU. Even if budget redistribution favoured less developed regions significantly more, this would not alleviate the EU's overall distribution problem; thinking in terms of distribution through tax and transfer is not sufficient. Such thinking backgrounds the law and its distributional consequences. It does not adequately identify the victims of the legal system. It consequently does not allow such victims to adequately participate in society's growth.[26]

The problem to be addressed is thus not at all only in the level of compensation, but above all in the way we, lawyers, think about issues to be discussed. The EU legal discourse has important distributional consequences between countries, between regions, and between the centre and periphery. But, at the same time, it resists a discussion of these consequences. Many claims of the periphery—aspirations or claims of protections against harm—are foreclosed from operating powerfully[27] in the Union.

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[21] See, for example, A. Mayhew, 'The Financial and Budgetary Impact of Enlargement and Accession in EU Enlargement', (2003) Sussex European Institute Working Paper no. 65, available at https://www.sussex.ac.uk/webteam/gateway/file.php?name=sei-working-paper-no-65.pdf&site=266.

[22] See, for example, G. Majone, *Europe as the Would-Be World Power, The EU at Fifty* (Cambridge University Press, 2009), at 55. See also A. Mayhew, 'The Financial and Budgetary Impact of Enlargement and Accession in EU Enlargement', n 21 *supra*.

[23] See, for example, 'Which Countries Are Net Contributors to the EU Budget?', available at http://www.eu-oplysningen.dk/euo_en/spsv/all/79/, and 'EU Budget, How the Money Is Spent by Country', available at http://news.bbc.co.uk/2/hi/8036096.stm.

[24] The data for the contribution of Slovenia, a country with a comparable living standard to Cyprus, are conflicting. While some reports claim that Slovenia has been a net contributor at least in 2007, others show that it has always been a small net receiver from the EU Budget. Moreover, the costs of the Cypriot financial crisis and subsequent bailout were mainly borne by many Cypriots who had had nothing to do with the crisis, and the solutions were imposed in a manner that foreclosed alternative distributional scenarios.

[25] See, for example, 'Which Countries Are Net Contributors to the EU budget', n 23 *supra*.

[26] See, for example, D. Kennedy, 'Law and Economics from the Perspective of Critical Legal Studies', in P. Newman (ed.), *The New Palgrave Dictionary of Economics and the Law* (Macmillan, New York, 1998), at 465; R. M. Unger, *What Should the Left Propose?* (Verso, 2005), at 149.

[27] I owe the term 'foreclosed from operating powerfully' to Lewis Sargentich. However, my understanding is that in his account, logic forecloses, whereas in my account, it is our ideology that forecloses some demands from operating powerfully. For a further elaboration of this argument see D. Kukovec, 'Hierarchies as Law' (2014).

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III Whose Social Europe?

Dynamic foreclosure of the concerns of the periphery can be seen in the construction of 'social' Europe. Much of the debate in the EU is structured around the dichotomy between free movement and its opposite. The opposite is usually framed in the sense of a right of protection against harm. Examples include general social considerations, protection of health, human rights and so on. The critiques levelled by legal academia against the work of European (or international) institutions and of the EU in general have most often been made in terms of a critique of neoliberalism—that there is too much emphasis on neoliberal free movement considerations, or that market efficiency is prized above other competing social values.

I, however, claim that this distinction between free movement and social considerations, and critiques based on this distinction (such as the critique of neoliberalism), are themselves constraints to a meaningful distributional discussion in the EU. It treats both 'social' and 'free movement' considerations as general to the union as a whole, making it difficult to discuss alternative social arrangements—or alternative modes of structuring free movement—that might have very different distributional consequences.

This is illustrated by the discussion surrounding the judgment of the European Court of Justice (ECJ) in the *Laval* case.[28] Laval, a Latvian construction company, was hired through government procurement to perform a public works contract in Sweden. (Note that Sweden is a country of the centre and Latvia a country of the periphery.) Laval paid its Latvian workers significantly less than Swedish workers typically would receive for similar construction jobs, making the Latvian company more competitive in this respect. A Swedish trade union took industrial action against the Latvian company because the latter refused to negotiate the wages for its Latvian workers. The Swedish union's blockade effectively forced Laval out of this business. Laval sued the Swedish union in a Swedish court, which asked the ECJ for an interpretation of EU law on the subject.

The ECJ concluded that under the facts before it, the trade union had violated Laval's freedom of movement of services. However, crucially, the ECJ also strongly condemned social dumping—the use of lower labour standards to undercut competition.

The ECJ's holding in this particular case depended on the fact that Sweden had not set a minimum wage by law or by some generally applicable collective agreement. This effectively narrowed the scope of peripheral workers' freedom of movement to a set of specific and exceptional circumstances, which a state like Sweden could change relatively easily.

Thus, the judgment represented just a small win for the periphery. But it caused an unprecedented uproar in legal academia, the media, among social scientists and the general public, and so on.[29] I do not believe any other ECJ judgment has yielded such

[28] Case C-341/05, Laval un Partneri Ltd *v.* Svenska Byggnadsarbetareförbudet [2007] ECR I-11767. For a very similar factual situation, see also Case C-346/06, Dirk Rüffert *v.* Land Niedersachsen [2008] ECR I-1989.

[29] For a small sample of reactions see C. Joerges and F. Rödl, 'Informal Politics, Formalised Law and the "Social Deficit"', n 7 *supra*; C. Barnard, 'Viking and Laval: An Introduction', (2008) 10 *Cambridge Yearbook of European Legal Studies*, 463, 487; H. Collins, 'The European Economic Constitution and the Constitutional Dimension of Private Law', (2009) 5 *European Review of Contract Law* 2, 71–94; A. Somek, *Engineering Equality, An Essay on European Anti-Discrimination Law* (Oxford University

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a unanimously negative response. The condemnation of social dumping was praised, but critics complained that the ECJ was giving preference to economic freedoms to the detriment of workers' rights. There were numerous claims that the EU's social model was undermined.

We heard, for example, claims of 'regulatory disarmament through the exercise of rights', the judgments being described as 'deeply disturbing', a step in need of a correction, 'a most unfortunate affair' and 'a step back'. We have heard that the ECJ is not tolerating the 'divergent' national systems as well as headlines such as 'The only solution is to refuse to comply with ECJ rulings'. Fritz Scharpf, who has critiqued the European legal discourse for the problem of constitutional asymmetry, whereby social considerations are subordinate to economic, free movement considerations,[30]

Press, 2011); N. Countouris, 'European Social Law as an Autonomus Legal Discipline', (2009) 28 *Yearbook of European Law* 95; T. Novitz, 'A Human rights Analysis of the Viking and Laval Judgments', (2008) 10 *Cambridge Yearbook of European Legal Studies* 541; S. Sciarra, 'Viking and Laval: Collective Labour Rights and Market Freedoms in the Enlarged EU', (2008) 10 *Cambridge Yearbook of European Legal Studies* 563, 579–580; S. Deakin, 'Regulatory Competition After Laval', (2008) 10 *Cambridge Yearbook of European Legal Studies* 581, 608–609; R. O'Donoghue and B. Carr, 'Dealing with Viking and Laval: From Theory to Practice', (2009) 11 *Cambridge Yearbook of European Legal Studies* 123, 149; A. Dashwood, 'Viking and Laval: Issues of Horizontal Effect', (2008) *Cambridge Yearbook of European Legal Studies* 525, 532–534; A. C. L. Davis, 'One Step Forward, Two Steps Back? The Viking and Laval Cases in the ECJ', (2008) 37 (2) *Industrial Law Journal* 126; U. Belavusau, 'The Case of Laval in the Context of the Post-Enlargement EC Law Development', (2008) 9 *German Law Journal* 2279, 2304; M. Höpner, 'Das Soziale Europa Findet Nicht Staat', (2008) 54 (5) *Die Mitbestimmung* 46. For the responses of Hungarian authors see, for example, E. Kajtar, 'Bridge(s) over Trouble Water', (2011) 4 *Pécsi Munkajogi Közlemények* 117. For the replies of Italian authors see, for example, F. Vecchio, 'Dopo Viking, Laval e Ruffert; verso una nuova composizione tra libertà economiche euoropee e diritti sociali fondamentali', (2010) *Assegnista di ricerca presso l'Università di Catania F. Vecchio*; G. Michelini and V. Piccone, 'Giurisprudenza europea e diritti sociali, un rapporto da ripensare, Contributo per il Convegno in ricordo di Giorgio Ghezzi—Attività sindacale e diritti dell'economia: un rapporto difficile (I casi Laval, Viking, Ruffert)' (25 June 2008), available at http://www.europeanrights.eu/index.php?funzione=S&op=5&id=147; B. Veneziani, 'La Corte di Giustizia ed il Trauma del Cavallo di Troia', (2008) 275 *Rivista giuridica del lavoro*; F. Dorssemont, 'L'esercizio del diritto all'azione collettiva contro le libertá economiche fondamentali dopo i casi Laval e Viking', (2008) 3 *Diritti Lavori Mercati* 524; V. Angiolini, 'Laval, Viking, Ruffert e lo spettro di Le Chapelier', in A. Andreoni and B. Veneziani (eds), *Libertà economiche e diritti sociali nell'Unione europea* (Ediesse, 2009), at 51–66. For the responses by Spanish authors see, for example, A. B. Grau, 'El Espacio Supranacional De Ejercicio Del Derecho De Huelga Y La Restricción Legal De Sus Capacidades De Acción', (2008) 41 *Revista de Derecho Social* 123. For the replies of Scandinavian (or North European) authors, see, for example, J. E. Dølvik and J. Visser, 'Free Movement, Equal Treatment and Workers' Rights: Can the European Union Solve Its Trilemma of Fundamental Principles?', (2008) 40 *Industrial Relations Journal* 491; S. Gärde and I. Persson, 'Stoppa Laval-propositionen—Lagförslaget bygger på principer som EU underkänner', (30 March 2010) 3 *Lag&Avtal* 30, available at http://www.lag-avtal.se/asikter/debatt/article138100.ece; J. Malmberg and T. Sigeman, 'Industrial Actions and EU Economic Freedoms: The Autonomous Collective Bargaining Model Curtailed by the European Court of Justice', (2008) 45 *Common Market Law Review* 1115, 1145. For the responses by French authors, see, for example, A. Supiot, 'Under Eastern Eyes', (2012) 73 *New Left Review* 29; A. Supiot, 'L'Europe gagnée par «l'économie communiste de marché»', (2008) *Revue Permanente du Mauss*, available at http://www.journaldumauss.net/spip.php?article283; C. Goyet, 'Viking et Laval; libertés de circulation v. droits sociaux', (5 December 2011) *Nouvelle Europe*, available at http://www.nouvelle-europe.eu/node/1332.

[30] F. Scharph, 'The Asymmetry of European Integration, or Why the EU Cannot Be a "Social Market Economy"', (2010) 8 (2) *SocioEconomic Review* 211. For the argument of constitutional asymmetry, see also C. Joerges, 'Re-Conceptualising European Law as Conflicts Law', n 2 *supra*; C. Joerges and F. Rödl, 'Informal Politics, Formalised Law and the "Social Deficit"', n 7 *supra*.

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even advocated submitting the judgment to the check of the political consensus.[31]

The dominant discourse of the European legal profession, as well as of the legal profession in contemporary legal thought in general, associates the autonomy and free movement, market freedom claim with the interests of strong parties and the social claim, the claim of protection, with the interests of the weak party.[32] However, as mentioned, I believe that the discourse of the opposition between market freedoms and social concerns does not allow any meaningful discussion about distribution between regions and countries in Europe. My claim is that what is social and what is economic (or 'free movement') really is a matter of perspective.

'Social rights' can be understood as a rhetorical representation of the idea of the welfare state, of the institution that tames the dynamics of the markets, driven by economic, autonomy rights.[33] In this view, social rights are a product of social regulation, while economic rights are legally constituted by private law, including property and contract and are thus an emanation of economic freedom.

This view is based on the state–market and public–private distinction, as rejected by legal realists.[34] Robert Hale argued that an error of a choice between freedom and coercion arises from the role of the state in private legal arrangements. It was conventional to think that public law such as social regulation or administrative law is a vertical imposition of state power or 'coercion' on individuals in society and to see private law—property, contract or tort law as the horizontal defence of private autonomy. For Hale, such a view underestimated the role of coercion in private law as the state makes constant choices about precisely who will bear the coercive force of the state.[35]

Duncan Kennedy argues that a conflict between individualism and altruism, reflecting the dualism of autonomy (economic, free movement) and protection against harm (social), is reproduced throughout the legal system. He argues that the positions in case law and in the academic literature can be located on an axis between two poles. At one end is individualism, described as 'the making of a sharp distinction between one's interests and those of others, combined with the belief that a preference in conduct for one's own interest is legitimate, but that one should be willing to respect the rules that make it possible to coexist with others similarly self-interested'. At the other end is altruism, which he describes as 'the belief that one ought not to indulge

[31] See F. Scharpf, 'Interview: The Only Solution Is to Refuse to Comply with ECJ rulings', (2008) 4(1) *Social Europe Journal* 16, available at http://www.boeckler.de/36195_36456.htm.

[32] For a further critique, see D. Kukovec, 'Taking Change Seriously, The Rhetoric of Justice and the Reproduction of the Status Quo', n 4 *supra*.

[33] This is, for example, the understanding of Alexander Somek. He defines social policy following T. H. Marshall's classic formulation as the use of political power with the aim of correcting, modifying or superseding the operation of the economic system in the pursuit of values that are not supported by market forces themselves. See T. H. Marshall, *Social Policy in the Twentieth Century* (Hutchinson University Library, 1975), at 15; W. Streeck, 'Vom Binnenmarkt zum Bundesstaat? Überlegungen zur politischen Ökonomie der europäischen Sozialpolitik', in S. Leibfried and P. Pierson (eds), *Standort Europa: Europäische Sozialpolitik* (Suhrkamp, 1997), at 379. See also A. Somek, *Engineering Equality, An Essay on European Anti-Discrimination Law* (Oxford University Press, 2011).

[34] See R. Hale, 'Coercion and Distribution in a Supposedly Noncoercive State', (1923) 38 *Political Science Quarterly* 470.

[35] *ibid*, at 471: 'What is the government doing when it protects a property right? Passively, it is abstaining from interference with the owner when he deals with the thing owned. Actively, it is forcing the non-owner to desist from handling it, unless the owner consents'.

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a sharp preference for one's own interest over those of others but should make sacrifices, share and be merciful'.[36] Moreover, as noted by Duncan Kennedy, in modern legal thought, it is a premise that any real fact situation will contain elements from both sides of the conceptual polarity and thus each outlook—the individualist and the altruist—incorporates some elements of its rival.[37]

Indeed, a fairly conventional understanding in contemporary legal thought and in EU legal scholarship in particular is that many rules, including basic free movement rules, can be seen as both economic and social, as pursuing both social or economic aims, such as, for example, the provisions of free movement of persons.[38] Such a vision, that an economic, autonomy claim contains a social dimension is also accepted in the law and development scholarship, for example.[39]

My argument is not that one incorporates the other, that there is a social claim within the economic and vice versa, but rather that one claim can be interpreted as the other when viewed from a different perspective and when one takes away all the symbolic meaning from the framing of a particular claim. When the symbolic meaning of the social claim (as an emanation of either the welfare state or altruism) or the autonomy claim (as an emanation of either the market or individualism) is reduced to a distributional allocation as experienced by a particular party in a particular case, one's autonomy claim is social and one's social claim is an autonomy claim.

Once we see the issues at stake in *Laval* from a distributional perspective, what first appeared as free movement becomes social, and what first appeared as social becomes free movement—depending on the angle from which we view the dilemma. The debate in *Laval* was framed as a conflict between Swedish unions' and workers' right of collective bargaining on the one hand and a Latvian company's right to free movement on the other. However, the *Laval* debate could just as well have been framed as a conflict between Latvian workers' social rights and the Swedish interpretation of the freedom of movement provisions, which impedes the realisation of these rights.

In other words, what appears as an economic freedom in the dominant EU legal discourse could just as well be a social right of Latvian workers struggling to improve their livelihood, dignity as well as fair and just working conditions. What from one perspective looks like a protection against harm, from another perspective looks like a claim for autonomy. 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. In the distributional sense, social rights are nothing else than economic. One person's social or altruist objective is another's economic or individualist objective and vice versa.

IV Conceptualism of Contemporary Legal Thought

The existing framework treats both 'social' and 'free movement' considerations as general to society as a whole, making it difficult to discuss alternative social

[36] See D. Kennedy, 'Form and Substance in Private Law Adjudication', (1976) 88 *Harvard Law Review* 1685. See also D. Kennedy, 'Three Globalizations of Law and Legal Thought', n 3 *supra*.

[37] *ibid*, at 1731–1732.

[38] See, for example, P. Craig and G. de Búrca (eds), *EU Law: Text, Cases, and Materials* (Oxford University Press, 2002).

[39] See K. Rittich, 'The Future of Law and Development: Second Generation. Reforms and the Incorporation of the Social', (2004) 26 *Michigan Journal of International Law* 199, 203; K. Rittich, 'Global Labour Policy as Social Policy', (2008) 14 *Canadian Labour and Employment Law Journal* 227.

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arrangements—or alternative modes of structuring free movement—that might have different distributional consequences. Deployment of this dichotomy results in an endless game of proportionality and balancing between the present and strong conceptualisations of the social and the economic, with endless reinforcement of existing perceptions of one and the other.[40] The current legal consciousness, which follows thinking in terms of giving preference either to the (universalised existing) social/altruist or to the (universalised existing) economic/individualist reflects a conceptual understanding of the world, the mode of thinking I have called 'the conceptualism of contemporary legal thought'.[41]

Thinking in terms of the dichotomy of social and economic/individualist considerations pervades thinking in all domains of law—economic law, property law, contract law, constitutional law etc. The (anti)-World Trade Organization, or the rhetoric challenging the work of international financial institutions, often rests on the same assumption.[42] In international law, this dichotomy is, for instance, portrayed by the argument that the primary function of management of the traditional public realm, where social power is exercised exclusively in the public interest, has gradually come to be, not the service of some common interest of well-being conceived in terms of general values (say, justice or solidarity or happiness or human flourishing), but the maintaining of the conditions required for the well-being of the economy including, above all, the legal conditions.[43]

It has further been argued that there is a structural bias in the relevant legal institutions that makes them serve typical, deeply embedded preferences and that something we feel that is politically wrong in the world is produced or supported by that bias. A typical demonstration of structural bias would describe extraterritorial jurisdiction in such a manner so as to show that while domestic courts in the West sometimes extend the jurisdiction of domestic antitrust law, they rarely do this with domestic labour or human rights standards, although nothing in the standards themselves mandates such distinction.[44]

Strengthening social, labour and human rights components of our legal thinking is the guiding line of the progressive legal profession today. Justice, poverty

[40] For one such attempt at theorising balancing economic freedom and social rights see, for example, M. P. Maduro, 'Striking the Elusive Balance Between Economic Freedom and Social Rights in the EU', in P. Alston (ed.), *The EU and Human Rights* (Oxford University Press, 1999), at 450–472.

[41] For the critique of conceptualism of classical legal thought, see F. Gény, *Method of Interpretation and Sources in Positive Private Law* (1899). For the critique of social conceptualism, see K. Llewellyn, 'A Realistic Jurisprudence: The Next Step', (1930) 30 *Columbia Law Review* 43; D. Kennedy, 'From the Will Theory to the Principle of Private Autonomy: Lon Fuller's Consideration and Form', (2000) 100 *Columbia Law Review* 94; and K. Klare, 'The Deradicalization of the Wagner Act and the Origins of Modern Legal Consciousness', (1978) 62 *Minnesota Law Review* 265. For a further elaboration of 'conceptualism of contemporary legal thought', see D. Kukovec, 'Taking Change Seriously' (2012), n 4 *supra*; D. Kukovec, 'Taking Change Seriously: The Rhetoric of Justice and the Reproduction of the Status Quo', n 4 *supra*; D. Kukovec, 'Hierarchies as Law' (2014), n 4 *supra*; D. Kukovec, 'Hierarchies as Law' (SJD dissertation, Harvard Law School), n 4 *supra*.

[42] See, for example, G. C. Shaffer, 'The World Trade Organization Under Challenge: Democracy and the Law and Politics of the WTO's Treatment of Trade and Environmental Matters', (2001) 25 *Harvard Environmental Law Review* 1; K. Rittich, 'The Future of Law and Development: Second Generation Reforms and the Incorporation of the Social', in D. M. Trubek and A. Santos (eds), *The New Law and Economic Development: A Critical Appraisal* (Cambridge University Press, 2006), at 228.

[43] See P. Allot, *The Health of Nations: Society and Law beyond the State* (Cambridge University Press, 2002), at 311–312.

[44] See M. Koskenniemi, *From Apology to Utopia* (Cambridge University Press, 2005), Epilogue, at 607–608.

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alleviation, solidarity and advancement of the concerns of the marginalised are then understood to follow from a stronger enforcement of social and socioeconomic rights or from other social or value-laden components of our thinking. The progressive trend is towards making social and socioeconomic rights stronger and more justiciable. This is often perceived as benefiting all the workers, all the poor and all the marginalised.[45]

This dichotomy equally portrays a distorted picture of the EU's internal market. Deployment of this dichotomy leads to the conclusion that the EU's internal market is a constant advancement of free movement considerations over social considerations, which is the current perception of EU lawyers from both political poles. This leads to the conclusion of progressive lawyers that what needs to be fought is 'the market' or 'the goal of free competition'. Efficiency is contrasted with 'just distribution' or fairness.[46] More 'justice' means less free movement; the argument of justice should fight free movement considerations.

Claims about equity or justice need to be framed as 'social' considerations to be balanced against free movement. Because the periphery's social claims, just as free movement claims, are structurally weak, progressive politics from the periphery is disabled. Moreover, in the current understanding of the social and economic considerations in which the universal considerations are those of the centre, the periphery's social and economic claims are systematically foreclosed from operating powerfully. The strong social claims are the existing specific claims of the centre and they run counter to the weak or even invisible social claim of the periphery.

Countless sets of analytical mistakes reproduce or are based on this conceptualism. That free movement/autonomy claims are always neoliberal,[47] that the weakest claims will always be the social ones, that justice comes from the realisation of the social claim, that the poor and the marginalised will automatically benefit from them, that there is a clear choice between helping all the poor and helping all the rich, which aligns with either the social or economic claim in contemporary legal thought, to name just a few.

My thinking has been labelled as 'total market' legal thinking,[48] as ordo-liberal or neoliberal[49]. Similarly, Alain Supiot has collectively labelled Eastern European elites as believers in the spontaneous order of the market, which entails a desire to protect it from the untimely interventions of people seeking 'a just distribution'. According to Supiot, the political is dethroned by means of constitutional steps that create 'a functioning market in which nobody can conclusively determine how well off particu-

[45] See D. Kukovec, 'Taking Change Seriously' (2012), n 4 *supra*; D. Kukovec, 'Taking Change Seriously: The Rhetoric of Justice and the Reproduction of the Status Quo', n 4 *supra*; D. Kukovec, 'Hierarchies as Law' (2014), n 4 *supra*; D. Kukovec, 'Hierarchies as Law—Conceptualism of Contemporary Legal Thought' (SJD dissertation, Harvard Law School), n 4 *supra*.

[46] For a further critique of this dichotomy see D. Kukovec, 'Taking Change Seriously' (2012), n 4 *supra*; D. Kukovec, 'Taking Change Seriously: The Rhetoric of Justice and the Reproduction of the Status Quo', n 4 supra; D. Kukovec, 'Hierarchies as Law' (2014), n 4 *supra*; D. Kukovec, 'Hierarchies as Law—Conceptualism of Contemporary Legal Thought' (SJD dissertation, Harvard Law School), n 4 *supra*.

[47] For one of more recent contributions sharing this assumption in EU legal scholarship, see, for example, A. Somek, 'From Workers to Migrants, from Distributive Justice to Inclusion: Exploring the Changing Social Democratic Imagination', (2012) 18 (5) *European Law Journal* 711, 721.

[48] See E. Christodoulidis, 'The European Court of Justice and "Total Market" Thinking', (2013) 14 (10) *German Law Journal* 2005.

[49] See A. Somek, 'From Workers to Migrants', n 47 *supra*.

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lar groups or individuals will be'.[50] In accordance with this line of reasoning, in the Laval and Viking cases the European Court of Justice has striven to prohibit trade unions or collective bargaining from hindering 'the spontaneous order of the markets'.[51]

Has anyone ever seen a general phenomenon of 'the market', from which we could draw conclusions in any particular case? The left, even its critical strand, attacks the dogmatic faith in the benefits of the market, but not the notion of the market and 'market forces' themselves. On the contrary, there is a conceptual assumption of the existence of an individualist market or of a benevolent altruist alternative to it, usually conceived in terms of social goals and values or in terms of the economic policy of the state. Kerry Rittich, for example, critiques the reliance of international financial institutions upon the market to further social objectives and how centrally market measures and benchmarks figure in measuring 'success' in the realm of the social.[52]

However, the general phenomenon of the 'market', seen either statically or as a dynamic force of causation, is an illusion.[53] There are only competing constructions of the legal system with competing distributional consequences and competing options of work and decisions of lawyers and other social actors.[54] Thus, we should look to specific legal entitlements and to the specific dynamics of their change and reproduction rather than to legal categories such as the 'market'.[55] In other words, in an analysis such as that of Rittich, we worry about the destiny of select substantive social values without an analysis of the impact of our work on people who find themselves in radically different structural situations.

Supiot further argues that economic science is elevated to the status of 'mother of law' and the mission of the ruling elites of the newly admitted Eastern Member States, of the belatedly born-again free marketeers, was to force the immanent laws of economics upon the ignorant masses and to bring the legal system into line with them, too.[56] However, an argument that a legal system or a particular decision has a 'neoliberal' or 'ordo-liberal' character is a rationalisation of reality that misses particular hierarchical relationships.[57]

Furthermore, just as there is no law that the future will always resemble the past, there is no theory of causation that could determine the future or determine and describe a legal system. Economic theories may provide guidance for the construction of a legal system, but a legal system cannot be understood as a reflection of one economic theory or another. Neither law nor economic theories could hope to provide

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[50] See A. Supiot, 'Under Eastern Eyes', n 29 *supra*.

[51] *ibid*.

[52] K. Rittich, 'Global Labour Policy as Social Policy', (2008) 14 (2) *Canadian Labour & Employment Law Journal* 227.

[53] D. Kukovec, 'A Critique of the Rhetoric of Common Interest' (26 December 2012), n 4 *supra*; D. Kukovec, 'Hierarchies as Law' (2014), n 4 *supra*; D. Kukovec, 'Hierarchies as Law' (SJD dissertation, Harvard Law School), n 4 *supra*.

[54] See D. Kukovec, 'A Critique of the Rhetoric of Common Interest' (13 April 2012), n 4 *supra*; D. Kukovec, 'A Critique of the Rhetoric of Common Interest' (26 December 2012), n 4 *supra*; For a further elaboration, see D. Kukovec, 'Hierarchies as Law' (2014), n 4 *supra*; D. Kukovec, 'Hierarchies as Law' (SJD dissertation, Harvard Law School), n 4 *supra*.

[55] *ibid*.

[56] A. Supiot, 'Under Eastern Eyes', n 29 *supra*.

[57] D. Kukovec, 'Hierarchies as Law' (2014), n 4 *supra*.

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such coherence. Economic theories can serve as ex post justification for our decisions, but cannot provide us with ready-made solutions or critiques nor can they portray an accurate picture of the structure and construction of the legal system.[58]

As a result, I argue that a general critique of 'ordo-liberal' or 'neoliberal' free movement/autonomy claims is insufficient and inaccurate. Neither neoliberalism nor its social opposite, such as the theory of import substitution industrialisation, are concepts that are merely implemented in individual instances. There are competing constructions of free movement and of social considerations, and they need to be assessed on their merits. Once this perspective is adopted, it becomes clear that the EU legal structure is much better understood as a set of freedoms and prohibitions,[59] of specific legal entitlements[60], than as a conflict between free trade claims based on neoliberal economic theory and social claims, based on an alternative economic theory or simply based on morality or on the idea of justice. The main question becomes which/whose social and which/whose free movement considerations are to be honoured and which are not to be honoured.

Once the European legal structure is seen as a set of freedoms and prohibitions,[61] the picture of the EU's legal structure appears quite different from the imagery of seeking a just balance between social and economic considerations.[62] In this new picture, the EU centre's views concerning free movement and social considerations are strong and are conceived of as natural or less problematic, whereas the periphery's claims are often perceived as harmful.

V Social Dumping, Goods Dumping and Understanding of Harm

The social claim of the periphery is thus almost inexistent in the current discourse.[63] The latter is most often not seen. However, even after I have reversed the social and economic assumptions, the social of the periphery is foreclosed from operating powerfully. Because the centre's social claim is consistently strong, the periphery's free movement claim is weak. And as the periphery's social claim is weaker, the centre's

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[58] For a further critique of the exaggeration of the coherence of economic theories, of conceptualist links between economic theory and a legal claim and of critiques of neoliberalism in law, see D. Kukovec, 'Hierarchies as Law' (2014), n 4 *supra*. D. Kukovec, 'Hierarchies as Law' (SJD dissertation, Harvard Law School), n 4 *supra*. For a discussion of fear of neoliberalism in the EU legal discourse see A. McCann, 'The CJEU on Trial: Social Justice and Economic Mobility', (2014) 22 *European Review of Private Law*.

[59] See D. Kukovec, 'A Critique of the Rhetoric of Common Interest' (13 April 2012), n 4 *supra*.

[60] For the notion that centre and periphery relationship should be seen as structured by legal entitlements, see D. Kukovec, 'Taking Change Seriously' (2012), n 4 *supra*; D. Kukovec, 'A Critique of the Rhetoric of Common Interest' (26 December 2012), n 4 *supra*. For the notion of Hohfeldian legal entitlements, see J. Singer, 'The Legal Rights Debate in Analytical Jurisprudence from Bentham to Hohfeld', (1982) *Wisconsin Law Review* 975.

[61] D. Kukovec, 'A Critique of the Rhetoric of Common Interest' (13 April 2012), n 4 *supra*.

[62] See, for instance, M. P. Maduro, 'Striking the Elusive Balance', n 40 *supra* and generally n 29 *supra*.

[63] Norbert Reich argued that both the boycott of Swedish unions and the Swedish law were discriminatory in the Laval case and that in the Viking case the union's action was covered by legitimate social policy goals. See N. Reich, 'Free Movement v. Social Rights in an Enlarged Union—The Laval and Viking Cases before the European Court of Justice', (2008) 9 *German Law Journal* 125. Reich's article is an example of how subordination of the periphery is backgrounded when the cases are understood in the consciousness of the conflict of universalised social and free movement considerations whereby both Viking and Laval cases concern the movement of companies and the workers' collective action against this movement.

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free movement claim is stronger. The centre's social claim—the claim against social dumping—is honoured, and this weakens the periphery's free movement claim. Whereas social dumping presents a problem,[64] goods dumping within the Union has never been a part of the EU legal vernacular.[65]

Goods dumping is a doctrine of international trade. Dumping is broadly defined as exporting at prices below those charged on the domestic market (or, if none, on a third-country market). Under the rules of the General Agreement on Tariffs and Trade (GATT), the unfair price is determined by the standard of 'normal value' of the product.[66] Dumping can also mean selling at prices insufficient to cover the cost of the goods sold, as selling for export at prices below those necessary to cover production costs (below cost sales).[67] Dumping is deemed to be an unfair business practice where the unfairly traded imports cause or threaten material injury to the industry, or slow the establishment of a new industry.

There are important distributional effects resulting from dumping. It is assumed that it generally makes consumers in the higher-priced market worse off and the producer better off[68]. If dumping does harm to the exporting economy, it is because of an adverse effect on price levels in that economy. While it is not clear whether dumping harms the exporting country on balance one cannot ignore the telling fact that exporting countries have not thought it worthwhile to control dumping, which strongly suggests that dumping does not have any significant adverse effect on the exporting country,[69] while it is beneficial to the industry involved in dumping.

Rather, the rationale for prohibition of dumping is provided by the effect of dumping on the importing country. It is generally agreed that consumers in the importing country will benefit from the lower prices resulting from dumping (at least in the short term) and that producers in the importing country who compete with the dumpers will be injured because they will lose their market share to the dumpers. Dumping has a significant potential to harm the existing or potential industry in the importing country. Moreover, goods dumping can negatively affect the investment

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[64] See, for example, C. Barnard, 'Regulating Competitive Federalism in the European Union? The Case of EU Social Policy', in J. Shaw (ed), *Social Law and Policy in an Evolving European Union* (Hart Publishing, 2000), at 63–64. See also C. Barnard, 'Social Dumping or Dumping Socialism?', (2008) 67 (2) *Cambridge Law Journal* 262.

[65] See D. Kukovec, 'Whose Social Europe?' (2010), n 4 *supra*; D. Kukovec, 'A Critique of the Rhetoric of Common Interest' (13 April 2012), n 4 *supra*; D. Kukovec, 'Hierarchies as Law' (SJD dissertation, Harvard Law School), n 4 *supra*.

[66] According to Article VI of the GATT, a product is to be considered as being introduced into the commerce of an importing country at less than its normal value if the price of the product exported from one country to another (1) is less than the comparable price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country, or, (2) in the absence of such domestic price, is less than either (1) the highest comparable price for the like product for export to any third country in the ordinary course of trade, or (2) the cost of production of the product in the country of origin plus a reasonable addition for selling cost and profit.

[67] See J. H. Jackson, W. J. Davey and A. O. Sykes, *Cases, Materials and Texts on Legal Problems of International Economic Relations* (MIT Press, 2002), at 686–687. This type of dumping can be beneficial to an exporter even in situations where also their domestic sales are made at a loss, as long as export prices are above variable costs. Thus, dumped exports help to reduce the exporter's per unit cost of production.

[68] *ibid*, at 686–687.

[69] *ibid*.

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climate in the importing market, particularly in an economic downturn and particularly on capital-intensive industry characterised by a high sunk investment and relatively low variable cost.[70]

It is no secret that many goods, not just luxury goods, are cheaper in the periphery than in the centre, where the purchasing power is higher. This also follows from a different elasticity of demand of the markets of the centre and of the periphery. Elasticity of demand measures the responsiveness of demand to changes in price. Where the percentage of change in demand is greater than percentage change in price, the demand is elastic. Where the percentage of change in demand is less than percentage of change in price, the demand is inelastic.[71] The elasticity of demand in the periphery is much higher than in the centre because of the immense difference in wealth. The difference in living standards thus creates very different markets or better, very different social structures.

Because of higher price elasticity of demand, consumers on the market with lower purchasing power react to a change of price more radically than consumers on the market with higher purchasing power. As the reaction to price increase is smaller on a market with a higher purchasing power than on a market with a low purchasing power, the lost quantity sold on the market of the centre is well compensated for by the increased quantity sold in the periphery, on the market with lower purchasing power. Companies of the centre can thus simultaneously increase prices in the centre and decrease prices in the periphery and dump goods on markets of the periphery,[72] thus undercutting the already disadvantaged competition of the companies of the periphery.

An industry facing dumped imports is in a difficult position, as it is faced with powerful competitors selling at low prices. Goods dumping often significantly injures the periphery's industry producing the like product and often leads to ceasing of the production or is retarding the establishment of such industry in the periphery.[73] Contrary to the international trade regime, the harm that goods dumping may cause to peripheral, typically less-powerful companies in terms of, for example, capital, brands and prestige on the internal market is not considered by EU law. Workers of these local companies or national budgets of economies on a downward spiral are even further out of the picture.

While the EU vigorously fights goods dumping coming from outside of the Union, EU legal rhetoric provides no vocabulary to argue the problem of goods dumping

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[70] See W. Mueller, N. Khan and T. Scharf, *EC and WTO Anti-Dumping Law: A Handbook* (Oxford University Press, 2009).

[71] See, for instance, P. A. Samuelson and W. D. Nordhaus, *Microeconomics* (McGraw-Hill Companies, 16th edn, 1998), at 64–68.

[72] As a general rule, it is considered that companies can operate price discrimination, that is, apply different prices between domestic and export sales, when their home market is not freely accessible to imports of the goods in question while the export markets are. Dumping is thus possible by market segregation. This is possible on the internal market despite the prohibition of exclusive distribution and despite the possibility of parallel trading. See D. Kukovec, 'Hierarchies as Law' (SJD dissertation, Harvard Law School), n 4 *supra*.

[73] Slovenian pork producers have complained about the dumping of low-priced pork onto the Slovenian market by Austrian producers despite the much higher price of pork in Austria. See http://www.dnevnik.si/slovenija/v-ospredju/1042527722; http://www.dnevnik.si/clanek/1042527199. Similarly, Slovenian construction companies have been complaining about the dumping prices in services in construction contracts by a particular Austrian company. See http://www.delo.si/gospodarstvo/podjetja/strabag-postaja-mocan-igralec-a-tudi-cgp.html.

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within the internal market, despite the fact that dumping has enormous potential to harm the periphery's industry and level of employment. However, decisions in favour of companies or workers of the periphery cannot be justified by the doctrine of goods dumping as it is not recognised in the EU legal vocabulary. Moreover, none of the existing competition rules, including those prohibiting predatory pricing, addresses the described practices.

This reveals a general problem with how we think about harm in the EU. In the EU legal discourse, the invasiveness of the extremely dominant economic activity of the centre is not perceived as harm and is not actionable. The periphery's claims against it are often foreclosed from operating powerfully in the existing consciousness. We, EU lawyers, tend to think about harm in a very specific way—in terms of the harm to the centre.

For example, in the *Laval* debate, the 'bad capitalism' and neoliberalism card was raised repeatedly. Migrants were deemed to be a testament to the overpowering nature of capitalism. But in fact, the EU is a set of many migrations—of people, goods, services, etc. We all agree on free movement in the EU in general. However, the critique of capitalism is on the table only with regard to the dynamics which appear to favour the periphery. Other migrations, such as those of high-end services from the centre, a large flow of goods from the centre and migrations of people from the centre, pass by unacknowledged. They are perceived as necessary, natural, part of the normal state of affairs. Only the free movement considerations actually or purportedly harming the centre pose a concern and are conceptualised as 'conflicts in need of a solution'.[74] Those harming the periphery are not on the profession's radar.

VI The Discourse of Constitutionalism

This discourse, which fails to account for the periphery, also is furthered by the terms of the EU constitutional debate. According to Weiler, the current European constitutional architecture represents an alternative, civilising strategy of dealing with the 'other'. It is a remarkable instance of civic tolerance for one people to accept being bound by precepts articulated not by 'my people', but by a community composed of distinct political communities: a people of others. The daily practices of the EU and national governance are thus supposed to take the interests of others, the interests of Europe, into consideration.[75]

Meanwhile, Maduro has argued that judicial bodies in the Union should justify their decisions in the context of a coherent and integrated European legal order. For this to be possible, and in order to satisfy the requirement of equality in the competing determinations of EU law, any national decisions on EU law should be argued in universal terms. A national court must justify their decisions in a manner that could be universalisable. Such decisions must be grounded in a doctrine that could be applied by any other national court in similar situations.[76]

Maduro further identifies three main sources of constitutional and democratic added value that the process of European integration and EU Law, the Union's universal argument, can bring to national political communities and their

[74] C. Joerges and F. Rödl, 'Informal Politics, Formalised Law and the "Social Deficit"', n 7 *supra*.
[75] See J. H. H. Weiler, 'Europe's Sonderweg', n 5 *supra*.
[76] See M. P. Maduro, 'Contrapunctual Law: Europe's Constitutional Pluralism in Action', in N. Walker (ed.) *Sovereignty in Transition* (Hart Publishing, 2003), at 529–530.

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constitutional democracies.[77] First, European constitutionalism promotes inclusiveness in national democracies by requiring national political processes to take into account out-of-state interests that may be affected by the deliberations of those political processes.[78] By committing to European integration, EU states accept to mutually open their democracies to the citizens and interests of other Member States. This amounts to an extension of the logic of inclusion inherent in constitutionalism, and all the affected interests are thus taken into account.[79] Second, European constitutionalism allows national democracies to collectively regain control over transnational processes that evade their individual control. Third, European constitutionalism can also constitute a form of self-imposed external constitutional discipline on national democracies. There are many instances in which domestic political malfunctions can be better corrected by external constraints.

However, the 'universal' of the Union most often coincides with the 'particular' of the centre. So this universal—the centre's particular—is then deemed to be the 'interest of Europe' and becomes the means for dealing with national issues in daily practice, for dealing with transnational processes, and constitutes the self-imposed constitutional discipline on all national democracies.[80]

A cherished example of the self-imposed constitutional discipline on national democracies is state aid law policy.[81] State aid policy, in the same way as internal market regulation, is framed in terms of preventing negative distortion to the market, subject to exceptional authorisations due to outweighing social benefits.

Chris Rumford calls this view, that of state aid threatening competition but having a socially useful function, the common sense view.[82] He argues that it is not the existence of state aid as such that distorts competition, but the wide disparities in the levels of state aid awarded between member states. Thus, state aid tends to work counter to the principles of social and economic cohesion.[83] If Rumford's conclusion that most state aid is given by the wealthy countries[84] is correct, how should one then

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[77] See M. P. Maduro, 'Three Claims of Constitutional Pluralism', n 6 *supra*.

[78] See M. P. Maduro, *We the Court*, n 7 *supra*, at 173–175.

[79] See M. P. Maduro, 'Three Claims of Constitutional Pluralism', n 6 *supra*; M. P. Maduro, *We the Court*, n 7 *supra*, at 173–175.

[80] See M. P. Maduro, 'Three Claims of Constitutional Pluralism', n 6 *supra*; C. Joerges and F. Rödl, 'Informal Politics, Formalised Law and the "Social Deficit"', n 7 *supra*.

[81] M. P. Maduro, talk delivered at the Faculty Club of Harvard Law School (12 April 2012).

[82] See C. Rumford, *European Cohesion? Contradictions in EU Integration* (St Martin's Press, 2000), at 126–128.

[83] *ibid*, generally at 123–162.

[84] The five largest granters of state aid represent approximately 60% of the total, €39 billion in terms of volume; they are Germany (€13.6 billion), France (€12.3 billion), United Kingdom (€4.8 billion), Spain (€4.5 billion) and Italy (€3.8 billion), see http://ec.europa.eu/competition/state_aid/studies_reports/expenditure.html#1 (*I.2. State aid in absolute and relative terms, Table:* Non crisis state aid, without railway, volume in absolute values). The ranking is different in terms of per cent of GDP; in this case, most aid is granted by Malta (1.6%), Greece (1.2%), Finland (1.2%), Hungary (1.1%) and Slovenia (1.1%), see http://ec.europa.eu/competition/state_aid/studies_reports/expenditure.html#1 (*I.2. State aid in absolute and relative terms, Table and chart:* Non crisis state aid, without railway, as a % of GDP). As Rumford notes, the surveys he addressed in measuring the amount of state aid do not cover all sectors. If all sectors were included, the figures would be considerably higher. He concludes that in the absence of a comprehensive survey, the true scale of state aids is impossible to calculate. See Rumford, n 77 *supra*, at 139. Indeed, the numbers in the Commission's report on State aid for 2012 do not cover railway subsidies, see http://ec.europa.eu/competition/state_aid/studies_reports/2012_autumn_en.pdf. The notified railways subsidies in 2011 amounted to €32.3 billion and as the Commission notes in footnote 7 of

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argue in the state aid law framework from the perspective of the disadvantaged structural situation of the companies (and workers) of the periphery? The general choice in terms of whether more state aid or less state aid should be awarded is argued in terms of either more competitiveness or more emphasis on social considerations.

A general policy argument for more competitiveness may work to the detriment of the structurally disadvantaged, thus to the detriment of the companies of the periphery. Arguing for the social, however, has the consequence of more state aid being given primarily to domestic industries of the centre—for instance to the industry producing the cars we are all driving or to the airlines we are all flying. The distributional element in terms of centre and periphery is obscured in the discourse of the interplay between competitiveness and social considerations and State aid alone, when given by the richer areas of the EU in excessive amounts, may have the potential to wipe out the benefits accruing from aid directed towards the poorer regions of Europe.

VII Politics of Left and Right

In order to foreground the periphery's concerns, and by making them stronger, I am proposing to introduce a new grid in daily legal thinking—the one of centre and periphery. Why do we need this new grid?

There have been proposals for a healthy left–right debate in the EU legal discourse. However, even the overtly political left–right discussion is a part of the problem. The periphery gets caught up in ideological abstractions of left and right. These abstractions are realised in the consciousness of the centre rather than in that of the periphery. The periphery's concerns thus remain obscured even in an overtly political discourse.

C = centre
P = periphery
L = left
R = right
CW = centre workers
CB = centre businesses
PW = periphery workers
PB = periphery businesses

I disaggregated the interests, demands or claims of actors in line with their position in the centre–periphery relationship. As the centre–periphery dynamic cuts across the class of workers and businesses, the opposing interests in a case are thus not two, as generally interpreted in contemporary legal thought, but rather (at least) four.[85] It should be stressed, however, that both the identity of each of these four groups as well as their demands or interests are themselves always resulting from articulating practices.

The debate surrounding the judgment was focused on the interpretation that all workers, on the one hand, have a common interest in the outcome of the case and that businesses have a common interest in the outcome of the case on the other hand. An equally plausible, if not more plausible interpretation in the *Laval* case is that the PW's and PB's interests aligned against the interests of the CW and CB. In view of the

this report, the information on subsidies to railways differs in scope and detail from that collected from Member States and thus the aggregation into a single State aid total is not possible.

[85] For a further critique of dualism in contemporary legal thought, see D. Kukovec, 'Hierarchies as Law' (2014), n 4 *supra*.

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resolution of this particular case, the interest of Laval as well as of its workers was to win the public procurement contract and perform the works. The Swedish company who lost the contract as a result, as well as the Swedish workers, had an opposing interest in the outcome of this case.[86] However, in the academic debate, the demise of social Europe has been lamented as it was deemed that the workers' interests were not sufficiently honoured and that the wealthy businesses were given priority by the judges. The periphery's social considerations and periphery's businesses' interests were out of the profession's picture.

A Laval *case*

	C	P
L	CW	PW
	—	—
	—	—
	—	—
R	CB	PB

In the *Viking* case,[87] the interests aligned quite differently. The periphery's workers' interests aligned with the centre's businesses' interests and the periphery's businesses' interests aligned with the centre's workers interests. However, the discussion was about workers' right to strike v. the businesses' right to relocation. Both of these considerations were considerations of the centre.

B Viking *Case*

	C					P
L	CW	—			—	PW
			—	—		
				—		
R	CB	—	—	—	—	PB

[86] The fact that the action undertaken by Laval was actively supported by one of the Swedish employers' organisation does not distract from this analysis of interests at stake in this particular case. While it is difficult to speculate about the motives and the bargaining gains the Swedish employers' association may have expected out of supporting Laval, one can, as an example of its motive, imagine another case in which a Swedish company established a subsidiary in Latvia only to take the advantage of cheaper labour from the Latvian market, thus undercutting also the competition of Latvian companies. Such a scenario would further complicate the picture in a particular case. In any event, such a scenario does not appear to have been the case in Laval, much as if a particular company could envisage it in the future.

[87] The plaintiff Viking, a Finnish shipping company with an Estonian subsidiary, was involved in a legal action against union activities. Viking is a ferry operator, operating a ferry between Helsinki in Finland and Tallin, Estonia. The ferry was registered in Finland with a predominantly Finnish crew working under Finnish labour standards. The ferry was not making sufficient profit, so Viking decided to reflag the ferry in Estonia and replace the Finnish crew with Estonian crew working under Estonian labour law, which would be far less expensive. Both the Finnish and Estonian seafarers' unions were members of the international union, which fought against the 'flag of convenience' policy and attempted to defend seafarers against low wage strategies. The international union advised its members not to enter into collective negotiations with Viking and the Estonian union complied, which effectively prevented Viking from reflagging its ship in Estonia. Case C-438/05, International Transport Workers Federation, Finnish Seaman's Union *v.* Viking Line [2007] ECR I-10779.

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In both *Viking* and *Laval* cases, the debate was about the conflict of workers in general against businesses in general, as if all members of these two groups were in the situation of workers and businesses of the centre. The social deficit of the Union would be alleged if the interests of the workers of the centre were deemed not to have been sufficiently taken into account. Businesses, just as workers, leaders, artists or small and medium-sized enterprises (SMEs) from the periphery, are in a significantly different structural position than those from the centre. Nonetheless, the situation and aspirations of businesses from the periphery are lost in the general critique of neoliberalism harming the workers. The left–right dynamics occurred between CW and CB in both cases, leaving the PW and PB backgrounded and their concerns foreclosed from operating powerfully.

Norbert Reich argued, in the Laval case, *for* the workers and companies of the periphery. However, he argued for the periphery in Laval, as well as in the Viking case in the *consciousness o*f the conflict of universalised claims of workers and companies, ignoring the structural disadvantage of the actors of the periphery. Reich frames and discusses the dilemma as follows: 'the two reference cases considered here concern the compatibility with EU law of *industrial disputes and collective actions* against *EU companies exercising their free movement rights*'.[88] A different structural situation of workers and companies of the periphery is not recognised in such framing of the argument and limits the range of justifications for the argument and decision in favour of the actors of the periphery.

It should be noted that arguing for the particular subordinated interests or demands as I propose, is not an argument of a concept of access justice that would allow all market participants, including workers, a fair and realistic chance to gain access to the labour market, as well as to take advantage of the benefits of the market.[89] In other words, this is not a systemic argument for free movement considerations. Rather, my argument is to destabilise the existing perceptions of harm and social cost,[90] which ignore the injury to the periphery and to seek, acknowledge and resist the negative externalities of universalised social and autonomy claims and decisions on workers and companies of the periphery.

Christian Joerges has been asking about the implications of these judgments for the new Member States' own long-term competitive advantage and their chances for similar development. The interests of workers on the periphery would thus only be taken into account in the (uncertain) future when they find themselves in the position of the workers at the centre. He has further argued that the ECJ should refrain from balancing social welfarism and free movement and should only intervene when there is a democracy failure of nation states**.** National welfare traditions, according to Joerges, by definition do not represent such failures.[91]Rejecting the social argument is deemed to be coercive, whether heeding to social considerations and non-intervention in the existing affairs is not. The choice is presented as non-coercive non-intervention

[88] See N. Reich, 'Free Movement v. Social Rights in an Enlarged Union', n 63 *supra*, at 125: 'It must be remembered also that the actions are directed against trade unions [. . .] which enjoy, in the traditions of all Member States—whether old or new—a substantial amount of autonomy guaranteed by national and European constitutional provisions. Therefore, it must be analysed first how far this constitutional autonomy extends within the system of the EC free movement rules [. . .].'

[89] See H. W. Micklitz, 'Three Questions to the Opponents of the Viking and Laval Judgments', (2012) *Observatoire Paper Series, Opinion Paper no. 8*.

[90] R. H. Coase, 'The Problem of Social Cost', (1960) 3 *Journal of Law and Economics* 1.

[91] See C. Joerges, F. Rödl, 'Informal Politics, Formalised Law and the "Social Deficit"', n 7 *supra*.

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in the existing state of affairs and coercive intervention, just as it was presented in the landmark US Supreme Court case of Lochner v. New York.[92] Such reasoning, however, is not laissez faire Lochnerism, as we have known it. Rather, I would call it 'social Lochnerism'.[93] According to this reasoning, the social considerations of the centre should remain untouched; the social concerns of the periphery workers are simply out of the picture.

A grid of legal thinking on the centre–periphery axis is thus needed. Only then does the space for thicker politics, which entails higher political engagement, open up. We do not understand well the reality of the EU in the existing vocabularies without taking into account this grid in legal reasoning and in thinking about European politics.

VIII Calls for Inclusion Rather Than for Change of Legal Thinking

Actors on the periphery have aspirations for movement and for protection against harm, yet these are often foreclosed from operating powerfully in the Union. The legal discourse, the currency in which interests are discussed, excludes people on the periphery. Consequently, I have my reservations about the idea that everyone's interests are taken into account, about the idea that the EU structure has an inbuilt element of tolerance and inclusion of the other, and about the periphery fully participating in the construction of Europe and in the European growth.

European academia has been preoccupied with the question of representation in EU institutions and with the question of potential under-representation of the interests of other Member States' nationals in each national political process.[94] Representation of out of state interests was also proposed as a test by which the European Court of Justice might scrutinise national measures.[95] It would ensure that all the affected interests are taken into account. However, even full representation in the decision making of European institutions, or representation of the interests of nationals of other Member States in national political processes, or enhanced standing of all regions in litigation could not promise a full participation of the periphery in the European legal structure.[96]

It is true that every Member State can intervene in any court proceedings. It is further true that every Member State has its own judges, Commissioners, its own officials, is represented in the Council, has Members of the European Parliament, and so on. It is also true that a plethora of actors from all legal systems, including national courts from across the Union, participate in the EU legal discourse. There are also academics from the periphery. However, their work could have been written by any odd Franz or Pierre.

The outlook, the mindset of the European legal profession, is one of the centre. The wrong suffered by the actors in the periphery is often not signified in the idiom.

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[92] Case Lochner *v.* People of the State of New York, 198 U.S. 45 [1905].

[93] D. Kukovec, 'Taking Change Seriously' (2012), n 4 *supra*.

[94] See, for example, C. Joerges and F. Rödl, 'Informal Politics, Formalised Law and the "Social Deficit"', n 7 *supra*.

[95] See M. P. Maduro, *We the Court*, n 7 *supra*, at 173.

[96] For a critique of constitutional thinking and of representation, participation and accountability see D. Kukovec, 'A Critique of the Rhetoric of Common Interest' (13 April 2012), n 4 *supra*; D. Kukovec, 'A Critique of the Rhetoric of Common Interest' (26 December 2012), n 4 *supra*; D. Kukovec, 'Hierarchies as Law—Conceptualism of Contemporary Legal Thought' (SJD dissertation, Harvard Law School), n 4 *supra*.

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Workers and companies from the periphery can participate in the discourse and somehow become plaintiffs and defendants, but this does not mean that they cease to be victims. Their aspirations are weak and their harms are often not actionable, as I described in the dumping discourse.

If some lose consistently, and particularly if the unprivileged lose more consistently and have trouble having their claims heard, the imagery of inclusion of the other, of everyone participating in the construction of Europe and everyone's interests being taken into account becomes troubling.

The constitutional and pluralist debate, the leading European academic discussion, perceives the EU legal system as an order implicitly containing 'the principle of constitutional tolerance', 'the logic of inclusion' and ideals of the good society, rather than as a set of specific compromises set in the legal consciousness, which subjects only a very specific selection of these compromises to destabilisation and debate. As a result, this order appears to need constant theoretical polishing, rationalisation and support, while the legal and political discourses cater to an exclusive debate on a selected set of conflicts.

The existing theorising of the EU legal discourse is oblivious to the power dynamics in the Union and only explains, rationalises and legitimates the status quo. The transformations of Europe[97] that we have been hearing have been transformations of the EU institutional structure, which in one form or another perpetuates the existing hierarchies and existing distribution of material and spiritual values in the Union.

IX Conclusion

The current discourses of free movement and its opposite, the overtly political debate, along with the constitutional discourse do not provide an adequate picture of the EU. In order to comprehend the reality of the Union more fully, and in order to acknowledge the claims for protection against harm and the aspirations of the people on the periphery, different legal thinking is needed. A new grid for daily legal thought and argument is needed—a grid on the centre and periphery axis. Moreover, I argued that the legal structure should be seen as a set of freedoms and prohibitions or legal entitlements[98] rather than interplay of social and autonomy considerations and that the existing configuration of freedoms and prohibitions in the Union favours the centre and disadvantages the periphery. These allocations need to be transformed and rearranged if the rhetoric of tolerance, of inclusion of the other, of taking everyone's interest into account and of full participation in the European project are to have any real substance.

First submission: May 2014
Final draft accepted: June 2014

[97] See, for instance, J. H. H. Weiler, 'The Transformation of Europe', (1990) 100 *Yale Law Journal* 2403.
[98] See D. Kukovec, 'Taking Change Seriously' (2012), n 4 *supra*; D. Kukovec, 'A Critique of the Rhetoric of Common Interest', (26 December 2012), n 4 *supra*. For a further elaboration of this argument, see D. Kukovec, 'Hierarchies as Law' (2014), n 4 *supra*.

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