Taking Change Seriously

The Discourse of Justice and the Reproduction of the Status Quo

I welcome the discourse of justice as an opportunity for change in legal thinking. My concern, however, is that the justice discourse could entrench existing legal thinking, which reproduces the current hierarchies in the European Union (EU) and in the world today.

I have been arguing for the need of center-periphery dynamics in EU legal thinking for some time now.\(^1\) As I have argued, we EU lawyers, tend to think about harm in a very specific way – in terms of harm to the center. Periphery’s claims are often foreclosed from operating powerfully in the existing consciousness. Moreover, our thinking tends to result in trade surpluses and an upward spiral for the EU’s center while resulting in stagnation and destruction of the periphery’s economies.

We are faced with an endless perpetuation of the tragedy of Central Europe and a tragedy of the EU’s periphery. I come from Slovenia, which is said to be the next country in line to ask for a bailout. It is a tragedy unfolding in front of our eyes and our current legal thinking contributes to it. The problem is structural. It follows from the structure of our legal thinking in various domains of law – e.g. antitrust law, free movement law, social law, constitutional law and various internal market regulations.

---

How does the discourse of justice relate to this tragedy? My fear is that it may contribute to it, just as it may contribute to the reproduction of existing hierarchies in the Union.

I will first briefly address two dangers that I see in the discourse of justice.

First, no theory has one necessary realization. Likewise no theory of justice has one necessary realization. Once we operationalize justice, I fear that the realizations will be made according to the existing conceptualization of harm. In the context of the EU legal structure, this means that social justice, distributive justice, justice as human rights etc. will again be interpreted from the existing perspective of the center.

For instance – what good is it to speak of social justice or justice as human rights when the realization of those rights will again be from the existing perspective of the center, sidelining the periphery’s concerns, as was the case in the debate following the European Court of Justice’s Laval and Viking judgments?²

Moreover, “justice” is an empty term, it is devoid of meaning. It is because there is no human situation in which injustice of some kind or another does not exist that “justice” as a term makes any sense at all. The empty notion of justice as a rhetorical device assists particular demands to be able to claim universality. Particular demands remain closed in their particularism unless there is a radical investment in them becoming universal. Justice gives particular demands the appearance of unity and coherence.³

As I have argued, the claims of the center, no matter if they are social or free movement claims, are consistently stronger than the claims of the periphery. My fear is that the claim of justice would reinforce the existing, already powerful claims and preferences. They are recognized in the legal and political debate, and are therefore more likely to fill

³ Ernesto Laclau, ON POPULIST REASON 96-97 (2005).
the emptiness of the rhetorical claim of “justice”. The existing strong claims are thus more likely recognized as “just”.

Many externalities are hidden from view in our current legal discourse and they are often not even recognized as “legal”. It is difficult for them to enter the legal or the political debate with the mere label of “justice” added to them. Adding the term justice to current legal thinking reproduces the existing dilemmas and perceptions ad infinitum. Meanwhile, actual decision-making is guided by the same mindset that would guide decision-making without the talk of justice. Think of a merger case or an odd free movement case – what would a discourse of justice add to the debate?

Furthermore, while we are sitting here in the center of the center, there is poverty, despair, suicides, pain in the periphery. This suffering is unactionable in the current human rights discourse. It is deemed as political and unworthy of legal debate - with or without the discourse of justice.

In the EU legal context, the notion of justice may thus simply further reinforce the existing, visible and strong claims: the specific claims of the center.

Second, any understanding of justice which attempts to eradicate the inherent contradictions of our lives should be avoided. Legal thinking can cover up life's contradictions, but it cannot alleviate them. We only know pain if we know love. We only know a rise if we know a fall. We live neither in heaven nor in hell. We need to keep deciding faced with the irreducible contradictions of life.

Talk of justice very often assumes that we solved these contradictions. The danger of the discourse of justice, which purports to have perpetually solved them, is that it may cover them up.

There is a downside to everything in life. If we ignore this, externalities, the downsides of legal rules, are hidden from view. This has been the case, to give just one example, in the
“Social Europe” debate following the Laval and Viking judgments, in which both workers and companies of the periphery have been sidelined. Indeed, many of the externalities which are structurally hidden from view in the existing EU legal discourse are the externalities that are borne by the EU’s periphery.

If, however, the justice talk does not cover up these contradictions and acknowledges its own, never perpetually resolved contradictions, then the endeavor of justice as social justice or justice as human rights or justice as democracy fails to deliver what it has been promising – an idea or a stable situation of justice. The existing dilemmas and contradictions may then be merely reproduced in different terms or in a different form.

**Taking Change Seriously**

Nevertheless, it is good to talk about justice, if it invites us to start considering a change in our legal thinking. We do not have a good understanding of the power dynamics in the world. We are generally ill-equipped to detect problems in the Union as well as in the world in general, let alone to address them.

If we are serious about change, we should consider the change of our analytics and the rearrangement of the existing legal entitlements. Better implementation of existing thought bears a limited promise of change. The current discussion of “Social Europe”, a stronger enforcement of the social component of our legal thinking, the current constitutional law debate and other debates in the existing consciousness of Contemporary legal thought have a limited transformative potential, to which I will now be turning.
The Distinction Between Social and Economic Considerations in Contemporary Legal Thought

Often, talk of more justice calls for more social justice or more human rights as opposed to economic considerations. The debate on Social Europe and the ensuing debate on justice are thus based on the premise of the dichotomy of social and economic/autonomy/free movement considerations in Contemporary legal thought. Understanding legal issues as a conflict between economic and social considerations is the accepted way of understanding the EU legal structure. As I will explain, this dichotomy and the empowerment of the social component of our legal thinking raises concerns in any context and domain of Contemporary legal thought. It contributes to the reproduction of the existing distribution of material and spiritual values.

This dichotomy forms the basis of legal reasoning of courts and decision-makers around the world today. It pervades thinking in all domains of law – economic law, property law, contract law, constitutional law etc. The (anti) WTO rhetoric rests on the same assumption. South African constitutional and antitrust courts, which have been branded the most progressive courts in the world, are engaged in the same practice of an ever-stronger enforcement of social claims.⁴

The distinction between economic and social concerns and the reasoning following from it has not just been the main feature of mainstream academia, courts and decision-makers. It has also been shared by critical legal thinkers. Philip Allott, for example, makes such a distinction in international law where he states: “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.”

Martti Koskenniemi has 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, according to Koskenniemi, 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 anti-trust law, they rarely do this with domestic labor or human rights standards, though nothing in the standards themselves mandates such distinction.

Strengthening social, labor and human rights components of our legal thinking tends to be the guiding line of the progressive legal profession today. Justice, poverty alleviation, solidarity and advancement of the concerns of the marginalized 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 benefitting all the workers, all the poor and all the marginalized.

It was the debate that followed the Laval and Viking judgments, which I found deeply disturbing, that prompted me to challenge this dichotomy.

As I have argued, the difference between a social right and autonomy/economic right or social and autonomy claim is a matter of perspective. The question that we should be asking is not whether to give a preference to social or economic considerations. The question we should be asking is whose social and whose economic considerations we

---

7 Damjan Kukovec, Whose Social Europe?, supra note 1 at 4-6 and Damjan Kukovec, "A Critique of the Rhetoric of Common Interest", supra note 1 at 3-6.
would like to give preference to. Likewise, the question is *what kind* of social and *what kind* of economic considerations we wish to further.⁹

The existing framework treats both “social” and “free movement” considerations as general to society as a whole, making it difficult to discuss alternative social 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 conceptualizations of the social and the economic, with endless reinforcement of existing perceptions of one and the other. The current legal consciousness, which follows thinking in terms of giving preference either to the (universalized existing) social or to the (universalized existing) economic reflects a conceptual understanding of the world, the mode of thinking I have called “the conceptualism of Contemporary legal thought”.¹⁰ Conceptualism of Contemporary legal thought pervades legal thinking in all contexts and domains of law today, the discussion surrounding the Laval and Viking judgments is just a perfect example of it.

Countless sets of analytical mistakes reproduce or are based on this conceptualism. That free movement/autonomy claims are always neoliberal¹¹, that the weakest claims will always be the social ones, that justice comes from the realization of the social claim, that the poor and the marginalized will 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. Sometimes in these debates, people reason as if there is a choice between coercion and non-coercion.

---

⁹ See Damjan Kukovec, Whose Social Europe?, supra note 1 at 3-6 and Damjan Kukovec, A Critique of the Rhetoric of Common Interest, supra note 1 at 5.

¹¹ This has been the assumption of the Laval/Viking discussion. For one of more recent contributions, see for example Aleander Somek, *From Workers to Migrants, from Distributive Justice to Inclusion: Exploring the Changing Social Democratic Imagination*, 18 EUR. L. J. 5, 711, 721 (2012).
Rejecting the social argument is deemed to be coercive, whether heeding to social considerations and non-intervention in the existing affairs is not. Christian Joerges has argued that the European Court of Justice 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. The choice is presented as non-coercive non-intervention 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. Such reasoning, however, is not laissez faire lochnerism, as we have known it. Rather, I would call it “social lochnerism”.

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. This leads to the conclusion of progressive lawyers that what needs to be fought is “the market” or “the goal of free competition”. More “justice” therefore means less free movement; the argument of justice should fight free movement considerations.

Emphasis on social rights, justice and values as the opposite of economic thinking cannot be a recipe for a progressive agenda. It lacks a serious transformative potential, both in the relation between the center and periphery, as well as in the relationships within the center and within the periphery.

In the context of the relationship between the center and the periphery, it is harmful to the latter. 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 conceptual understanding of the social and economic considerations in which the universal considerations are those of the center, the

---


periphery’s social and economic claims are systematically foreclosed from operating powerfully. The strong social claims are the existing specific claims of the center and they run counter to the weak or even invisible social claim of the periphery.

As social and economic considerations are a matter of perspective, the current conceptualism should be discarded. The legal system should rather be viewed as a set of freedoms and prohibitions, a set of entitlements allocated differently between different actors, thus creating very unequal distribution and opportunities. Only through this lens can we stop calling for more social considerations, as if they are general to society as a whole and as if they will improve everyone’s lives. Likewise, in the EU legal structure, the EU’s internal market should rather be viewed as a set of freedoms and prohibitions, a set of entitlements allocated differently between different actors in the Union. As I have argued, there is a structure to this allocation – the EU’s periphery has less freedoms and more prohibitions.15 These allocations need to be rearranged if we are to take change seriously.

The Constitutional Discourse

The current constitutional debate also has a limited transformative potential. Every time the EU Treaties are changed, there are big expectations that the Union will change, plenty of ink is spilt on the reshuffling of institutional power, on new institutions, on more human rights, on more social rights, on the name of the document and of the Union16 etc. However, this has a limited effect on the deep structure of the Union.

The EU was set up to substitute power with law. This move made its scholarship and general thinking focused on the polishing of the legal order, but oblivious to a serious

analysis of the dynamics of power. Ignorant of these dynamics, the EU legal structure endlessly reproduces the existing hierarchies and existing distribution in the Union.

Similar to the theorizing of justice, the constitutional and pluralist debate, the leading European academic discussion, perceives the EU legal system, or its suggested alternative conceptualization, as an order implicitly containing “the principle of constitutional tolerance”, “the logic of inclusion” and the ideals of a good society.

As a result, this order appears to need constant theoretical polishing, rationalization and support, while the legal and political discourses cater to an exclusive debate on a selected set of conflicts.

For the sake of brevity, I will only make a brief further comment on the inadequacy of the current constitutional discourse. Within the constitutional discourse, we usually hear arguments for more democracy, more participation, more accountability (and for more human and socioeconomic rights). This resembles the discussion of justice calling for more democracy, more accountability, more participation.

But for celebrating the existing order, it adds little analytics and says nothing about the externalities of the EU legal structure. For example, one of Joseph Weiler’s reactions to the crisis in which the EU currently finds itself is “that we need to put the scoundrels out”. This, in effect, means that the answer to our problems is more accountability.

This does not get us far. The creators of the Euro were not scoundrels. Those arguing against social dumping are not scoundrels either. These are all honorable and well-

---

meaning people. They are just mixing their own politics with insufficient analytics which they often universalize in the name of justice.

An endless call for more accountability, for more democracy, for more participation and representation is an endless call for the better implementation of existing thinking and fails to bring about change.

**Conclusion**

To conclude, we have been hearing infinite calls for more justice, more politics, more human rights, more socioeconomic rights, more solidarity, more democracy, more representation and participation, more accountability and so on. Justice, either as a rhetorical move or theories of justice, can be added to the free movement debate, the constitutional debate, the property debate or any other context and domain of legal thinking.

However, unless the discourse of justice is accompanied by a change of legal thinking, the discourse of justice may further contribute to the reproduction of the existing distribution of material and spiritual values in the world today. Different analytical thinking, combined with a rearrangement of allocations, could result in change; a change which the talk of justice alone does not promise to bring about.

My own interest has been in the center-periphery relationship within the EU. Instead of inclusion and tolerance which the EU discourse has been promising, we are facing a tragedy, specifically today, a tragedy of the EU’s periphery. Discarding the conceptualism of Contemporary legal thought, adopting the center-periphery relationship as *a grid of legal thought* and rearrangement of the existing allocations$^{20}$ may move us away from the reproduction of this tragedy.