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THE CENTRE–PERIPHERY ANTAGONISM IN ADJUDICATION: A CASE STUDY ON THE SPATIAL DIMENSION OF THE POLITICAL

Abstract. One of the key elements of the critical theory of adjudication is the identification of an objective antagonism that is at stake behind a given court case. The identification of the antagonism allows to develop an axis, along which interpretive possibilities can be spread and arranged from those most favourable to social group A (e.g. workers) to that most favourable to social group B (e.g. businesses). The paper discusses the famous *Laval–Viking* case-law which was concerned with the fundamental rights of workers (right to strike and undertake collective action) and their relation to the economic freedoms of businesses, seeking to escape the high standards of worker protection in their own country either by changing the flag of a ship to a flag of convenience (*Viking*) or by importing cheap labour force from abroad, without guaranteeing the workers equal rights (*Laval*). Whereas the vast majority of scholars have interpreted the *Viking–Laval* jurisprudence as relating to the fundamental socio-economic antagonism opposing workers and businesses, the Slovenian scholar Damjan Kukovec has proposed an alternative reading. According to him, the real antagonism is ultimately between workers from the periphery (Central Europe, *in casu* Baltic countries) and workers from the centre (Western Europe, *in casu* Scandinavian countries). By introducing the spatial dimension to the political, Kukovec entirely changes the formulation of the underlying antagonism. The paper engages critically with Kukovec's analysis and argues that the objective interest of Central European workers lies not in selling their labour at dumping prices, but gaining the same guarantees of social protection as existing in the West.

Keywords: adjudication, the political, centre, periphery, spatial justice.

ANTAGONIZM CENTRUM–PERYFERIE W ORZEKANIU: STUDIUM PRZYPADKU O PRZESTRZENNYM WYMIARZE POLITYCZNOŚCI

Streszczenie. Jednym z kluczowych elementów krytycznej teorii orzekania jest identyfikacja obiektywnie istniejącego antagonizmu, którego dotyczy dane orzeczenie. Identyfikacja antagonizmu pozwala rozwinąć oś, wzdłuż której układane są możliwości interpretacyjne, od najkorzystniejszej dla grupy społecznej A (np. pracowników) do najkorzystniejszej dla grupy społecznej B (np. przedsiębiorców). Artykuł analizuje słynne orzecznictwo *Laval-Viking*, którego przedmiotem są podstawowe prawa pracownicze (prawo do strajku i działania zbiorowego) oraz ich relacja

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do swobód gospodarczych przedsiębiorców, którzy zmierzają do uchylenia się od wyższych standardów ochrony praw pracowniczych w ich własnym kraju, już to poprzez zmianę miejsca rejestracji statku na tanią banderę (*Viking*), już to poprzez import taniej siły roboczej z zagranicy bez zapewnienia pracownikom sprowadzonym równych praw pracowniczych (*Laval*). Podczas gdy większość badaczy postrzega orzecznictwo *Viking–Laval* jako dotyczące społeczno-gospodarczego antagonizmu pracowników i przedsiębiorców, słoweński badacz Damjan Kukovec zaproponował odczytanie alternatywne. Jego zdaniem rzeczywisty antagonizm ma miejsce pomiędzy pracownikami z peryferii (Europy Środkowej, *in casu* Pribałtyki) a pracownikami centrum (Europy Zachodniej, *in casu* państw skandynawskich). Wprowadzając wymiar przestrzenny do polityczności, Kukovec całkowicie zmienia sposób sformułowania analizowanego antagonizmu. Artykuł podejmuje krytykę analizy Kukovca, argumentując, że *obiektywny* interes środkowoeuropejskich pracowników nie polega na tym, by sprzedawać swą pracę po cenach dumpingowych, ale by uzyskać te same gwarancje ochrony socjalnej, jak na Zachodzie.

Słowa kluczowe: orzekanie, polityczność, centrum, peryferie, sprawiedliwość przestrzenna.

1. INTRODUCTION: THE SPATIAL DIMENSION OF THE POLITICAL IN ADJUDICATION

According to critical legal theory, adjudication is a process in which conflicting interests are decided upon by judges under conditions where legal materials do not fully determine the outcome of cases (Kennedy 1997). Given the judge's proactive role in deciding cases, and the fact that from her perspective the law functions as a "medium" (Kennedy 2008, 6–7, 18–19, 25), the judge can never be considered to be a completely impartial umpire, as she must side with one or the other conflicting interest which is at stake (Kennedy 2008, 160, 181; Mańko 2018a, 215–220). Of course, the judge can opt for interpretations which seem prima facie to be a "compromise" between the conflicting interests: for instance, if legal norm N_1 can be interpreted in five different ways (I_1… I_5) the judge can adopt a "compromise solution" by opting mechanically for interpretation I_3, which is equally distant from interpretation I_1 (most favourable to the plaintiff) and I_5 (most favourable to the defendant) (Mańko 2020a, 99–101). But what if only four interpretations are possible (I_1… I_4), or if interpretation I_3 is actually more favourable to the plaintiff, despite formally being located mid-way between I_1 and I_5? Ultimately, therefore, the judge must make choices – she must take a *politico-juridical decision* – which affects the antagonism, both in its concrete form (between the plaintiff and defendant) and in its collective form (between the abstract subjectivities, e.g. workers and employers) (Mańko 2018b).

The most obvious types of antagonisms are those based on economic struggles, such as, for instance, the aforementioned workers/employers antagonism, or the consumers/traders antagonism, or landlords/tenants antagonisms (Mańko 2018b). Other antagonisms which are easy to identify are those based on clearly-cut ideological lines, such as the antagonism between progressives and conservatives in their various facets (e.g. pro-choice vs. pro-life, LGBT vs. traditional family).

For the critical theory of adjudication to make sense, the antagonisms must exist *objectively*, not only in the minds of the individual litigants, but also on the level of *social structures* they represent (in the philosophical, not necessarily juridical sense).[1] This objectivity can be measured by the third-party effects of cases: if the European Court of Justice ("ECJ") decides a case between a bank and a client, the interpretation given in that case, for instance concerning the legality of Swiss franc clauses, will have an impact upon millions of clients (as in the *Dziubak* case and its aftermath in Poland).

Given the requirement that criteria for identifying social antagonisms need to be objective, the question arises whether geographical or spatial criteria could also be employed. After all, they refer to objective elements and could help to identify the antagonism at stake, allowing to speak of the spatial dimension of the political. As a case study I will analyse the *Viking–Laval* jurisprudence, two well-known judgments, decided one after the other in the time-span of only one week in December 2007. Most scholars commenting on the *Viking–Laval* case-law have seen them as instances of the conflict between workers and employers (Warneck 2010b; Zimmer 2011; Hendrickx 2011; Barnard 2012; Christodoulidis 2013). Damjan Kukovec, in contrast, proposed to introduce the *spatial dimension* into the political and to reframe the antagonism as that between the periphery (Central Europe) and the core (Western Europe) (Kukovec 2014; 2015a; 2015b). This seems to be a promising conceptual move which could be an important contribution to the on-going theoretical discussions on the role of the core-periphery dichotomy for legal studies and for framing legal questions in general. In this paper, I will subject Kukovec's analysis to a critique, showing that despite the *prima facie* appeal of the spatial dimension, in casu its introduction to the definition of the antagonism at stake is ultimately flawed. This will serve as a more general methodological caveat against the overestimation of spatial factors, based on alleged regional interests, and their deployment for purposes of trumping the objectively interesting economic antagonisms.

The discussion proceeds as follows: in Section 2 I present the two cases, *Viking* and *Laval*, focusing on the facts, which are of crucial importance for ascertaining the antagonisms, and the legal aspects of the Court's findings. Then in Section 3 I discuss the *communis opinio* analyses, on one hand, and the spatial analyses, on the other hand, of the *Viking* and *Laval* jurisprudence, contrasting the *communis opinio* with Damjan Kukovec's claim. In Section 4 I question the approach of Kukovec, arguing that the objective interests of workers in

[1] Representation in the juridical sense will, however, take place if the case is a class action (representation *sensu stricto*) or if the case takes place between a court whose judgments are considered a source of binding or at least persuasive precedent (representaiton *sensu largo* and *sensu largissimo*, respectively). Given that the case-law of the European Court of Justice is considered, in European law as a source of law (binding precedent), any litigation between representatives of subjectivities (social groups) entails juridical representation *sensu largo.*

the periphery cannot be identified with that of businesses, but should rather be assimilated to the interests of workers in general. On this basis, I reject the utility of Kukovec's spatial analysis. Section 5 concludes.

In terms of methodology, the present paper should be seen as an intervention in the critical theory of adjudication, based on a concrete case study (*Viking–Laval* jurisprudence) and engaging critically with existing literature (especially Kukovec's model of spatial analysis). As such, the paper aims to contribute to developing the critical theory of adjudication (general theoretical aim) and at the same time properly framing the social antagonism at stake in the *Viking–Laval* case-law (specific theoretical aim with practical implications).[2] The main claim advance in the paper is that Kukovec's reframing of the antagonism as a spatial one must be *in casu* rejected because it is based on an improper understanding of the objective conditions of workers of the periphery and wrongly seeks to identify their interests with those of their socio-economic antagonists in the name of regional/national identity trumping class identity. Whereas such a reframing could, possibly, correspond to the subjective state of mind of certain workers, seeking "market access" at any cost, it fails to follow the objective interests at stake which cannot be identified with seeking to work under conditions of appalling economic exploitation, against which the Finnish and Swedish trade unions rightly protested.

2. THE TWO CASES: *VIKING* AND *LAVAL*

2.1. The *Viking* Case

The case of *Viking* opposed, on the one hand, the Finnish company Viking Line, and, on the other hand, two trade unions: the International Transport Workers' Federation (ITF) and the Finnish Seamen's Union (FSU), which is federated in ITF. The ITF pursues a "flag of convenience" policy, whereby it tries to pressure ship owners to abide by the labour law rules of the state of beneficial (actual) ownership, especially demanding the collective agreements be concluded with trade unions from the state of beneficial ownership, not a state of the flag of convenience. ITF uses boycotts and solidary actions among workers to enforce its policy.

The litigation concerned the ship Rosella, owned by Viking Line. Initially, Rosella raised the Finnish flag, and its crew were subject to the high standards of Finnish labour law. According to the terms of a collective bargaining agreement, Rosella crew members received the same pay as was applicable in Finland.

[2] By contrast, the paper is not intended as an intervention in the doctrine of EU law. Therefore, certain complex issues of EU consitutional, administrative and labour law have been omitted for the sake of providing a clear picture of the theoretical issue in focus. For a proper doctrinal analysis of the *Viking–Laval* jurisprudence, see especially Barnard (2012).

However, the route operated by Rosella came under competitive pressure from Estonian vessels, where crews were subject to Estonian labour regulation and were paid less than Finnish seamen. In this context the socio-economic background contrasting Finland, a well-established Nordic welfare state, and Estonia, a post-socialist country subject to neoliberal policies, should be underlined:

> Under a neo-liberal political and economic framework Estonia has followed policies of radical market liberalisation with minimum attention and resources devoted to the welfare state or social cohesion. This dominant political-economic discourse resulted in a poorly developed system of industrial relations, where social partners are hardly influential players. Estonia is one of the countries in the EU with the lowest proportion of employees in trade unions (10 per cent) and collective bargaining coverage (33 per cent). The individualistic, neo-liberal economy and weak social partnership of the three post-socialist Baltic countries stand in a sharp contrast to the neighbouring Scandinavian countries where autonomous collective bargaining systems are strong (Evas 2014, 140–141).

It is in this precise context that we should view Viking Line's plans to reflag Rosella from the welfare state Finland to the neoliberal Estonia.[3] This would allow Viking Line to escape Finnish law and the existing collective agreement, which was beneficial to the crew, guaranteeing them decent working conditions. As required by Finnish law, Viking Line notified the Finnish Seamen's Union of its plans, and the Union informed it is opposed to them. The Finnish Seamen's Union, in turn, informed the ITF federation about Viking Line's plans to switch to a banner of convenience, recalling that the Rosella ship is "beneficially owned in Finland" and therefore the Finnish Union retains "the right to negotiate with Viking," rather than any Estonian or Norwegian trade union. Upon the FSU's request, this information was passed to all unions federated in ITF, which – in line with union solidarity – were asked not to enter into negotiations with Viking Line.

When the existing collective agreement for Rosella expired, the Finnish Seamen's Union was entitled to start a strike, which it did. It demanded from Viking Line to increase the crew by eight new seamen, and to refrain from plans to reflag the Rosella. Viking Line agreed to expand the crew, but insisted on reflagging the Rosella. FSU indicated that it would agree to renew the collective agreement only if Viking Line understood that regardless of the possible reflagging of the Rosella, Finnish law would still apply to labour relations, that no seamen would be laid off as a result of the reflagging, and that the employment conditions would not be changed without the employees' consent.

Viking Line sued the FSU before Finnish courts but in the end a settlement was reached. Once Estonia became EU member (on 1 May 2004), Viking Line returned to its plans to reflag it, choosing the Estonian flag of convenience. Viking Line brought proceedings in the courts of England against both

[3] It transpires from the facts of the case that Viking Line was also contemplating to reflag Rosella to Norway which, given that the latter is also a welfare state, is not clear as to its economic purpose.

FSU and ITF, arguing that the trade union's actions violated Art. 43 of the EC Treaty which guarantees freedom of establishment. The English court of second instance decided to stay proceedings and submit a number of questions to the ECJ concerning the interpretation of the Treaty articles concerning the freedom of establishment (Art. 43 EC), the freedom of movement of workers (Art. 39 EC) and the freedom to provide services (Art. 49 EC), on one hand, and Art. 136 EC, guaranteeing social rights as set out in the European Social Charter and the Community Charter of Fundamental Social Rights of Workers, on the other hand.

The ECJ, sitting in the composition of the Grand Chamber, ruled only on the interpretation of Art. 43 EC, considering that the questions regarding freedom of movement of workers and freedom to provide services remain hypothetical until the Rosella would be actually reflagged. The Court's interpretation of Art. 43 EC was to the effect that:

1) the scope of Art. 43 EC covers collective action initiated by a trade union or a group of trade unions against a private undertaking in order to induce that undertaking to enter into a collective agreement, the terms of which are liable to deter it from exercising freedom of establishment;

2) Art. 43 EC has horizontal direct effect, i.e. it is capable of conferring rights on a private undertaking which may be relied on against a trade union or an association of trade unions horizontal dire;

3) collective action such as that between Viking Line and FSU/ITF, which seeks to induce a private undertaking whose registered office is in a given Member State to enter into a collective work agreement with a trade union established in that State and to apply the terms set out in that agreement to the employees of a subsidiary of that undertaking established in another Member State, constitutes a restriction within the meaning of that article;

4) such a restriction may, in principle, be justified by an overriding reason of public interest, such as the protection of workers, provided that it is established that the restriction is suitable for ensuring the attainment of the legitimate objective pursued and does not go beyond what is necessary to achieve that objective.

The Court, therefore, did not give a ready answer to the national court, but nonetheless confirmed that the EU rules in question apply. It was left to the national court (of England) to decide whether the restriction, arising through FSU/ITF action, is justified "by an overriding reason of public interest, such as the protection of workers." We do not know how the national (English) court would have decided the case, since following the reply from the ECJ – which arrived two years after the initial reference – the parties decided to settle case out-of-court (Malmberg 2010, 5). It is true that the decision opened up the possibility of using the freedom of establishment as a legal tool against trade unions, but on the other hand national courts were given room to justify such action; however, they would have to apply the test of proportionality (*Viking*

para. 84). Given the unpredictability of outcomes of proportionality tests, and the inherent judicial discretion they involve (Kennedy 2015; Barnard 2012, 126–127), this alone constitutes a serious limitation of trade union freedom. After all, balancing (weighing) "takes place either arbitrarily, or unreflectively" (Habermas 1996, 259). Introducing the proportionality test also reverses the burden of proof: it is up to the trade union to prove that the industrial action was justified and proportionate (Christodoulidis 2013, 2011). In fact, as Zimmer points out, had an EU fundamental right be put to the test of proportionality at national law, that "would have been considered as interference in fundamental union rights" (Zimmer 2011, 215). Indeed, whereas the economic freedom of businesses is treated "absolute," the workers' rights are "treated as imposed barriers" (Zimmer 2011, 215). The proportionality test introduced by the ECJ deteriorates the situation in comparison e.g. to German or Swedish law where a margin of discretion is afforded to the trade unions (Zimmer 2011, 221–222).[4]

Looking upon the *Viking* judgment in the light of critical theory of adjudication (Mańko 2020a; 2020b), one should consider all the possible interpretations of the law that the Court *could have* adopted in this case. Due to the limited scope of the present article such an analysis cannot be performed here in full, but it can be said that, given the wording of Art. 43 EC, the systematic arrangement of the Treaties and the open-ended category of purpose, the Court could have equally well ruled that Art. 43 EC is not applicable to industrial actions (for instance, for systemic and teleological reasons), that is has no direct effect (for instance, owing to its wording and purpose), and that, to the contrary, EU law protects the right to collective action enshrined in Art. 136 EC, or at least that is a matter of national law. This would have been the most pro-worker possible interpretation, but – in line with the methodology of critical theory of adjudication – a number of other possible interpretations should be considered, and placed on an axis (cf. Kennedy 1976) from the most pro-worker to the most pro-business interpretation. All in all, the interpretation adopted by the Court is definitely very close to being the most pro-business of all. Perhaps the only positive aspect of the *Viking* case is that, as Zimmer points out, "the ECJ acknowledged for the first time the right to take collective action and the right to strike as fundamental, 'even if' the court gives priority to the fundamental (economic) freedoms over the fundamental (union) rights" (Zimmer 2011, 215).

[4] This aspect, incidentally, has its own centre-periphery aspect, in which a centralised court imposes its own understanding of the law upon even distant areas (cf. Economides 2012, 2–3), rather than deferring the judgment on how to protect workers' rights to the local courts of Sweden and Finland. Indeed, as Kim Economides points out: "The rule of law implies the rule of central law over peripheral law; the former dominates the latter, which is usually silent but, if heard, will be subordinated to the former" (Economides 2012, 3).

2.2. The *Laval* Case

Laval was a Latvian company which, upon Latvia's EU accession, posted 35 workers to Sweden to work on a building site operated by a Swedish company L&P Baltic. Laval was not bound by any collective agreements in Sweden. The Swedish trade unions of the construction sector wanted to force Laval to sign a Swedish collective agreement. Negotiations were opened. The Swedish trade unions wanted to guarantee for the Latvian workers more decent remuneration than they were receiving under Latvian law. However, in the end the negotiations broke down and Laval did not subscribe to the Swedish collective agreement, as proposed by the trade union. As a result, collective action against Laval was initiated by the Swedish trade unions, including the blockading of the construction site where Laval was operating, which included the prevention of people, vehicles or goods from entering the site. Laval asked for police assistance, but the Swedish police explained that the collective action was lawful under Swedish labour law. Following that, a mediation meeting was arranged and Laval was given the chance to sign up to the Swedish collective agreement, whereupon the blockading action would be immediately stopped. However, Laval refused. Collective action intensified, including a solidarity action by the electrical workers' trade union, which prevented Swedish companies from providing electricians' services to Laval. In the end, Laval gave up that specific construction site, and sent its workers back to Latvia. Meanwhile, solidarity actions ensued, with all Laval's constructions sites in Sweden being blocked, and Laval withdrew from the Swedish market.

Whilst the collective actions were on-going, Laval brought a case against the Swedish trade unions involved, demanding a declaration that both the blockading and the solidarity actions were illegal and should be stopped. The Swedish court referred a question to the ECJ concerning the freedom to provide services (Art. 49 EC) and the Posted Workers Directive.

The ECJ ruled that Art. 49 EC and Art. 3 of Directive 96/71 "are to be interpreted as precluding a trade union, in a Member State in which the terms and conditions of employment covering the matters referred to in Art. 3(1), first subparagraph, (a) to (g) of that directive are contained in legislative provisions, save for minimum rates of pay, from attempting, by means of collective action in the form of a blockade ('*blockad*') of sites such as that at issue in the main proceedings, to force a provider of services established in another Member State to enter into negotiations with it on the rates of pay for posted workers and to sign a collective agreement the terms of which lay down, as regards some of those matters, more favourable conditions than those resulting from the relevant legislative provisions, while other terms relate to matters not referred to in Art. 3 of the directive." The first part of the Court's answer was, therefore, directly concerned with the facts of the case and left the national court with

no manoeuvre. The second part of the ECJ answer stated that: "Where there is a prohibition in a Member State against trade unions undertaking collective action with the aim of having a collective agreement between other parties set aside or amended, Art. 49 EC and Art. 50 EC preclude that prohibition from being subject to the condition that such action must relate to terms and conditions of employment to which the national law applies directly." In the motives, the Court signalled that the legal evaluation could have been different if the trade unions were merely trying to enforce a legally binding minimum salary for the sector at stake (*Laval*, para. 109–110), which, however, is an inadequate criterion for Sweden where, thanks to the social partners' "large extent of self-regulation (…) there are no statutory minimum wages but the social partners themselves regulate rates of pay and working conditions" (Zimmer 2011, 222). The Court's interpretation of the Posted Workers Directive is open to debate: a directive hitherto considered as a *minimum* standard allowing for better protection of workers (in line with what is explicitly provided in motive 17 of its preamble), is suddenly transformed into an act of *maximum* harmonisation (Warneck 2010b, 10; Zimmer 2011, 217).

Given the definitive nature of the ECJ's judgment, which did not leave the national court any room for manoeuvre, it was left with the decision on the amount of damages to be paid to Laval (Malmberg 2010, 10). Laval demanded EUR 140 000 in damages, but the Swedish court was not satisfied with evidence concerning actual economic damage, and awarded about EUR 50 000 in punitive damages, a decision reached by a narrow 4-to-3 majority (Malmberg 2010, 10).

As in the *Viking* case, in line with the methodology of critical theory of adjudication, all plausible interpretations would have to be confronted with one another, and the decision taken by the court – analysed in the context of other interpretive options. One of them could have been, like in *Viking*, to consider (for linguistic, systemic and teleological reasons) that Art. 49 EC is directed only to the Member States and has no direct effect (Reich 2008, 128, 135), or – arguing by analogy to competition law – that labour rights constitute a protected exemption (Reich 2008, 129).

3. *COMMUNIS OPINIO* ANALYSIS VS. SPATIAL ANALYSIS

The critical theory of adjudication insists on analysing court judgments as *politico-juridical decisions* which intervene in the sphere of the political, i.e. that of collective social antagonisms is a given society (Mańko 2018b). A crucial step in the analysis is, therefore, the identification and description of an objectively existing *social antagonism* which is at stake in a given case (Mańko 2020a; 2020b). Once such an antagonism is properly identified and described, all legally possible interpretations (plausible under a given legal culture) need

to be arranged from the most favourable to social group *A* to the most favourable to social group *B*, assuming that the antagonism is between those two groups (subjectivities, collectivities). The method of critical theory of adjudication does not provide a mechanical tool for solving cases, but invites a critical reflection upon the content of judgments from the point of view of their actual consequences for social groups – such as workers, migrants, women or minorities – at stake.

Prima facie the social antagonism at stake in the *Viking* and *Laval* cases should seem obvious: it is yet another instance in the on-going struggle between workers and businesses, and more specifically it is concerned with the scope of the right to collective action, such as strike (*Viking*) or blockade (*Laval*). Due to the specificity of the European legal order, both cases are concerned with the interrelation between the so-called "fundamental freedoms" of business operators, on one hand, and workers' collective rights, on the other hand, and in line with what Norbert Reich pointed out, the two judgments "certainly tend to a more 'liberal' and less 'social' approach by invoking a certain precedence of free movement rights over the fundamental right to strike, despite the 'social rhetoric' of the ECJ" (Reich 2008, 159–160). Indeed, in both cases the Court has given more weight to the rights of businesses, severely restricting workers' rights at national level, despite the fact that the EU has no competence to regulate the right to strike or other form of collective action (Warneck 2010a, 563; Hendrickx 2010, 1063; Zimmer 2011, 212; Barnard 2012, 135). Thus, the vast majority of legal scholars have focused on the worker-business antagonism and, indeed, taken the side of workers (Warneck 2010a, 563).

Also those (few) scholars who supported the *Viking–Laval* jurisprudence looked at the problem from the angle of the workers vs. business antagonism, just siding with the businesses, rather than with the workers. Thus, for instance, Roger Blanpain asked and immediately answered himself: "Was the industrial action, namely to boycott of Laval by the Swedish unions compatible with freedom of services? The Court said no, and rightly so" (Blanpain 2009, xxii), and Alicia Hinarejos opined that "[i]t is doubtful that the Court could have dealt with the conflict … in any other way" (Hinarejos 2008, 728).

In contrast to the *communis opinio* framing of the antagonism in the *Viking–Laval* jurisprudence, Damjan Kukovec took a different view, proposing to replace the class antagonism by a regional antagonism (Kukovec 2014; 2015a; 2015b). His views were also partly shared by Norbert Reich (2008). Concerning the *Laval* case, Kukovec wrote that

> …no one in the *Laval* debate noticed that the case could just as well have been framed as a conflict between Latvian workers' social rights and Swedish businesses' interpretation of freedom of movement provisions which would impede the realization of these rights (in order to make it impossible for a Latvian business to compete with Swedish businesses in Sweden) (Kukovec 2014, 143–144).

Later on in the same paper Kukovec drops entirely the reference to businesses as a side of the antagonism, and focuses on purely spatial (geographical) terms, arguing that

> 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 realization of these rights (Kukovec 2014, 145).

Also Reich drew attention to the spatial dimension at stake, claiming that the *Laval* case "concerned a 'non-proportional' social action of labour unions against service providers and their workers from another, namely a 'new' Member country; this action violated the principle of solidarity in the EU and was clearly aiming at protecting and segregating the national (Swedish) labour market from competition" (Reich 2008, 160), thus at least partly sharing Kukovec's core-periphery rhetoric, but also emphasising the neoliberal value of competition, rather than – as we will see below – the value of "market access" for peripheral workers, although, to an extent, both ways of framing the case are congruent.

Indeed, Kukovec goes as far as to argue that stake of Latvian workers was "a social right claim of Latvian workers struggling to improve their livelihood – or, to place it in the register of the EU Charter of Human Rights, their 'right to dignity and just working conditions'" (Kukovec 2014, 145), somewhat forgetting that the litigants were not the Latvian workers, exploited due the neoliberal regime in their country (cf. Lulle and Ungure 2019), but the employer who sought to exploit them by exporting "cheap labour force." Noting that a lot of critique of the *Laval* judgment focused on the critique of capitalism, Kukovec retorted:

> One solution in the *Laval* case is not more "capitalist" than another. As such, capitalism is not something that can be located in these choices and "tamed." All possible solutions in the case are capitalist. In this sense, there is nothing outside of capitalism. The solutions are just different and lead to a different constellation of entitlements and distributional consequences within the capitalist structure of society (Kukovec 2014, 150).

It is difficult to agree with Kukovec's view, because precisely the choice in the *Laval* case was between two varieties of capitalism: the Nordical welfare-state, social-democratic capitalism or neoliberal capitalism. Perhaps for the time being in Europe there is, indeed, "nothing outside capitalism," but at the same time – there is no *single and uniform* capitalism, as the scholarship on varieties of capitalism has shown (e.g. Hall and Soskice 2001; Westra, Badeen and Albritton 2015).

Kukovec then goes on to reproach scholars who have criticised the *Laval* judgment for remaining silent with regard to those legal solutions "harming the periphery" (Kukovec 2014, 150) and focusing only on those – as the commented judgment – which "actually or purportedly harm the center" (Kukovec 2014, 150).

His view on the *Viking* judgment is similar. He notes that "[t]he reactions to this judgment equally portray a limited understanding of harm to actors of

the periphery" (Kukovec 2014, 150), as in the *Laval* case. The Slovenian scholar proposed the following reinterpretation of the antagonism at stake in *Viking*:

> The debate in *Viking* was framed in the sense of a general conflict between workers and universalized social considerations on the one hand, and companies and universalized economic interests on the other hand. But an interpretation that the periphery workers' interests aligned with the center businesses' interests, while the periphery businesses' interests aligned with the center's workers interests, is equally if not more plausible. In this interpretation, the interests of workers of the periphery aligned with those of Viking, the company of the center, as those workers gained employment. And the companies of the periphery's interest aligned with the interests of the particular workers of the center in view of not allowing Viking to relocate to Estonia, a country of the periphery. Companies of the periphery would face, as a result of relocation, stiffer competition from Viking taking advantage of lower labor costs, which could drive them out of the market or at least reduce their profits (Kukovec 2014, 150).

In his view, the dominant academic narrative about *Viking*, i.e. a focus on the right to strike and collective action belongs to "considerations of the center" (Kukovec 2014, 150). Furthermore, he claims 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" (Kukovec 2015b, 414).

One of the authors to respond to Kukovec's striking line of argumentation is the Greek-British critical legal theorist from Glasgow, Emilios Christodoulidis, who speaks of

> …ululations of lawyers and theorists from the "new," post-2004, EU countries loudly proclaiming a victory against the arrogance of the older Member States. If the workers of the Baltic states want to sell their labor – and their life – cheap, goes the "inclusionary" argument, why should they be constrained from doing so (…)? (Christodoulidis 2013, 2005–2006).

Commenting on the two judgments, Christodoulidis makes the important claim that the Court's argumentative strategy is not so much about adopting the superiority of the economic over the social, but rather a deconstructive strategy undermining the very antagonism between the two. Christodoulidis notes that the notion of "market access" (access to the labour market) is prioritised over workers' rights:

> On the 'access' register, the clash is no longer between rights and freedoms, the social and the economic, but between the social rights of two constituencies seeking market access. It is now between those who are prepared to work for half the wage and those who are not. Incidentally, it does not matter to the advocates of this position that the halving of the salaries does not double the number of the workers but the profits of the entrepreneurs (Christodoulidis 2013, 2015–2016).

Leading specialist on EU labour law, Catherine Barnard, commenting on Kukovec's argumentation points out that:

> It distracts from the general thesis … that in terms of preserving the integrity of national social systems, the *Viking* judgment is severely damaging to rules developed by the states in the social field – the very area over which the initial Treaty of Rome settlement deliberately gave autonomy to the states – because fundamental (EU) economic rights take precedence in principle over fundamental (national) social rights (Barnard 2012, 123).

Commenting on Barnard, Christodoulidis notes

> Barnard is right, of course. But she misses something profoundly disturbing about "the merit" of an argument that suggests a mutual substitution (…) that pivots on market access, understood in its functionality of sustaining a downward spiral of lowering wages (social dumping); of an argument, that is, that assumes "market access" in this modality as sole guarantor of both social and economic rights. Social rights depend on political decisions. To hand them over to the market in this way, and assume that the social costs of the erosion of standards, conditions, and wages are inevitable, folds political thinking into the most reductive form of what Alain Supiot calls "total market" thinking (Christodoulidis 2013, 2016).

Concluding this section, it can be said that the vast majority (*communis opinio*) of scholars, regardless of their ideological preferences, frame the *Laval–Viking* case-law in terms of the classical antagonism between the owners of the means of production and the workers. While in his publications Kukovec (2014; 2015a; 2015b) tried to frame the *Laval–Viking* cases as entailing an antagonism between peripheral workers and businesses from the core, this position is untenable and one should rather understand his argument along the lines proposed by Christodoulidis, namely as an antagonism between "those who are prepared to work for half the wage and those who are not" (Christodoulidis 2013, 2015), i.e. between workers from Europe's core, especially the social-democratic welfare states, such as Sweden or Finland, and from Europe's Central European periphery, where severe neoliberal policies have been in place since the dismantlement of state socialism at the turn of the 1980s and 1990s. Essentially, therefore we are faced with the alternative of reading the key antagonism in the *Laval–Viking* case-law as a class antagonism (workers vs. businesses) or as a regional antagonism (Central Europe vs. Western Europe, or, more narrowly, Baltic countries vs. Scandinavian countries).

4. IS THERE A CENTRE–PERIPHERY ANTAGONISM AT STAKE?

The key analytical question, therefore, that needs to be posed from the perspective of critical theory of adjudication, is whether the antagonism at stake *involves a spatial dimension or not*. As I have shown above, Kukovec argues that it does, and he embeds his argument in a more general discussion of Central Europe's economic peripherality (Kukovec 2014, 134–137; Kukovec 2015a, 321–323; 2015b, 408–411). These arguments, based on objective criteria such as GDP per capita, or value of foreign direct investments, or role in global value

chains, are absolutely persuasive and I do not intent to question them. Incidentally, Kukovec's classification of Central Europe as a periphery is not isolated, the same conclusions are also drawn by Polish scholars applying Immanuel Wallerstein's theory[5] of peripherality (e.g. Zarycki 2016). Peripherality is visible not only in the economic field, but also in fields of symbolic production, such as culture or science (e.g. Warczok 2016), including legal culture (Mańko 2019, 71–74), legal science (Mańko, Škop and Štěpáníková 2016) and even legal practice (Dębska 2016). The *premise* used by Kukovec is, therefore, correct. But does the fact that Central Europe is a periphery automatically warrant the *conclusion* that the proper reading of the social antagonism at stake in the *Viking–Laval* jurisprudence is a spatial one? Or is it rather a reading which, in itself, imposes symbolic violence, on top of economic violence, upon Central European workers, trying to tell them that their best interest is mere "market access," i.e. to sell themselves as cheap as possible?

This question brings us to the conceptual core of the critical theory of adjudication, namely to the objectivity vs. subjectivity of the criteria, according to which an antagonism ought to be identified. In other words: do the feelings or convictions of the Latvian construction workers, sent in to Stockholm, or the severely underpaid Estonian seamen (potentially) to be employed at Viking Lines after the Finnish seamen would have been fired or quit voluntarily (due to low wages), should be taken into account? What about the subjective understanding of the situation by the owners of Viking Line and the Laval construction company, as well as by the Finnish and Swedish workers, engaged in collective action? To give a properly empirical answer to these questions would require a great deal of fieldwork which, years after the litigation, could be difficult to accomplish (e.g. tracking down former workers of Laval in Stockholm,[6] or former seamen of the Rosella, or – even more impossibly – the potential Estonian seamen of Rosella, who never got the job, because the vessel in question ultimately remained under the Finish banner,[7] etc.). Furthermore, even if such subjective feelings or convictions were to be researched, I think they would be irrelevant from the point of view of the critical theory of adjudication which focuses on *objectively existing* antagonisms, and not on *subjective* feelings or convictions which are individual and can change.[8]

[5] Wallerstein (2004). For an overview of other core-periphery theories, see e.g. Pylypenko (2014).

[6] In analysing their own understanding of their situation, the concept of "legal-spatial consciousness" could be useful (see Flores, Escudero and Burciaga 2019).

[7] Following the *Viking* litigation, the Rosella has been refurbished and transferred to a Sweden – Finland route, continuing to raise the Finnish flag (of the Åland Islands, a Finnish region). See e.g. https://www.sales.vikingline.com/find-cruise-trip/our-ships/ms-rosella/; https://www.dfly.no/uppgraderade-ms-rosella-ater-pa-ostersjon/; https://www.youtube.com/watch?v=dOX_neGDVI0 (all last accessed on 12 February 2021)

[8] Incidentally, it can be remarked that according to a 2017 opinion poll (Eurobarometer 2017, 20), Lithuanians and Latvians, just like Swedes and Finns, would prefer more solidarity in European societies. This is the desire of 79% of Swedes, 71% of Lithuanians, 66% of Finns, and 65% of

Putting Baltic workers against Scandinavian workers, as Kukovec does, is constructing an artificial antagonism, which ultimately seeks to obfuscate the real one, which is true, global and perennial: that between the owners of capital and those who do not own it, but have to sell their own labour to make a living. The difference in bargaining power between the two groups is enormous, and the entire legal invention of labour law – with such institutions as protection of the durability of the labour contract or the right to collective action – is aimed at remedying, even if only partly, the injustice inflicted every day upon those who need to sell their work to make a living. The alternative is not between free movement or its restriction: keeping borders open for people (cf. Jones 2019) is one thing, but using free movement as a tool for demolishing labour law, is another. I cannot agree with Kukovec when he bemoans the justice rhetoric by stating that, in the view of progressive lawyers, "[e]fficiency is contrasted with 'just distribution' or fairness. More 'justice' means less free movement; the argument of justice should fight free movement considerations" (Kukovec 2015b, 417). The question is not about the free movement of Latvian or Estonian workers; the question is about the conditions of work of *European* workers and the undermining of those conditions by means of social dumping.

Kukovec's claim that "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" (Kukovec 2015b, 415) tells only part of the truth or, to be precise, obfuscates the more important part of the truth. Whereas Latvian or, more generally, Central European workers indeed "struggl[e] to improve their livelihood, dignity as well as fair and just working conditions," this does not *per se* put them objectively in an antagonistic position towards Swedish or Finnish workers who – let us paraphrase Kukovec – struggle to *maintain* their livelihood, dignity as well as fair and just working conditions from the neoliberal onslaught. Why turn Central Europeans into the Troian horses of neoliberalism? Such a framing of the issue is, at the very least, a manipulation, and the use of spatial justice discourse is *in casu* not justified. Why shouldn't Central European workers enter Western European labour markets *respecting their rules*, and, especially, *respecting the social acquis*,[9] which is the outcome of decades-long, largely successful, class struggle?

Latvians. The situation of Estonians is a bit different, as 47% would prefer more solidarity, but 29% would like to have an equal share of solidarity and individualism, while 15% would like more individualism than solidarity (the latter view is shared by 12% Swedes, 13% Lithuanians, 24% Finns and 14% Latvians). Despite the differences between the views of the Baltic societies and Scandinavian societies, the converge is visible. Most workers simply desire better working conditions, and it can be plausibly claimed that a vast majority would prefer to stay in their home country if they could get a decent and well-paid job there.

[9] Which they actually do – "Labour mobility, that is, mobility of the workforce, within the EU tends to be predominantly from jurisdictions with weak social protection to jurisdictions with strong protection" (Evas 2014, 152–153).

The use of the centre-periphery rhetoric by Kukovec cannot justify his far-fetched claims. He argues that:

> The social claim of the periphery is thus almost inexistent in the current discourse. 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 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 (Kukovec 2015b, 419–420).

Ultimately, the fundamental difference between the approach of Kukovec and that of myself and most other authors is the *identity of the subjectivity* at stake. Let me recall here that for the critical theory of adjudication, the subjectivities (such as workers and businesses) which are in a conflict of interest, are crucial in identifying the antagonism (Mańko 2020b). Antagonisms are, by their very definition, *collective* conflicts, and an individual conflict is perceived, in line with that theory, as an instantiation of a general (collective) conflict of two (or more) subjectivities (Mańko 2018, 84–88). The question therefore arises: should one speak of workers, or rather of "Latvian workers," "Estonian workers," or "Swedish workers"? Should the interests of workers be treated as a pan-European question, or should it be confined to national borders? Should priority be given to *class solidarity* or *national unity*? It seems that a tacit assumption behind Kukovec's approach is, in fact, a different answer to those fundamental questions from the one given by most commentators.

This approach – national unity over class struggle – is visible in Kukovec's reading of the *Laval* case: "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" (Kukovec 2015b, 424), where "PW" stands for workers of the periphery, "PB" – businesses of the periphery, whereas "CW" and "CB" stand for, respectively, the workers of core and the businesses of the core. Kukovec bemoans that "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" (Kukovec 2015b, 425) whereas, in fact, the interest of peripheral businesses (such as Laval, attempting to dump its services in Sweden) is not congruent with workers' interests, but is precisely based on their *exploitation*. As for the *Viking* case, Kukovec's analysis is even more striking: "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" (Kukovec 2015b, 425), he claims. Once again, this is deeply problematic, as it requires the assumption that it lies in the interest of peripheral workers *to be exploited*, to receive lower wages, worse working conditions, in other words, to be treated with less dignity

that Western workers. After all, let us recall, if the Finnish trade unions were not successful, Viking Line would reflag the Rosetta and hire cheap Estonian workers, laying off the more fairly paid Finns. One can say that the Estonians would not be paid more on the Talinn–Helsinki line than other Estonians were paid on an Estonian vessel. What kind of gain would they, then, ultimately have? Would it not have been the syndrome of the dog-in-the-manger attitude? The only genuine gain for the Estonian workers would have been for the Estonians to gain an employment contract on the Finnish vessel *under Finnish law* (or, in the long term, for the working conditions in Estonia to be harmonised with those in Finland to remove social dumping). But Kukovec does not even analyse such a scenario, limiting himself to the assumption that Estonians want to be paid less.

5. CONCLUSION

The aim of the present paper was to analyse the famous *Viking–Laval* jurisprudence from the point of view of critical theory of adjudication, focusing on one preliminary question: the definition of the social antagonism at stake. It was noted that the vast majority of authors see the antagonism in both cases as one between workers, on one hand, and business, on the other hand, and most authors have sympathised with the former, bemoaning the negative effects of the two cases upon workers' rights in Europe. Against this backdrop, Slovenian-British scholar Damjan Kukovec has put forward a perspective based on introducing the spatial element into the equation, and effectively proposing to see the antagonism as a regional one between Central European workers, on one hand, and Western European workers, on the other. The former wish to enter the labour market by offering their time, effort, and ultimately life at a bargain price, whereas the latter seek to defend the social *acquis* from unfair competition and what is precisely described as social dumping. Despite the fact that Kukovec's analysis rests on a proper understanding of the core-periphery dynamic in Europe, whereby Central Europe is indeed in a peripheral position, whereas North-Western Europe is the core, his reasoning with regard to the antagonism underlying the *Viking–Laval* cases is fundamentally flawed.

This example shows that introducing a spatial element into legal analysis must be done carefully and should not be performed mechanically. The analytical force of the critical theory of adjudication rests on a correct identification of the social antagonism in a given case: this is the basis for creating an axis of possible legal interpretations (cf. Kennedy 1976), ranging from those most favourable to group A (e.g. workers) to that most favourable to group B (e.g. businesses). Assuming with the majority of scholars that indeed, the relevant antagonism in the *Viking–Laval* jurisprudence is that of workers vs. businesses, the Court's reading of the conflict between "fundamental freedom" of business operators

and fundamental workers' rights is definitely one which is extremely favourable to business operators. However, should we adopt Kukovec's perspective, we would have to analyse those solutions as spanned on an axis between the interest of Central European workers (seeking to sell their labour at a bargain) and Western European workers (seeking to protect their labour rights). The evaluation of the solutions chosen by the Court would be different, in Kukovec's terms – moderately positive for the Central European workers.

But the ultimate question needs to be asked: does the objective interest of Central European workers really lie in selling their labour at half the price, working in bad conditions, and being deprived of the rights enjoyed by workers in such countries as Scandinavia? Regardless of what false consciousness might dictate them, the only answer can be: no. Therefore, it is impossible to accept Kukovec's analysis which, in fact, only conceals what is purportedly reveals: whereas on the surface Kukovec speaks of the interest of workers, in fact, he means (consciously or not) the interest of capital, while wrapping it up in an attractive labelling of giving voice to the periphery.

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