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Integration, Disintegration and the Protection of Competition: Of Myths, Stories and Images

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INTEGRATION, DISINTEGRATION AND THE PROTECTION OF COMPETITION: OF IMAGES, STORIES AND MYTHS

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As events in Europe have unfolded over the last year, the contrast between political disintegration in the post-socialist world and the integration of states in Western Europe has become increasingly stark. The Soviet Union, one of the world's superpowers, has disintegrated, together with its empire, while in Europe independent states have become increasingly interwoven in the legal structure of the European Communities. The juxtaposition of these two seemingly contradictory processes often has seemed perplexing.

My claim here is that at the core of both of these processes is an image rooted in a story becoming a myth. The image is of a particular relationship between law and economic activity in which competition and the free market create wealth, and law assures that such wealth will be acquired fairly and distributed equitably. The story is of the reconstruction of Europe in the wake of the Second World War. This story has acquired mythic status, and understanding it provides critical insights into the apparent contradictions in contemporary Europe.

In this interpretive Essay, then, I seek to: (1) better understand these two world-changing processes, (2) identify and analyze the important and often neglected roles that law is playing in these processes, and (3) demonstrate the potential value of using narrative-imagery analysis in areas such as economic law that generally have been reserved for more conventional forms of legal thought.¹

I. EASTERN EUROPE

A. *The Search for a Path*

The formerly state socialist countries of Eastern Europe and the

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1. For other recent efforts to expand the range of analytical perspectives in this area, see, for example, the symposium entitled *Law and Economics and the Semiotic Process*, 42 SYRACUSE L. REV. 1-216 (1991).

I have found Bruce Lincoln's DISCOURSE AND THE CONSTRUCTION OF SOCIETY (1989) particularly useful in thinking about the subject of this Essay.

constituent units of the former Soviet Union are immersed in a process of disintegration. The political power structures that have governed their operations for decades have collapsed, requiring the construction of new structures of power and authority. Simultaneously, the ideological framework that had supported these institutional structures has been banished. These socialist political systems reflected a high degree of interpenetration of ideology and authority, and the two have dissolved together.

This disintegration entails, however, the need to create new political communities and restructure existing ones, and the desire to create new and independent political communities has played a major role in the overthrow of the old system. These states are seeking to create a political-legal structure that is fundamentally different from the one in which they have been operating, and they are trying to find an image of society that can guide the community-building process.

These new or newly-reconstituted states have chosen as a basis for constructing their political, social and economic systems an image that has two basic components.² One is primarily political and envisions enhanced protection of personal freedoms as well as improved and broadened participation in government. The other envisions a particular set of relationships between law and economic processes as the core of the new community. I am concerned here with this second component of the image.

This legal-economic image features a rapidly growing market economy replacing the remnants of the socialist economy of the past. This market is expected to release energies within the population and lead to rapid and sustained increases in living standards. This economic process is to be protected and channeled by the community through its legal processes. Laws are necessary to create the structural prerequisites for markets, and a specific legal regime called "competition law"³ is given the assignment of assuring that the market avoids unfairness in the competitive process, achieves an equitable, and hence socially integrating, distribution of the market's benefits throughout society, and does not generate private replications of previous political power structures. This

2. There obviously are important differences among the various states of the post-socialist world with regard to the importance attached to particular components of this image as well as to power of the image itself, but at least for the moment that image seems to be playing a role in the construction of virtually all post-socialist states.

3. I here use the term "competition law" to refer to legal regimes that seek to protect the process of competition.

legal-economic framework is also seen as an important means of creating and assuring political stability.

The envisaged role of this new conception of law helps explain the importance these countries have attached to competition laws. Even before the fall of the socialist regimes in Eastern Europe, these countries often rushed to enact competition laws which frequently resembled those of Germany and the European Community. The Russian Republic enacted such a law in the summer of 1991—before the Soviet Union collapsed, and it has shown great interest in strengthening that law since it acquired independence at the end of 1991.

These laws serve the symbolic function of announcing the choice of a competitive system and the rejection of the old system—both to members of the domestic political community and to the outside world. As yet, however, they generally are little enforced, and thus traditional views of law and legal analysis might suggest that we need not further consider them. If law's only role is as a norm of conduct, as traditional legal analysis holds, this conclusion is inevitable.

Accordingly, observers in the United States and Western Europe generally have reacted in one of two ways. Some assume that laws have only one function—i.e., to control conduct—and that, therefore, these laws function as laws do in the United States or in much of Western Europe. Starting from the same assumption, others ask how effectively the laws are enforced and, on discovering the relative lack of enforcement of the norms, they proceed to ignore them. Both miss the point.

B. The Informing Story

They fail to recognize that these laws and the image in which they are imbedded are tied to and shaped by a particular story. This story is being used in the process of societal integration, and an understanding of that process and law's roles in it requires analysis of that story.

The story begins in postwar Germany in a situation strikingly similar in many ways to the current situation in Eastern Europe.⁴ German society had just emerged from a long period of totalitarian control in which the market had been considered an "enemy of the people." Its economy and society were in ruins. There was a strong belief that society had to be reconceived and restructured.

The image of society that emerged victorious during the years following the war centered on a new conception of the relationship between

4. Sources describing the situation in post-war Germany are voluminous. See, e.g., HENRY C. WALLICH, *MAINSPRINGS OF THE GERMAN REVIVAL* (1955).

law and the economy. It was offered by a small group of economists and lawyers most of whose members had been exiled and/or persecuted by the Nazis.⁵ This group of so-called "ordoliberals" emphasized the need to build the new society on the foundation of a competitive economy, but its members adamantly opposed laissez-faire capitalism. In their view, the market economy had to be imbedded in the legal and constitutional framework of society. The market would produce wealth, and law would be used to protect the competitive process from the influence of public and private concentrations of power. Moreover, law would assure that the market was fair to all participants, that its rewards were equitably distributed, and that it respected human values. This guiding image came to be known as the social market economy.

Supporters of this new conception of society acquired positions of power in the postwar period, and one of the members of this group changed the course of postwar Europe (providing, in the process, a model for Boris Yeltsin). In mid-1948 Germany was still an occupied country subject to the political will of the occupying military governments. Its economy had begun to recover from the destruction of the war, but it remained mired in price controls, rationing and the black market that generally attends those structures. At this point Ludwig Erhard, the highest political official in the German government, took an extraordinary step. Without the required formal approval of the U.S. authorities (though with tacit support from General Lucius Clay, the U.S. commander whose approval was necessary) he eliminated virtually overnight most rationing and price controls in Germany.

At first this bold move generated more criticism than kudos for Erhard. Few believed it could succeed, and many thought it a recipe for disaster. For several months it seemed likely that the critics were right. Prices soared for important products, and inflation created popular resentment.

But it did work. By the end of the first year the economic situation had changed radically. Prices stabilized, and employment and investment made impressive gains, generating a new confidence and releasing unanticipated energies. The 1950s were the decade of the German "economic miracle," and by the end of the 1960s at the latest the German economy was the most powerful in Europe. The period of the social market economy has been one of continuing growth and improvement which has lasted with few interruptions until today.

Competition law has played a prominent role in this success story.

5. See generally REINHARD BLUM, *SOZIALE MARKTWIRTSCHAFT* 47-89 (1969).

Ludwig Erhard and his colleagues viewed such a law as an indispensable part of the social market economy. Erhard began the public fight for a competition law at about the same time that he freed the German economy from price controls, and he continued his support as federal economics minister through almost a decade of bitter struggle. In 1957, the German Law Against Restraints of Competition (GWB) was finally enacted into law.⁶ It was a political compromise, but it was based on the ideas of the ordoliberals and the supporters of the social market economy.

The original statute has changed little. It contains a general prohibition of cartel agreements (subject, however, to significant exceptions) and provisions designed to prevent abuse of market-dominating provisions. In the 1970s, provisions were included requiring notification of mergers and acquisitions and authorizing the Federal Cartel Office (FCO) to prevent such transactions under defined circumstances. The FCO is a largely autonomous governmental agency that has primary responsibility for enforcing competition laws.

The German GWB was the first extensive and seriously-enforced competition law in Europe, and it remains Europe's most effective national competition law. By the late 1970s, observers often considered it to rival or surpass the United States antitrust laws as the most stringent competition law regime in the world.

From Germany the social market economy and its new conception of the relationship between law and the economy spread to the European Community legal system. The Rome Treaty establishing the European Economic Community was heavily influenced by this concept, and in articles 85 and 86 it created the basis for what has become a well-developed and highly-respected competition law. The success of this competition law, in turn, has led to its spread to other member states of the Community.⁷

Thus the enormous success of the German economy, in particular, and Western European economies, in general, has accompanied the development of highly effective competition law regimes. For many, the message of this story is that the key to economic development, at least where there is an ongoing process of community integration, is to imbed a market economy in a constitutional-legal framework that seeks to as-

6. Gesetz gegen Wettbewerbsbeschränkungen [GWB], 1957 BUNDESGESETZBLATT [BGB1. I] 1081 (Ger.).

7. The most recent example of this phenomenon was the enactment of Italy's first competition law statute in 1990. For discussion, see generally David C. Donald, *Comments on the Italian Antitrust Law of October 10, 1990*, 26 INT'L LAW. 201 (1992).

sure the fairness, effectiveness and social equity of the market. The validity of the social market economy as a model for other countries has become one of the most common themes in economic discussions in Europe for two decades.

C. Functions of the Story

This story thus provides an image of the desired future, a means of achieving it and a basis for confidence that it can be achieved. The story of the social market economy provides a model for post-socialist countries which combines the promise of rapid economic development with ideals of social equity and community integration.⁸ This is the model to which they regularly refer and on which they are modelling their laws and constitutional structures.

In this framework the relationship between law and the economic system is central. These states want economic development, but they also require a model in which law secures social integration by assuring fairness and equity during the process of economic development. This is one reason why they have attached great importance to enacting competition laws based on German and European Community models.

The language of the social market economy provides the discourse that is at the core of the process of community building. The very term "social market economy" focuses attention on the integration of society around the market, and its discourse provides the emotional and psychic ties that structure the community's efforts and define its boundaries. Its language is socially integrative and community oriented.

Finally, this story provides a basis for confidence that these goals can be attained, and this generates its capacity to influence behavior and secure community support. It locates the common goals of the community not in an abstract image deriving from speculation or political slogans, but in a concrete story in which the ideas have been tried and found successful.

When the president of the newly-created Russian Republic, Boris Yeltsin, dramatically ended price controls in January, 1992, and claimed that he would need one year to see if his move would work, the parallels to Ludwig Erhard's action in 1948 were stunning. In the midst of the economic and political circumstances similar to those facing Erhard in

8. The power and impact of this story are difficult to imagine from the perspective of the United States, where liberalism virtually always has been a dominant ideology. At the close of the second world war in Europe, however, liberalism was widely viewed as a failure and both morally and socially unacceptable. The concept of the social market economy thus radically changed the direction of European history.

post-war Germany, Yeltsin seems to have used Erhard's story to guide his actions, even to the point of using the same time frame for evaluating its success.

Thus, the story of the social market economy and of its new concept of the relationship between law and the economic system is operating as a constitutive myth in the post-socialist world. It is more than a story, because a community believes the story has a message and uses that message to guide its policies. This belief imbues the story with authority and accords it the status of paradigmatic truth, and thus the story provides important insights into the developments in those countries and into the role of law in those developments.

II. THE EUROPEAN COMMUNITY

The integration of Western Europe is also a process of creating community through law, and it is also shaped by images, stories and myths. What generally has gone unnoticed is that they are the same ones that are shaping developments in Eastern Europe. Viewed from this perspective, the integrative processes in the East and West are not only not contradictory, but also structurally quite similar.

In the process of European unification, independent sovereign states are relinquishing significant elements of their national sovereignty to the institutions of the European Community. According to current estimates, as many as one-half of all legislative decisions in the member states currently are influenced by the Community law, and it is expected that by the end of the decade more than half of the legislative competence currently held by the member states will have been transferred to Brussels.

Voluntary political integration of these dimensions is without precedent, and thus analysis of these processes lacks a comparative base. One means of gaining insight into this integration, however, is to analyze the images that are providing the energy for it and the stories that are being used to justify these sacrifices of authority.

A. *The Guiding Image*

The image driving this integrative process is a conception of the relationship between law and the economic system that is also leading the search for integration in the post-socialist world. In this image, the unified market creates a continuously improving standard of living throughout the Community, and a legal framework assures that all states, enterprises and individuals are fairly treated in this process and share

equitably in the wealth created. Economic improvement is inextricably intertwined with the process of political integration and with concomitant conceptions of competitive fairness and distributional equity.

This conception of the goals of the process assumes a variety of factors intertwining market successes with community political integration. It assumes, for example, that a more fully integrated community can more rapidly create wealth and more effectively compete with the United States and Japan. In addition, such a community is seen as providing access to political power in the international arena to which most member states otherwise would have significantly less access. In this process, all member states and all segments of society expect to benefit.

The Community's competition law plays a key role in achieving these goals. It is seen as a constitutional guarantee that the market that is the engine of political integration will function effectively and in ways that foster rather than impede political integration. It is expected to assure that private agreements are not used to erect or maintain boundaries within the Community or to preserve existing technological, organizational or financial advantages. Similarly, it is to prevent large enterprises from using their power to disadvantage competitors or harm consumers, suppliers or distributors. Finally, it seeks to prevent governmental power from being used to skew the economic, political or social development of the Community.

B. A Familiar Tale

The drive toward integration in Western Europe is also shaped and energized by the same basic story of economic and legal development in Western Europe to which the post-socialist world is referring. In the European Community context, the focus is on the latter part of the story, i.e., the role of European integration in the growing economic prosperity of the member states since the founding of the Community, but it is the same story.

The Community was created in order to achieve economic integration—a common market for Europe. Its founders were convinced that such economic integration would generate prosperity for the member states and that this prosperity would reduce social tensions and generate political stability.

This “integration around the market” was based on a new conception of the relationship between law and the economic system, for law had to create the conditions for a unified market. In particular, the competition law provisions of the Rome Treaty (articles 85 and 86) were in-

cluded in order to protect the central dynamic of the market—economic competition.

Although there have been periods of doubt about the Community's capacity to fulfill its founders' aim (as, for example, in the early 1980s) this process has been exceptionally successful. The economies of the member states have flourished, and living standards have improved dramatically. Moreover, these economic improvements have been spread equitably throughout all sectors of the population and among all member states of the Community. It is this law-based distributional component of the economic process that has generated the dynamic of political integration.

The success of this process has made membership in the Community highly attractive, and it has created the momentum to achieve a monetary and, ultimately, a political union. The Community has grown to twelve members, with many more clamoring for membership. The story has convinced most Europeans that they must continue to follow the path of "integration around the market."

Community competition law has played a prominent role in this success story, as the European Commission and the European Court have used it to eliminate obstacles to integration.⁹ Article 85 of the Rome Treaty has been used frequently, for example, to strike down private agreements designed to divide or segment the European market, and article 86 has been employed to prevent large enterprises from using their economic power to create obstacles to trade within the Community. Competition law consistently has highlighted the perception that law is at the center of the integrative process and that the relationship between law and the market has been the key to its success.

C. Functions of Story

This story of success has painted the image that is guiding the member states and those who seek to join the Community. The story is used to light the path of the future through the process of extrapolating from the past. Confidence in that story produces the energy to continue in the same direction.

That story also provides a language for the further integration of the Community. That language is characterized by the interpenetration of legal, economic and social justice concepts. The process of integration is

9. See generally Claus-Dieter Ehlermann, *The Contribution of EC Competition Policy to the Single Market*, 29 COMMON MKT. L. REV. 257 (1992).

itself understood as a legal-economic phenomenon as well as merely a political phenomenon.

As in Eastern Europe, this story has acquired mythic dimensions. It has become not merely a story, but an object of belief, and this belief, in turn, establishes the direction of the process of integration and influences the strength of that process. The perception that this story has a message for those making decisions today and in the future may well be critical to the success of that process.

III. PATTERNS AND USES

The analytical perspective presented here reveals as illusory the apparent contradiction between disintegration in the post-socialist world and integration in Western Europe. From this viewpoint, both processes are guided by the same powerful image of the relationship between law and economic competition and the same story of law's role in the economic reconfiguration of Western Europe.

The guiding image in both cases features a conception of law's roles that has evolved since the Second World War, initially in the context of German neo-liberalism. In this conception, law is to be used to protect the process of economic competition from impairment and distortion by holders of political and economic power. Whereas prior thought generally viewed the economy with little reference to law and law as a form of government intervention, this new conception of law's relation to the economy portrays legal processes as shaping and protecting the conditions necessary for the market to operate effectively. Law functions here as a constitutional framework for the economy, and the belief that it can function effectively as such is impelling integration in both Eastern Europe and in the European Community.

The same basic story of law's role in postwar Europe structures both these images. In it, wealth creation, community integration and social equity are not only compatible, but interdependent, and the use of law to protect competition not only creates wealth, but also fosters community integration and social equity. This story supplies the elements of an image that is guiding development.

This perspective on development in Europe and the post-socialist world provides insights that more traditional perspectives often fail to provide or merely adumbrate. To identify and analyze the story that animates and impels economic and policy developments is to reveal the dynamics of these processes rather than merely to describe or to interpret them according to conventional assumptions. It also provides a vantage

point from which we can better perceive the direction of current and future developments, assess and gauge their progress and predict the consequences of particular events or circumstances on them.

The close association between economic competition and the processes of social and political integration in the guiding story suggests that using law to create and maintain the conditions for effective economic competition will be a primary policy goal in both Europe and the post-socialist world. In particular, the competition laws enacted in the post-socialist countries are likely to be strengthened and enforced with increasing intensity, and the European Community is likely to continue to use competition law as an important tool of integration.

In both cases, the imperative of community integration is likely to generate particular attention to communitarian values. In Eastern Europe this is likely to mean, for example, that competition laws will target reducing prices to consumers on staple goods and creating opportunities for smaller businesses. In the European Community context, it is likely to mean that competition law will focus on reducing the capacity of national governments to influence the competitive process and thus disrupt the integration of the market.

This narrative-image analysis also helps assess the strength of these integrative processes. The story will continue to guide conduct only so long as it is considered both valid and applicable. If the Western European countries falter seriously or the process of Western European integration stalls, the force of the story they represent will diminish. Similarly, political or economic developments within the post-socialist world may make the situation in those countries appear less comparable to the story they are following, and to that extent its force is likely to be reduced.

Finally, this perspective reveals mistakes and distortions in the prevailing views of these developments. For example, it is common in the United States to assume that the post-socialist countries want to be like the United States and that their turn to the market is a turn toward *laissez-faire*. This results from interpreting words and actions by reference to the viewer's assumptions rather than by reference to the story or stories to which they are related in the eyes of those using them.

The discourse currently structuring thought and action in the post-socialist world does not call for *laissez-faire* capitalism. The market is central to it, but it views the market as necessarily imbedded in a legal-constitutional framework reflecting the imperatives of societal integration—particularly, fairness, social equity and community responsibility.

Each of these uses of narrative-image analysis has practical importance not only for legal and economic analysts, but also for policymakers and legal practitioners. Policymakers can fashion effective policies, for example, only if they understand the dynamics of the circumstances to which they must respond. Similarly, a legal practitioner's value is enhanced to the extent that she recognizes the roles played by law in different countries, the probable direction of legal and economic developments and the likely impact of events on those processes.

In this Essay I have sought to demonstrate the potential value of analyzing a dimension of law often overlooked. Law is more than norms of conduct. Legal processes are enmeshed in the construction and maintenance of communities. They create, represent and transmit values, goals and interpretations of reality, and thus they influence, often decisively, the ways in which peoples and groups see themselves and their worlds. We in law schools and in the legal profession often simply do not perceive the variety of law's roles, and to the extent that we do not, we view our missions too narrowly and our professional lives too prosaically.