Enlargements, and Displacements of Social Europe: the Example of Sweden

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EU law – Investigating the displacement of Social Europe at moments of EU enlargement – Sweden as an example of how Social Europe can be displaced – Enlargement of 1995 and austerity policy – Enlargement of 2004 and posted workers – Enlargement of 2007 and 'vulnerable' EU-migrants

Introduction

What do EU enlargements reveal about the displacement of Social Europe? The specific lens through which this question will be investigated in this article is Sweden. Sweden has a GDP per capita above the EU 28 average and a historic domestic commitment to social protection through the construction of one of the strongest examples of a universalist welfare system, as well as a system of labour law that has relied on peaceful collective bargaining.[1]

Does this domestic pledge to a comparatively high level of social protection translate to European engagement in the progressive construction of a Social Europe? I will illustrate how moments of EU enlargement reveal that this is not necessarily the case.

The conception of Social Europe that I use is primarily legalistic, namely an understanding of Social Europe as a primary and secondary law net of social

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[1] G. Esping-Andersen, *The Three Worlds of Welfare Capitalism* (Princeton University Press 1993) p. 27-28. Esping-Andersen described the regime-cluster where Sweden figured as the one in which 'the principles of universalism and de-commodification of social rights were extended also to the middle-class. … All benefit; all are dependent; and all will presumably feel obliged to pay.' For a nuanced assessment of this history *see* J. Andersson, 'Nordic Nostalgia and Nordic Light: the Swedish model as Utopia 1930-2007', 34 *Scandinavian Journal of History* (2009) p. 229.

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protection, aimed at all EU citizens.[2] Even though 'Social Europe for Workers' certainly captures the core of this body of social law, I will include protection of free movement for all EU citizens as well.

I will look at the way in which this body of social law could be understood as displaced within the EU project. Claire Kilpatrick explains how 'displacement' captures both how something may be understood as moved elsewhere or as being replaced, as well as the way in which something is missing, threatened or made vulnerable.[3] I argue that one fruitful way of investigating such displacement is to look at the contestation of the very basic notion of a Social Europe which protects all EU citizens, especially at moments when the number of citizens changes. Moments of enlargement, or for that matter withdrawals, represent fundamental changes in the number of collective interests at play, most importantly expressed as national interests and interests related to socio-economic factors. In this article, I will study what such changes may reveal about the (dis)placement of Social Europe within the broader European integration project.

This Swedish case study specifically serves to highlight the way in which a gap between a national and an EU commitment to social protection by the same country might shed light on certain unexpected dynamics corroborating the displacement of Social Europe.[4] Indeed, the notion that historically strong social democracies would straightforwardly externalise their commitment to social protection has been assumed in the past. For instance, Willy Brandt, the social democratic chancellor of Germany between 1969-1974 and a committed European integrationist advocated inclusion of the Scandinavian countries, believing that this would solidify the EEC in a social democratic tradition, especially through strong trade union participation. Brandt thus assumed that such an enlargement would strengthen Social Europe.[5] Did he miscalculate the effects of northward enlargement?

[2] Examples of such social protection, mainly but not only aimed at working people, are Directive 2006/54/EC on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast); Council Directive 93/104/EC concerning certain aspects of the organisation of working time; Council Directive 96/34/EC on the framework agreement on parental leave concluded by UNICE, CEEP and the ETUC.

[3] For a fuller explanation of this definition *see* C. Kilpatrick, 'The Displacement of Social Europe: A productive lens of inquiry', in this special issue. Kilpatrick goes on to explain how one of the 'key aims of analyses focusing on displacement is to test the persuasiveness of different *explanations* and *evaluations* of Social Europe developments. In so doing, it is also to ask about the conditions under which Social Europe might find new ways to flourish in the contemporary EU'.

[4] I suggest that one interesting way of learning more about displacement would be to proceed in this way for every member state.

[5] S. Schirmann, 'Willy Brandt et les débuts de l'Europe sociale, 1969-1974', in A. Wilkens (ed.), *Willy Brandt et l'unité de l'Europe: De l'objectif de la paix aux solidarités nécessaires* (P.I.E. Lang 2011) p. 311-324; *see further* A. Andry, 'Social Europe in the long 1970s: the story of a defeat' (EUI PhD 2017).

I will provide an answer to this question by tracing the posture of Sweden on Social Europe through legislation, official government material such as reports and commission inquiries, but also through public debates and commentary, specifically as related to the so-called EFTA enlargement in 1995 when Finland, Sweden and Austria joined the EU; the enlargement of 2004 which brought Estonia, Latvia, Cyprus, Czech Republic, Hungary, Lithuania, Malta, Poland, Slovakia and Slovenia into the EU; and ultimately and by way of conclusion the enlargement of 2007, when Romania and Bulgaria joined the Union.

I will seek to construct three thematic examples of the way in which these enlargements may reveal something about how Social Europe can be displaced. The first theme relates to the 1995 enlargement. It concerns the way in which the EU, in the run-up to the introduction of the Euro, represented a financial policy vision reliant on privatisation and cutbacks in public spending and the way that Sweden, when embracing membership in the early 1990s, adopted that vision as the best solution for overcoming the financial crisis it was in at the time. This vision was adopted in spite of the repercussions for working people and welfare state services. I will thus trace what later emerged as economic orthodoxy in the 2008 economic crisis, to the Swedish discourse concerning its own enlargement of the then EC.

The second theme is drawn out of the circumstances of the 2004 enlargement and centres on a quest for status quo in the face of fundamental change. The Swedish position on the posting of workers regime will be understood as a failure to compromise for the sake of achieving new strategies for transnational social protection in the EU. In much, albeit not all, mainstream analysis of the *Laval* judgment and its aftermath, the Swedish labour system has been depicted as a casualty of the internal market.[6] I will add nuance to this framing by showing that amidst fundamental change in member state constellations, Sweden has managed to steer the European posting of workers law in a direction which fits the needs of Swedish construction workers, rather than a broader community of European workers.

Lastly, I will turn to the enlargement of 2007 and the way in which Sweden has favoured bilateral agreements over EU primary and secondary law sources as the best method for addressing the social protection of 'vulnerable' citizens from Romania and Bulgaria. While arguing against equal treatment in access to social protection for migrating 'non-economically active' EU citizens in the European Court of Justice's *Dano* and job-seekers in *Alimanovic*, Sweden simultaneously adopted bilateral agreements with Romania and Bulgaria addressing the social

[6] Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services and ECJ 18 December 2007, Case C-341/05, *Laval un Partneri Ltd* v *Svenska Byggnadsarbetareförbundet*.

protection of what official government materials indicate are the same group of EU citizens.[7] I will seek to show that the Swedish reaction to the 2007 enlargement reveals a displacement of a Social Europe that would protect the poorest EU citizens through EU law, while consistently appreciating the need for strengthened social protection of this group of people.

The enlargement of 1995 and the placement of austerity policy

The entry of Sweden, Finland and Austria enlarged the EU from 12 to 15 Member States. It was referred to as the EFTA enlargement, even though the remaining EFTA member, Norway, ultimately voted no. This enlargement occurred on Jacques Delors' watch as President of the European Commission. Known for having pushed European integration forward by overseeing the creation of the single market (1986) and the Maastricht Treaty, Delors also emphasised the importance of both the continuous construction of a Social Europe and social dialogue in Europe.

The period during which the 1995 enlargement was negotiated is a good juncture from which to assess the direction of the EU from the perspective of EU legal and constitutional developments. Appraising this through the lens of the Swedish position concerning the approaching enlargement of the Union in which it would take part, it is noteworthy how strikingly focused it is on Economic and Monetary Union.[8]

It is probably true, as is often suggested, that the fall of the Berlin wall represented the loss of the 'neutrality' argument, which had long been used by the Swedish Social Democratic Party to morally motivate staying out of the EC. However, the context in which EC membership was first suggested is telling in terms of the positive arguments put forward for membership.[9]

Sweden was in deep financial crisis during the early 1990s. Public debt was at 75% of GDP in 1993, high interest rates were hurting private homeowners, GDP growth rate was negative and EC membership was seen as one way out of this financial crisis. During the Autumn of 1990 the intention to seek EC membership was first announced by the Social Democratic government as one measure among others in an economic austerity program.[10]

[7] ECJ 11 November 2014, Case 333/13, *Dano* v *Jobcenter Leipzig* and ECJ 15 September 2015, Case 67/14, *Jobcenter Berlin Neukölln v Alimanovic*.

[8] At the time of the 1995 enlargement the Maastricht 'convergence criteria' were already in place and the Stability and Growth Pact had already been negotiated, albeit it was not in force.

[9] *See further* J.F.L. Ross, 'Sweden, the European Community, and the Politics of Economic Realism', 26 *Cooperation and Conflict* (1991) p. 117 and P. Luif, *On the road to Brussels: the political dimension of Austria's, Finland's, and Sweden's accession to the European Union* (Purdue University Press 1995) p. 122.

[10] In Regeringens skrivelse Proposition 1990/91:50 and it is also stated in the memoirs of Ingvar Carlsson, who was prime minister at the time, see I. Carlsson, *Så tänkte jag* [*My Thoughts*] (Hjalmarson & Högberg 2003) p. 409.

The Swedish government's (first Social Democratic then Centre-Right) view of EC/EU membership between 1990-1994, leading up to the referendum, was essentially constructed as an economic argument. Both the Social Democratic and Centre-Right governments insisted on the importance and benefits of adapting to the Maastricht convergence criteria, specifically to cut public spending and privatise the public sector (albeit privatisation by varying degrees).[11] The impetus was not merely, as is continually repeated in government reports, for the sake of obeying future EU rules in the event of membership, but because these structural reforms were considered the right and necessary politics for Sweden as a means of recovering from a financial crisis.[12]

These economic assumptions should be looked at as part of a broader trend. Adopting a global outlook on this economic tendency, Nancy Fraser describes how from the 1980s on:

> prescient observers could discern the emerging outlines of a new regime, which would become the financialized capitalism of the present era. (…) The major driver of these developments, and the defining feature of this regime, is the new centrality of debt. Debt is the instrument by which global financial institutions pressure states to slash social spending, enforce austerity, and generally collude with investors in extracting value from defenceless populations.[13]

It is therefore important to point out that the sharp decrease in public sector jobs in Sweden between 1993 and the present day, as well as the direction the Swedish welfare system took towards privatisation, is not, I argue, best described as simply a result of EU membership.[14] Sweden did, however, embrace the economic rationales of Economic and Monetary Union as a method for overcoming fiscal crisis and therefore from the outset accepted the idea of macro-economic austerity politics at the EU level. Sweden arguably consolidates, rather than questions, a specific view of what EU macro-economic policy should look like – all of which happens, as Fraser points out, in the context of a broader shift.

In 2003 Sweden voted 'no' to joining the third stage of Economic and Monetary Union, which commenced in 1999, and entailed namely the introduction of the Euro currency. Sweden therefore finds itself in a unique position as the only member

[11] The principal document is the sizeable committee inquiry, SOU 1994:6, Sverige och Europa en samhällsekonomisk konsekvensanalys. For debate on this inquiry *see* P. Lundborg, 'Tro och vetande i EU-konsekvensutredningen', 22 *Ekonomisk Debatt* (1994) p. 127 and M. Baimbridge *et al.* 'Välfärdsstaten och Maastrichtfördraget–konsekvenser för Storbritannien och Sverige', 23 *Ekonomisk Debatt* (1995) p. 399.

[12] *See* Proposition 1994/95:100, bilaga 1, p. 24 and Proposition 1994/95:150, bilaga 1, p. 4.

[13] N. Fraser, 'Contradictions in Capital and Care', 100 *New Left Review* (2016) p. 99 at p. 112.

[14] In 1993 45% of the Swedish working population was employed in the public sector, in 2016 it was just under 30%.

state that implemented the budget rules of the first two stages of Economic and Monetary Union (initiated in 1990 and 1994 respectively) but later rejected the common currency in a referendum, while (unlike the UK and Denmark) never signing an opt-out agreement from Economic and Monetary Union.

This position, which combines scepticism towards EU integration while affirming EU-level austerity budget rules, was again discernible during the Eurozone crisis.[15] Fast forward to the period between 2009 and 2015, and two consecutive Swedish governments showed support for austerity policies regulated through bailout loan conditionality in other member states such as Greece, Ireland and Portugal.[16] In 2013 the Swedish Prime Minister Fredrik Reinfeldt (Centre-Right government) spoke to the Swedish *Riksdag* on the Eurozone crisis: 'we need to be clear about (our position) when everyone is calling for investments in social protection around Europe, our main concerns is who they ('southern Europe') think should pay the bill.'[17] From 2015 onwards the Social Democratic/Green Party government used more moderate rhetoric, while still supporting the idea that bailouts should be made conditional upon the introduction of austerity politics – often referring to what Sweden 'learned in the 1990s'.[18]

Ensuring that the legal protection offered by Social Europe was guaranteed in countries such as Greece, Portugal and Ireland during these years of severe economic distress was not a policy consideration for the Swedish Centre-Right and Social Democratic/Green Party governments in power between 2008 and 2015. Did Sweden give Social Europe any consideration before membership, when Sweden itself was experiencing a financial crisis?

I would argue that the Swedish discourse in that period, as formulated in doctrine and by the government in a series of preparatory works, very rarely posited the idea of an affirmative legislative agenda for Social Europe, notwithstanding Delors' ongoing work on the Social Pillar.[19] Prior to Community membership, the

[15] In 1997 29.6% were 'largely positive' on EU-membership, in 2007 that number was 49.9% and in 2017 54.5%. In 1997 22.9% of the Swedish population was 'largely positive on introducing the Euro currency', 2006 that number was 35.5% and in 2017 this number was 18.9%: Statistiska centralbyrån; www.scb.se, accessed on 5 October 2017.

[16] C. Kilpatrick, 'Are the Bailouts Immune to EU Social Challenge Because They Are Not EU Law?', 10 *EUConst* (2014) p. 393. Kilpatrick summarises the measures taken as a result of the bailouts as 'extensive cuts to, or limitations in who can access, health and education provision; reduced access to and levels of pensions and other social benefits; reductions in the size and pay of the public sector; a decentralising and dismantling of collective bargaining; cuts to minimum wages and related employment safety nets for vulnerable workers; and reduced employment protection'.

[17] Sveriges Riksdag, Föredragningslista 2012/13:52.

[18] T Lundin, 'Svenska pengar kan användas till nödlån' [*Swedish money could be spent on bailouts*], *Svenska Dagbladet*, 14 July 2015.

[19] K. Ketscher, 'Kvinnor, jämställdhet och socialförsäkring i EU', 2 *Tidskrift för genusvetenskap* (1994) p. 37.

government committee report which focused specifically on the effects on the Swedish welfare system found that most of the minimum standards offered by Community rules would presumably be below the Swedish standard anyway. However, it added that if the Swedish economy continued to plummet as a result of the financial crisis it would in that case be possible to resort to the Community standard.[20]

The preparatory works thus introduce the notion that Social Europe would provide some form of social protection guarantee of last resort. This perspective, while arguably reductionist, did not reappear during the years when fiscal crisis was a fact of life in other countries.[21] I would therefore be sceptical of any depiction of a Sweden that, by enlarging the Community and by virtue of its national political tradition, had straightforwardly strengthened Delors' case for a more Social Europe – one favoured by some writers.[22]

In the early 1990s, Sweden's orientation towards austere EU-level macro-economic policies is a harbinger of sorts, during a period when the EU performed a double role of both working towards a strengthened Social Europe for workers,[23] while in the same historical context instating a form of financial politics with long-term consequences for European workers.

The enlargement of 2004 and displaced transnational workers' protection

The EU expanded from 15 to 25 Member States in 2004. In its election manifesto for the 2004 European Parliament elections, the Swedish Social Democratic Party, at that point in government since 1994, celebrated the 'eastward enlargement as a project of justice and cooperation', but the main election promise was that 'poverty in new Member States should not be used to force diminished labour protection and weaker collective agreements on Sweden'.[24]

[20] Fi 1993: 06, EG-konsekvensutredningarna Samhällsekonomi och Social välfärd av Stefan Fölster och Eva Lindström Sveriges offentliga sektor i europeisk konkurrens: konsekvenser av EES-avtalet och medlemskap i EG/EU.

[21] Kilpatrick, *supra* n. 16, p. 393.

[22] P. Manow, et al., 'European Social Policy and Europe's Party-Political Center of Gravity, 1957–2003', MPIfG Discussion Paper 04/6 (2006).

[23] For instance during the first part of the 1990s the following important secondary law instruments for social protection were enacted: Council Directive 92/85/EEC on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding; Council Directive 93/104/EC, concerning certain aspects of the organisation of working time; Council Directive 96/34/EC on the framework agreement on parental leave concluded by UNICE, CEEP and the ETUC.

[24] *See* <www.socialdemokraterna.se/var-politik/arkiv/val/europaparlamentsvalet-2004/>, visited 20 January 2018.

On 21 November 2003, the Social Democratic Prime Minister stated that Sweden wanted 'freedom of movement for workers, but not social tourism, we cannot be naive' when discussing the 'eastward' enlargement.[25] Shortly thereafter the Government announced its intention to seek transitional rules for workers from the new Member States, except for Malta and Cyprus. The concern was articulated as relating to 'an increase in workers from the new member states' without Sweden being able to 'maintain working standards in accordance with Swedish collective agreements equal to what a Swedish worker would be guaranteed in an analogous situation.'[26] After thorough debate, this government proposal never became law.[27]

The idea of ensuring that the Swedish system of collective bargaining should remain rigorously unmodified notwithstanding EU membership is also represented in the preparatory act to the legislation implementing the Posted Workers Directive of 1996. In Sweden, the minimum wage is established in collective agreements and not by legislation. The drafters of the Posted Workers Directive, with *inter alia* the Swedish situation in mind, therefore introduced a mechanism, Article 3.8, whereby collectively bargained *national* sector-specific minimum wage standards could be 'universalised' and applied to posted workers. Sweden, however, did not use the option provided for in Article 3.8.

What might explain this choice by the Swedish government? The preparatory works somewhat obliquely state that 'the current system is sufficient'.[28] However, the specific context is important. It should be pointed out that most posted workers are active in the construction sector.[29] In Sweden, within the construction sector, the social partners bargain *locally*, often per construction site, not nationally. Moreover, just like the disputed construction site in *Laval* (I will soon turn to the facts of the case), the vast majority of posted workers are stationed in the Stockholm region, where salaries were (and are) higher than in the rest of

[25] 'Tidningarnas Telegrambyrå, Göran Persson orolig för "social turism"' [*Göran Persson worried about 'social tourism'*], *Aftonbladet*, 23 November 2003.

[26] *See* the opinions produced by the government: Regeringens skrivelse Proposition 2003/04:119, Särskilda regler under en övergångsperiod för arbetstagare från nya medlemsstater enligt anslutningsfördraget.

[27] The prime minister's use of 'social tourism' created an unlikely alliance between the Left Party and the Centre-Right parties, with both sides turning against the xenophobic undertones of the term and voting against the proposal. *See* the transcript of a debate in the parliament's social security committee; Betänkande 2003/04:SfU15, p. 29 and 85.

[28] Proposition 1998/99:90, Utstationering av arbetstagare, page 25-27.

[29] In 2015, of the 42,697 workers registered as posted to Sweden from all over the world, 36,832 came from the EU. Out of these 42,697 individuals, 22,950 were registered as working within the (broadly defined) construction sector, which is therefore by far the most common sector for posted workers, followed by computer programming.

Sweden.[30] This may help explain the incentive to insist on local rather than sector-specific national collective agreements. One of the most prominent Swedish labour lawyers, the late Tore Sigeman, described the implementation strategy as 'disputable'.[31]

In November 2004, Swedish implementation of the Posted Workers Directive was put to the test at a construction site outside Stockholm when workers from an EU member state of seven months' standing, Latvia, together with their employer *Laval*, refused to sign a *local* collective agreement presented to them by the Swedish Builders Union (*Byggnads*), which would have provided the same level of pay and workers' benefits afforded to Swedish workers working on that same site. What unfolded was a situation in which the European Court of Justice ultimately declared the collective action taken, namely a lockout hindering Latvian workers from entering the construction site, to be disproportionate and therefore an unjustified infringement of the freedom of movement of services.

Reading *Laval* as a case where the European Court of Justice legally construed the freedom to provide services as being weightier than the right to take collective action led many to note, in no uncertain terms, the end of an era.[32]

In 2010, in response to *Laval*, the Swedish government, at that point Centre-Right, reformed the rules guiding collective action and posted workers to specifically state that collective action can only be lawful if taken to enforce a *national* collective agreement pertaining to a certain industry. Moreover, any collective action would be unlawful if the posted worker could show that such a *national* agreement had been entered into (this came to be known as 'the proof rule'). This meant that according to *Lex Laval* it was in principle never lawful to take collective action to enforce a *local* collective agreement (as *Byggnads* had done in *Laval*).

In 2012, the same Swedish government asked a parliamentary committee to evaluate *Lex Laval* a mere two years after it was enacted.[33] The results were presented in 2015 and were under review by a sizeable number of experts and stakeholders until April 2017, when the Swedish *Riksdag*, as proposed by the then Social Democratic/Green Party government, voted to repeal *Lex Laval* and in principle (however, in vague terms) to reinstate the right to collective action to

[30] Arbetsmiljöverket, Helårsrapport 2015, Register för företag som utstationerar arbetstagare i Sverige.

[31] T. Sigeman, 'Fackliga stridsåtgärder mot gästande tjänsteföretag – EG-rätten förtydligad', *SvJT* (2008) p. 553 at p. 567 (emphasis added).

[32] The most eloquently entitled example being C. Barnard, 'Social dumping or dumping socialism', 67 *Cambridge Law Journal* (2008) p. 262.

[33] SOU 2015:13 Tillämpningsdirektivet till utstationeringsdirektivet, Del I and SOU 2015:13 Tillämpningsdirektivet till utstationeringsdirektivet, Del II.

enforce *locally* bargained collective agreements.[34] The new law entered into force on 1 June 2017.

It is elucidating to understand this seven-year process of national parliamentary work, which ultimately led to the restoration of the pre-*Laval* order regarding collective action, as running parallel to the Social Europe legislative context.

In 2012 (as in 2011) the Swedish *Riksdag* issued the highest number of Reasoned Opinions under Protocol No. 2 to the Lisbon Treaty in the whole EU.[35] One of these opinions (which should state why a national parliament considers a draft piece of EU legislation to be noncompliant with the principle of subsidiarity) concerned the Monti II Regulation. The regulation, long underway, was constructed so as to address the question of the right to strike in the context of freedom of movement.[36] Monti II triggered a total of 12 such Reasoned Opinions, enough for a 'yellow card,' and the Commission, without agreeing with the arguments advanced in the Reasoned Opinions, withdrew the proposed Monti II Regulation.[37]

There were two main Swedish arguments for why a proposal that aimed to transnationalise collective action breached the principle of subsidiarity. First, the regulation's Article 2, which established that the right to strike and the fundamental freedoms of service and establishment were of equal weight, would not make the applicable law any clearer. Second, the alternative dispute resolution mechanism in Article 3 would jeopardise the 'well-functioning Swedish system'.[38] This reasoning appears oblique, but might be explained as resulting from a combination of disinterest in new forms of collective action on the part of the Centre-Right and a desire to maintain the Swedish *status quo* on the part of Social Democratic parliamentarians.

While still opposing Monti II, the Swedish government (Social Democratic/Green Party) has sustained the EU Commission's proposal for the revised Posted Workers Directive presented in early Spring of 2016.[39] This proposal, while imposing new regulations on temporary work agencies and sub-contracting, also

[34] The Social Democratic/Green Party Government achieved a majority in the *Riksdag* with support from the xenophobic right-wing Swedish Democrats. For voting records, *see* < www.riksdagen.se/sv/dokument-lagar/arende/betankande/nya-utstationeringsregler_H401AU9 > , accessed 2 January 2018.

[35] Report from the Commission, Annual Report 2012 on Subsidiarity and Proportionality, Brussels, 30 July 2013 COM (2013) 566 final.

[36] COM (2012) 130: Proposal for a Council Regulation on the exercise of the right to take collective action within the context of the freedom of establishment and the freedom to provide services.

[37] These Reasoned Opinions came from Chambre des Représentants, Folketing, Eduskunta, Sénat, Saeima, Chambre des Députés, Kamra tad-Deputati, Tweede Kamer, Sejm, Assembleia da República, House of Commons, and Riksdag.

[38] Arbetsmarknadsutskottets utlåtande, 2011/12:AU14, Subsidiaritetsprövning av förslag till Monti II-förordning.

[39] Proposal for a Directive of the European Parliament and of the Council amending Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services, COM(2016)128.

contains a provision which would make it possible to demand that posted workers should be guaranteed *locally* negotiated pay standards and benefits. When in June 2016 Bulgaria, Estonia, Croatia, Latvia, Lithuania, Poland, Romania, Slovakia, The Czech Republic, Hungary and Denmark opposed the revised Posted Workers Directive draft, again amounting to a yellow card, the Commission simply stated that the posting of workers regime is transnational in nature and hence the subsidiarity principle by definition cannot be violated in this instance.[40] The Swedish government, pleased with the Commission's decision to not consider the 'yellow card', urged it to continue working on its proposal for the revised Posted Workers Directive.[41] In October 2017 the European Council largely agreed on the Commission's proposals, including the proposal which would make it possible to demand locally negotiated pay standards and benefits.[42]

In the meantime, as we know, the Swedish government went ahead and repealed *Lex Laval* while the revision of the Posted Workers Directive was still in progress. It is possible to argue that the Swedish law that entered into force in June 2017 is compatible with the proposed revised Posted Workers Directive. However, its compatibility with the Posted Workers Directive currently in force is more questionable, since the new Swedish law still does not ensure that there is a sector-specific national collective agreement in place for posted workers. Rather than the end of an era, it appears that the Swedish preference is prevailing.

What is behind this strong resistance to EU proposals for transnational collective bargaining? What is the motivation behind the positions taken – first, when implementing the Posted Workers Directive; then when repealing *Lex Laval*; and finally, when supporting the revision process of the Posted Workers Directive – implying that that *national* collective agreements are not enough to protect workers who live in Sweden as well as workers who are posted in Sweden from another member state country?

The sociologist Anders Neergaard has written about trade unions and migration in Sweden and his work offers a valuable contextual illustration of the way in which the Swedish position on posted workers might have been a lost opportunity for achieving actual solidarity among a broader category of workers. Neergaard uses the concept of 'imagined solidarity', relying on Hyman, who in turn has written that trade unions 'are agencies whose role in the aggregation of interests may also involve the (re-)distribution of gains and losses: not only between workers and employers but also among workers themselves. Typically,

[40] *See* < www.europa.eu/rapid/press-release_IP-16-2546_en.htm > , visited 2 January 2018.

[41] T. Nandorf, 'Ett steg närmre svenska avtal för utländska arbetare i EU' [*One step closer to Swedish agreements for foreign workers in the EU*], Dagens Nyheter, 2 December 2016.

[42] General Secretariat of the Council, 13612/17, Brussels, 24 October 2017. With this agreement the Council can start negotiations with the European Parliament.

the definition of union-relevant interests has systematically reflected the existing distribution of power within the working class.'[43]

Neergaard carefully traces the position of the various Swedish trade unions within the Swedish Trade Union Confederation, which is closely linked to the Social Democratic Party,[44] and describes how these Unions, amidst a decrease in membership, have each chosen different ways to approach workers from other countries.

Neergard describes how the defendant in *Laval*, the Builders Union (*Byggnads*), holds a very strong position within the Swedish Trade Union Confederation due to a historically high level of organisation, the highest pay levels within the Confederation, and because it is composed almost exclusively of white men (11% of its members are born outside Sweden and 1% are women).[45] As described earlier, most posted workers are active in the construction sector and a vast majority of these are posted in Stockholm where construction wages are higher than in the rest of Sweden (regional pay differences amount to around €2 per hour); the locally negotiated collective agreement is very much a central focus of *Byggnads*.[46] This is in contrast to *Kommunal* for instance, a trade union triple the size of *Byggnads*, which organises public sector workers but bargains nationally and consists of 80% women. The members of *Kommunal* make on average €700 a month less than the members of *Byggnads*.

The overall Swedish strategy on the Posted Workers Directive, while often depicted in Social Democratic political communications as a means of saving the 'Swedish model', arguably caters to the interests of a relatively specific fraction of workers.[47]

[43] R. Hyman, 'Imagined Solidarities: Can Trade Unions Resist Globalization?', in P. Leisink (ed.), *Globalization and Labour Relations* (Edward Elgar 1999) p. 98.

[44] Informally described as the 'two legs of the Swedish workers' movement'. The Trade Union Confederation contributes financially to the Social Democratic Party and the leader of the TUC is also automatically a member of the SDP's executive board. L. Hennel, '70-miljoner i LO-stöd till S' [*70 million in TUC support to SDP*], *Svenska Dagbladet*, 5 February 2014.

[45] A. Neergaard, 'Det fackliga löftet: solidaritet, fackföreningsrörelse och arbetskraftsinvandring, Arbetskraft från hela världen' (Delmi Rapport och Policy Brief 2015:9) p. 219.

[46] According to *Byggnads* own statistics, *see* <www.byggnadsarbetaren.se/2017/06/har-ar-lonetoppen-2016/>, visited 2 January 2018.

[47] During the 2009 European parliamentary election, four out of seven election posters advertising the Social Democratic Party were related to protection of the Swedish labour market model. They read; 'Fair working conditions!', 'Unfair working conditions is not the answer!', 'Work first!', 'Avoid job crises!'. Out of the four national posters advertising the Social Democratic Party in the European parliamentary election in 2014, three related to the protection of the Swedish labour market model ('Vote for fair conditions', 'Swedish salary for everyone in Sweden', 'Do you think that jobs are important?'): *see* <www.socialdemokraterna.se/var-politik/arkiv/val/>, visited 20 January 2018.

This is a very close look at the heart of the Swedish position. *Laval* has habitually been framed as a clash between the social and the economic within the EU, implying that the social argument was displaced or indeed lost.[48] I argue that if you look more closely at what in such accounts has been described as 'the social', what is displaced is an all-embracing approach to the protection of European workers, to the benefit of a specific group of Swedish workers.

Importantly, however, the Swedish preference for the status quo and against moving towards new solutions for enhanced transnational collective action needs to be taken in context. For instance, the Swedish position could be read as an example of resistance to the constitutionalisation of worker's rights as explained by Judy Fudge.[49] The traditional Swedish method of collective bargaining, which is heavily reliant on negotiation rather than on the judicial resolution of labour conflicts, was backed into something of a corner by the Court of Justice's fundamental rights conceptualisation in *Laval*. To some extent, this rights approach was also relied upon in the failed Monti II Regulation, in which the core legal technique was the achievement of a just balance between the fundamental freedoms of movement and the fundamental right to collective action.

It should also be remembered that while the Court turned *Laval* into a clash of fundamental rights, it never operationalised the national constitutional identity justification, even though the right to take collective action was separately protected under Article 2.14 of the Swedish constitution *Grundlagen*. This stands in contrast with the fact that the European Court of Justice has on occasion used the concept of constitutional identity to justify a limitation on a fundamental freedom without, as was the case in *Laval,* the concept having been mentioned in the preliminary reference from the national court. The most prominent examples of this are *Omega* concerning German human dignity and laser dome games, *Dynamic Medien* concerning German rights of the child and commercials, and *Sayn-Wittgenstein* concerning Austrian equal treatment and noble names.[50] In sum, the European Court of Justice's fundamental rights conceptualisation in *Laval*, I would argue, was not fine-tuned enough to satisfactorily address all the aspects of the legal conflict.

[48] P. Syrpis and T. Novitz, 'Economic and Social Rights in Conflict: Political and Judicial Approaches to their Reconsiliation', 33 *European Law Journal* (2008) p. 411; S Giubboni, 'Social Rights and Market Freedom in the European Constitution: A Re-Appraisal', 1 *European Labour Law Journal* (2010) p. 161; R Nielson, 'Free Movement and Fundamental Rights', 1(1) *European Labour Law Journal* (2010) p. 19.

[49] J. Fudge, 'Constitutionalizing Labour Rights in Canada and Europe: Freedom of Association, Collective Bargaining, and Strikes', 68 *Current Legal Problems* (2015) p. 267.

[50] ECJ 14 October 2004, Case C-36/02, *Omega Spielhallen* v *Oberbürgermeisterin der Bundesstadt Bonn*; ECJ 14 February 2008, Case C-244/06, *Dynamic Medien* v *Avides Media AG*; ECJ 22 December 2010, Case C-208/09, *Sayn-Wittgenstein* v *Landeshauptmann von Wien*.

Perhaps if the European Court of Justice in *Laval* had focused on the legally problematic Swedish implementation of the directive, which created a situation wherein no national sector specific standard was available, Sweden would have been prompted to address the conflict as a lack of social dialogue between workers from different EU Member States. The opportunity to address *Laval's* underlying socio-economic conflict by finding new modes of deliberation between social partners from different member states – with the view to *collectively* countering forms of exploitation of workers within the internal market – appears at this stage to have been displaced.

The 2007 enlargement – protecting 'vulnerable' EU migrants by replacing EU law with bilateral agreements

In 2007 Romania and Bulgaria joined the EU. Romania and Bulgaria have a GDP per capita of, respectively 48% and 52% below the EU average. Sweden, in contrast to the UK and Germany, never asked for transitory rules for citizens from Bulgaria and Romania. The Swedish Prime Minister (Centre-Right) motivated this decision by stating that 'we saw in 2004 that concerns about "social tourism" were exaggerated'.[51]

However, in 2014 Sweden's biggest newspaper broke the story that the Swedish government (Centre-Right) had secretly negotiated with Romania to try to make them use the EU funds they had received from the European structural and investment fund specifically to aid their citizens of Roma origin.[52] The Swedish minister responsible for this initiative maintained that the sharp increase in the number of Romanian and Bulgarian EU citizens of Roma origin begging in the streets of Sweden after the 2007 enlargement was an issue that immediately needed to be resolved. She expressed great frustration that the EU Commission had not earmarked the EU funds in the manner suggested by the Swedish government. The negotiations with Romania, according to the Swedish minister, stalled.

In 2015 the newly-elected Social Democratic/Green Party government established a Commission of Inquiry entitled 'Seeking a Future', which was directed at providing a strategy for 'vulnerable EU migrants', by which was meant Bulgarian and Romanian EU migrants without residence permits, 'a majority of whom are Roma.'[53] The introduction read, 'Over the last 100 years, Sweden has gone from being Europe's poorest country to being one of its richest, and with one

[51] Tidningarnas Telegrambyrå, 'Inga hinder för rumäner och bulgarer' [*No obstacles for Romanians and Bulgarians*], *Sydsvenskan*, 20 October 2006.

[52] J. Hökerberg, 'Hemliga förhandlingar om tiggarna i Sverige' [*Secret negotiations concerning the beggars in Sweden*], *Dagens Nyheter*, 8 April 2014.

[53] SOU 2016:6, Framtid sökes. Slutredovisning av nationella samordnaren för utsatta EU-medborgare, p. 10 and 19-20.

of the highest levels of welfare provision. When vulnerable EU citizens began begging on the streets (…), Swedish society was unprepared.'[54]

Together with this inquiry, and in line with the concerns expressed therein, in June 2015 the government signed a bilateral 'collaboration agreement' with Romania aimed at 'strengthening the cooperation in the field of social policy', stating that 'the cooperation will especially target our population groups most at risk.'[55] In February 2016, a 'letter of intent' was also signed with Bulgaria concerning cooperation on social policy.[56] Both bilateral agreements specifically identify four main areas for cooperation; 'children's rights, gender equality, social welfare and social security.'

These agreements do not appear to provide direct financial assistance but rather facilitate collaboration between social services and non-governmental organisations working with Roma rights, and articulate Swedish guidance on how EU structural funds should be used in Romania and Bulgaria.[57]

Aside from the Swedish governments' sustained interest in the way Romania and Bulgaria use their EU funds, the Commission Inquiry also addressed the applicable EU law and described it as 'developing', referencing the Grand Chamber decisions *Dano* and *Alimanovic*.[58]

In *Dano*, a Romanian citizen, Ms Dano, had applied for a non-contributory unemployment cash benefit in Germany, to which a German citizen in her position would have been entitled. Ms Dano was a legal resident of Germany under German law. The European Court of Justice held that Ms Dano could only claim equal treatment under EU law in terms of access to non-contributory cash benefits if she met the residence requirements expressed in the Citizenship Directive. The European Court of Justice ruled that she did not meet those requirements since she was unemployed and did not have sufficient recourse to means that would allow her to avoid becoming a 'burden' on the host state.[59]

In *Alimanovic* the claimant Nazifa Alimanovic was, unlike the claimant in *Dano*, a job-seeker. However, as in *Dano*, she applied for a non-contributory unemployment cash benefit. The European Court of Justice held that even if the Citizenship Directive protected her from expulsion due to being a job-seeker,

[54] SOU 2016:6, p. 13.

[55] *See* <www.regeringen.se/4903e6/globalassets/regeringen/dokument/socialdepartementet/social-omsorg/joint-statement_rovana-plumb_asa-regner.pdf>, visited 2 January 2018.

[56] *See* <www.regeringen.se/4903e6/globalassets/regeringen/dokument/socialdepartementet/social-omsorg/letter-of-intent-between-bulgaria-and-sweden-on-cooperation-in-the-area-of-social-policy.pdf>, visited 2 January 2018.

[57] Press release, Swedish government, <www.regeringen.se/pressmeddelanden/2017/09/asa-regner-till-rumanien-for-att-folja-upp-samarbetsavtal/ > , visited 2 January 2018.

[58] SOU 2016:6, p. 44.

[59] *Dano*, para. 74.

neither the Directive nor primary law precluded discrimination based on nationality in terms of access to this type of, it should be noted, *non-contributory* social assistance.[60] Nazifa Alimanovic was a Swedish citizen, as the European Court of Justice pointed out, of Bosnian origin.

The Swedish government intervened in *Alimanovic*, arguing that the Court should continue the restrictive reading of the Citizenship Directive that it had set out in *Dano*.[61] The Swedish government endorsed the position that discrimination based on nationality concerning access to non-contributory cash benefits should also be justified for EU citizens who are job-seekers and as such protected from expulsion under the Citizenship Directive.

The enlargement of 2007 reveals a developing, though already noteworthy, Swedish approach to the best forms of EU social protection for the poorest EU citizens. At the EU level, especially when it comes to the European Court of Justice's evolving free movement case law concerning 'non-economically active' or 'job-seeking' citizens, the Swedish government intervened in support of a restrictive approach. What emerges, albeit in a highly preliminary fashion, is a retreat from using the EU primary and secondary law structure to address issues of equal treatment in terms of access to social protection for EU citizens who migrate within the Union, a path, in contrast, chosen by the Italian government when it intervened in *Alimanovic*.[62]

Instead, the method favoured by two consecutive Swedish governments is to address the issue of social protection of 'vulnerable EU citizens', 'often of Roma origin', bilaterally with Romania and Bulgaria, by organising working groups with government representatives and supporting non-governmental organisations working with Roma populations, as well as encouraging Romania and Bulgaria to direct the EU funds that they receive to their Roma populations.

The results of these bilateral agreements are difficult to evaluate at this point, but the '07 enlargement nevertheless reveals a new form of engagement with the structure of Social Europe. The Swedish position appears to combine a consolidation of the

[60] Art. 14.4(b) of the Citizenship Directive. *See further* C. O'Brien, 'Civis capitalist sum: Class as the new guiding principle of EU free movement rights', 53 *Common Market Law Review* (2016) p. 937.

[61] The Swedish Government's written submission to the ECJ in Case C-67/14, *Alimanovic*, dated 27 May 2014.

[62] The Italian Government's written submission to the ECJ in Case C-67/14, *Alimanovic*, dated 19 May 2014 read in its conclusion: 'L'art. 45, paragrafo 2, TFUE in combinato disposto con l'art. 18 TFUE osta ad una disposizione di diritto nazionale che, per il periodo del diritto di soggiorno giustificato dalla finalità di ricercare lavoro e a prescindere dal collegamento con lo Stato membro ospitante, neghi senza eccezioni a cittadini dell'Unione che, quali persone, in cerca di occupazione, possono avvalersi del diritto alla libera circolazione, una prestazione sociale finalizzata a garantire la sussistenza e, allo stesso tempo, ad agevolare l'accesso al mercato del lavoro.'

trend of further stratifying the right to freedom of movement of people, with an effort to bilaterally improve the living condition of portions of the Romanian and Bulgarian populations. This trend, as well as an in-depth normative evaluation of its merits, I argue, should be the subject of further research as new material becomes available.

Conclusion

What has been depicted in this article are moments of one country's reflections on the Union as it grows to include new members. First, from the perspective of a new member itself, viewing the EU as an essentially economic project that promotes fiscal rectitude, alienating not only the domestic political left from the rationales of membership, but participating as a force for the consolidation of that very policy orthodoxy within the Union, with repercussions for workers and the welfare state citizenry.

Thereafter, post-2004, Sweden positions itself as a promoter of the status quo to the benefit of a fraction of its own working population, amidst fundamental change in *EUropean* society. When revisiting yet again the posting of workers topic, what is striking about the Swedish position is the way the process ultimately appears to have led to a return to Sweden's desired standstill in terms of preferring locally rather than nationally bargained collective agreements for posted workers.

With respect to the 2007 enlargement, while admitting the need for transnational coordination of the social protection of 'vulnerable' EU citizens through bilateral agreements with Romania and Bulgaria, Sweden rejects European Court of Justice-guaranteed equal treatment and free movement protection for what it argues is essentially the same group of people.

At moments of enlargement, the official Swedish position tells a story which runs counter to the conventional wisdom on the potential for undiluted externalisation of domestic commitments to social protection. Instead, 'fiscal responsibility', 'workers' protection' and the 'social protection of the vulnerable' might have different albeit interconnected meanings, depending on the context – Sweden or the EU. From the perspective of the states in the wealthy margins of the EU, changes in the constellation of member states reveal interesting details on how Social Europe can be displaced.