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Teach Cultural Differences in
the Global Economy

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I. INTRODUCTION

As a Belgian, I am sensitive to the variety of cultures existing in a given territory. In my country, there are, at least, three different cultures. People speak Dutch, French, and German—not to mention other languages spoken by immigrants coming from Europe or elsewhere.

The situation in Belgium is hardly different from that existing on the European continent elsewhere. In the European Union, three languages are used as working languages by the European institutions. And 24 are considered official languages—that is, languages that can be used in relationships between institutions and citizens.

That diversity is not limited to languages. It also finds an expression in the variety of attitudes people adopt vis-à-vis different sorts of issues to be addressed in society, including how relationships between business actors on economic markets should be handled. Scholars and practitioners involved in antitrust matters can only confirm how different approaches can be, throughout the world, when it comes to regulating competition.

II. JAPAN AND SUPERIOR BARGAINING POSITION

An example is the emphasis placed, in Japan, on the regulation of “Superior Bargaining Positions.” That concept refers to situations where, in transactions, one party is powerful and the other, weak. According to Japanese scholarship, such situations may give rise to a tendency, on the part of the powerful one, to constrain the weaker into acquiescing to conditions that would not be accepted were the latter not in a situation of dependency.

“Superior Bargaining Positions” are not regulated everywhere—and, where they are, the possible difficulties associated with regulating them are rarely dealt with under the rules of competition. The reason for such an attitude in many countries is that bargaining positions are generally analyzed as affecting vertical relationships, with no or little impact on competition. However, Japanese scholars, officials, and judges insist that, in their country, these bargaining positions should be regulated—and that that regulation should be integrated in the regime of competition law.

To understand that insistence, one must study the importance of social structure of Japan—what it is today, what it used to be in the past. Long an isolated island, Japan had to deal with the necessity of composing a society where the degree of inter-individual violence would remain under control. To that effect, the population was divided into categories forming a hierarchy. In that hierarchy, those categories were rather hermetic. Rare were the people

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authorized to rise to a superior class. Slipping to an inferior one—thereby making room available in upper categories—was easier.

In such a structure, behavior now qualifying as “abuse of power” was not infrequent. In substance, belonging to a superior category meant that you could coerce those under you. That sort of relationship is illustrated in stories and books about former Japan. Thus, an interesting testimony can be found in “Unbroken”—a film made by American producers and that many students may have seen. That film displays U.S. prisoners mishandled by the Japanese military during the Second World War. It also provides useful insights on relationships among Japanese themselves—on the type of relationship that existed between ordinary people and somebody belonging to a superior category. In the firm, the head of the camp is portrayed as behaving like an emperor with Japanese soldiers playing the role of servants.

That structure, as it existed in former Japan, was altered when, after the Second World War, the United States imposed in Japan western-like rules, including antitrust laws. Beforehand, competition was prohibited—at least between people belonging to socially different categories. Across categories, dependency was the norm. This changed drastically with the introduction and the application of antitrust rules. In the antitrust era, challenging the mighty ones, together with the power they exercise on the lower ranked, became permissible, and even encouraged.

In that new vision, the idea that, in vertical relationships, the powerful can coerce the weak had no place any more. In some sense, that idea that coercion does not belong to modern Japan was expressed, with legal terms, in the rule providing that, henceforth, it would be prohibited, to firms holding Superior Bargaining Positions, to take advantage of these positions. For the Japanese legislator, and the Japanese judiciary, that new rule could only find a place in the regime of competition law as the latter deals with all situations where power has been acquired, or is being detained, by business actors, on economic markets.

III. COMPETITION IN TRADITIONAL COMMUNITIES

The Japanese example shows us that one cannot understand the emphasis placed on certain aspects of antitrust, in given countries, without analyzing the cultural specificities existing in those countries. Does it have implications for education? Should students be aware of subtle cultural distinctions, if the purpose is to teach them how to exercise their legal profession and, ultimately, as some would reckon, make money?

My answer is that cultural differences matter to legal education—they matter a lot. All over the world, it has become a priority to open students to what it is like to live in a globalized world. The only way to achieve that result is to explain to students that approaches to antitrust issues are not unique—that they are not necessarily identical to those encountered in the country where education is taking place. We must explain to students that societies react differently to competition. Some like it—as is the case, mostly, in the United States, since the fifties. Others look at it with suspicion—as was the case, until recently, in Europe, and is still the case, nowadays, in Africa.

In traditional societies, competition is perceived as a threat. It potentially brings about violence in a group where people must live together for years. That observation became obvious when I was spending some time on a tiny, beautiful island in The Netherlands close to Denmark.

There, there was one bakery. The story was that it had always been so. Always—except during a limited period, when an employee of that bakery decided to start his own business and opened another shop, selling the same products, around the corner.

In modern economies, such an initiative is key to a correct functioning of markets. It makes it possible for customers to choose the products best fitting their needs. And it places on undertakings a pressure to deliver the best possible results as regards price, quality, and diversity. But in the traditional society existing on that island, that opening of a new shop brought about an uncontrollable chain of reactions going up to physical violence and, eventually, murder.

This cannot be understood by students if they cannot perceive what it is like to live on a small territory from which it is virtually impossible to escape. At that time, people living on such an island could not imagine sailing to the continent and start a new life in an unknown city where they had no family and could not find a job. Born on the island, you were to die on it.

In such a context, opening a second bakery seriously affected the owner of the first shop. He lost business—an inevitable consequence as people did not eat more bread than before but simply shared their purchases between the two shops to avoid being treated as enemies by either of them. Losing business, he could not provide food and shelter to his family. What do humans do where their life, and the one of their loved ones, is in danger? They fight—sometimes to the death.

In such societies, competition means, as it often does for wild animals, a struggle for survival. In that struggle, traditional societies have much to lose. Violence spreads, with some supporting one side of the battle and others, the other side. This explains the perception, in those societies, that competition is a threat—a threat to their very existence.

IV. THE TRANSFORMATION INTO OPEN SOCIETIES

Originally, the situation was not very different in the United States. When that country was created, communities also had a local dimension. With the development of transport, it became possible to carry out activities away from home. People started to study in different cities. Where not successful, competitors could start, elsewhere, a new life. The space available to anyone, and necessary for each to live, was suddenly widening, and increasing in size. In that new context, people challenged by competitors, and unsuccessful in their struggle, could build elsewhere a new life. Competition was no a longer a fight to death. At its best, it was an invitation to evaluate mistakes, make adjustments, and start again—possibly on a different product and/or geographic market.

That transformation has been experienced in the European Union over the last 30 years. Before the creation of the Union, countries were separate and businesses did not easily cross borders. With the emergence of the European Union, a transformation took place. To explain the scope of that transformation, a good example is *Yves Rocher*—a case where a French company wanted to sell beauty products in Germany. In Germany, there was, at that time, a legislation prohibiting price comparisons among competitors. The law also forbade marketing campaigns featuring, in a flashy manner, substantial price reductions—that is, comparisons between prices charged by one firm and those that used to be charged, beforehand, by that same company.

That legislation was presented by the German legislator as protecting consumers who, attracted by discounts, would purchase products they would not necessarily need. Underlying the legislation, there was also, probably, some lobbying carried out by German firms, aiming at limiting the competition among them for reasons seen above.

That legislation was challenged, however, by the French firm, which hoped to attract clients by undercutting—in a visible manner—the prices charged by German competitors. The case arrived to the Court of Justice EU where it was struck down for incompatibility with European law. Free choice, the Court stated in substance, must be the rule on markets. Customers must be given opportunities to choose the products corresponding, in their judgments, to their needs. Instead of protecting consumers through prohibitions, regulators should ensure that they are properly informed—and that is exactly what marketing campaigns are doing by ensuring that possible clients are duly informed about price discounts.

That case inaugurated, with others of the same nature, a change in the perception that people had, in European, about competition. As in traditional societies, competition used to be considered, in the Member States, as a threat to social cohesion—the sort of cohesion that appeared necessary, at that time, to build national communities. With the emergence of the European Union, and the idea of creating a single market to cover all territories of the Member States, a movement started to develop whereby competition would be analyzed, as in the United States, as an opportunity—an opportunity for firms of European countries to present their products and services to clients located elsewhere in the Union. And an opportunity for consumers to choose among more items as economic borders were opened among Member States.

V. APPROXIMATION OF LEGISLATION

Thus, students must be taught that competition is not perceived in the same manner in all societies. This is the case, at least, for students interested in a private practice at an international level. How about those who prepare themselves for a carrier in public service? For these students, my opinion does not change. Yes, such students should be taught about cultural diversity worldwide—it matters, and it matters to them a lot.

Of course, the context, here, is different. The purpose is not, for these students, to understand how they must deal with clients, courts, or officials in given countries. It is to teach them how to engage with foreign counterparts in fruitful discussions that will serve their country.

This is important in our age where, as globalization gathers pace, activities are often subject to rules applied by different countries. To deal with a plurality of applicable laws, one possibility is to designate one country or one national legislator as having competence. Typically, that approach is implemented in international private law. In competition law, it is applied to actions introduced by private parties before courts in the context of private enforcement.

Public enforcement also plays a role in the application of the rules of competition—a very important role indeed, and the most important one, still, in many countries. The only way to solve the situations of conflict of law, which then emerge, is to organize a progressive approximation of legislations.

Such a process has been taking place, in Europe, in antitrust, for some time, as well as in other fields of the law. It is also happening, at worldwide level, as regards competition law, within the International Competition Network (“ICN”). That network operates as a forum gathering competition law officials from around the globe, with a view to exchanging opinions as to how cases should be solved. Through these discussions, it is hoped, a common language will progressively develop—giving rise, in a longer term, to a coordination of legislation.

In the course of those discussions, it is not indifferent that one type of rule or another be chosen. In substance, each participant seeks to convince others that the approach used in his/her country is better—and should be adopted as the legal standard. Norms indeed reflect values—and it is comfortable for societies to consider that their values are excellent and possibly universal. In such forums, discussions thus take the form of negotiations where the object concerned is not a product, or some sum of money, but rules—rules to be adopted, possibly, as standards, valid worldwide.

On the basis of my experience, I can assert how impossible it is, for an antitrust official with no exposure to cultural diversity, to reach success in that sort of setting. Whatever their object, negotiations imply that participants must be informed about the positions of their counterparts. They must understand these positions, and the reasons why the latter have come to exist.

VI. THE SAME RULES, ALWAYS AND EVERYWHERE?

Robert Bork stated that, with the development of economics, antitrust issues would no longer give rise to divergent solutions. Henceforth, solutions would be universal—that is, they could be applied in all places, at all times. Having developed these economic tools, one could and should get rid of ancient form-based legal reasoning where decisions depended, mostly, on the discretion of the official(s), or judge(s), involved.

I can sympathize with the thirst for solutions that do not depend on personal discretion—on arbitrariness, that is. As a matter of fact, the law as a whole was developed as a remedy against arbitrariness—against the capacity of powerful ones to decide in favor of their interests, their wills, or their visions.

But do we need universal solutions to avoid arbitrariness? Administrative and judicial decisions must be based on clear principles established by law and where personal discretion has no incidence. But these principles do not need to be the same always and everywhere. That is precisely what international antitrust teaches us—that people think differently in different places of the globe and that their opinion also changes with time—as do economics.

Globalization will bring about some form of convergence among practices, attitudes, and rules. But we would be wrong if we were to consider that people should adopt our approach just because we feel that it is the best one. Students need to be made aware of that—they need to be taught humility in their dealings with clients, partners, and officials from around the world.