

# PRIVATE LAW AS BIOPOLITICS: ORDOLIBERALISM, SOCIAL MARKET ECONOMY, AND THE PUBLIC DIMENSION OF CONTRACT

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## I

### INTRODUCTION

The transition of society from bourgeois to capitalist, that is, the coming of the Industrial after the French Revolution, transformed the proprietary order into a proprietary organism, incapable of producing emancipation. Private law was still the foundation of society and still had to free the individual. Nevertheless, pluralism had to be opposed in order to force economic behavior into cooperative schemes able to produce systemic balance and development. This is the point of reference for understanding the public dimension of contract law consistent with ordoliberalism, in which citizenship is reinterpreted through market categories: in particular those stressing that producers and consumers hold delegated economic police functions and have to react automatically to market stimuli.

For many reasons the European Union has been conceived as an ordoliberal construct since its very beginning. Many efforts have been and still continue to be made to develop the idea that the common or internal market is “at the heart of the European project.”<sup>1</sup> That’s why EU law is mainly concerned with the prevention of market failures—that is, with the imposition of the correct functioning of free competition. This goal is achieved by initiatives that are sharply criticized for showing little respect for democratic decision-making, such as those related to the recent sovereign debt restructuring. Indeed, sovereign debt restructuring is legitimating imposed legal change expected to enhance the efficient functioning of the market in ordoliberal terms.<sup>2</sup>

To some extent this outcome is not surprising at all. From its very beginning, the ordoliberal agenda encouraged transformations in the balance between

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1. *Communication from the Commission to the European Parliament, the Council, the Economic and Social Committee and the Committee of the Regions. Single Market Act. Twelve Levers to Boost Growth and Strengthen Confidence*, at 3, COM (2011) 206 final (Apr. 13, 2011).

2. See Alessandro Somma, *Legal Change and Sovereign Debt Crisis. The Clash Between Capitalism and Democracy in the Western Legal Tradition*, in *DO WE NEED AN ORDERLY WORK-OUT SCHEME FOR INSOLVENT SOVEREIGNS?* (Cristoph Paulus ed., forthcoming 2013).

politics and economics that must be seen as a continuation of the process of the publicization of private law, the same process started with the crisis of the bourgeois society and the emergence of the capitalist one.<sup>3</sup> This crisis culminated in the fascist reform of economic freedoms realized through the suppression of political freedoms. Even if political freedoms were reestablished after the fall of fascism, economic freedoms still characterize the construct of Europe as an ordoliberal project affecting, among others, the formation of a European contract law.<sup>4</sup> This is what the concept of social market economy represents: supporting the formation of an economic police state to impose an economic eugenics and delegating economic police functions to individuals to accomplish related systemic tasks.<sup>5</sup>

These are the points of reference for considering ordoliberalism and social market economy as biopolitics, as well as the related private law and public dimension of contract.<sup>6</sup>

## II

### THE PUBLICIZATION OF PRIVATE LAW

Notoriously, the distinction between private and public law is an artificial one. It was conceived in a time when the economic and political spheres had to be separated, the first representing the protection of the individual menaced by the invasion of the second. While the political sphere was an organicist ambience dissolving the individual within the order (well represented by the image of the Leviathan),<sup>7</sup> the economic sphere had to enhance individual freedom and emancipation, understood as access to the proprietary order.<sup>8</sup>

The identification of the individual with the owner, and that of society with private law society, took place in a pre-capitalist context: it did not mean to impose “the rites of cannibalism in the name of self-interest.”<sup>9</sup> Indeed, as was typical for a time when economics was still part of moral philosophy, accumulation beyond real utility had no justification—everyone could obtain property through labor, and workers had to be assured wages “at least sufficient to maintain” themselves.<sup>10</sup> These were the foundations of the bourgeois society, in which the mythical invisible hand was understood to coordinate utilitarian behavior and induced the rich to “make nearly the same distribution of

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3. *See infra* Part II.

4. *See infra* Part III.

5. *See infra* Part IV.

6. *See infra* Part V.

7. *See* THOMAS HOBBS, *LEVIATHAN* (1651).

8. JOHN LOCKE, *TWO TREATISES OF GOVERNMENT AND A LETTER CONCERNING TOLERATION* 142–43 (Ian Shapiro ed., Yale Univ. Press 2003) (1690).

9. KARL POLANYI, *THE GREAT TRANSFORMATION* 112 (Beacon Press 1965) (1944).

10. ADAM SMITH, *THE WEALTH OF NATIONS* 73 (Edwin Cannan ed., Modern Library 1994) (1776).

necessaries of life which would have been made had the earth been divided into equal portions among all its inhabitants.”<sup>11</sup>

The process of modernization, that is, the transition from the bourgeois to capitalist society, determined a profound alteration of this scheme. Mass production needed the accumulation of property, as well as the division and rationalization of labor, which ceased to assure access to property. The capitalist society was based on a “forced schematization of the existence,”<sup>12</sup> which was assured by the transformation of the economic sphere into an organicist ambience, with the systemic tensions typical of the political sphere taking possession of the economic sphere.

In other words, even if discriminations based on feudal status had been overcome by the bourgeois society, individuals were now polarized along the lines of class-belonging, as is typical of the capitalist society.<sup>13</sup> The dissimulation of the new reality set up and reinforced the separation of owners and non-owners, as well as the premises of such divisions. The famous movement from status to contract was not up to its evolutionist premises: private law based on contractual freedom, understood as a value conceived for individual emancipation, had developed into a means of oppression.

What then happened was the attempt to keep the identification of society with the private law society, but also to transform society’s foundations. Indeed, individual behaviors had to be functional in order to meet the needs of the organicist ambience they were forced to keep in balance and develop. Private law had to direct and coordinate the exercise of contractual freedom in order to make it compatible with industrial production, which is characterized by the use of machines and the imposition of strict hierarchies.<sup>14</sup>

The “factory system” wanted to make sure “that the same rules apply to numerous groups of workmen, considering the identicalness of nature and duration of the labor relation.”<sup>15</sup> The same happened with market relations—those between producers as well as those between producers and consumers, the former developing within cartels and the latter around large-scale distribution, both determining the spread of standard-form contracts.<sup>16</sup>

All this was in line with the idea of society as a whole, subject to dynamics analogous to those of a biological organism.<sup>17</sup> Organicism and functionalism

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11. ADAM SMITH, *THE THEORY OF MORAL SENTIMENTS* 215 (Knud Haakonssen ed., Cambridge Univ. Press 2002) (1759).

12. MAX WEBER, *WIRTSCHAFT UND GESELLSCHAFT* 439–40 (Steiner 2009) (1922).

13. See OTTO BRUNNER, *STORIA SOCIALE DELL’EUROPA NEL MEDIOEVO* 38–40 (1988) (1978).

14. SPIROS SIMITIS, *The Case of the Employment Relationship*, in *PRIVATE LAW AND SOCIAL INEQUALITY IN THE INDUSTRIAL AGE* 193–94 (Willibald Steinmetz ed., Oxford Univ. Press 2000).

15. Giuseppe Messina, *I Concordati di Tariffe nell’Ordinamento Giuridico del Lavoro*, 2 *RIVISTA DI DIRITTO COMMERCIALE* I 458 (1904).

16. See RAYMOND SALEILLES, *DE LA DECLARATION DE VOLONTE: CONTRIBUTION A L’ETUDE DE L’ACTE JURIDIQUE DANS LE CODE CIVIL ALLEMAND* 229–30 (F. Pichon ed., Libraire Cotillon 1901).

17. AUGUSTE COMTE, *THE POSITIVE PHILOSOPHY OF AUGUSTE COMTE* 142 (Harry Martineau trans., Batoche Books 2000) (1842).

became a point of reference for an increasing number of rules aiming at conforming individual behavior under a systemic point of view, affecting private law in general and contract law in particular.<sup>18</sup> The result was that individual emancipation could be conceived only as a side effect of measures devoted to producing the development of the proprietary order—now understood as proprietary organism.

The result was an overcoming of the division of private and public law that laid at the basis of the bourgeois society and the beginning of what can be defined as the process of publicization of private law. The related body of rules was supposed to conform individual behaviors relevant to the functioning of the private law society, trying to outline a third way between traditional liberalism and the rising socialist thought. The main distinction was between rules directly conditioning the economic sphere and rules trying to do the same thing indirectly. Yet, from many points of view, this was a false distinction: different modes of regulation may be used to stabilize the same accumulation regime, understood as patterns of production and consumption reproducible over a long period.<sup>19</sup>

The third way could take several forms. The supporters of solidarism, even if they focused on self-determination and on the related “struggle for individual development,” also sponsored an “association of individual actions” to “maintain the individual in enduring prosperity and security.”<sup>20</sup> Similarly, functionalists recognized a certain space for “developing one’s individuality” only if the use of the related power performed the duty of contributing to the balance of the social organism.<sup>21</sup> Professorial socialists pleaded for a new synthesis of private and public law in order to overcome the image of the “individual loose from any community.”<sup>22</sup> A similar approach marked legal socialism in its attempt to promote the coordination of classes towards common ends.<sup>23</sup>

### III

#### ORDOLIBERAL CONTRACT LAW

The different ways of conceiving the process of publicization of private law were related to considerations such as the balance between individual and order, and the balance between emancipation and subordination to systemic needs. Nevertheless, even measures with undeniable positive effects on emancipation strategies had their systemic function, at least as social

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18. EMILE DURKHEIM, *DE LA DIVISION DU TRAVAIL SOCIAL* 142 (Presses Universitaires de France 1967) (1926).

19. See Robert Boyer & Yves Saillard, *A Summary of Régulation Theory*, in *REGULATION THEORY: THE STATE OF THE ART* 36 (Robert Boyer & Yves Saillard eds., Routledge 2002).

20. LEON BOURGEOIS, *SOLIDARITE* 61–62 (1902).

21. LEON DUGUIT, *LES TRANSFORMATION GENERALES DU DROIT PRIVE* 37 (1911).

22. OTTO GIERKE, *DIE SOZIALE AUFGABE DES PRIVATRECHTS: EINE GRUNDFRAGE IN WISSENSCHAFT UND KODIFIKATION AM ENDE DES 19 JAHRHUNDERTS* 9–12 (1889).

23. GIUSEPPE SALVIOLI, *I DIFETTI SOCIALI DELLE LEGGI VIGENTI* 102–05 (1906).

peacekeeping tools or as a means of adapting society to the administrative tasks of the state or to economic necessities of production. These strategies influenced the emergence of the welfare state,<sup>24</sup> which could be better described in terms of welfare of the state, created to educate individuals and to make them fit for armies and companies.

In such a situation, the dominance of the order over the individual had to produce the abandonment of political freedoms, sacrificed to the reforms intended to functionalize economic freedoms. This was exactly what characterized the fascist third way between traditional liberalism and socialism and what determined its dominance over attempts to balance individual and order in such a way that conflict and emancipation could still coexist with systemic tensions.<sup>25</sup>

This evolution of capitalist societies can best be described through the schemes suggested by a group of German scholars who were active during the Nazi dictatorship. These scholars, later indicated as ordoliberal, developed the idea of “economic constitution” in order to highlight the primacy of politics over economics, but in such a way that the rules of an economic order based on freedom of contract had to be seen as a point of political reference. These rules, together with competition as an overarching principle, had to be imposed as a political direction tool to enhance the functioning of the economic order<sup>26</sup>—that is, to prevent market failures due to the pursuit of individual strategies,<sup>27</sup> both for economic and emancipative purposes.

The economic constitution was thus a “partial constitution” to be put in tune with the “whole political constitution.” It had to enhance individuals’ cooperation in order to functionalize and standardize their economic performance, so as to strengthen the order from a systemic point of view: behaviors that were detrimental to the development of the system had to be sacrificed.<sup>28</sup> These were the fundamental principles inspiring private law rules typical for that time, such as rules that denied the validity of contracts contrary to “interests worthy of protection under the legal order”<sup>29</sup> or rules that fixed conditions for the validity of standard contract terms.<sup>30</sup>

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24. ERNST-WOLFGANG BÖCKENFÖRDE, *RECHT, STAAT, FREIHEIT* 170–208 (1st ed. 1991).

25. See ALESSANDRO SOMMA, *I GIURISTI E L’ASSE CULTURALE ROMA-BERLINO: ECONOMIA E POLITICA NEL DIRITTO FASCISTA E NAZIONALSOCIALISTA* 81–122 (2005).

26. FRANZ BÖHM, *DIE ORDNUNG DER WIRTSCHAFT ALS GESCHICHTLICHE AUFGABE UND RECHTSSCHÖPFERISCHE LEISTUNG* 10 (1937).

27. See Leonhard Miksch, *Möglichkeiten und Grenzen der Gebundenen Konkurrenz*, in *DER WETTBEWERB ALS MITTEL VOLKSWIRTSCHAFTLICHER LEISTUNGSSTEIGERUNG UND LEISTUNGS AUSLESE* 102–04 (Günter Schmölders ed., 1942).

28. BÖHM, *supra* note 26, at 12–13.

29. C.c. art. 1341–42.

30. See *id.*; see also the rules discussed within the redaction of *The Nazi Volksgesetzbuch*, in *AKADEMIE FÜR DEUTSCHES RECHT 1933–1945: PROTOKOLLE DER AUSSCHUSSE VOLKSGESETZBUCH* 119 (Werner Schubert ed., 1988).

After the fall of the Nazi dictatorship, political freedoms were restored, but economic freedoms still had to be conformed in line with the ordoliberal agenda. For that reason, a new formula was needed to hide embarrassing continuities.<sup>31</sup> That is why the term “social market economy” was coined, which indicated an “irenic” order, able to integrate and to “lead the essential forces of society towards real cooperation.”<sup>32</sup> More precisely, economic freedoms had to be fostered when able to promote competition and opposed when they did not.<sup>33</sup> Freedom of contract had to be combined with mainly indirect state interventions aimed at conditioning individual behavior as needed to avoid market failures or to promote social cohesion.

This is the point of reference for identifying the public dimension of contract, the same characterizing current efforts to develop a European private law, in line with the reference made by the Treaty on the European Union to “a highly competitive social market economy” as the foundation needed to “establish an internal market.”<sup>34</sup> To that end, an international network of scholars was established and asked to provide “a more coherent European contract law,” focusing on improving the existing *acquis* and suggesting “an optional instrument, which would provide parties to a contract with a modern body of rules.”<sup>35</sup>

The result was a “Draft Common Frame of Reference,” a set of “principles, definitions and rules of European Private Law.” These include freedom of contract as “the starting point,”<sup>36</sup> with limitations intended to prevent market failures by functionalizing economic behavior in order to enhance its consistency with a free competition-based market order and to assume the related distributive effects as a point of reference for the European social model.<sup>37</sup>

All this is in line with the approach inspiring the EU Charter of Fundamental Rights, which promotes only formal equality before the law and neglects social rights—that is, limitations on the freedom of contract for purposes directly connected with the will of promoting individual emancipation over market order.<sup>38</sup> If individual capacities have to be promoted, it is only to fulfill an institutional precondition of an economy based on free competition.<sup>39</sup>

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31. This aspect is very controversial among scholars. See RALF PTAK, *VOM ORDOLIBERALISMUS ZUR SOZIALEN MARKTWIRTSCHAFT* (2004).

32. Alfred Müller-Armack, *Das Gesellschaftspolitische Leitbild der Sozialen Marktwirtschaft*, 12 *WIRTSCHAFTSPOLITISCHE CHRONIK* 11 (1962).

33. Walter Eucken, *Die Wettbewerbsordnung und ihre Verwirklichung*, 2 *ORDO* 52, 52–57 (1949).

34. Treaty on the European Union, art. 3.

35. See *Communication from the Commission to the European Parliament and the Council. A More Coherent European Contract Law—An Action Plan*, at 23, COM (2003) 68 final (Feb. 2, 2003).

36. STUDY GRP. ON A EUROPEAN CIVIL CODE & ACQUIS GRP., *DRAFT COMMON FRAME OF REFERENCE—OUTLINE EDITION 62* (Christian von Bar et al. eds., European Law Publishers 2009).

37. Alessandro Somma, *Towards a European Private Law? The Common Frame of Reference in the Conflict between EC Law and National Laws*, in *EUROPEAN PRIVATE LAW AFTER THE COMMON FRAME OF REFERENCE 1–23* (Hans-W. Micklitz & Fabrizio Cafaggi eds., 2010).

38. See *THE POLITICS OF THE DRAFT COMMON FRAME OF REFERENCE* (Alessandro Somma ed.,

## IV

## SOCIAL MARKET ECONOMY AS EUGENICS

Due to its organicist inspiration, the social market economy does not take care of individual needs. Producers and consumers, seen as economic actors representing the whole system of supply and demand, have to accomplish systemic tasks: they hold delegated economic police functions defined within the ordoliberal way of functionalizing individual behaviors. Producers want to escape from competition, so the law has to preclude agreements among producers to prevent such an outcome. Consumers would avoid investing time to make an accurate and rational comparison of products to buy; nevertheless, their legal protection has to be conceived as mere promotion of self-determination and capability of making informed choices.<sup>40</sup> From this point of view, European contract law is developing as a sort of “Neo-Pandectistic,”<sup>41</sup> sponsoring a contract law based on Roman law categories, thus inventing a tradition for neoliberal visions of society.

Workers disappear as an autonomous category: they have to behave as consumers or as producers, abandoning conflicting visions of their role in society and assuming a cooperative attitude toward their taking part in production. European citizenship, understood as the meeting point between the individual and the order, develops along the point of view of production and consumption instead of that of labor.<sup>42</sup>

This scheme is needed to obtain a systemic effect consistent with a form of economic eugenics: to determine an efficient demand, which is, in turn, necessary to select supply within the competitive mechanism. It has nothing to do with individual emancipation, which would frustrate the functioning of the system by allowing individuals to develop in a different way than that conceived by the current form of economic racism<sup>43</sup>—outside the boundaries of *homo oeconomicus* based behavioral schemes. Neither does it have to do with the idea of taking the distributive effects of private law into account, since redistribution has to be the end of state interventions outside the market, which are meant to be financed through taxation and realized to avoid the formation of social rights. Private law has to ignore redistribution, or better, to reproduce the redistribution resulting from the functioning of the market: private law only has to guard the balance and development of the proprietary order by enhancing

Wolters Kluwer 2009).

39. Simon Deakin, *Capacitas: Contract Law and Institutional Preconditions of a Market Economy*, 2 EUR. REV. CONTRACT LAW 317, 317–41 (2006).

40. See ALESSANDRO SOMMA, *ECONOMIA DI RAZZA: DAL FASCISMO ALLA CITTADINANZA EUROPEA* 129–33 (2009).

41. See Paolo Cappellini, *Scienza Civilistica, Rivoluzioni Industriali, Analisi Economica del Diritto: Verso una Neopandettistica Involontaria?*, 15 QUADERNI FIORENTINI PER LA STORIA DEL PENSIERO GIURIDICO MODERNO 523, 523–30 (1986).

42. Pietro Costa, *Cittadinanza Sociale e Diritto del Lavoro Nell'Italia Repubblicana*, in DIRITTO E LAVORO NELL'ITALIA REPUBBLICANA 21–83 (Gian Guido Balandi & Giovanni Cazzetta eds., 2009).

43. SOMMA, *supra* note 40, at 110–24.

individual capacities consistent with market competition rules. This is the point of reference for disclosing the public dimension of contract consistent with the current evolution of capitalism and for letting its biopolitical inspiration emerge.<sup>44</sup>

To verify how this scheme helps to detect the deep inspiration of European contract law, one can refer to the rules concerning the prohibition of discrimination in order to underline continuities between the prohibition's origin and its current development.

The first time private law considered such a prohibition was during World War II, within the so-called Fair Employment Act, an executive order of U.S. President Roosevelt that "reaffirm[ed] policy of full participation in the defense program by all persons, regardless of race, creed, color or national origin."<sup>45</sup> Indeed, from its very beginning, non-discrimination policies were intended to enhance the functioning of the market in such a way, for example, that it could fit into national defense strategies. Afterwards, other state strategies were enhanced by the prohibition of discrimination. Nevertheless, their compliance with systemic needs of the market order never ceased to represent its first inspiration, as the current evolution in EU contract law clearly shows. Emancipative effects are not excluded, but they mainly represent the indirect effects of functionalizing strategies directly aimed at favoring the market order.

In line with this scheme, the Draft Common Frame of Reference provides for "a right not be discriminated against on the grounds of sex or ethnic or racial origin in relation to a contract" concerning "goods or services which are available to the public."<sup>46</sup> This is not a rule directly protecting human rights, as stated in the introduction to the Draft,<sup>47</sup> at least not in the sense that human rights have directly to do with individual emancipation, not in the sense that they do not need to be filtered by the market systemic logic. Of course, the protection of human rights through a market economy is a possible outcome, a possible side effect of a rule concerning the inclusion in the market of persons called upon to fulfill systemic tasks or delegated economic police functions. A supplier of goods or services, denying the conclusion of a contract with certain categories of consumers, prevents them from acting as efficient selectors of his or her supply. He or she exercises an autonomous economic power, imposing his or her own strategy on how, or how not, to make use of the competitive mechanism.

For the same reasons, discriminatory behavior of our supplier will be taken into account by consumer-protection rules, producing possible emancipatory side effects, even if directly conceived as rules aiming at preventing market

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44. VANNI CODELUPPI, *BIOCAPITALISMO VERSO LO SFRUTTAMENTO INTEGRALE DEI CORPI, CERVELLI ED EMOZIONI* (2008).

45. Exec. Order No. 8802, 6 Fed. Reg. 3109 (1941) (capitalizations removed).

46. STUDY GRP. ON A EUROPEAN CIVIL CODE & ACQUIS GRP, *supra* note 36, at 14.

47. *Id.*



failures. This is the sense of social market economy and of the ordoliberal inspiration for non-discrimination in European contract law.<sup>48</sup>

We derive evidence of such inspiration by considering the personal characteristics that are taken into account by the rule we have just mentioned—that is, a person’s sex and racial or ethnic origin. A broader formulation is contained in the EU Charter of Fundamental Rights, which also prohibits discrimination on the grounds of “social origin” and “property.”<sup>49</sup> Considering these characteristics would mean, for example, that a bank could not refuse a loan to a temporary worker. Such a measure would contribute to individual emancipation, but would also represent a possibly disruptive factor for the correct functioning of the market in a private law society. Emancipation through the market may be an illusion, and it is often an illusion.

The idea of social market economy as eugenics and as a form of economic racism may be found in what early ordoliberals used to postulate about the supremacy of the political over the economic constitution: that the economic constitution, just like demography and racial biology, had to put into effect the political constitution.<sup>50</sup> Such a statement helps us to understand how the prevalence of the order over the individual in systemic terms has to be seen as the main characteristic of ordoliberalism and the reason for its tendency to direct behaviors in biopolitical terms.

## V

### ORDOLIBERALISM AS BIOPOLITICS

The current use of biopolitics in social science discourse mainly goes back to Michel Foucault.<sup>51</sup> We find a first attempt to define this concept in his trilogy on the history of sexuality, in which he describes a progressive shift in the essence of political power, more and more inclined to “foster life or disallow it to the death” than to “take life or let live.” To that end, an “anatomy-politics of the human body” and “a bio-politics of the population” are needed—the first concentrating on “the body as a machine” and the second on “the species body.”<sup>52</sup>

Investigating its origin, Foucault establishes a link between biopolitics, defined as the attempt “to rationalize the problems posed to governmental practice by phenomena characteristic of a set of living beings forming a population,” and the “political rationality” of liberalism. In this context the latter is considered anything but a theory on unlimited freedom, because

48. Alessandro Somma, *Principio di Non Discriminazione e Cittadinanza nel Diritto Privato Europeo*, in *IL DRAFT COMMON FRAME OF REFERENCE DEL DIRITTO PRIVATO EUROPEO* 259, 259–80 (Guido Alpa et al. eds., 2009).

49. Charter of Fundamental Rights of the European Union art. 21.

50. BÖHM, *supra* note 26, at 13 (showing that ordoliberals and Nazi regime converged well apart from the idea on how market should be ordered).

51. See also GIORGIO AGAMBEN, *HOMO SACER: SOVEREIGN POWER AND BARE LIFE* (1998).

52. MICHAEL FOUCAULT, *THE WILL TO KNOWLEDGE* 135–39 (2d ed. 1990) (1976).

liberalism “needs freedom,” but also needs to “consume” it as a condition of historical and social possibilities for a free market economy. As for the specific ordoliberal way of matching together production and consumption of freedom, Foucault notes that early supporters of that doctrine intended to redefine capitalist rationality in a different way than the one sponsored by the Nazis.<sup>53</sup>

Some parts of this reasoning may be questioned. For example, one may question the implicit idea that anatomo-politics of the human body and biopolitics of the population can be distinguished, because it is difficult to conceive the latter without the former. This is particularly true for biopolitics enhancing a market order based on free competition, which acts at an anatomic and biological level, but also with deeper conditionings influencing consumers as well as producers, the latter including capital and labor conceived as a cooperative community.<sup>54</sup>

The consideration of ordoliberalism and Nazism as alternative ideologies concerning the market order is also problematic. Indeed, ordoliberals did not oppose Nazi direct intervention in the market order, since they thought of a combination of direct and indirect state interference according to the historic contingencies.<sup>55</sup> Moreover, even if ordoliberalism is not necessarily linked to antidemocratic thinking and practices, it is at least indifferent towards the destiny of democracy. Politics has to impose a market order based on competition and this agenda may also include the instauration of authoritarian or totalitarian regimes. In doing this politics still makes use of violence, even if related to aesthetics which are different from the traditional one.<sup>56</sup>

Above all, ordoliberalism intends to fight pluralism in order to reduce individual behavior to a mere automatic reaction to market stimuli.<sup>57</sup> This implies a condemnation of pluralism as such, which is seen as a source of conflicts because it enhances individual emancipation. Thus, pluralism is an obstacle to functionalizing strategies of the proprietary organism, in a way that is incompatible with democratic decision-making: ordoliberalism intends to enhance vital forces simply in order to guide them towards systemic needs transcending the individual.<sup>58</sup>

The struggle against pluralism derives from conceiving ordoliberalism as a completion of the program of the French Revolution. In fact, following

53. MICHEL FOUCAULT, *THE BIRTH OF BIOPOLITICS: LECTURES AT THE COLLEGE DE FRANCE 1978–1979*, at 63, 317–22 (Michel Senellart ed., Graham Burchell trans., 2008). See also Richard Faber, *Autoritärer Liberalismus: Von Thomas Hobbes zu Carl Schmitt*, in *LIBERALISMUS IN GESCHICHTE UND GEGENWART* 59–77 (Richard Faer ed., 2000).

54. See LAURA BAZZICALUPO, *IL GOVERNO DELLE VITE: BIOPOLITICA ED ECONOMICA* (2006).

55. BÖHM, *supra* note 26, at 103–04.

56. *FORME CONTEMPORANEE DI TOTALITARISMO* (Massimo Recalcati ed., 2007).

57. F. Böhm, *Die Bedeutung der Wirtschaftsordnung für die Politische Verfassung*, 1 *SÜDDEUTSCHE JURISTENZEITUNG* 141, 147 (1946).

58. See Alessandro Somma, *Der Faschismus und die Große Transformation. Modernisierung und soziale Befriedung in den Europäischen Diktaturen*, in *ÖSTERREICH 1933–1938: INTERDISZIPLINÄRE ANNÄHERUNGEN AN DAS DOLLFUß-/SCHUSCHNIGG-REGIME* (Ilse Reiter-Zatloukal ed., 2012).

ordoliberal thinkers, the bourgeois society had a fundamental historical function, since it gave value to the principle of self-determination, thus freeing the individual from the constraints of feudal structures. Yet, the order of the bourgeois society started exactly as “order,” aimed at the steering of individual forces towards a “reasonable general use.” In the program of the French Revolution, “the aim of liberation and the aim of direction could not be separated.”<sup>59</sup>

A link with the French Revolution ideology may also be seen in the ordoliberal fight against pluralism. To overcome the feudal structures, French revolutionaries had to remove each intermediary body between the individual and the state. Similarly, from the very beginning, ordoliberals pleaded for a “strong state” able to establish a “healthy economy,”<sup>60</sup> that is, a state that has to impede the emergence of powers acting in a different way than that consistent with the needs of the economic system.

The biopolitical inspiration of this program may be seen in the analysis of what is intended to produce an effective conformation of economic life. Ordoliberals did not condemn direct conformation by law, which was supposed to produce positive effects if needed by the circumstances. However, they tried to demonstrate the supremacy of indirect conformation, not only because of the aptitude of the procedural approach to guiding economic actors towards concrete and precise substantial results. Indirect regulation was supposed to act as a “state-psychology” that could transform an individual into a tool of “political direction of social day-life,” even if he or she is not conscious of the fulfillment of the state’s “higher aims.”<sup>61</sup> In other words, a market order based on free competition may rely on rules recognized by market operators. The market order may also rely on “procedures and behaviors that reproduce basic social relationships, guide active growth regimes and ensure the accounting of a myriad of decentralized decisions, without actors necessarily being aware of these system-wide adjustment principles.”<sup>62</sup> This is the main point of reference for holding ordoliberalism as a typical biopolitics.

In line with biopolitics is also the reference to the “social,” which can be found in the evolution of ordoliberalism, above all with reference to the meaning of “social market economy.” This expression intends to underline the fact that a free competition-based market is a source of social values per se, so that no conformation of economic behavior in line with a social rights system is needed. What is more important from our point of view is that “social” refers to the need to produce social cohesion in order to prevent conflicts related to the process of modernization, which has to be encouraged in biopolitical terms.

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59. BÖHM, *supra* note 26, at 3–7.

60. Carl Schmitt, *Starker Staat und Gesunder Wirtschaft*, 2 VOLK UND REICH 81–94 (1933).

61. Alexander Rüstow, *Interessenpolitik oder Staatspolitik*, 7 DER DEUTSCHE VOLKSWIRT 169, 172 (1932). *See also* BÖHM, *supra* note 26, at 113.

62. Robert Boyer, *How and Why Capitalism Differs* (Max-Planck-Institut für Gesellschaftsforschung, Discussion Paper 05/4, 2005), available at [http://www.mpifg.de/pu/mpifg\\_dp/dp05-4.pdf](http://www.mpifg.de/pu/mpifg_dp/dp05-4.pdf).

This concern has led to the combination of market-order doctrines and Catholic social teaching,<sup>63</sup> following early ordoliberalism with its traditional plea for class harmony and collaboration.<sup>64</sup> Even if this enhances corporatism, allowing forms of pluralism that were opposed by early ordoliberalism, the same cannot be said for social market economy, thus confirming the biopolitical essence of the modes of regulations needed to stabilize the related accumulation regime.

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63. See DIETER HASELBACH, *AUTORITÄRER LIBERALISMUS UND SOZIALE MARKTWIRTSCHAFT, GESELLSCHAFT UND POLITIK IM ORDOLIBERALISMUS* 117–58 (1991).

64. This may be seen as a main concern for the emergence of Catholic social teaching. See *Rerum Novarum*, Encyclical Letter from Pope Leo XIII, at ¶¶ 2, 3, 8 (May 15, 1891), available at [http://www.vatican.va/holy\\_father/leo\\_xiii/encyclicals/documents/hf\\_l-xiii\\_enc\\_15051891\\_rerum-novarum\\_sp.html](http://www.vatican.va/holy_father/leo_xiii/encyclicals/documents/hf_l-xiii_enc_15051891_rerum-novarum_sp.html).