

FOREWORD TO THE ISSUE 21 OF I-LEX

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Is there anything like a normative science? Part of the contemporary economic science pretends to be such a science, it is up to the legal philosopher to discover the underlying values and normative premises of this self-called science. This claim is not new and repeatedly affirmed in the various Methodenstreits that characterize the culture of the German social sciences. In our field it can be traced back, in succession, from the liberalism of the Austrian von Hayek, to the premises of the economic analysis of law of Posner along with the Chicago School of Milton Friedman. It is on this basis that in the 70s, there was an increasing clamor for a significant deregulation of markets. The lawyer cannot help but notice that the decreasing in state's regulation went along with an increasing in the regulatory power of private authorities on the market, favoring the formation of monopolistic positions.

It would seem paradoxical - but it is not - the fact that, the state's regulation was reduced regarding the private authoritative positions in the financial market, but it increased for what concerning the citizen. In fact, the deregulation only changed the authority regulating, which is now the dominant firm on the market. The current discussion on the sources of law, the so-called soft law rules, i.e. the *lex mercatoria* or the production of rules in international law firms, is just the legal aspect of this reality.

The state's deregulation of financial markets has led to the current crisis, particularly evident in Europe, where the crisis grew worse due to the simultaneous devolution of the public regulatory power to the local level, devolution that has been compounded by the simultaneous transfer of legislative power to the private interests acting at the European level, without a federal regulatory power, due to the lack of a constitutional founding process.

The link between state's deregulation, creation of large concentrations of economic power, financial crisis and the trend toward monopolistic markets is evident and discussed in the literature; anyway, it is not as well known and discussed the possibility of prediction of it on the part of some theoretical hypotheses.

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This issue of i-lex is entirely focused on the Ordoliberal school of Freiburg and its particular theoretical position, which asserts the primacy of the legal normativity on economic reality, in the social domain. This kind of liberalism, not devoid of ethical and egalitarian consideration, is the closest to the hypothesis of a normative science. The term 'Ordoliberalismus', means, traditionally, those researchers who wrote in the journal 'Ordo', and refers to the assumptions discussed herein from the school of Freiburg - composed among others, by Karl Diehl, Walter Eucken and Franz Böhm¹ - and other researchers. The heterogeneity of scholars and herein proposed ideas makes the term vague and scientifically useless.

The real boundary line runs between the liberalism that appeals to the Austrian Methodenstreit and its evolution in the Chicago school on the one hand, and the liberalism that appeals to the German school of Fribourg.

The crucial philosophical and legal point concerns the dominating higher-level role that the legal regulation assumes in relation to economic issues, creating the market rather than simply regulating a pre-existing reality. It is without doubt a methodological and substantial minority position, which clashes with both idealism and materialism of Hegelian descent, who have had such a great influence, and still have it, in the twentieth centuries German, but even more Italian culture.

But it is also a well represented hypothesis in a genealogy that goes from the neo-Kantianism of Marburg, with Rudolf Stammler, arriving at the school of Freiburg through the pupil of Stammler: Karl Diehl. Diehl was part of the research meetings in Fribourg; he was teacher and master of Franz Böhm², who, in 'Wettbewerb und Monopolkampf', will prove in a theorem the necessity of the legal regulation for the

¹ On the Diehl-Seminar meetings in Fribourg see T. ROSER, *Protestantismus und soziale Marktwirtschaft: eine Studie am Beispiel Franz Böhms*, Lit, Münster 1998.

² F. BÖHM, *Das Problem der privaten Macht*, in *Franz Böhm, Reden und Schriften über die Ordnung einer freien Gesellschaft, einer freien Wirtschaft und über die Wiedergutmachung*, Ernst-Joachim Mestmäcker, ed., Karlsruhe, C.F.Müller, 1960, p. 40 (25-45), orig. *Das Problem der privaten Macht*, in *Die Justiz*, 3, 1928, pp. 324-345; see also H.F. ZACHER, *Aufgaben einer Theorie der Wirtschaftsverfassung*, in *Wirtschaftsordnung und Rechtsordnung, Festschrift zum 70ten Geburtstag von Franz Böhm*, H. Coing, H. Kronstein, E.-J. Mestmäcker, eds., Karlsruhe, F.C. Müller, 1965, pp. 63 - 109. A complete bibliography of the author in: [://www.eucken.de/freiburger-tradition/franz-boehm/bibliographie.html](http://www.eucken.de/freiburger-tradition/franz-boehm/bibliographie.html).

maintenance of a free market, in which the absence of the legal claims would leave the economic private authorities dominating the market, which would inevitably evolve towards monopolistic forms.

The theoretical studies of the Fribourg school, although not complete, are not merely a political program; they are based on this common position: the primacy, in a social environment, of legal normativity on economic reality. It's an awkward position to most: the enemies of the free market, those who see it as the place of exploitation, and to his friends who operate there in hopes of becoming monopolies, destroying it, or to force it into a mere representation of their own will. The German version of liberalism, not devoid of ethical and egalitarian aspirations, however, is the nearest to the hypothesis of a normative science.

In fact, within this theoretical framework, the crash of the housing market, first, and then the financial crisis, could be predicted, as well as the current trend towards the growing concentration of capitals and the gradual elimination of free competition, as a result of deregulation.

In accordance with this theoretical framework is now immediately urgent a public intervention toward a re-regulation: otherwise, once collapsed the free market, also the democracy will rapidly fall, in all the new forms that the digital 'liquid surveillance' economy will be able to give³.

It is no longer a purely academic exercise. Lawyers, scientists and philosophers on law, politics and economy must debate here and now on this topic. The history summons the jurist who can no longer deny himself to his task.

The scientific foundations have already been placed in the theoretical framework of the Marburg - Fribourg school thought. We just have to put on the glasses of Aristotle, focusing on the old bad teachers who, despite their self-proclaimed science, not only have not been able to prevent or predict, but they have caused the current social situation, populated by distressed digital ghosts, manipulated, unbeknownst to them, by economic forces disruptive of sociality.

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³ Z. BAUMAN and D. LYON, *Liquid Surveillance: A Conversation*, Polity Press, Cambridge UK, 2013.