

FREIBURG SCHOOL OF LAW AND ECONOMICS, FREIBURG (LEHRSTUHL-)TRADITION AND THE GENESIS OF NORMS

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Abstract: The paper analyzes the parallels and differences between the *Freiburg School of Law and Economics* represented by the works of Eucken (and Röpke) and the *Freiburg (Lehrstuhl-)Tradition* represented by the works of Hayek and Vanberg. The parallels are illustrated by making use of the constitutional economics concepts *Ordnungspolitik* (i.e., order of rules/choices over rules) as well as freedom of privileges and discrimination. The differences, which have received surprisingly little attention, include the following aspects: 1. philosophy of science and epistemology, 2. genesis of norms, and 3. political philosophy. The paper tackles these issues in three steps: The second chapter presents Vanberg's constitutional economics theory with special emphasis on the concepts of citizen sovereignty and normative individualism. The third chapter reviews the ordoliberal concepts of science and the state which are – to a certain degree – elitist and expertocratic, that is, they rely to a considerable degree on intellectual experts (in particular, scientists) and other members of the societal elite. The fourth chapter differentiates two kinds of genesis of norms: an evolutionary one and an elitist-expertocratic one allowing for a differentiation between Eucken's and Röpke's Ordoliberalism(s) on the one hand and Vanberg's Hayekian- and Buchanan-style constitutional economics approach on the other hand. The paper ends with a summary of the main findings.

Keywords: Freiburg School of Law and Economics, Freiburg (Lehrstuhl-) Tradition, genesis of norms, Walter Eucken, Wilhelm Röpke, Friedrich August von Hayek, Viktor Vanberg.

1. Introductory Remarks

It seems to be common knowledge that the *Freiburg (Lehrstuhl-) Tradition* is highly connected with the ordoliberal *Freiburg School of Law and Economics* gathering around Walter Eucken and Franz Böhm.

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Moreover, it is often assumed that Eucken's successors at Freiburg University – starting with Friedrich August von Hayek right through Viktor Vanberg – are standing in the tradition of classical Ordoliberalism. Such statements are true when Ordoliberalism is viewed from a constitutional economics perspective; however, it is not entirely true when taking a closer look at the different kinds of genesis of norms underlying the different concepts: While constitutional economics is mainly based on a Hayekian cultural-evolutionary genesis of norms, Eucken's (and Röpke's) Ordoliberalism favors a somewhat different account of genesis of norms, namely an elitist-expertocratic one. Other points of differences include the dissimilar philosophies of science as well as political philosophies. Thus, it is the aim of the following paper to analyze the (slightly) different approaches of Ordoliberalism on the one hand and Vanberg's Hayekian constitutional economics approach on the other hand. The main questions underlying this paper are the following ones: What are the (subtle) differences between the Freiburg School of Law and Economics and Vanberg's constitutional economics approach? In which regard can parallels and similarities between these two research agendas be detected? Finally, which role does (the late) Franz Böhm play? The hypothesis of the paper is that Böhm might be considered the missing link between Eucken's Ordoliberalism, Hayek's evolutionary liberalism and Vanberg's constitutional liberalism.

The remainder of the paper is structured as follows: The second chapter presents Vanberg's constitutional economics theory with special emphasis on the concepts of citizen sovereignty and normative individualism. The third chapter reviews the ordoliberal concepts of science and the state which are – to some degree – elitist and expertocratic, that is, they rely to a considerable degree on intellectual experts (in particular, scientists) and other members of the societal elite. The fourth chapter differentiates two kinds of genesis of norms: an evolutionary one and an elitist-expertocratic one allowing for a differentiation between Eucken's (and Röpke's) Ordoliberalism on the one hand and Vanberg's Hayekian constitutional economics approach on the other hand. The paper ends with a summary of the main findings.

2. Vanberg's Constitutional Economics: Normative Individualism and the Idea of Citizen Sovereignty¹

Constitutional economics as a research project is an academic sub-discipline of so called New Institutional Economics which systematically analyses the design and impact of formal as well as informal institutions guiding and steering human behavior. The main representatives of constitutional economics are the Nobel laureates Hayek (as a representative of evolutionary liberalism) and James M. Buchanan (as a representative of constitutional liberalism). A widely known exponent of constitutional economics in Germany and beyond is Viktor Vanberg. Vanberg as a Buchanan-'disciple' follows the Buchanan- *and* Hayekian tradition in constitutional political economy (i.e., as a disciple of Buchanan, he stands within the tradition of the Buchanan-school often referred to as the Virginia School of Political Economy²). Moreover, he is the former director of the Walter Eucken Institute in Freiburg and, thus, a direct successor to the chair of Walter Eucken (the same holds true for Hayek who also was a successor to Eucken's chair). As such, Vanberg is a representative of the Freiburg (Lehrstuhl-)Tradition as well. In this sense, Vanberg is linking the Freiburg School of Law and Economics with its main representative Walter Eucken with Hayek's social and political philosophy and Buchanan's constitutional economics approach; this is one of the reasons for comparing Vanberg's constitutional economics approach as part of the Freiburg (Lehrstuhl-)Tradition with the original Freiburg School of Law and Economics.

Vanberg draws on (and aims at combining) the works of Franz Böhm, Walter Eucken (both members of the Freiburg School of Law and Economics), Alfred Müller-Armack, mentor of the concept of Social Market Economy, and Hayek. By building on these philosopher-economists and by adopting a specific constitutional economics approach, Vanberg tries to advance the concept of Social Market Economy. In this regard, he highlights the characteristic features of the Freiburg School, that is, freedom of privileges and freedom of discrimination. Moreover, he attempts to transfer the inherent logic of markets to the fields of socio-political decision-making and collective choice. To be precise, he aims at transferring the fundamental and

¹ Cp. for foundation; V. J. VANBERG 2000; 2001/2008; 2004; 2005; 2008a-d; 2011; see also F. BÖHM 1928/2008; 1933/1964; 1937; 1950 and especially 1966/1980.

² Cp. J. M. BUCHANAN 1975/2000; 1991/1999; G. BRENNAN / J. M. BUCHANAN 1985/2000; J. M. BUCHANAN / R. CONGLETON 1998; J. M. BUCHANAN / G. TULLOCK 1962/1999; R. CONGLETON 2013; V. J. VANBERG 2013.

constitutive idea of markets, namely the mutual gains from trade and exchange momentum, to social/public choice; methodological individualism derived from economics (understood here as a 'science of the gains from trade'³) is extended from the analysis of market processes to socio-political processes.⁴ Of importance in this regard is Vanberg's Hayek-like distinction between the constitutional and the sub-constitutional level, that is, the distinction between the order of rules and the order of actions.

The *constitutional level* respectively the *order of rules*-level refers to the *choices of/over rules* and institutional framework-settings. It involves political choices regarding a society's socio-economic constitution (cp. V. J. VANBERG 2004, 11), a comparison of alternative rule regimes and their particular properties, and decisions between alternative *rules of the game*. The *sub-constitutional level* or the *order of actions*-level instead is the level at which private choices within the constitutionally determined rules of the game are made (cp. V. J. VANBERG 2004, 11). This level contains all the plays of the game of the economic subjects within the rules of the game and within the constitutionally determined freedom of action. Vanberg speaks in this regard of *choices within rules* respectively choices *within* constraints instead of choices *among* constraints.

Like Hayek and (the late) Franz Böhm, Vanberg is convinced that it is only feasible to reach a societal consensus in terms of *constitutional interests*, while a consensus in terms of (sub-constitutional) personal *action interests* is rather unlikely. As a consequence, it must be the aim of social and economic policies, to implement rules of the game which are in the long-run interest of society and which are, therefore, more likely to be consensual. The legitimacy of these kinds of (potentially) consensual constitutional interests depends on the voluntary(!) agreement of the persons involved. "... *the legitimacy of transactions and arrangements ultimately derives from their voluntary agreement. [...] [And the] voluntary agreement [of the parties involved is] the relevant criterion for the 'goodness' of social transactions and arrangements ...*" (V. J. VANBERG 2005, 26 e 28). From a Vanbergian point of view, legitimacy is resting on the ethical-normative *consensus*

³ I.e., "*studying the means and ways by which people can reap mutual benefits from voluntary cooperation*" (V. J. VANBERG 2005, 26).

⁴ The behavior of sovereign individuals in collective-political decision-making processes is apparently similar to the one in private market transactions; "... *market processes and political processes are to be explained [...] in terms of the actions and interactions of individual human beings*" (V. J. VANBERG 2005, 24).

criterion. Moreover, his argument is based on so called *normative individualism*, which states, that the voluntary agreement of the parties involved is the basic criterion of justification and legitimization; the agents and economic subjects themselves are the ultimate judges. Vanberg (2005, 24) adds: "... *the welfare of the individuals concerned represents the relevant standard against which market and state are to be judged ...*" The voluntary agreement of affected individuals, thus, fulfils a legitimizing function especially at the constitutional level: the order of rules must rest on voluntary agreement of the people concerned.⁵ Agreeable and consensual, however, are only those rules, which are mutually beneficial and, therefore, desirable. Once adopted and implemented, the ethics of fairness and general rule commitment requires an abidance by these consensual and overall preferable constitutional rules. This is true even when in a particular case the rule turns against an individual and when it is accompanied by situational and personal disadvantages. Even in these special cases, the overall advantage for society as a whole is granted; otherwise, the constitutional rule would have been dismissed.⁶

Vanberg is aware of the problem, that there exists a huge difference between a general rule application interest (*Regelgeltungsinteresse*) on the one hand and a rule compliance or rule-following interest (*Regelbefolgungsinteresse*) on the other hand. From an individual perspective each person has a strong incentive that others adhere to norms while she herself is not binded by any law or (in-)formal institution. Each person wants to avoid personal restrictions with regard to individual autonomy, freedom of choice and freedom of action; yet, each individual benefits from restrictions put on the personal autonomy of particular interaction partners acting according to norms while her own autonomy is totally preserved and no restrictions with regard to her freedom of action occurs.⁷ Vanberg notes, that "[e]ven though such a

⁵ The voluntary agreement at the constitutional level "... *legitimizes the application of non-unanimous choice procedures at the sub-constitutional level*" (V. J. VANBERG 2005, 43).

⁶ "*The contracting parties voluntarily agree at the constitutional level to be subject to binding constraints at the sub-constitutional level. [...] [The] ongoing[!] voluntary acceptance of the club's constitution by its current members [is essential]. [...] its ultimate test must be seen in citizen's voluntary choice to remain within the jurisdiction in the presence of accessible alternative options [i.e., exit-option]*" (V. J. VANBERG 2005, 45).

⁷ Here, it is assumed that norm compliance is linked with increased transaction costs, that the individual freedom to dispose is restricted, the

constitution can be shown to be mutually beneficial to all involved, incentives remain for interest groups to seek for themselves the extra benefits of special privileges [i.e., social dilemma situation]" (V. J. VANBERG 2005, 41). We will come back to the issues of privilege- and rent-seeking, the (alleged) erosion of fundamental ethical principles of the market as well as the question of how to implement effective institutional constraints later on in this chapter.

Vanberg is convinced that it is viable by implementing an adequate constitutional (social) contract and via a *voluntary joint commitment to* (abstract, generalizable and negative prohibition) *rules* as well as an *exchange of commitments* to approximate Böhm's *private law society* (F. BÖHM 1966/1980; V. J. VANBERG 2008e). Such a Kantian-like private law society is characterized by the following features: it equals a privilege-free and non-discriminating order of rules based on the equality before the law/the rule of law and universal (liberty) rights. Such order would replace the old feudal and privilege order and would be solely committed to Kantian private autonomy. Vanberg speaks in this regard of *citizen sovereignty* in analogy to consumer sovereignty.⁸ Here, democratic polities are seen as cooperative ventures for mutual advantages. They are collective arrangements that are supposed to advance common interests of their members; citizen cooperatives serve the interests of their constituents, the citizens. In this instance, politics is to be considered as an arena where mutual gains from cooperation can be realized; they derive their legitimacy fundamentally from voluntary agreement (cp. V. J. VANBERG 2005, 42).

From a Vanbergian perspective the private law society equals a *coordination order* in which market and price mechanisms – being part of the Hayekian *game of catallaxy* – coordinate the different autonomous plans of economic subjects. The market equals a rule-constrained playing field – to make again use of the constitutional economics and ordoliberal game metaphor –, a playing field for voluntary cooperation, trade and exchange. It represents a space of

personal utility reduced and that norm observance clashes with the personal self-interest. Norm conformity is only possible, so the argument goes, given that it is the best action alternative from an individual utility calculation standpoint (i.e., cost-benefit analysis).

⁸ Consumer sovereignty is related with the ordoliberal concept of *Leistungswettbewerb* (i.e., competition in terms of better services for consumers/performance competition). Here, consumers are the ultimate judges and their choices are the essential controlling force in socio-economic market processes.

action suitable for coordination via voluntary contracts and transactions. The rules of the game of the market-based game of catallaxy or 'exchange game' encompass private property rules and contract law; market transactions are mainly based on private autonomy and subsequent rights of disposal. Following Böhm, a further member of the Freiburg School, Vanberg claims that a market economy and a private law society are mutually dependent on each other. The market economy is, so to speak, the 'twin sister' of the private law society (cp. V. J. VANBERG 2011, 13), that is, it is the economic or private market side of the private law society.

Vanberg and other constitutional economists standing in the tradition of Buchanan (and Hayek) are concerned with the mutual advantages arising from *collective* rule commitment. This general commitment to rules induces self-interested individuals to commit themselves to constitutional rules, although these rules are not in their personal interest when they are *unilaterally* implemented; yet a win-win-situation is more than likely once a concurrent and general rule commitment is granted (cp. V. J. VANBERG 2011, 8). Rule-based cooperation takes place for the mutual benefits of the involved parties. The necessary and required rule approval is based on the expected mutual advantages being gained (i.e., idea of reciprocity). The medium and long-run net advantages stemming from these mutually beneficial cooperations (i.e., "overall benefits *that result over time from having the continuing process of interaction and cooperation bound by suitable constraints*" (V. J. VANBERG 2005, 29) exceed the short-term profits of the (defecting and opportunistic) *Homo oeconomicus* utility-maximizer. It is, thus, (ideally) possible to reconcile individual self interest and the common good respectively rationality and morality.

From a contractarian-constitutionalist perspective, voluntary (exchange and transaction) agreements are likely, since they are able to serve as means of mutual improvement (i.e., mutual gains from voluntary cooperation and voluntary joint constitutional commitment/exchange contracts). However, a fundamental problem exists: "... *the omnipresence of opportunities for gaining at the expense of others [...] [and] the temptation for self-interested agents to take advantage of such opportunities*" (V. J. VANBERG 2005, 28). Each individual has a strong incentive not to abide by a constitutional agreement (i.e., commonly agreed constitutional rules) and to tread the path of exploitative rent- and advantage seeking. Here, a far reaching discrepancy between rule application and rule compliance interests occurs. From an individual actor's standpoint it is advantageous – at

least in the short-run – to defect and not to cooperate since the individual pay-off increases or as a minimum the costs of rule observance are negligible – provided that all the other fellow players act compliant to the rules (i.e., social/moral dilemma). Such behaviour has far reaching consequences insofar as more and more people are attracted to it and when more and more people adopt, imitate and internalize such opportunistic and free-riding norms behavior. As a result, a ‘collective self-damage’ (*Selbstschädigung*) will occur. Vanberg links this prisoners’ dilemma situation with the so called *Paradox of the Social Market Economy*, a phenomenon which refers to the fact that most people are more aware of the underlying risks and of the ethical deficits of the market economy than they are aware of the productivity and the wealth-creating potential of the underlying economic system. Each competitive economic order has beloved and unloved aspects; one side which bears fruits and one which places burdens on economic subjects – these are two sides of the same coin. While the positive side-effects of competition and the market economy are taken for granted and have been eagerly accepted, the economic order is blamed for its risks and dangers associated with competitive market processes. According to Vanberg and others, a lack of awareness of the underlying risks as well as a deficient understanding of market forces has to be detected. This kind of misjudgment plus the imbalance between the perceived risks and chances of a market economy are even more worrying when they are accompanied by the influence of rent-seekers and lobbyists. Interest groups often aim at obtaining exceptions⁹ and pursuing special interests, that is, particularistic private interests and privileges contrary to the common good. These *Privilegieninteressen*, i.e., interests in government-granted protectionist regulations and privileges, are opposed to constitutional (rule) interests or *Regelinteressen* which are supposed to be in everybody’s interest. To put it differently: these unilateral benefits on behalf of special interest groups are opposed to rules and regulations which equally and indiscriminately apply to all actors in the respective jurisdiction. By aiming at an exemption from the burdens and risks of competition and

⁹ The once adopted rules of the game may be changed at any time and for all involved parties, if and only if via an institutional reform a more suitable game of catallaxy is achievable. Rule changes, of course, require the overall approval of (all) the citizens and these alterations and modifications should be made at the constitutional level (i.e., order of rules-level), not at the sub-constitutional or order of actions-level. In addition, personal rule changes or case-by-case and ad hoc ‘exception regulations’ must be avoided.

by aiming at a relief from the (global) socio-economic pressures to adapt they undermine and threaten the two fundamental ethical principles of the market as an ethical order: the freedom of privileges and the freedom of discrimination. Hence, the voluntary joint commitment to rules is reduced to absurdity. In summary, it is a striking violation of the inherent *ethics of fairness* of the Social Market Economy, an ethics which demands not to offend the rules of the competitive game as well as not to look out for special treatment and privileges (cp. V. J. VANBERG 2008a, 11).¹⁰ All too frequent, rent- and *privilege-seeking* interest groups meet with *privilege-granting* (interventionist) politicians (cp. V. J. VANBERG 2008a, 13). This fatal interplay might lead to an erosion of the ordering principles of the market economy with its constituent privilege-free competitive order. The end result of such a slippery-slope-like process might be the relapse into the old feudal 'order of privileges', characterized by social protectionism and a waning of the dynamics of the competitive order harming the vast majority. At stake are the resilience and resistance of the market economy: Which extent of isolated, ad hoc and case-by-case process-interventions can a competitive order withstand? Which extent of a privilege-granting and discriminatory social policy is compatible with such an order? At which point will such an order overturn into a corporative state? Finally, which effective institutional precautions should be adopted to prevent this trend towards more and more state interventionism?

Hence, the task of constitutional economics as an 'economics of rules' is twofold: 1. the practical issue of how rules and institutions respectively socio-economic and political arrangements may be improved (e.g. via the identification of rule changes¹¹) in the sense of enhancing consumer and citizen sovereignties; and 2. providing systematic insights into the relationship and the interplay between the order of actions and the order of rules (cp. V. J. VANBERG 2005, 25). The

¹⁰ Vanberg (2011, 20) moves on to state that: „... wenn Menschen Vernunftgründe haben, sich um der daraus zu ziehenden gemeinsamen Vorteile willen für eine marktwirtschaftliche Ordnung zu entscheiden, dann haben sie auch Vernunftgründe, die Spielregeln, die die Funktionsfähigkeit dieser Ordnung sicherstellen, als gerechte Regeln anzuerkennen. Dann ist es unangemessen, an diese Ordnung ethische Maßstäbe anzulegen, die andersartigen Moralkontexten [d.i. Kleingruppenmoral und Stammesethik] entstammen, und es ist widersinnig, das Streben, im Spiel der Katallaxie erfolgreich zu sein, also Gewinn zu erzielen, mit einem ethischen Makel zu belegen.“

¹¹ I.e., inquiring how economic subjects may be able to play better games of catallaxy by adopting Pareto-superior rules.

overall task, however, is to identify institutional ways which enable a joint commitment to rules, that is, institutional arrangements which encourage and foster voluntary cooperation and at the same time discourage exploitative and privilege-seeking strategies. In this regard, the rule-focused research perspective of constitutional economics favours a rule-constrained/bound *Ordnungspolitik*, a policy which avoids a slightly interventionist, discretionary, outcome-oriented policy, a policy which abstains from intervening in economic processes, and a policy which favours a procedural, rule-oriented liberalism and which confines itself to reform the institutional framework of rules, that is, "*policies that seeks to institutionally frame market processes in the sense of defining the general terms under which market transactions are carried out*" (V. J. VANBERG 2004, 4).

What should become clear in the following paragraphs are the differences between Vanberg's constitutional economics approach (= *Freiburg (Lehrstuhl-)Tradition*) on the one hand and Eucken's *Freiburg School of Law and Economics* approach (and Röpke's Ordoliberalism) on the other hand. In the centre of my argument is the dissimilar genesis of norms: While Vanberg favors a cultural-evolutionary genesis of norms, Eucken's (and Röpke's) approach includes an elitist-expertocratic genesis of norms. Moreover, Vanberg's argument fundamentally rests on democratic contract theory (i.e., voluntary agreement, consensus-seeking, normative individualism, etc.). These elements are of minor importance in Eucken's (and Röpke's) writings. To the contrary, some passages even indicate a (slightly) anti-democratic and mass-averse understanding of politics. However, the parallels should not be dismissed: In this regard, we have to refer to the ordoliberal principles freedom of privileges and freedom of discrimination. Interestingly, the late Franz Böhm seems to be a missing link between Vanberg and Eucken: the parallels between Vanberg, Hayek and (the late) Böhm as well as the dissimilarities between Eucken and (the late) Böhm are striking.

3. Ordoliberalism and Science as an 'Ordering Power'

Many people have criticized Ordoliberalism from different perspectives and for different reasons. Three main groups of (interdependent) arguments may be distinguished: 1. the critique put forward by the spokespersons of *Catholic social teaching* and *Catholic social ethics*, in particular Nell-Breuning, Nawroth, Höffner, and Emunds; 2. the objections made by Foucault and other representatives of *Governmentality-Studies*; and 3. the critique expressed by Haselbach

and Ptak accusing Ordoliberalism for its alleged *Authoritarian Liberalism*. Most of these accusations can be refuted by referring to the primary literature of Rüstow, Röpke, Eucken and others.¹² Yet, there is one point of criticism missing respectively one point which has received surprisingly little attention. Ptak, Fischer et al. are mentioning this kind of argument en passant. E.g. Fischer writes: "*Eucken [...] searches for the independent expert and intellectual authority that has gained valuable insights into the overall economic problem of steering and managing; a person that has acquired the knowledge of the objective needs of the socio-economic interdependencies and is, thus, able to make use of his/her authoritarian certainty. With due regard to this requirements profile, the potential number of conceivable elitist ordering potencies is reduced to just one: nothing but the reasoning of 'men of science' with their 'rigorous theoretical-economic training', a training which cannot be properly acquired by laymen and ideologists, comes basically into question as an ordering power. [...] Science – in the sense of Eucken – is the authority, which not only possesses theoretical truth, but also practical-political truth. This possession of truth makes science the one and only approved vital power in the rank of a formative and constituting power [i.e., exclusive ordering function of science]" (T. FISCHER 1993, 146; translation by the author; emphasis added).*

The aim of this paragraph is to sustain and corroborate this verdict (i.e., accusation of an elitist-hierarchical thinking including claims of objectivity and absoluteness) by analyzing the primary literature of the main representatives of Ordoliberalism in the strict and wider sense, namely Wilhelm Röpke and Walter Eucken. Eucken, in this regard, is of special importance, because his pursuit of absolute truth reminds the reader of the works of Edmund Husserl – the founding father of phenomenology – and Rudolf Eucken – a German philosopher and winner of the 1908 Nobel Prize for Literature – both searching for a 'realm of truth' (*Reich der Wahrheit*).¹³ Moreover, the paper picks up the differentiation between individual and regulatory ethics¹⁴ since this separation allows for a segregation with regards to the genesis of norms: ordoliberal individual ethics with its Christian foundation of values and its liberal-Kantian heritage refers to the cultural-evolutionary genesis of norms (it, thus, bears remarkable resemblances to Hayek's (and Vanberg's) conceptions of cultural evolution and spontaneous order), while ordoliberal regulatory ethics refers to the epistemological

¹² Cp. M. WÖRSDÖRFER 2010.

¹³ Cp. R. KLUMP / M. WÖRSDÖRFER 2011.

¹⁴ Cp. M. WÖRSDÖRFER 2013a.

realm of truth and, consequently, to an elitist-expertocratic genesis of norms. As a result, the (subtle) differences between the Freiburg School and the Freiburg (Lehrstuhl-)Tradition become clear.

Before moving on to the next paragraph it seems necessary to start with a brief definition of Ordoliberalism: Ordoliberalism or as it is often referred to as German neoliberalism is one major pillar of German Social Market Economy. It contains of at least two factions: the Freiburg School of Law and Economics with its main representatives Walter Eucken and Franz Böhm (i.e., Ordoliberalism in the narrower sense) as well as Sociological Neoliberalism à la Alexander Rüstow and Wilhelm Röpke (i.e., Ordoliberalism in the wider sense). Both factions are campaigning for the implementation of an economically efficient and humane socio-economic order. By justifying and legitimizing such an order, many Ordoliberals, and especially Eucken and Röpke, make use of elitist-expertocratic arguments. The following sections will analyze these arguments in great detail.¹⁵

¹⁵ The following analysis is based on: M. WÖRSDÖRFER 2010.

3.1 Performance-Orientation and Elite-Hierarchy¹⁶

¹⁶ It is remarkable that – although the Ordoliberals are not quite often referring explicitly to the term ‘elite’ (elite simply means ‘elected’, ‘selecting’ or ‘chosen’ (lat.: *exlegere/electus*; fr.: *élire*); cp. W. RÖPKE 1963/1965, 217) – they reject elites qua birth, social origin/background and descent (often accompanied by inherited richness). This kind of *Herkunftselite* associated with feudal aristocracy, bourgeoisie or oligarchy with all their exclusive privileges and prerogatives is condemned by Ordoliberalism. Another type of elite – so called *Machtelite*/power elite – is disapproved as well. Yet, Ordoliberalism favors a different terminology/concept of elite – namely the so called *Leistungs-* and *Wertelite* (i.e., elite based on individual achievements, qualifications and/or special habitus (canon of values) characterized by distinguished moral-ethical qualities) or the *Positions-* and *Funktionelite* (e.g. achievement-dependent economic, political, administrative, jurisprudential, and scientific/expert elite). The focus of Ordoliberalism is, thus, on the ‘education elite’: scientific experts – as seen by Ordoliberalism – are THE central component of the societal elite. The meritocratic principle of achievement and performance (*Leistungsprinzip*) is highlighted by several Ordoliberals in different occasions. The selection of elites is primarily based on individual merits and qualifications (i.e., performance as selection criterion); the elites contain the key personnel of a society (*Leistungsträger*). Society consists of a (heterogenic) plurality of *Teileliten* (sectoral elites) depicting the functional social differentiation. What is essentially important from an ordoliberal perspective is that the elitist position is not dependent on (educational) privileges, exclusive and network-dependent access to class-specific institutions, that is, societal segregation, distinction, exclusion and closure, and/or (socio-economic) power. They are pleading for equal opportunities for advancement and upward mobility as one major precondition for recruiting the ‘strategic elite’. Additionally, the Ordoliberals are adopting the common distinction between elites (as the ruling class) and masses respectively the mass society (cp. the ordoliberal topic of *Gesellschaftskrisis*). Röpke, Eucken et al. fear the ruling of uncivilized masses; thus, they fight the process of massification. The uneducated ‘mob’ requires leaders which are supposed to be intellectually superior (masses vs. leaders). The Ordoliberals are convinced that societal leadership is indispensable and that some people (the elitist minority) are predestined for leading and guiding the majority of the population (i.e., ordoliberal scientific experts as being part of the elite are ideally in charge of fulfilling this task). Inseparably linked with the distinction between masses (=lower classes) and elites (=upper classes) is the ordoliberal criticism of parliamentarism, democracy and pluralism: The ruling of masses – in combination with the impact of interest groups – has to be prevented. Moreover, Ordoliberalism not only emphasizes the dynamic and meritocratic elements

In his work *Civitas Humana* – the first edition dating back to 1944 – Röpke mentions the eminent significance of leadership and guidance (cp. W. RÖPKE 1944/1949, 17; see also W. EUCKEN 1953, 24). According to Röpke, leadership should be restricted to an elitist minority¹⁷ or ruling class (cp. W. RÖPKE 1944/1949, 210); such leadership is indispensable – otherwise, the decay and disintegration of the occidental society, as the *real* community, will occur (cp. W. RÖPKE 1944/1949, 339); the hierarchical nature of society belongs to its essence. Each attempt to level and flatten the societal hierarchy will lead to chaos and anarchy (i.e., intellectual massification as a major component of the societal crisis of the present) and to a devoid of relationships. Therefore, Röpke's ideal-typical society is structured and arranged in a pyramid-like and hierarchical manner (cp. W. RÖPKE 1944/1949, 245). However, although the hierarchical and non-egalitarian nature belongs to the core of society¹⁸, Röpke distinguishes between a hierarchy based on privileges and (an elitist) hierarchy based on performance (and virtue¹⁹) (i.e., Confucian-like leading by example²⁰; cp. W. RÖPKE 1944/1949, 339). Röpke leaves no doubt about his preferences: Like Rüstow and Eucken, he prefers a performance-based hierarchy or in Röpke's terminology: a *Leistungs-* and *Elite-Hierarchie* (i.e., societal hierarchy based on socio-economic, political and cultural performances/elitist expertocracy; cp. W. RÖPKE 1944/1949, 211). Thus, the ordoliberal elitism and its thinking in societal hierarchies are closely linked to special intellectual and mental capabilities and skills. All this goes along with a high degree of

concerning the circulation of elites (social advancement and decline), they also highlight the eminent importance of elites concerning the genesis of norms as well as (in-)formal institutional changes (cp. for more information about the sociology of elites: M. HARTMANN 2004/2008).

¹⁷ Röpke often refers to the elitist nature of so called *Stammfamilien* (cp. W. RÖPKE 1944/1949, 211), that is, families which are part of the elitist hierarchy based on individual performance; Böhm (F. BÖHM 1937, 118) even claims that certain social classes are born to rule and destined for leadership.

¹⁸ See for further information: Rüstow's *Ortsbestimmung der Gegenwart* (Determination of the Present's Location), his essay *Wirtschaftsethische Probleme der Sozialen Marktwirtschaft* (Economic-ethical Problems of the Social Market Economy (1955)) and Röpke's *Gesellschaftskrisis der Gegenwart* (The Social Crisis of Our Time (1942)).

¹⁹ According to Röpke (1963/1965, 216), intellectual skills form a unified whole with exemplary character traits and virtues.

²⁰ See the indicated literature about meritocratic-expertocratic elitism inside Confucianism in: M. WÖRSDÖRFER 2007.

confidence and trust in the societal elite and scientific experts. The ideal state equals a corporative system, a *Ständestaat*, yet, with pervious class barriers. In addition, it merges meritocratic and expertocratic elements; the ideal ordoliberal society à la Röpke is a meritocracy²¹ and at the same time an expertocracy! Each person is able to climb up the social ladder according to his/her individual capabilities, achievements and personal merits; the *intellectual* elite consists mainly of scientists and experts who guide and direct society.

3.2 Meritocracy: The Special Role of Performance Capability

The principle of performance capability (i.e., *Leistungsfähigkeitsprinzip*²²) is omnipresent in almost all ordoliberal writings. It shapes the ordoliberal notion of justice²³, the ordoliberal concept of competitive order as well as the ordoliberal socio-economic policy recommendations.

The ideal ordoliberal society is based on the meritocratic principle: Every man is the architect of his fortune and fortune favours the brave – to use two well-known sayings. Each person should be able to socially ascend according to one's (physical and) intellectual competencies and skills²⁴ and be rewarded according to one's merits. Social climbing and upward mobility has to be allowed for and facilitated by making the socio-economic structures more transparent and achievement-oriented. In addition, public authorities are responsible for guaranteeing justice of the starting conditions, that is, equality at the start of life or in German: *Startgerechtigkeit*²⁵ including just and equal opportunities with regard to

²¹ Röpke favours a natural hierarchy of performances and functions. Such a societal structure deems necessary in order to prevent intellectual massification and the flattening of the pyramid of ranks.

²² Cp. A. RÜSTOW 1950; W. RÖPKE 1950: i.e., social advancement of diligent persons respectively social decline of non-diligent ones; cp. H. O. LENEL / F. W. MEYER 1948: p. IX: "*Competition does not tolerate the conservation and preservation of social classes. It is the order of social advancement and decline depending on the principle of pure performance*" (translation by the author); see also F. BÖHM 1933/1964, 273 (i.e., meritocratic competitive order as the principle of individual justice).

²³ Cp. M. WÖRSDÖRFER 2013b.

²⁴ Although, Ordoliberalism incorporates *physical* gifts and talents into its analysis as well, a clear favouritism or bias towards *intellectual* skills becomes apparent.

²⁵ Equal opportunities and justice of the starting conditions should not be confused with egalitarianism. All ordoliberal thinkers are highly critical of

education, training and qualification (cp. A. RÜSTOW 2001, 83). Education should not depend on the social/family background or the financial means of a person; rather, what matters are the individual talents and gifts as well as the willingness and the proof to work hard (cp. A. RÜSTOW 2001, 83). The education policy, therefore, has to provide scholar- and fellowships for promoting promising and auspicious students and their respective talents.

Equal opportunities/chances as well as justice of the starting conditions are two central requirements of the principle of performance capability. To facilitate the implementation of this principle it is necessary to abolish the 'aristocratic' nobility by birth and the 'feudal' law of inheritance which is responsible for inherited inequalities (cp. A. RÜSTOW 2001, 83). Here, Rüstow pleads for progressive inheritance taxes so to overcome the current state of plutocracy.

The principle of performance capability is also essential in the context of economic policy: the ordoliberal concept of competitive order rests upon the distinction between *Leistungswettbewerb* (competition through achievement or competition in terms of better services to consumers) and *Behinderungs- or Vernichtungswettbewerb* ('competition' based on market powers instead of performances²⁶ aiming at the restriction and hindrance of competition/'competition' to prevent competition). The Ordoliberals speak in this context of *Leistungskonkurrenz* which has to be established. *Leistungskonkurrenz* and *Leistungswettbewerb* assure a just income and asset distribution according to individual efforts, performances and achievements. In addition, justice consists of the equivalence of performance and counter-performance (i.e., principle of equivalence) (see A. RÜSTOW 1950).

egalitarianism which is believed to be interlinked with Mises' 'spiral of interventions' (e.g. L. VON MISES 1926/1981) and the creation/extension of the modern welfare state (cp. Röpke's critique of the welfare state in: 1933/1965: p. 175; 1942, 261 and 271; 1944/1949, 171 and 255; 1958/1961, 75, 226 and 244.; see also W. RÖPKE 1950, 65ff., where he argues against absolute material equality of the living conditions). Equality of opportunity is just a relative, not an absolute principle; it has to be compatible with the ethical ideal of personal liberty.

²⁶ Entrepreneurial freedom is only legitimately justifiable when it is based on market performance, not on market power (see L. ERHARD / A. MÜLLER-ARMACK 1972, 222).

3.3 'Expertocracy': The Special Role of Clercs

In his book *Civitas Humana*, Röpke mentions the importance of special countervailing powers, acting as counterbalance to public authorities – a concept quite similar to Eucken's ordering potencies developed in his *Grundsätze*-book: In line with Eucken, Röpke includes science respectively academics at the forefront of these countervailing powers – together with judges and journalists. Together, they are subsumed under the term *clerc*. Clercs are not part of a separate institution or profession; the term rather refers to a special kind of people and to a unique attitude of mind and thinking. The characteristics of clercs are: 1. a sense of responsibility and justice; 2. the pursuit of truth; and 3. 'steeliness' in the sense of being un-influenceable. Clercs (ideally) serve the uncorrupted truth and are committed to values which are supra-national and antecedent to the state. Remarkable is the fact that many clercs are part of the middle classes – equally apart from proletarianisation (a certain degree of material independency is necessary) as well as corrupting opulence and prosperity. Some clercs (or clergyman) are part of a religious community – religion²⁷, therefore, serves as a further countervailing power and as a constitutive force of the economic and socio-political order (cp. W. EUCKEN 1952/2004, 347).

As has already been stated, the major groups within clercs are scientists, judges and journalist; altogether, they form the *Nobilitas naturalis*. 1. *Scientists and academic scholars* function as independent authorities of society just like judges and journalists. They are obliged to the truth and ideally represent the ultimate truth – even though in some cases verity might conflict with state doctrines. Should it be necessary, scientists as 'secularized clergies' have to swim against the tide; they have to be intellectually independent of prevailing opinions (see also F. BÖHM / W. EUCKEN/ H. GROßMANN-DOERTH 1936/2008, 27: "*the men of science are the only objective, independent advisors due to their extraordinary position standing above economic interests*"). Their task is to ban ideologies and unjustified prejudices as well as to disclose and critically evaluate pseudo-scientific value-judgments.²⁸ Yet, what is most important is their fight against the relativization of values and the

²⁷ Röpke, in this regard, opposes 'religions in disguise' ('verkappte' Ersatzreligionen), that is, nationalism, collectivism and biologism (cp. W. RÖPKE 1944/1949, 224).

²⁸ Value judgments are inextricable linked to science; they are not per se illegitimate – to the contrary. Value judgments are necessary especially in the context of (justifying) absolute ethical values; cp. for a contrary position: Weber's postulate of freedom from value judgments (cp. M. WEBER 1904/1968).

defence of binding core ethical values like trueness, justice, peace and community spirit (cp. W. RÖPKE 1944/1949, 156). Science – so to speak – is the shrine of the pursuit of absolute verity and the diligent defence of last and absolute values (cp. W. RÖPKE 1944/1949, 229).²⁹ Science is the array of free thinking of independent minds that are responsible for preventing society taking the wrong track (i.e., pseudo-scientific demagogy, dogmatism as well as desires of bossiness and ambition). The potential danger that might come up within the scientific community is infection with the virus of massification and stereotyping. Röpke speaks of the potential danger that science might become a kolkhoz and a collective farm (which, of course, has to be prevented).

2. The second group of clerics consists of the *judges*: Like scientists, judges have to be independent and they have to serve justice and the truth (cp. W. RÖPKE 1944/1949, 231). They are responsible for monitoring and implementing the 'supranational and antecedent to the state majesty of law'. Of great significance are the division of powers, institutional checks and balances, and the rule of law. Here, Röpke explicitly opposes arbitrariness, despotism and tyranny.³⁰

3. Last not least, *journalists* constitute the third group of clerics: Röpke points at the eminent relevance of freedom of the press as well as the journalists' sense of responsibility. This professional group has to meet high intellectual qualifications *and* ethical standards; journalists are – among others – responsible for saving society from political despotism. After all, press and media are the fourth estate. The danger that might come up is the unscrupulousness regarding the choice of means in order to increase the number of publications of the yellow or tabloid press. Additionally, Röpke sees the danger that newspapers and magazines are growingly dependent on advertisement and investors. As a direct consequence, journalists and editors are compelled making

²⁹ According to Röpke, absolute or ultimate values are scientifically objective and therefore, legitimate. They refer to anthropological facts and elementary, normative-ethical ideals as anthropological constants of the psycho-physical nature of human beings (cp. W. RÖPKE 1944/1949, 158).

³⁰ It is important not to confuse this hierarchical, elitist and paternalistic concept of the state with a totalitarian regime or dictatorship (cp. W. RÖPKE 1944/1949, 245) – these accusations put forward by Haselbach (1991) and Ptak (2004; 2007) can also be dismissed when taking a closer look at Eucken's and Röpke's biography (i.e., Eucken, for example was part of the German resistance movement opposing National Socialism) and their personal fights in and outside of Germany against the totalitarian Nazi-regime (cp. R. KLUMP / M. WÖRSDÖRFER 2011, 555 and 570).

concessions to the mainstream and, as such, tend to promote the process of massification (cp. W. RÖPKE 1944/1949, 235).

All different kinds of clerics share one moment: they all have equally access to the realm of truth; they are holders of the truth and they are pre-destinated to be a part of the elitist and meritocratic expert-culture envisioned by Ordoliberalism; they are part of the leading class or as Fischer puts it: they belong to the 'ruling class of the knowing' or the 'reign of the knowing' (T. FISCHER 1993, 149).³¹ Röpke sums up the Eucken-like *ordering function of clerics* when he comments: "... nowadays, more than ever, indispensable leadership by real intellectual authority [is required] [...]. Indeed, when science willingly abandons its own authority, whereto should we address ourselves? When science does not show us the way through all the chaos of opinions and ideas and when science does not draw up general (ethical) guidelines for values and aims – because it is beneath its dignity – to whom can we apply and from whom can we expect it?" (W. RÖPKE 1944/1949, 152); translation by the author). Clerics are advising politicians and other representatives of the state as well as economic decision-makers. In addition – and that is essential for the argument of this paper –, they are mainly in charge of modifying the institutional, socio-economic framework of society. The elitist experts are accountable for altering and reforming societal norms (cp. W. RÖPKE 1950: 231). Thus, clerics are in a certain way prescribing norms in a paternalistic-heteronomous and anti-pluralistic³² manner. The reason for this is that these experts have gained access to the realm of absolute truth.

3.4 The Ordoliberal Quest for Ultimate Truth

In his book *Mass und Mitte*, Röpke criticizes *progressism* for its alleged nihilism. In his eyes, nihilism is responsible for destructing the notion of truth and for eliminating fundamental ethical values (cp. W.

³¹ Fischer (T. FISCHER 1993, 149) also speaks in this context of "*enlightened dictatorship*".

³² *Anti-pluralistic* in this regard means that the development/evolution of norms takes place without the explicit approval of legitimate interest groups and without the citizens' involvement and participation in democratic decision-making processes (i.e., anti-Vanbergian, *non-consensus-seeking approach*). Not all interest groups are per se illegitimate and in danger of misusing their powers in terms of rent-seeking, think of parties, non-governmental organizations, civil society groups, etc. – given that appropriate constitutional checks and balances are implemented. Here, Ordoliberalism is overstating the fear of the influence of power groups in an unsophisticated manner.

Röpke 1950, 59). Nihilism is apparently highly correlated with relativism; in the end, this process is supposed to lead to a far-reaching secularisation, emancipation from religions and old traditions, nomad-like lives, the cult of technology, and proletarianisation with its dissolving footholds and disintegration of values and traditions. Röpke criticizes "[t]he resolute secularisation of intellectual contents of our time with its bluntness and [...] resolution of religious minds, the decomposition of ultimate transcendental norms, values and beliefs, the 'nihilism' in the sense of destructing truth, absolute values and the immaterial sense of life and world" (W. RÖPKE 1950, 58; translation by the author) as well as "... the urge to get completely rid of everything that seems to constrain the absolute self-aggrandisement of humans. It is the advancement towards the utterly emancipation of the human being. The ultimate aim is to cut off the human being from its roots and to break away from all bonds and exterior forces [...]. The emancipation from all absolutes involves a tendency towards total relativisation. Thereby, arbitrariness and randomness are becoming more and more dominant. [...] No distinct boundaries, no unalterable points, no rigid fundamentals that could stabilize. We are directly heading towards a world of entire despotism" (W. RÖPKE 1950, 62; translation by the author). What is required in such a situation of massification and stereotyping, a state of an overall intellectual-ethical and socio-political crisis, is a return to truthfulness, that is, an absolute secure foundation of values. The only way out of this time of crisis is the philosophical search for ultimate truth (cp. W. RÖPKE 1944/1949, 25); here, clerics and their 'service to truth' (*Dienst an der Wahrheit*) are vital.³³

Eucken in turn aspires to overcome the 'Great Antinomy' in economic methodology, the *Methodenstreit*, as well as the (scientific) crisis of humanity by laying a revolutionary new methodological fundament of science in general and economics in particular. He intends to establish *economics as a rigorous and crisis-proof science* – to use a title of one of Husserl's essays and lectures – and searches for a solid and absolute epistemological basis of economics: a search seeking evidence, objectivity, apodictic truth and ultimate justification based on eidetic cognition, as Husserl puts it. Moreover, Eucken's epistemological aim is not only to implement a true, i.e., ultimately justified and crisis-proof

³³ Cp. W. Röpke 1933/1965, 173: "... [What is required is] the will to emancipate the mind from heteronomous authorities, the absolute aspiration for truth while rejecting any kind of obscuration, mythology [...]. [What is also needed is] intellectual integrity [...], the liberal ideal of using ratio in the service of truth" (translation by the author).

science.³⁴ He seeks gaining access to Rudolf Eucken's *realm of truth*³⁵ as well. Via applying an analytical raster which interlinks (Weberian) ideal-type- as well as (Rudolf Euckenian and Husserlian) isolating-abstraction-elements it becomes possible – at least in the eyes of Walter Eucken – to deduce theoretical knowledge and to arrive at (Husserl's and Rudolf Eucken's) realm of truth. Pointedly distinguishing abstraction simply means interpenetration of economic reality, radical turn towards reality, steering towards eidetic essences, to essential truth³⁶, and the founding of an atemporal valid morphology. According to Walter Eucken, the feedback of the *evident truth of reasons* (*Wesenswahrheit*; cp. W. EUCKEN 1934, 29) enables the overcoming of the scientific dualism of theoretical and historical economics (i.e., Great Antinomy or *Methodenstreit*); moreover, it allows the founding of a crisis-proof science. In summary, Eucken's methodology is an instrument or a tool in order to overcome the *Gesellschaftskrisis* (by reaching the realm of truth via a crisis-proof science) and in order to explore economic systems capable of meeting the twofold condition of a functioning and humane socio-economic order based on religious values.

Excursus: Ordoliberalism and Historism

All this goes along with the ordoliberal antipathy towards *historism*. The aim of Ordoliberalism is the refutation of historism due to its (alleged) fostering of relativism, determinism and fatalism. The only way

³⁴ By quoting Husserl, Eucken applies directly *early* phenomenology to economics. Husserl (as cited in W. EUCKEN 1950/1992: 304) writes: "*The systematic character of a science, if genuine, is not something invented, but lies in the facts, and its existence therein has to be discovered. A science must be the means by which the realm of truth is extended, and this realm is no disordered chaos but governed by uniformity and regularity.*"

³⁵ *Rudolf Eucken's epistemology and methodology* uses a method of abstraction and reduction, and a Weberian method of isolating ideal types. He calls this technique *noological method* which is close by the phenomenological approach. He aims at the substance or the being of facts; he also highlights the entirety, totality, the intuitive, direct and straight look, and the advance towards the essence, and he pursues – in complete concurrence with Husserl – the realm of truth (cp. R. EUCKEN 1918; 1922, 70 and (without publication date), 59, 66; cp. W. EUCKEN 1950/1965, 230; N. GOLDSCHMIDT 2002, 80; 2007, 7 and 2009; see for more information about parallels of the noological and the phenomenological method: N. Goldschmidt 2002, 83; F. Fellmann 2009; R. KLUMP / M. WÖRSDÖRFER 2011).

³⁶ Cp. R. EUCKEN (without publication date), 94.

of overcoming historicism is – at least from an ordoliberal perspective – a new method of thinking in orders and economic constitutions based on the already mentioned phenomenological *Wesensschau* (i.e., contemplation or intuition of essences). As Eucken (1938b, 64) states, historicism is responsible for the relativization of all religious and ethical norms and values³⁷ and – worst of all – for the denial of absolute truth. This relativization of the idea of truthfulness (see also W. EUCKEN 1950/1965, 271) is inseparably connected with subjectivism and a mistrust in reason, rationality and prudence. Science is regarded by historicism as a minor subject; as a result, it loses its constitutive and ordering function. The actual fundamental aim of science is – according to Eucken – the search for objectively valid knowledge which has to be defended at all events against public authorities. However, since the (alleged) victory of historicism at the end of the 19th and beginning of the 20th century and since historicism has become the predominant force and ideology of the present, irrationalism is – in the eyes of Ordoliberalism – pervasive as well as *punktueller Denken*. This unsystematic and selective thinking combined with irrationalism leads to a neglect of answering fundamental (scientific) questions and pursuing pure science and scholarly activities. Due to the historic-relativistic mentality with its irrationalism and its idea of a deterministic and fatalistic development, science loses its role of analysing and influencing everyday life. All (pseudo-)‘scientific’ insights are time-dependent and relative (i.e., *Daseinsbedingtheit der Wahrheit* and *Daseinsrelativität der Existenz*); obligatory and lasting rational knowledge is simply inexistent – so the representatives of historicism claim (at least this is Eucken’s et al. interpretation). Thus, science is no longer an ethical ordering power, Eucken concludes.

According to Eucken, who is convinced that we are living in an ‘era of historicism’, this mental attitude of relativism has to be overcome. Historicism has to be challenged and combated. The decay of science has to be abandoned, the sceptical atmosphere towards science has to be ended and the dethronement of the ratio has to be undone. The real objective of (economic) science is to approach truth and to reach veritable and genuine cognition. Additionally, science is mainly responsible for revealing the actual and true connections of the facts of

³⁷ The all-pervasive challenging of religious and ethical values is regarded as a serious threat. It inevitably leads to nihilism and a decline in values – Eucken and other Ordoliberals are convinced. It is, therefore, related with the ordoliberal topic of the societal crisis of the present and with its thorough critique of the societal conflicts of modern civilization.

everyday (economic) life, for pushing aside the ever changing and subjective 'surface-opinions' (*Oberflächenansichten*), for approaching non-relative truthfulness and for the penetration of 'historical reality' in order to understand everyday economic experiences and in order to solve real-world problems. Here, Eucken's belief in the power of rational and scientific thinking and in the power of ideas becomes evident. His faith in human reason (cp. W. EUCKEN 1933; 1938b, 74) seems to be limitless and in a way adjoins hybris.³⁸

By intensely discussing (a caricature(?) of) historicism, two things become clear. First of all, Eucken is criticizing Gustav Schmoller and the German Historical-Ethical School as one major representative of historicism and, thus, as one major component fostering relativism, fatalism and irrationalism and for querying the creative and formative function of science (see also F. BÖHM / W. EUCKEN / H. G. GROßMANN-DOERTH 1936/2008, 32). According to Eucken, the Historical School is not able to explain economic reality; a characteristic of the Historical School is its evasion of fundamental questions and in particular its disregard for constitutional-economic analysis. To the contrary, the Historical-Ethical School just focuses on minor (i.e., selective and unsystematic) questions without considering the socio-economic interdependencies and without using tools of theoretical methodology. Second, what becomes clear is the *connectedness of unprejudiced love of truth, science and religion*: Ordoliberalism is not only fighting the decay of reasoning and truth; they are also fighting for eternal and imperturbable values³⁹ which help to stabilize and secure individual existences in an era which has lost its ethical benchmarks (cp. W. EUCKEN 1950). These ethical-normative values are stemming from human ratio, but in the end, they rest upon God (cp. W. EUCKEN 1938b, 68). The overall aim is to establish an 'order of truth' based on 'Ordo' as a natural order of essence respectively as an exact image of the order of reason willed by God. The ideal normative order, therefore, equals the divine order which functions as a regulatory normative ideal (cp. W. EUCKEN 1950/1965, 239).

³⁸ Recent behavioral economics theories such as bounded rationality, Simon's satisficing man model or Kahneman/Tversky's heuristics and biases approach seem to contradict Eucken's et al. philosophy of science.

³⁹ Cp. L. MIKSCH 1950, 279: "It was a struggle for eternal values of humankind. For [Eucken], economic theory was just a means in order to create an order capable of liberating these values clasped by chaotic, anarchistic-collectivistic and fundamentally nihilistic forces" (translation by the author).

3.5 The Implementation of Ordoliberalism and Social Market Economy

The implementation strategy of Ordoliberalism rested fundamentally on influencing politics and the public opinion – especially via educational institutions (i.e., public enlightenment⁴⁰) and via consulting academies and advisory councils (i.e., Eucken's ordering function of science and education). Accordingly, ordoliberal academics pushed their agenda in both the scholarly and popular press. The pursuit of hegemony in the scientific community started already in the NS-era when several ordoliberal thinkers were working as referees and advisors. Right after the collapse of the Nazi-regime, the ordoliberal expert-counselling continued when Eucken and others delivered expert opinions on socio-economic topics to the allies. The aspiration after cultural and socio-economic supremacy was interconnected with the filling of strategic key positions within the sector of politico-economic consulting. The overall aim was to directly influence political decision makers in order to implement ordoliberal ideals or at least to prevent anti-ordoliberal policies. In addition, the Ordoliberals indirectly exerted pressure on politics by influencing the *vox populi*, the public opinion and by being ever-present in public debates (i.e., media support and the use of media as multipliers).

According to Ordoliberalism, no more than the scientific experts know what is best for their country – based on the assumption that they are the only ones having gained access to the realm of truth.⁴¹ Mass

⁴⁰ See also the so called *Volkswirtschaftsfibel* written by Dietze, Eucken and Lampe (1941/1942), aiming at the general education of the public. Accordingly, although the scientific concept of Ordoliberalism is an elitist one, elements of general (mass-)education are incorporated into it as well (cp. D. RÜTHER 2005).

⁴¹ In this context, a further similarity between phenomenology and Ordoliberalism can be detected: According to Eucken and Husserl, Ordoliberalism and phenomenology are mainly responsible for overcoming mental immaturity and reaching autonomy and self-confidence. Transcendental economic ethics and philosophy, thus, incorporate a claim to *ordoliberal-phenomenological leadership* similar to that of Platonism (i.e., philosopher kings). Ordoliberally and/or phenomenologically trained persons are the teachers of the people; they are the bearers of rationality, they teach and educate their milieu until an ordoliberal/phenomenological movement and finally an overall ordoliberal/phenomenological society has been established (cp. Husserl's unpublished manuscripts: Ms. K III 9/64a and K VI 334 cited in R. KLUMP / M. WÖRSDÖRFER 2011 and for a similar elitist understanding of science W.

influence has to be limited; otherwise the chaotic and anarchic forces of the masses will destroy order and security. The masses are often regarded as a synonym for an uneducated and uncivilized mob following primitive instincts and passions.⁴² The majority of the population, the mass population, has to be led by a strong and assertive intellectual elite (i.e., leading by elitist experts).⁴³

Prior and especially after 1949, scientific counselling was an eminent factor of power and the expert culture and intellectual elites framed much of Germany's post-war history. The work of Böhm, Eucken, Miksch, Röpke and others were reasonably influential especially with regard to the monetary and economic reform of 1948 (i.e., *Leitsatzgesetz/Währungs- und Wirtschaftsreform*), the anti-cartel legislation (i.e., Monopolies Commission Act and establishment of a cartel office in 1958), the monetary policy focusing on price stability and the independency of the German central bank (i.e., *Bundesbankgesetz*, 1957⁴⁴). Of particular importance were Röpke's expertise for the Adenauer government *Ist die Deutsche Wirtschaftspolitik richtig?* (W. RÖPKE 1950/1981) as well as Böhm's political commitment to competition policy (e.g. Law against Restraints of Competition (*Gesetz gegen Wettbewerbsbeschränkungen*, 1957) as a supplement of the Fair Trade Law (*Gesetz gegen den unlauteren Wettbewerb*)).

The so called *Brigade Erhard*, or as Hutchison (1981/1992, 168) puts it, Erhard's "satellite economists and experts", that is, (academic) supporters of Ludwig Erhard's economic policy, was mainly responsible for implementing, strengthening and securing ordoliberal ideals; they also helped consolidating and advancing the Social Market Economy-policy of Erhard and Müller-Armack by legitimizing and justifying the newly established socio-economic concept as an 'Irenic Formula' and a 'Third Way' between socialism and laissez-faire capitalism. Furthermore, the *Frankfurter Allgemeine Zeitung* (FAZ) and the *Neue Zürcher Zeitung* (NZZ) were of eminent significance in providing journalistic and, in a

EUCKEN 1952/2004, 338 and R. EUCKEN 1922, 80, where he regards himself as an intellectual leader and people's advisor).

⁴² However, it is not correct to state that the masses are a synonym for the poor people. Everyone has the chance by educating him-/herself to become part of the intellectual and meritocratic elite (cp. W. RÖPKE 1942, 27).

⁴³ Cp. R. PTAK 2007, 34; 2004, 193: Ordoliberalism is "... oriented towards a corporatist structure of society, the influence of elites rather than masses in the context of political decision-making..." (translation by the author).

⁴⁴ Cp. already W. EUCKEN 1923, 80, where he additionally pleads for the gold standard; see also C. VON DIETZE / W. EUCKEN / A. LAMPE 1941/1942, 81.

certain way, propagandistic 'fire protection'.⁴⁵ This process of legitimizing a new *justification narrative* was accompanied by the setup of a scientific infrastructure at the Federal Ministry of Economy (BMW) and elsewhere. An academic advisory council (*Wissenschaftlicher Beirat*) was founded in 1948 at the Economics Administration in Frankfurt – the successor organisation of the so called *Arbeitsgemeinschaft Erwin von Beckerath* and the predecessor organisation of The German Council of Economic Experts (*Sachverständigenrat zur Begutachtung der gesamtwirtschaftlichen Entwicklung*).⁴⁶ Among the first members were many ordoliberal or ordoliberal-affiliated thinkers like Franz Böhm and Walter Eucken. Other appreciable founding members were von Beckerath, Hallstein, Lampe, Liefmann-Keil, Miksch, Müller-Armack, von Nell-Breuning, Preiser, Rittershausen, Schiller, Veit, and Wessels – to name but a few. In the years and decades following WWII, further neo- or ordoliberal think tanks and multipliers have been setup, e.g. the economic-political society WIPOG *Wirtschaftspolitische Gesellschaft* (founded in 1947)⁴⁷, Die WAAGE *Gemeinschaft zur Förderung des sozialen Ausgleichs e.V.* (1952-1965), the *Aktionsgemeinschaft Soziale Marktwirtschaft* (ASM, 1953), the Walter Eucken Institute (WEI, 1954), and the *Kronberger Kreis* (1982). Internationally, the *Mont Pèlerin Society* (MPS), founded in 1947 by Hayek and others (Eucken and other Ordoliberals were among the founding members of the MPS), provided the ordoliberal program (and in some sense also the Social Market Economy) with worldwide credit, acknowledgment and political clout.⁴⁸

⁴⁵ Ptak speaks here of an ordering-political indoctrination and of the mythical-legendary triumvirate: Erhard – Social Market Economy – Economic Miracle (cp. R. PTAK 2004, 263 and 282).

⁴⁶ Cp. R. PTAK 2004, 256.

⁴⁷ Cp. K. SCHULZ 1986.

⁴⁸ Cp. P. PLICKERT 2008. The hour of birth of neoliberalism was the so called *Colloque Walter Lippmann*, organized by Rougier in 1938. The basis for discussion was the book *The Good Society* written by Lippmann (1945). Among the participants of the colloquium were Aron, Hayek, Lippmann, Mises, Polanyi, Röpke, Rueff, Rüstow et al. (in total 12 of the 26 participants of the Lippmann-colloquium were later among the founding fathers of the MPS). Neoliberalism is, thus, a by-product of the crises of the 1920ies and 1930ies (i.e., Great Depression and rise of totalitarian ideologies). What becomes clear right from the start is that the neoliberal movement was split into (at least) two poles or camps: the one faction was led by spokesperson Ludwig von Mises, the other one by Rüstow and Röpke, the two major representatives of Sociological Neoliberalism. This subdivision was also characteristic of the first meetings of

Some of the mentioned think tanks⁴⁹ nowadays function just like ordinary lobbying institutions with all their PR instruments⁵⁰ shifting their focus from public enlightenment and education more towards rent seeking (they, thus, have diverged from the origins of Ordoliberalism).

In summary, the *implementation strategy* of Ordoliberalism rested on four pillars: After having gained access to the realm of truth, Ordoliberalism aimed at the circulation and spreading of ordoliberal *Wirtschaftsordnungspolitik* as the only reasonable way of economic policy (i.e., the competitive order as the one and only socio-economic order) within the scientific community. This *first step* was accompanied by an argumentative and in some ways ideological fight against opposing and rival economic theories competing for academic hegemony (i.e., ideological moment within Ordoliberalism) (*second step*). The *third step* involved the circulation of the ordoliberal 'doctrine' via multipliers in the media and in the education sector, that is, ordoliberal academics pushed their agenda in both the scholarly and popular press in order to win the battle of ideas. The *fourth and final step* contained the convincing of political, administrative and economic decision makers that the ordoliberal alternative is the only one guaranteeing individual liberty, social security and justice; all other available alternatives would lead to a policy based on privileges and arbitrary interventions into the plays of the game (mainly induced by the influence of powerful interest groups prescribing the rules of the

the MPS. The MPS itself was founded in 1947. Among the invited scientist were Friedman, Knight, Machlup, Mises, Stigler, Hayek, Popper, Robbins, Röpke and Eucken (who later became Vice-President of the MPS). The aim was to establish an international network of neoliberal economists. Noteworthy is the fact that the weights within the MPS shifted gradually over time. In its early years, the MPS was mainly dominated by European thinkers and a balanced equilibrium between the two poles could be detected within the neoliberal community. Since the 1960ies, however, the MPS has been successively dominated by Anglo-Saxon economists and the sociological element so characteristic of early neoliberalism has faded away (i.e., since then, Sociological Neoliberalism is no longer part of the MPS). Especially after the demission of Röpke and the resignation of Rüstow (the so called Hunold-affair was a major caesura) the transformation of the MPS into a mere (Anglo-American) economic association began.

⁴⁹ Worth mentioning are furthermore the Initiative New Social Market Economy (INSM) founded in 2000 and the Hamburg Institute of International Economics (HWWI) founded in 2005.

⁵⁰ Cp. R. PTAK 2007, 75; see also M. CANDEIAS 2003/2009, 316.

game) and would, therefore, reduce the overall wealth of society. Hence, the main focus of the implementation strategy lied on influencing the political elite – confirming once again the allegation of an elitist and expertocratic societal ideal.

Astonishing is the *epistemic optimism* displayed by ordoliberal thinkers: They are convinced of the malleability of economics and politics with the help of academics. From their point of view, science functions as a corrective containing the influence of interest groups and ideologies alike. In the idealistic⁵¹ eyes of Böhm, Eucken and Großmann-Doerth (1936/2008, 27; see also F. BÖHM 1937), scientists are the only objective and independent advisors due to their independent position standing above the influence of politico-economic interest groups. Therefore, they have a duty to intervene in public affairs (i.e., relativisation of Weber's postulate of value-free scientific judgments) and help to resolve concrete socio-economic problems. Their belief in the ordering powers of ratio and reason includes the feasibility of (completely) rationalizing public-political debates and discourses; moreover, they believe that it is indeed possible to educate and enlighten the public – although certain ambivalences exist towards the masses.⁵² In order to rationalize public debates, scientific enlightenment, clarification and explanation is indispensable. Additionally, what is required is a national economic education program (in combination with role-models, i.e., scientists that help ordinary people in finding their intellectual orientation and to establish moral

⁵¹ Here, it should be noted that science is anything but independent of the influence of interest groups. In addition, this apodictic belief in the salutary role of science is a special kind of authoritarianism as well. So, Ordoliberalism is free of totalitarianism, yet not free of authoritarianism of all kinds – although, they are warning against a political 'subordinate mentality' (*Obrigkeitsdenken*).

⁵² Röpke (1933/1965) warns of the tyranny of the masses, discusses the problem of mass stultification (168) and notes that the masses might endanger European culture: „Die Masse steht im Begriff, den Garten der europäischen Kultur zu zertrampeln ...“ (178). Miksch, on the other side, admits that economic laymen and the masses will never be able to fully understand (and appreciate) the functioning of the price mechanism or the interdependencies of the socio-economic orders (L. MIKSCH 1949/2008, 164) – pointing once more at the underlying ordoliberal elitism or at least intellectual-aristocratic tenor (some might say, arrogance) (see also W. RÖPKE 1963/1965, 216 and especially his *Nobilitas naturalis*). One reason for the negative ordoliberal attitude towards the masses is the connection between the masses and the mass movement of the Nazi regime (and other totalitarian ideology).

certainties). E.g. Eucken has written a *Volkswirtschaftsfibel* – together with von Dietze and Lampe – in order to educate and inform ordinary people about fundamental economic theories and socio-economic interdependencies (cp. C. VON DIETZE / W. EUCKEN / A. LAMPE 1941/1942; see also D. RÜTHER 2005). Röpke is convinced that it is feasible to educate consumers in a way that they build up their own autonomous power of judgment, that they withstand suggestive advertisement and the mass psychology of promotion, so that they are immunized against the allure of ideologies and their power of seduction (cp. W. RÖPKE 1950, 208). Röpke and Eucken believe that it is the mission of scientists (and academic teachers) as the 'organs of wisdom' with their intellectual integrity and authority to provide the public with overall, general, uninterested and objective enlightenment – starting already in primary schools. Finally, the Ordoliberals believe that the advices of experts and 'think tanks' would directly or indirectly influence the composition of a new socio-economic order by shaping the ordering thinking of the leading classes. People in the ivory tower are searching for objective and absolutely valid knowledge and try to implement and transform it by advising the leaders in the world of politics and economics on how to build up a humane and functioning socio-economic order (cp. W. EUCKEN 1947/2008, 150).

4. Genesis of Norms

4.1 Individual Ethics

What should have become clear in the previous parts of the paper is that the Freiburg School of Law and Economics as well as Ordoliberalism in its original form incorporate hierarchical, elitist-expertocratic and in some ways anti-democratic and mass-averse elements. In this regard, the ordoliberal (epistemological and moral-/political-philosophical) axioms differ fundamentally from Vanberg's own constitutional economics approach which is mainly based on voluntary agreement and legitimizing (democratic) consensus in the form of normative individualism and citizen sovereignty. In this chapter, I will now move on to another category of differences between the Freiburg School and the Freiburg (Lehrstuhl-)Tradition by picking up the distinction between individual and regulatory ethics. According to Wörsdörfer (2013a) the *regulatory ethics level* encompasses the typical ordoliberal framework, the ordering policy and Eucken's so called competitive order. The second ethics level – the so called *individual ethics level* – can be subdivided into three sections: the first type of individual-ethical norm commitment refers to the religious-sociological background (i.e., Christian foundation

of values), the second one refers to the liberal-Kantian heritage of Ordoliberalism (i.e., Kantian understanding of autonomy, freedom and idea of man), and the third one refers to a (Neo-)Aristotelian virtue ethics. Each ethics-level is now subject to different processes of norm generation: While the individual-ethics level is mainly based on an evolutionary genesis of norms (i.e., emergence of norms as a spontaneous process), the regulatory-ethics level is based on an elitist-expertocratic genesis of norms. Here, a further difference between the Freiburg (Lehrstuhl-)Tradition (à la Vanberg) and the Freiburg School may be detected since both schools are favouring different genesis of norms approaches.

At the heart of Ordoliberalism are the individual-ethical (Kantian) values personal liberty, autonomy, citizen sovereignty, human dignity, but also Christian maxims like solidarity, benevolence and love of neighbour. Other examples of evolutionary developed ethical maxims and norms include the Golden Rule, the Decalogue, the *do ut des* formula, and the tit for tat strategy (i.e., an eye for an eye, a tooth for a tooth). All these kinds of values have evolved spontaneously and evolutionary in the course of time and are formed bottom up by local associations (as opposed to a top-down construction): They are to a considerable degree the non-intentional by-product of evolutionary forces and have not been consciously invented or implemented by deliberate design or a master plan. Instead, they gradually evolved along the 'path of tradition' over centuries⁵³; they were generated (through human action and interactions, yet not through human design), proved themselves in practise and finally became prevalent through experimental trial and error learning processes – first in small-scale communities and later on in large, loose-knit and anonymous societies (i.e., historically evolved framework of rules and institutions). This kind of genesis of norms reminds the reader of Hayek's (and Vanberg's) concept of cultural evolution as well as Poppers' *piecemeal social engineering* which allows for perpetual revisions providing the ground for the fallibility, irrationality, partial knowledge and uncertainty of individuals. According to Hayek (and Vanberg), formal as well as informal norms and institutions are mainly an unintended by-product of self-regulating und self-organizing *spontaneous orders*⁵⁴ and the dynamic processes of *cultural evolution* – relying on abstract,

⁵³ Cp. W. RÖPKE 1933/1965, 169.

⁵⁴ Cp. F. A. VON HAYEK 1960; 1966/1996, 263; 1970/1996; 1971/2005, 51 and 68; 1973; 1976; 1979; 1983/1996; V. J. Vanberg 2003; 2006; see also M. STREIT / M. WOHLGEMUTH 2000 for a comparison between Eucken and Hayek.

impersonal and negative general rules (of prohibition), making use of de-centrally fragmented knowledge (i.e., widely dispersed, hidden and tacit knowledge) and the division of knowledge. The spontaneous emergence of the market order – to give an example – is not a deliberately intended product of constructivist organizations; it cannot be invented or implemented by deliberate design or a master plan; instead, it has gradually evolved over millennia and gone through constant and ongoing selection and learning processes. Self-interested individuals are pursuing their own personal goals, and by doing so they 'create' (led by an 'invisible hand') a new kind of societal order which is not an intentionally created order through planning. Due to its complexity and unforeseeable coincidences, future socio-economic developments cannot be predicted and rationally planned. It is up to the individuals and their preferences to choose the (in-)formal institutions which – in their eyes – have proved to be beneficial and valuable in everyday-life and which are, therefore, worth imitating, and which institutions on the contrary are not and, thus, should be dismissed. Additionally, new (and highly innovative) institutions come into being when they succeed the test of the selection processes and are imitated by a large number of people (cp. Schumpeter's model of innovation and imitation). According to Hayek, Vanberg and others, this model of cultural evolution allows for a highly innovative and prosperous open society. Finally, already existing institutions are not rigid and fixed for all times. Rather, (socio-economic) orders can be improved step by step by deliberate reform (cp. V. J. VANBERG 2004, 8): The political-cultural product, based on a constitutional order requires careful cultivation for its maintenance and proper functioning. Vanberg uses in this regard the metaphor of a gardener (contrary to the metaphor of an engineer). The socio-economic order is not a self-generating and self-maintaining gift of nature but something that needs to be actively pursued and cultivated. He also speaks of the competitive order as a 'care-dependent park landscape' (cp. V. J. VANBERG 2008, 91).

4.2 Regulatory Ethics

So far, parallels between Hayek, Vanberg and Ordoliberalism exist. However, when we take a closer look at the regulatory-ethics level, we can detect several divergences between Hayek and Vanberg on the one hand (= Freiburg (Lehrstuhl-)Tradition) and Ordoliberalism on the other hand (= Freiburg School of Law and Economics as well as Sociological

Neoliberalism).⁵⁵ While Hayek and Vanberg transfer the concepts of cultural evolution and spontaneous order to both kinds of institutions – formal as well as informal ones –, the representatives of Ordoliberalism limit the concepts of cultural evolution and spontaneous order to the field of informal institutions. In the area of formal institutions or in my terminology, the area of regulatory ethics, Ordoliberalism pursues an elitist-expertocratic genesis of norms, not a spontaneous and culturally-evolutionary one.⁵⁶ The decisive determinants in terms of genesis of norms are academics and scientific experts pointing towards a constructivist instead of a spontaneous order.⁵⁷ Sally (R. SALLY 1996, 5) concludes: "... [Ordoliberalism] is really asking too much of both political intelligence and political practice in believing that these principles can be fully and rigidly implemented. There is an element of perfectionism and impracticability in the overall scheme. [...] its leading lights are rather constructivist in the Hayekian sense of the term. There is a faith in human intelligence and knowledge to design or make a new order or *Ordo*, and in the subsequent ability of the state to regulate such an order. [...] A free order should accommodate highly imperfect, irrational and fallible human beings; it should not be designed for saints or even rational and intelligent maximisers."

Given that science is capable of conquering the three prevalent prejudices and resentments, namely positivism, historicism and *Punktualismus* (i.e., isolated and selective thinking)⁵⁸, it is able to

⁵⁵ Therefore, it is at least doubtful, whether Hayek can be classified as an Ordoliberal as stated by Kolev (2010) and others. Kolev draws a threefold division of Hayek's life and work: Hayek I as the business cycle theorist, Hayek II as the ordoliberal philosopher (i.e., 1930ies-1940ies; the time of *The Road to Serfdom* and the founding years of the Mont Pèlerin Society), and Hayek III as the evolutionist philosopher (starting in the 1950ies until the end of his life). What becomes clear is that Hayek's arguments underwent substantial changes; especially, the distinctions between Hayek III and Ordoliberalism become apparent – although some parallels, no doubt, (still) exist; in particular, Hayek's *Road to Serfdom* bears some considerable parallels to the work of Eucken et al.

⁵⁶ For Eucken, a functioning market economic order neither emerges nor prevails spontaneously, but has to be generated by ordoliberal science and instituted and protected by the ordoliberal state (W. EUCKEN 1952/2004, 14 and 372). Thus, we can speak of a deliberate design and framework-*setting*.

⁵⁷ Contrary to Ordoliberalism, Hayek would probably blame such a concept for its 'pretence of knowledge' (see F. A. VON HAYEK 1974/1996).

⁵⁸ According to Eucken, *positivism* (cp. Eucken's criticism of Weber's postulate of freedom from value judgments in: W. EUCKEN 1952/2004, 341) runs

become a constitutive, formative and creative ordering power or ordering potency – beside religions and the state (cp. W. EUCKEN 1952/2004, 340; see also F. BÖHM / W. EUCKEN / H. GROßMANN-DOERTH 1936/2008). Science has to study and analyse socio-economic reality in an unprejudiced manner relying solely on facts, not on prejudices. A phenomenological method or as Eucken puts it, a method of isolating abstraction is required aiming at the essence of being and searching for evidence, objectivity, apodictic truth and ultimate justification. As stated above, pointedly distinguishing abstraction simply means interpenetration of economic reality, radical turn towards reality, steering towards eidetic essences and the founding of an atemporal valid morphology. By capturing the essence of being, it is possible to get an insight into and to gain knowledge about reality. In a second step, science arrives at a well-informed (constitutional-economic) 'leading decision', a *wirtschaftsverfassungsrechtliche Gesamtentscheidung*, that

into the danger of getting swept up into daily politics and the prevalent fight of vested interests. Thus, positivism becomes increasingly dependent on rent-seeking groups and subordinated to the socio-political interests of power groups. As specified by Ordoliberalism, scientists and academics have to stand above power groups, daily businesses and politics. They have to function as independent intermediaries only committed to objectivity, facts and ultimate truth (cp. W. EUCKEN 1952/2004, 342). The second kind of prejudice which has to be overcome is *relativism*: Historism and romanticism – strongly interconnected with relativism – have begun the flight from reason (see F. BÖHM / W. EUCKEN / H. GROßMANN-DOERTH 1936/2008). Consequently, this arbitrary irrationalism and uncritical wallowing in passions and emotions leads to a far-reaching rejection of the creative power of rational thought and reasoning (cp. W. Eucken 1938b). Moreover, relativism and its all-pervasive anti-rational views suffer in Eucken's portrayal from an inherent repugnancy: It denies all ultimate values and truth, although it believes that this thesis – that truth is only valid relative to its historical context – is objectively valid (cp. W. EUCKEN 1952/2004, 342). The third and final resentment is related to the advancing *specialization* and fragmentation of science and industries: This development leads to *Punktualismus* with its focus on isolated and selective facts without recognizing socio-economic interdependencies and without overlooking the broader picture beyond and above all the details (cp. W. EUCKEN 1952/2004, 344). Noteworthy is the fact, that Eucken criticizes in this context Schmoller's (younger) Historical-Ethical School for not 'thinking in orders' and for neglecting the socio-economic interdependencies – although, Eucken praises Schmoller's school for its ethical attitude of social humanism (cp. W. EUCKEN 1952/2004, 344; see also W. EUCKEN 1937, 562).

is, deliberate constitutional choice, which allows for holistic designing and a deliberate and conscious arrangement of terms and orders (*bewusste Gestaltung der Ordnungen*) (cp. W. EUCKEN 1952/2004, 340; W. EUCKEN 1934, 41). The economic order cannot be left to chance, but must be consciously guided. In the eyes of Eucken, scientific reasoning, thus, is responsible for making or at least for preparing such a fundamental decision regarding the institutional and legal framework. If science does not take over this task, if it does not fulfil its responsibilities, the decision will be made by anarchic political and economic power groups and their dogmatists and ideologists. This last scenario would inevitably lead to group egoism and anarchy, arbitrariness, despotism and to the violation of fundamental liberty rights (cp. W. EUCKEN 1952/2004, 342).

By overcoming the three mentioned prejudices and by gaining access to the realm of truth and, hence, generating adequate norms (i.e., elitist and expertocratic genesis of norms), science becomes a real constitutive force of the economic, political and social order and is able to influence or to give direction to political, administrative and judicial decision makers.⁵⁹ The implementation strategy is quite similar to the one favoured by phenomenology: first of all ordoliberal scientists have to overcome mental immaturity, they have to reach autonomy, self-confidence and gain access to the realm of truth. This kind of transcendental philosophy incorporates a claim to ordoliberal leadership. Ordoliberally trained persons are the teachers of the people, they are the bearers of rationality; they teach and educate their milieu – starting at the top of the societal hierarchy. They influence and warp decision makers like politicians, judges and journalists and proceed in concentric circles until an ordoliberal movement and, finally, an overall ordoliberal society has been established. This is what actually happened right after World War II (cp. chapter 3.5.).

Before drawing a conclusion, a further point is worth mentioning: The two kinds of genesis of norms – the culturally-evolutionary and the elitist-expertocratic one – are not independent of each other; rather they are mutually dependent and correlative. Regulatory-ethics norms and institutions aim at safeguarding individual-ethical ideals; regulatory

⁵⁹ According to Röpke, the clerics are even in charge of *modifying* the institutional, socio-economic framework of society; the elitist experts are responsible for altering and reforming societal norms (cp. W. RÖPKE 1950, 231). Thus, clerics are in a certain way prescribing norms in a paternalistic-heteronomous and anti-pluralistic manner – all this is possible since clerics have gained access to the realm of truth.

ethics functions as a guarantor of freedom, human dignity and a humane socio-economic order. This ethics level is, thus, interlinked with the individual-ethical conception of liberty based on Kantianism as well as (Christian) religiosity. In other words: the elitist-expertocratic genesis of norms of the competitive order is responsible for safeguarding the individual ethical norms which evolved over time in a culturally-evolutionary manner. Yet, even if both ethics levels and both kinds of genesis of norms are interdependent, an apparent oxymoron turns up: this inconsistency and apparent contradiction in terms refers to the seemingly incompatibility and irreconcilability between *Kantianism* as one normative fundament of Ordoliberalism resting on liberty as *autonomy* (i.e., citizen sovereignty and normative individualism) and the *paternalistic and elitist-expertocratic notion of norms* resting on *heteronomy*.

5. Concluding Remarks

Let us summarize the argument of the paper in a nutshell: The first part has provided the reader with Vanberg's constitutional economics approach with its concepts of normative individualism and citizen sovereignty. In the second part, the ordoliberal expertocratic elitism and its inherent 'truth claim' (*Wahrheitsanspruch*) has been evaluated in particular by studying the primary literature of the Freiburg School of Law and Economics as well as Sociological Neoliberalism. In the final part, a distinction between a culturally-evolutionary and an elitist-expertocratic genesis of norms has been drawn building upon the differentiation between individual ethics and regulatory ethics. The main aim of this paper has been to illustrate the parallels and distinctions between the concepts of the Freiburg School of Law and Economics and the Freiburg (Lehrstuhl-)Tradition à la Hayek and Vanberg. The parallels have been illustrated by making use of the constitutional economics concepts *Ordnungspolitik* (i.e., order of rules/choices over rules) as well as freedom of privileges and discrimination. The differences, which have received surprisingly little attention, include the following aspects: 1. philosophy of science and epistemology, 2. genesis of norms (culturally-evolutionary vs. elitist-expertocratic), and 3. political philosophy (i.e., normative individualism and citizen sovereignty). While Eucken and Röpke believe in science as an absolute, while they search for absolute truth and ultimate justification and while they strive for gaining access to the realm of truth⁶⁰, Hayek and Vanberg seem to be more modest

⁶⁰ What becomes clear right from the start is that the main representatives of Ordoliberalism in a strict *and* in a wider sense belief in science as an absolute

and favour a Popper/Albert-style epistemology (i.e., critical rationalism with its warning of pretence of knowledge). While Hayek, Vanberg and other representatives of the Freiburg (Lehrstuhl-)Tradition prefer a cultural-evolutionary approach, the Freiburg School, and in particular Eucken (and Röpke), adopt an elitist-expertocratic approach. Finally, while Eucken and Röpke are in favour of an elitist-expertocratic as well as hierarchical and anti-pluralistic/democratic political philosophy, Vanberg makes use of constitutionalist-contractarian-based arguments. Here, he highlights the significance of voluntary agreement, normative individualism and the so called consensus criterion (i.e., multilateral and voluntary exchange of (self-)commitments, interpersonal reciprocity). Instead of consensus-seeking, the Freiburg School and Ordoliberalism use an anti-Vanbergian, non-consensus-seeking and 'mass-averse' (anti-pluralistic) approach. Anti-pluralistic in this regard means that the emergence and advancement of norms takes place without the explicit

and that their program rests upon a philosophical search for absolute/ ultimate truth. Consequently, this unprejudiced love for truth and its dependence on objective and generally valid range of values and truth independent of any subjectivity, arbitrariness and randomness (*Rückbindung an objektiven Werte- und Wahrheitsbereich*), corroborates the verdict of an elitist-hierarchical and expertocratic ideology. According to Ordoliberalism, no more than the metaphysical and transcendental realm of truth (this is a direct rebuttal of Pies' thesis that Eucken pursues a *metaphysics-free* Ordnungstheorie and a solely *economic* research agenda (cp. I. PIES 2001, 8); instead, Eucken mixes metaphysical and religious elements with scientific ones – all together embedded in a broader socio-economic and cultural framework) guarantees an ideal-typical order. Thus, by gaining access to the realm of truth and by implementing the entirely valid socio-economic order, it is likely to overcome the multi-dimensional and interlinked *crises*: i.e., the societal crisis respectively the crisis of contemporary culture (cp. Ordoliberalism in the wider sense including Rüstow and Röpke), the crisis of intellectual life (cp. Rudolf Eucken's *Krise des Geisteslebens*), the crisis of capitalism (cp. Walter Eucken) and the crisis of science and scientific justification (cp. Walter Eucken and Husserl who postulate a twin-crises, a crisis of science intertwined with a crisis of European manhood; hence, the parallels between Husserl, Rudolf and Walter Eucken are not restricted to the field of methodology as often claimed (see also J. RENKER 2009)). Furthermore, it becomes feasible to fight the different ideologies of interest groups (*Interessentenideologien*; see W. EUCKEN 1938a, 13 and 1950/1965, 12: rational-objective and true scientific judgments vs. subjective ideologies of interest groups respectively science vs. ideologies) and to 'scientificate' politics (*Szientifizierung der Politik*).

approval of legitimate interest groups and without the citizens' direct involvement and participation in democratic decision making processes. In summary, Vanberg picks up fundamental ordoliberal principles (i.e., elimination of privileges and discriminations) and transforms them – with the help of Buchanan's and Hayek's constitutional economics – into a timelier contractual-democratic setting. In this regard, we can speak of a further development, a further advancement of German Neoliberalism in the sense of a modernization accomplished by the work of Viktor Vanberg.

In the end, one question remains open: We have to debate the in-between position and the special role played by (the late) Franz Böhm. Especially in his 1950 and 1966 essays remarkable parallels between Böhm, Hayek and Vanberg exist; moreover, the differences between Eucken and (the late) Böhm become apparent (cp. R. SALLY 2003, 34). Here, Böhm describes the ordoliberal Ordo as a pre-established harmony which has to be discovered, yet not created. The societal order is not invented by humans; rather, it has to be detected. Cultural-evolutionary reminiscences can also be found in terms of genesis of norms: Böhm admits that norms evolve in a supra-individual manner: according to him, they are the by-'product' of a cooperative order which allow for game-like experiments, trial and error and voluntary transaction and exchange processes via markets. To illustrate this point, compare the following quotes relating to Hayek's (and Vanberg's) concept of cultural evolution: "... daß es solche Signalsysteme tatsächlich gibt, daß sie im Laufe ganzer geschichtlicher Zeiträume mehr oder weniger ohne Zutun planender Staatsgewalt, ja sogar ohne Zutun bewußter menschlicher Einsicht durch unbewußt intelligentes Alltagsverhalten zahlloser Generationen von Individuen zurechtgeschliffen und zurechtpoliert worden sind" (F. BÖHM 1966/1980, 118). Or the following quote referring to the peculiarity of market prices as an indirect, yet superior steering technique (i.e., inherent and highly sensitive intelligence incorporating numerous data and informations): "*Marktpreise sind Lenkungssignale, in deren Entstehungsprozeß und Urteilsfindung mehr natürliche und soziale Daten eingehen und verwertet werden, als dies bei jeder denkbaren anderen Art des Lenkens möglich ist*" (F. BÖHM 1966/1980, 123). In contrast to the previous mentioned quotes taken from Böhm's late works, compare his work *Die Ordnung der Wirtschaft als geschichtliche Aufgabe und rechtsschöpferische Leistung* dating from 1937, in which Böhm holds a reverse position. In this book, Böhm claims, that the socio-economic order is not the result of an evolutionary process; rather, it is the product of a conscious, professional and

authoritarian (sic!) decision of political leaders (cp. F. BÖHM 1937, 56). In addition, Böhm is convinced that the indirect steering of markets via competition and price/market mechanisms has to be complemented by the direct method of steering accomplished by state authorities. He even mentions authoritarian(!) market regulation and market control by state command and he concedes price-fixing by the state, expropriation and socialization of private property (cp. F. BÖHM 1937, 161); all mentioned elements are incompatible with his late works. Hayek would speak in this regard of pretence of knowledge. Finally, it becomes clear, that Böhm's early work is quite uncritical of the economic policy of National Socialism and that he places great faith in public authorities (cp. F. BÖHM 1937, 146) – sometimes, he even uses the terminology of NS-ideology. As a result, we can conclude, that Böhm's argument was subject to a profound change during his lifetime. In summary, it seems appropriate to classify Böhm in a certain way as a missing link and an intermediary between Eucken, Hayek and Vanberg linking the ordoliberal topic *Gesellschaftskrisis* (cp. Böhm's *Himmelsgabe*, his Tatwelt-essays as well as his monograph *Die Ordnung der Wirtschaft als geschichtliche Aufgabe und rechtsschöpferische Leistung* (here, especially pages 46-47)) with Hayek's (and Vanberg's) concepts of cultural evolution and spontaneous order. The works of Böhm deserve further investigation with special emphasis on a comparison between Böhm's early and his late works, regarding the distinction presented in this paper between a culturally-evolutionary and an elitist-expertocratic genesis of norms.

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