Articles

Biopolitics of Transnational Private Law – Sovereign Debt Crises, Market Order and Human Rights

By Alessandro Somma[*]

A. The Free Market as a Biopolitical Construction

A market economy is not a product of free economic behavior but rather, of an order requiring the fulfillment of systemic tasks by market operators. Their performance needs to be guided by rules imposing competition as a political tool to functionalize their action, in such a way that market failures can be avoided. This is not only the case for coordinated market economies, typically making use of direct market regulations, but also for liberal market economies, even if these latter ones prefer an indirect regulation of economic life, by having to condition individual behavior. Different modes of regulation may be used to stabilize the same accumulation regime, which is understood as patterns of production and consumption reproducible over a long period.[1] In other words, liberal market ideology, as well as liberalism, is anything but a theory on unlimited freedom: it "needs freedom", but also needs to "consume" this freedom as a condition of historical and social possibilities for a free market economy.[2] Even if differences may involve the way of assuring those possibilities, the necessity to force economic behavior into functionalizing schemes must be seen as unavoidable.

Exactly this point has been made clear by early ordoliberalism, understood as a completion of the program of the French Revolution. In fact, following ordoliberal thinkers, the bourgeois society had a fundamental historical function, since it gave value to the principle of self-determination, thus freeing the individual from the constraints of the feudal structures. Yet, the order of the bourgeois society started exactly as "order", aimed at the steering of individual forces towards a "reasonable general use": in the program of the French Revolution, "the aim of liberation and the aim of direction could not be separated".[3]

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[1] *See* Robert Boyer & Yves Saillard, *A Summary of Regulation Theory*, *in* REGULATION THEORY: THE STATE OF THE ART 36 (Robert Boyer & Yves Saillard eds., 2002).

[2] MICHAEL FOUCAULT, THE BIRTH OF BIOPOLITICS. LECTURES AT THE COLLÈGE DE FRANCE 1978-1979 63 (2008).

[3] FRANZ BÖHM, DIE ORDNUNG DER WIRTSCHAFT ALS GESCHICHTLICHE AUFGABE UND RECHTSSCHÖPFERISCHE LEISTUNG (The order of the economy as a historical task and creative achievement) 3-7 (1937).

The reference to ordoliberalism is useful to understand liberal market ideology, since it shows how indirect market regulation may work. This is not only because of the aptitude of the procedural approach to guide economic actors towards concrete and precise substantial results. Indirect regulation is supposed to act as a "state-psychology", by being able to transform an individual into a "political direction of social day-life", even if he or she is not conscious about the fulfilling of "higher aims".[4] In other words, free market economies may rely on those rules whose content can be recognized by market operators, but also on "procedures and behaviors that reproduce basic social relationships, guide active growth regimes and ensure the accounting of a myriad of decentralized decisions, without actors necessarily being aware of these system-wide adjustment principles".[5]

All this makes liberal market ideology a typical biopolitical tool, meaning one that concentrates both on "the body as a machine" and on "the species body". In fact, since biopolitics is interested in exercising the "power to foster life or disallow it to the death", rather than "the right to take life or let live", liberal market ideology must be seen as producing a biopolitical power, by being interested in enhancing vital forces and in guiding them towards systemic needs transcending the individual.[6] This is consistent with the purpose historically pursued by ordoliberalism: the idea of reducing individual behavior to a mere automatic reaction to stimulations coming from the market.[7]

B. Production and Consumption of Economic Freedom: the Administrative State

The need to functionalize economic behavior towards systemic needs was not felt in times when the market seemed to be kept in balance by the famous invisible hand, which was also able to determine what was considered as the best wealth-redistribution among individuals. The transition from a bourgeois to an industrial society was needed, in order to help a systemic approach to liberal market economies emerge: the process of the division of labor and of the standardization of economic life, for which a "forced schematization of the existence" was unavoidable, was a precondition for the accumulation process.[8]

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[4] Alexander Rüstow, *Interessenpolitik oder Staatspolitik* (Interest in politics or government policy), 7 DER DEUTSCHE VOLKSWIRT 169, 172 (1932); Böhm, *supra* note 3,at 113.

[5] Robert Boyer, *How and Why Capitalism Differs*, Max-Planck-Institut für Gesellschaftsforschung Discussion paper 05/2004, at 7 (2005), available at: www.mpifg.de/pu/mpifg_dp/dp05-4.pdf (last accessed: 1 December 2012).

[6] MICHAEL FOUCAULT, THE WILL TO KNOWLEDGE 138 (1998).

[7] Franz Böhm, *Die Bedeutung der Wirtschaftsordnung für die politische Verfassung* (The importance of the economic order for the political constitution), 1 SÜDDEUTSCHE JURISTENZEITUNG 147 (1946).

[8] MAX WEBER, WIRTSCHAFT UND GESELLSCHAFT 439 (1980).

Market operators were interested in producing a direction of economic behavior, such as the one assured by cartels or trusts, which allowed the use of the first standard form contracts. The state also started being a leading actor in functionalizing economic behavior, developing a body of administrative rules eventually used to produce forms of "regulated self-regulation".[9] This was typical for the European transition from liberalism to fascism, but also for the US-American New Deal, both enhancing the emergence or development of the so-called administrative state.

In the United States all this included the formation of a large body of public agencies, created to conform market freedoms in the many areas of economic life. This evolution was opposed by one of the main founders of Legal Realism, who considered the development of administrative rule-making power exempted from judicial control as leading to "administrative absolutism".[10]

Historians could document significant similarities between the New Deal and fascism, particularly the latter's Italian variation.[11] These are particularly evident in the way economic liberalism was reformed, even if this implied the suppression, and not just the limitation, of political liberalism. Italian fascism also intended to preserve private property and competition, imposing by law what the market could not produce spontaneously. This approach was meant to embody the third way between classical liberalism and socialism, the only one able to coordinate private and state or national interests,[12] the latter focused on economic growth.

The German version of fascism also intended to realize such a third way, even if the accumulation regime of that time was assured by different modes of regulation (regarding the role attributed to corporatism as a social peace keeping tool, for example). This was prescribed by the ordoliberal agenda, with its plea to favor individual self-determination to the extent that considerable benefit for the collectivity in terms of economic performance could be derived.[13] This was claimed in a similar way to the one later developed by the

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[9] *See* Alessandro Somma, *Regulierte Selbstregulierung in der Transition vom liberalen zum faschistischen Staat* (Regulated self-regulation in the transition from liberal to fascist state), *in* REGULIERTE SELBSTREGULIERUNG IN DER WESTLICHEN WELT DES SPÄTEN 19. UND FRÜHEN 20. JAHRHUNDERTS (Self-Regulation in the Western World in the Late 19th and Early 20th Centuries, Peer Collin & Michale Stolleis eds., 2012, forthcoming).

[10] Roscoe Pound, *Administrative Agencies and the Law*, 31 WOMEN'S L. J. 6 (1945).

[11] *See e.g.* WOLFGANG SCHIVELBUSCH, THREE NEW DEALS: REFLECTIONS ON ROOSEVELT'S AMERICA, MUSSOLINI'S ITALY, AND HITLER'S GERMANY 1933-1939 (2006).

[12] Vincenzo Gueli, *Nuovi ordinamenti dell'economia*, 37 RIVISTA DI DIRITTO COMMERCIALE I 91, 93 (1939).

[13] BÖHM, *supra* note 3, at 9.

supporters of social market economy, the expression chosen after World War II to hide the Nazi foundations of the German post-war economic constitution.[14]

C. Accumulation Regimes and Modes of Regulation in Times of Sovereign Debt Crises

Even if one intends to appreciate discontinuities in history, evidence is given that the current evolution of capitalism in fact shows many continuities with the past, as it also does in the modes of regulation adopted within sovereign debt restructuring to support the existing accumulation regime. Differences can be found in the identification of the sources of the rules aiming both at producing and consuming economic freedom in biopolitical terms. Nevertheless, the aim to support modernization, smoothing the related conflicts through systemic strategies consistent with liberal market ideology (an early ordoliberal concern) is still inspiring the formulation of those rules.

Rules enhancing economic freedoms are defined at the state level, again in such a way that the economic sphere is used as a point of reference by the political sphere at a legislative level, even if imposition from outside state boundaries has become the main reason for legal change. To functionalize economic freedom, the role once played by state administrative law is increasingly displaced to private actors operating at transnational level with soft law instruments.

We will first concentrate on state law enhancing economic freedom, particularly the one implementing solutions identified within sovereign debt restructuring of those EU-member states exceeding what is supposed to be acceptable: a national debt not exceeding 60% of the GDP and an annual budget deficit limited to 3% of GDP. All this, while the so-called Fiscal Compact, which should be adopted in 2013, has strongly sharpened this latter criteria: member states' national budgets will then have to be "balanced or in surplus", meaning that the structural deficit must not exceed 0.5% of the GDP.

Sovereign debt restructuring within the EU is led by the International Monetary Fund (IMF), due to the fact that it can negotiate conditions on lending in a way that is not possible under current European law. Indeed, the IMF policy of conditionality is able to impose detailed structural adjustments consistent with liberal market ideology, which have to be described in the Memoranda of economic and financial policies included in the letters of intent containing the request for financial support. This happened first with Hungary and Iceland, who started obtaining financial assistance from the IMF at the end of 2008. In 2010 arrangements concerning bail-out loans have been reached with Greece and

[14] This aspect is very controversial among scholars. *See* Alessandro Somma, *At the Roots of European Private Law: Social Justice, Solidarity and Conflict in the Proprietary Order*, *in* THE MANY CONCEPTS OF SOCIAL JUSTICE IN EUROPEAN PRIVATE LAW 187, 200 (Hans Micklitz ed., 2011).

Ireland, while the turn of Portugal came in 2011. Possible future candidates are Italy and Spain, those member states who are too far away from meeting the criteria fixed at EU-level to consider sovereign debt as acceptable.[15]

The Memoranda included in the letters of intent have attested to the will of the debtors to adopt measures aiming at a decrease of expenses, as well as measures concerning an increase of revenues. With the former, they all comprehend commitments to cut or freeze wages in the public sector, to cut or freeze pensions, to save in social security non-contributory benefits, to streamline the public sector and to reduce health, education and housing allowances. On the revenue side, we find commitments to increase privatization and liberalization, above all in transport, energy, communication and insurance. Finally, among the structural reforms that are supposed to enhance competitiveness, great emphasis is given to those dedicated to the labor market. The aim is to increase freedom of contract by reducing employment protection and fostering flexibility, to limit the power of unions by promoting firm-level agreements, and to stimulate cooperation between workers and employers by promoting wage adjustments in line with productivity.[16]

It is worthy of mention here that such a policy has been assumed as a point of reference for the future establishment of the European Stability Mechanism (ESM), created to provide financial assistance to member states in financial difficulty. The functioning of the ESM is based on an amendment of Article 136 of the Treaty on the Functioning of the European Union (TFEU)[17], stating that "the granting of any required financial assistance under the mechanism will be made subject to strict conditionality". Nevertheless, the involvement of the IMF is still foreseen, and even strengthened within the recent initiatives undertaken by the European Central Bank (ECB) to support strongly indebted member states through state bond purchase.[18]

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[15] Details on IMF conditionality, the full text of the letters of intent and the related Memoranda of economic and financial policies can be downloaded from the IMF website: *see* International Monetary Fund, *IMF Conditionality*, available at: www.imf.org/external/np/exr/facts/conditio.htm (last accessed: 1 December 2012).

[16] *See* Alessandro Somma, *Legal change and sovereign debt crisis. The clash between capitalism and democracy in the Western Legal Tradition*, *in* DO WE NEED AN ORDERLY WORK-OUT SCHEME FOR INSOLVENT SOVEREIGNS? (Christoph Paulus ed., 2012, forthcoming).

[17] *See* Article 136 of the Treaty on the Functioning of the European Union, 2008 O.J. C 115/47, [hereinafter "TFEU"], available at: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2010:083:0047:0200:en:PDF (last accessed: 1 December 2012).

[18] *Cf.* the introductory statement to the press conference of the President of the European Central Bank: *see* Press Conference Transcript, Introductory statement to the press conference (with Q&A): Mario Draghi, President of the ECB, Vítor Constâncio, Vice-President of the ECB (Frankfurt, Sept. 6, 2012), EUROPEAN CENTRAL BANK, available at: http://www.ecb.int/press/pressconf/2012/html/is120906.en.html (last accessed: 1 December 2012).

D. Transnational Private Law and the Market Order

It is evident that imposed legal change within sovereign debt restructuring in the EU is affected by the same vice typically connected with IMF-lending: it is harmful to democracy, producing shifts in its understanding, for which the concepts of post-democracy and of state of exception may be invoked to define the related theoretical background.[19]

Harm to democracy may also be seen in connection with the formation of transnational private rules created to condition the behavior of market actors, forcing their economic behavior into standards aiming at producing rationalization and functionalization in biopolitical terms.

As is well-known, transnational private law does not form a coherent body of rules and practices, somehow derived from structured shared principles.[20] Commonalities are limited to its nature and formation procedure: transnational private law standards are not legally binding and are defined by the addressees, or at least with their decisive contribution, in a way that is typical for corporatism or deliberative democracy. Transnational private law is, in fact, a soft law source, producing a strong liberal society, in which only formally free possibilities to take part in decisions are given, rather than a strong participative democracy, requiring the real possibility to influence the content of decisions.[21]

Transnational private law may be seen in connection with legal change imposed through sovereign debt restructuring, the latter being called upon to enhance market freedom, while the former is invoked to define the way to consume this freedom. Debt restructuring supports privatization and liberalization and leads to strengthened freedom of contract in labor law: it is intended to cancel state intervention, which results in limitations of economic behavior different from those needed to create and maintain the historical and social possibilities for a market economy. Transnational private law has a different but complementary task, which is to direct and functionalize economic behavior by forcing it into standards consistent with the purpose of producing a forced schematization of existence.

With regards to the first aim, that is to prevent market failures in a broader sense, hard law at state level is still irreplaceable. On the contrary, to produce standardization, a more

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[19] *See* COLIN CROUCH, POST DEMOCRACY (2004) and GIORGIO AGAMBEN, STATE OF EXCEPTION (2005).

[20] Peer Zumbansen, *Transnational Law*, CLPE Research Paper 2/2008, available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1105576 (last accessed: 1 December 2012).

[21] *Cf.* Alessandro Somma, *Some like it soft. Soft law and Hard Law in the Shaping of European Contract Law*, *in* THE POLITICS OF THE DRAFT COMMON FRAME OF REFERENCE 51 (Alessandro Somma ed., 2009).

flexible production of rules is required, allowing a reallocation of regulatory powers from the public to the private sectors, and from the local to the global context. In other words, regulatory capitalism, created to replace the regulatory state, is interested in placing into the hands of the economic actors the definition of sector-specific rules concerning the way systemic market needs are to be met.

E. Sovereign Debt Restructuring, Transnational Private Law and Human Rights

Transnational private law does not necessarily have to be consistent with liberal market ideology. On the contrary, it may constitute a tool to oppose it, or at least to enhance conflicts and contestations able to correct the functionalizing and systemic approach to economic behavior consistent with that ideology. This is the case for transnational private law allowing legal pluralism to emerge,[22] so as to represent a counterbalance to current sovereign debt restructuring strategies, above all in labor and environmental issues. In other words, if sovereign debt restructuring enhances the making of a market order based on economic freedom, transnational private law may be seen as an attempt to oppose this trend by strengthening the access to citizenship of disadvantaged groups or individuals, complying with "popular attitudes and sympathies across borders."[23] This could happen only if standards resulting from activism of non-governmental organizations or unions were taken into account, in such a way that human rights including social rights would be expanded in their conflict with free market strategies.

If this were the case, transnational private law would be able to oppose the outcome of current debt restructuring, and not just represent its completion or complement. Nevertheless, one can doubt the effectiveness of transnational private law in contrasting the permanent violation of human rights, consistent with reactions to the debt crisis in line with IMF lending policies.

Conditions related to those policies are producing a sudden overcoming of the Keynesian compromise, which has allowed the development of the welfare state as a mark of the variety of capitalism somehow consistent with European identity. IMF lending, also in connection with EU lending, is going to determine "transfers of wealth from the poor to the rich",[24] shattering any chance of resisting the functionalizing forces of the market order.

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[22] *See* Peer Zumbansen, *Defining the Space of Transnational Private Law: Legal Theory, Global Governance and Legal Pluralism*, CLPE Research Paper 21/2011, available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1934044 (last accessed: 1 December 2012).

[23] Robert Wai, *Transnational Private Law and Private Ordering in a Contested Global Society*, 46 HARV. INT'L L. J. 479 (2005).

[24] Tayyab Mahmud, *Is it Greek or déjà vu all over again? Neoliberalism and Winners and Losers of International Debt Crises*, 42 LOY. UNIV. OF CHIC. J. 629 (2011).

In doing this, IMF lending neglects even recent acquisitions within the Law and Development Movement, that is, among scholars dealing with the relationship between legal change and economic development policies. Those scholars now recognize that the idea of development as mere economic growth and poverty alleviation should be overcome. Development should be understood as human development and emancipation, that is as freedom conceived as a means of promoting "people's capacity and to enable individuals to live the life they choose to live".[25]

On the contrary, the current sovereign debt restructuring is about to sponsor legal change producing and consuming economic freedom, in a way that is incompatible with the purpose of enhancing individual emancipation as the main goal, and not just as a side effect of measures aiming at promoting a balanced economic order. This is due to the impact of austerity related to lending conditionalities: the "existing system of protracted, creditor-biased resolution of sovereign debt crisis" neglects the "rights of ordinary citizens, e.g. to education, health, or old age benefits".[26]

Sovereign debt restructuring provokes the "diversion of scarce national resources from fundamental public services of education, health, water, sanitation, housing and infrastructure to debt servicing", hindering "the realization of human rights, particularly economic, social and cultural rights", as well as "country ownership of national development strategies".[27] To overcome this situation a legal framework for sovereign debt restructuring is needed, giving debtors the opportunity to default through a structured process within this legal framework, based on international law principles. In particular, the principles of human-based development, sustainability and equity in the treatment of debtors and their creditors must be considered.

Without such a legal background, which is supposed to be based first on soft law, and then on more effective rules,[28] no chance is given for transnational private law to oppose liberal market ideology and the harm being done to democratic decision-making.

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[25] David Trubek & Alvaro Santos, *The Third Moment in Law and Development Theory and the Emergence of a New Critical Practice*, *in* THE NEW LAW AND DEVELOPMENT. A CRITICAL APPRAISAL 1, 7 and 8 (David Trubek & Alvaro Santos eds., 2006).

[26] United Nations, *Report of the Commission of Experts of the President of the United Nation General Assembly on Reforms of the International Monetary and Financial System* 122, available at: www.un.org/ga/president/63/PDFs/reportofexpters.pdf (last accessed: 1 December 2012).

[27] Cephas Lumina, *Report of the Independent Expert on the effects of foreign debt and other related international financial obligations of States on the full enjoyment of all human rights, particularly economic, social and cultural rights* A/HRC/20/23, OFFICE OF THE HIGH COMMISSIONER FOR HUMAN RIGHTS, UNITED NATIONS HUMAN RIGHTS (2011).

[28] *See* Christoph Paulus, *A Resolvency Proceeding for Default Sovereigns*, 3 INT'L INSOL. L. REV. 1-20 (2012).