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The Trouble with Liberalism: a Cautionary Tale about Populism and the Academy

By Michelle Everson, London

Michelle Everson

The Trouble with Liberalism

I. Introduction

At the very latest, 6th January 2021 marked the moment when it became clear. Trump, Bolsanaro, Orban, Modi, Putin, Kaczyński and Johnson are not slight deviations from our established modes of governing; in the case of Trump, a toe-curling, but harmless showbiz incursion into staid political structures. No. Our contemporary strongmen might not be identical with one another. But, whether we class each individual as authoritarian, neo-liberal, nationalist or nihilist, they all pose an existential challenge to the liberal state. This is not a dress rehearsal, rather the rule of law is under threat, a new breed of authoritarian, proto-fascist even, will not hesitate to call upon misinformation and the spurious notion of 'The People' in its violent assault on the structures of liberal democracy. The academic as well as political stakes have fundamentally altered. We are learning in real time what it means to be a dissenter, to owe an immediate duty to democracy and the rule of law and how easy it is to fail, be compromised or simply lose your way in that duty.

This contribution concerns itself with liberalism, the rule of law and the renewed academic-political impulse to protect them. It does not do so however, because the author is a 'Liberal' with a capital 'L'. Rather, liberalism necessarily stands in this analysis as an ambivalent framework, which also remains an enduring challenge to majoritarian democratic expression. Yet, in all of its sometimes anti-democratic, and sometimes elitist (expert-based) character, a liberal message might be argued to have doubled in importance in our times, standing as an implicit challenge to a contemporary academic debate which can be argued to overemphasise the 'neutral' study of a 'so-called' populism. In other words, one of our problems may be an academic debate, which sometimes makes unnecessarily light of dangerous authoritarian impulses, neutralising them as 'objects' for study, rather than recognising them as dangerous ideological movements to be opposed, as well as conflates a critical democratic-socialism with nationalistic, racist and xenophobic ideologies.

Clearly, an argument that we should engage actively with the world around us, in order to defend normative frameworks of government, such as the rule of law, poses its own challenge to scientific academic method. Has the act of scientific observation, the basis for academic study, been left too far behind? Identifying initially with a dissenter-academic of the Nazi era, the ordo-liberal Franz Böhm, this study is necessarily also aware of the ambivalence of academic activism. And yet, unpacking Böhm and his work in our current context of economic turmoil and ideological/opportunistic assault upon ordered democratic process, we must concede his rhetorical opportunism in defence of his ideals. But we must also be struck by the underlying continuities in the debate between his time of crisis and ours. Seen in these stark terms, we must necessarily ask ourselves: where do we stand? How can we improve upon the ordo-liberal, or any liberal mission, also giving added strength to democracy in our defence of the rule of law?

II. Franz Böhm, the Fight against Fascism and the Ambivalence within the Rule of Law

A wholly different account of the competitive order can be attempted from a second perspective, or from its comparison with the rule of law. Like the rule of law, the competitive order should also create parameters within which the free actions of an individual are limited by the sphere of freedom of other individuals such that a balance is attained between human rights to freedom. In truth the desire for competitive order is closely related to the desire for freedom.¹

¹ *Walter Eucken*, Grundsätze der Wirtschaftspolitik (Principles of Economic Policy), Tübingen 1952, p. 250, (author's translation).

The ordo-liberals, and their notion of the Economic Constitution (*Wirtschaftsverfassung*) have been subject to much recent criticism. This may, in part, be due to a misunderstanding, a misreading of the degree of ordo-liberal influence upon processes of European integration, above all European Economic and Monetary Union, and a conflation of the views of those who might make rhetorical-political claim to the ordo-liberal tradition with the ordo-liberals themselves.² The truth is that, minus the odd comment on the value of ‘stable money’,³ the original ordo-liberal Economic Constitution is concerned far less with the creation of secure, transnational money, and far more with securing a private sphere of free human organisation, albeit it within the economy, and defending it against the predation of the state-based collectivism of the right and of the left, as well as the mis-wielded power of individual economic actors.

Franz Böhm the lawyer, together with the economist Walter Eucken, was one of the founding fathers of the ordo-liberal movement, and a pre-war academic dissident. A post war Rector of Frankfurt University and Christian Democrat member of the Federal German Parliament, Böhm was a decorated Great War soldier who worked as a (competition policy) official during the Weimar years. He subsequently fell foul of Nazi sympathisers at the University of Jena just before the outbreak of World War Two and also narrowly escaped implication in the 1944 plot to assassinate Hitler.

In his pre- and post-WWII writings, Böhm is clearly concerned with the economic but is also, at core, a liberal, grappling with the best mode in which to secure both the normative mission of individual empowerment and the pragmatic desire for a balancing vision of ‘social order’, which dissipates the worst instincts of the collective and the individual. Multiple crises of pluralist dissolution, market nihilism and totalitarianism shape and heighten his 20th Century analysis, recalling also the troubled birth of liberalism in the 17th and 18th Centuries, its inception in an individually-liberating Enlightenment that was always susceptible to civil war, revolution, social collapse and violence. In the 21st Century, watching open-mouthed as so-called conservative political forces align themselves with radical right-wing attacks on the rule of law, Böhm’s work now recalls us to our liberal serves: “The spirit of the era cannot but be disfigured where such an important sphere of common social life is given over to the wholesale worship of naked fact, in a manner which, in practice, cannot but end in annulment of the very idea of law. In a first instance, it was the proponents of the free economy who armed themselves with the power to pry the free economic system out of each and every social, political and legal hypothetical, and to batter the ordering concept to death with the aid of the notion of freedom.”⁴

For us, the warning signs have been there, but not as so often assumed simply within the so-called ‘neo-liberal’ context (see below). Modern, scientifically-oriented economic organisation is far from liberal in its impulses, and is a danger to civilised democratic government in its overweening utilitarianism; yet, a more immediate attack upon the liberal state is explicit in the economic nihilisms and cronyisms of strong-man leaders across the globe, for whom the economic is not an optimum area of resource allocation, but rather a pool in which they might fish for their own self-satisfaction, and for economic rewards for their political supporters. The pathologies of, say, an Orban or a Putin are far from new, reproducing the disdain for untrammelled markets of the European dictators of the 1930s. It is in this context, as much as that of the collapse of the Weimar Constitution, that Böhm must be understood and the ambivalence within his mission must be understood. Why was he happy to accept, even be pleased by invitations to aid in formulation of economic policy during the latter years of the Nazi regime?

It is here in this context of co-operation with the Nazi regime that a comparison is sometimes made between Carl Schmitt and the ordo-liberals, and in particular a finger is pointed at supposed ordo-liberal use of the Schmittian notion of the ‘strong state’. And yet, this correlation is ill-considered: where Schmitt disturbingly reveals his colours as a fellow traveller of the regime, ascribing to Nazi-supporting industrialists a vital role in ‘protecting’ the private economic sphere,⁵ Böhm’s is a rhetorical mission to secure a sphere of ‘private action’ for the citizenry; a safe, Nazi-free space of (economic) self expression. His delineation of the valid economic constitution as a private zone of free competition is masterful in its artifice and persuasive logic. *Völkisch* ideology precludes a pre-political basis for economic order, and for the private market

² See, *Christian Joerges*, Epilogue, in: id., *Conflict and Transformation: Essays on European Law and Policy*, London (forthcoming 2022).

³ See e.g., *Knut Wolfgang Norr/Franz Böhm*, *The Theory of Capitalism in the German Economic Tradition*, Berlin 2000, p. 173.

⁴ Author’s translation (Economic Ordering as a Problem of Economic Policy and a Problem of the Economic Constitution) of *Die Ordnung der Wirtschaft als geschichtliche Aufgabe und rechtsschöpferische Leistung*, in: Franz Böhm/Walter Eucken/Hans Großmann-Doerth (eds.), *Ordnung der Wirtschaft*, Band 1, Stuttgart/Berlin 1937, p. 72.

⁵ See, for Schmitt’s notion of the strong state, *Renato Cristi*, *Carl Schmitt and Authoritarian Liberalism: Strong State, Free Economy*, Cardiff 1998. For Rudolf Wiethölter, renowned Frankfurt critical jurist, and one time colleague of Böhm, the ordo-liberal champion of the Weimar era shared an intellectual tradition with Carl Schmitt, separating out political order from private law and arguing that the state has a legitimate mission to defend the sphere of (*völkisch*) private regeneration. However, Wiethölter is in no doubt that equation of this position with Carl Schmitt’s ‘strong state’ is a misreading of Böhm, not least to the degree that Schmitt, but not Böhm could support the interventionist Nazi economic order: “this sort of Schmittianism is certainly not Franz Böhm’s world.”, *Rudolf Wiethölter*, Franz Böhm (1895–1977), in: Bernhard Diestelkamp/Michael Stolleis (eds.), *Juristen an der Universität Frankfurt am Main*, Baden-Baden 1989, pp. 209–252, p. 229.

sphere. An explicitly liberal argument would only fail. Instead, Böhm is at pains to provide a basis for his vision of a 'dynamic Economic Constitution' in a positive political act: "The first demand made of a modern economic constitution is accordingly that it is *knowingly founded in a clear and unassailable expression of political will*."⁶ This will be that of the "Volk, a people that comes into being over a long period of time through blood and historical-emotional common experience."⁷ Furthermore, the state would exercise the decision to support the Economic Constitution in "dual steering mechanisms of, on the one hand, indirect market management by means of legally-governed exchange and competition and, on the other, direct market steering by methodical means of command."⁸

So far, so apparently non-liberal. Franz Böhm as *völkisch* apologist for dirigiste Nazi economic policies? Certainly not: reference to the historical-emotional experience of the people surely derives from close reading of the left-leaning constitutionalist, Hermann Heller rather than of Carl Schmitt, and further might also be argued to act as an oblique reference to Friedrich Karl von Savigny, and more importantly (see below), his assertion of the existence of a *völkisch* rather than Napoleonic foundation for German private legal codes.⁹ Böhm is constrained by his political context, must play games of rhetorical expression. But he is also able to recommend that the Nazi regime constrain itself within his negative reading of the rule of law. The Reich had taken unto itself a power of command intervention into the economy. Nevertheless, to the degree that it did not act, a private exchange order would continue to exist, one rooted in the enduringly-classical traditions of the Holy Roman Empire, and one which would act as a 'dynamic' and 'self-referential system of political-economic order'.¹⁰

The assumption that the French Revolution liberated the individual from society is based in a fallacy...[.]...the French Revolution, from the constitutional point of view, did not emancipate the individual from society, rather it left him in society...[.]...the society was transformed from a feudal society of privileges, which...[.] possessed a private law into a pure private law society...[which]...is by no means merely a coexistence of unconnected individuals but is a plurality of people who are subject to a uniform order.¹¹

Defeat of the cult of the factual is a recurring feature throughout Böhm's writings and similarly relates to what might be considered to be his core concern: the re-establishment and maintenance of social harmony. Böhm's 1966 summary of his work and manifesto for the private law society makes much of Rousseau and the *volonté générale* in its explanation of an overriding problem of the place of the individual in society. The basic problem that Böhm tackles is one of the tyranny inherent to the *volonté générale*, its tendency to unlimited expressions of public power which threaten individual liberty. His solution is to be found in the coordinating character of the private law society, and its market, a complex of social relations which pre-date and civilise political revolution, dissipating the totalising dangers of the political collective, and binding individual citizens to one another in a society ordered by means of the myriad signals sent out by the market and its law.

The French Revolution is identified as the moment at which the individual was released from feudal, hierarchical relationships, but simultaneously became a threat and danger to her fellow man. Alienated from God and community, the individual attains a nihilistic character, or a potential for accumulation of power to the purpose of self-pleasure, and to the detriment of the citizenry as a whole. Böhm's starting point is the Enlightenment, but his problem is surely a couple of centuries older, being founded instead in the disorder and civil war that followed upon the Reformation. He is dismissive of the positive liberal construction of individual rights since it does not address the horizontal problem of being in society, of the citizen's responsibility to the citizen within a pre-existing (natural) sphere of freedom from the state: "There is no such thing [legally] as society, which vis-à-vis the state, might be a body responsible for constitutionally protected rights and powers... mention [is made] only of human rights or constitutional rights of the individual."¹²

In effect, Böhm has not fully accepted the Revolution, Rousseau or a *volonté générale* with the competence to carve out a private sphere from the Republic. Rather, his arguments are those of the tradition of 'negative liberalism', reminiscent of those of William Blackstone, early 18th Century English constitutionalist, identified by Duncan Kennedy as author of the protean liberal constitution, and a jurist with a mission to heal the wounds of English civil war and its authoritarian aftermaths.¹³ Civil war was far less a collapse of sovereign power, and far more a pluralist dissolution of English society,

⁶ See Böhm (note 4), p. 57.

⁷ Ibid., p. 58.

⁸ Ibid., p. 61.

⁹ And here I only refer to the stinging critique of Savigny's reliance upon romantic myth in Hermann Kantorowicz, Savigny and the Historical School of Law, Law Quarterly Review 53 (1937), pp. 326-343.

¹⁰ See Böhm (note 4), p. 61.

¹¹ Franz Böhm, Rule of Law in a Market Economy, in: Alan T. Peacock/Hans Willgerodt (eds.), Germany's Social Market Economy: Origins and Evolution, London 1989, pp. 46-67, 49; *id.*, Privatrechtsgesellschaft und Marktwirtschaft, ORDO, Jahrbuch für die Ordnung von Wirtschaft und Gesellschaft 17 (1966), pp. 75-152.

¹² Böhm, Rule of Law (note 11), p. 49.

¹³ Duncan Kennedy, The Structure of Blackstone's Commentaries, Buffalo Law Review 28 (1979), pp. 205-301.

quite independent from the form taken by the state. As we have learned again and again, authoritarian regimes are not established out of an abyss. Instead, they arise as advantage is taken and power is accumulated within the fissures and schisms of societies under stress. Böhm's course is set early on. In the face of collapsing European empires, the inability of the Weimar Constitution to master the centrifugal schisms of the 1920s, social order is paramount, even if only, and even more importantly perhaps, as a counterfactual, as a normative mission to identify the ties that bind.

In contrast to Blackstone's antiquarian usages, Böhm's language is that of modernity. Individuals are not left staring across a void at the state. The potential excesses of an unlimited *volonté générale* are immediately mediated by the legacy (left unidentified by Böhm) of Scottish Enlightenment thinkers, who asserted the existence of systems, primarily the market, but also the law, that coordinate the actions of the individual citizenry without recourse to big government: "It was a discovery of vital importance when it was realised that such signalling systems do exist, that they have been cut and polished into shape by the instinctively intelligent everyday behaviour of innumerable generations of individuals in the course of history, more or less without the help of conscious human understanding. The most important of these systems are language, private law and market prices."¹⁴

There is no concordance with Carl Schmitt and his 'strong state' here: the '*volonté générale*' passes to the state and is exercised the state alone,¹⁵ but is only ever meant to be a residual power that supports the coordination mechanisms of a pre-existing and enduring private society. Neither would Böhm ever tolerate the power of the private actors upon whom Schmitt relies, to secure his private sphere. Critiques of the system of market coordination are conceivable for Franz Böhm, especially in terms of a class analysis of the exploited worker, a reading of the evolution of the economy which perhaps confirms Böhm's earlier reliance upon Hermann Heller, as an author he followed (see above). Nevertheless, the supposed dangers posed by an oppressive bourgeois class, seem to Böhm to have been disproven by a century of rising wages. For him, this is an inevitable outcome of the decentralised steering capacities of the private market, at least insofar as the market is protected from the unfettered-selfish capitalist on the one hand, or the equally centrifugal forces of overly-powerful workers associations on the other.

III. An antidemocratic romanticism?

In an ideally-competitive economy, market prices are the outcome of a gigantic balancing process between the countless and varied individual interests of countless, powerless market participants, which unfolds in total freedom and which reflects every individual evaluation that has been asserted. Taking the social standpoint, it is this that makes the market price free of all arbitrariness. Market prices are compound articulations of necessity, justice and reason. In its own peculiar manner, market-price-creation is a voting process, taking place, by the day, hour and even minute. The free market economy is the most perfect expression of mass democracy; its degree of precision is impossible to reproduce within political life.¹⁶

In an immediate post-war setting we find Böhm at his most impressive: He shares a great deal with Hayek, not least an ability to surprise modern students with a radically-pluralist position which asserts its own democratic credentials in rejecting accumulation of power either by market participants, or by an authoritarian state. The unknown and unknowing processes of the market are the best suited to the protection of society from abuse by the individual and the collective, and, at the same time, can create their own form of democratic expression. The inherent dangers of the *volonté générale* dissipate in a realm in which the only legitimate "[C]oercion is created by a concordance, which is desired by none, between countless, comparable and spontaneous reactions. This is a force without masters or knaves. As a consequence, this is a form of power that does not violate the political, social or legal autonomy of those it acts upon. In its political, social or legal meaning, autonomy is no more or less than a freedom from the...[.]...imposition of the arbitrary will of others."¹⁷

For this author, writing in the midst and not yet the aftermath of a new age of authoritarian leadership, Böhm's cry for freedom from the 'arbitrary will' of others hums with a historical resonance stretching back to Blackstone's inverse construction of the rule of law (be free, but do no harm to others). But it also has its immediacy in our present. Academic and popular debate may hum and haw about the causes of present-day 'populism.' However, attention might better be paid to the destruction of truth in our political discourse, the authoritarian seizure of state and constitutional structures, the shameful reversion to talk of the 'Will of The People' in order to silence opposition and the assertion of the legitimacy of our now trashed and degraded political systems as a simple 'naked fact'. None of this resembles populist liberation. Rather, it is surely felt by many as an arbitrary assertion of power.

Many on the left of debate now recognise that we must make a form of peace with a radical and protective liberalism that can be asserted in order to protect our polities.¹⁸ At the same time, we note our own discomfort of academic accommodation

¹⁴ Böhm, Rule of Law (note 11), p. 52.

¹⁵ Ibid., p. 53.

¹⁶ (Author translation), Franz Böhm, Kartellauflösung und Konzernentflechtung: Spezialisten Aufgabe oder Schicksalsfrage?, Süddeutsche Juristen-Zeitung 2 (1947), pp. 495-505, 500.

¹⁷ Ibid., pp. 500-501.

¹⁸ Ian Dunt, How to Be a Liberal: The Story of Liberalism and the Fight for its Life, London 2020.

with a real world: Where are the boundaries between the academic and the activist? Can we oppose and remain scientific, do we oppose or do we seek to moderate? In all of this Böhm speaks to us. However, this does not mean that we must simply accept that this is the best way to organise society and to protect us from power. Lessons are surely there to be learned in his writings: above all market nihilists, such as Donald Trump, must give us pause and perhaps persuade us to support those who demand the creation of a global competition law, along ordo-liberal lines. But, dangers are surely also apparent, both in his romanticism and in his anti-democratic impulses.

From the *demos* to the *polis*,¹⁹ for all that Böhm welcomes democratic constitutionalism, the need for horizontal belonging between citizens is still a main preoccupation in the effort to overcome power and disorder. And it is here that the relocating of the individual in society also suffers from an aura of romanticism, still relies upon rhetorical devices, and still takes refuge in imprecise evocation of the public-private divide. In pre-political terms, the private law society, like the common law, is to be found in the genius of innumerable generations stretching somehow unbroken back to classical codes; a striking parallel to Blackstone, or Savigny in the German tradition. In addition, however, in an immediate post-War context, Böhm reveals his anti-democratic leanings, maybe born of a fear of populist manipulation, but unfairly exhibited towards collective organisation by ‘workers’, and expressed in his desire to redefine them as ‘consumers’: “The conclusion is obvious. When those portions of the public which have the most to gain from a solution to the problem of market power, that is workers and employees, and especially so in their role as *consumers* [...] cannot be persuaded to play an active part in a programme to deconcentrate power, then there is little overall hope (emphasis added).”¹⁹ Certainly, the public is to be trusted above any ‘brains-trust’ of experts,²⁰ must give its consent to the creation of the Economic Constitution. But within the market, it must restrict its democratic voice to the presentation of preferences within a market order overseen by experts. And it is here, that we can also begin to see the relevance of a critique and a fear that, although seeking to diffuse the power of the market nihilist, Böhm underestimated, or failed to foresee the utilitarian power of a supposedly ‘scientific’ and ‘liberal’ logic which has colonised anti-trust law to pursue instead, a general welfare in the dedication of competition provisions to the securing of the lowest possible price for the consumer, regardless of quasi-monopolistic positions within the market. In short, the power of a ‘neo-liberalism’ which argues that people are rationally inclined to seek a material welfare in the market which will trickle through to all, quite regardless of any liberal mission to tame market or political powers.

Perhaps one of the most overlooked questions never posed to neo-liberalism is one of where its liberal credentials actually might lie. And in this sense, it is far from surprising that Böhm’s (Hayek’s) star student, Ernst-Joachim Mestmäcker, is scathing about the (neo-liberal) the law and economics movement, dismissing it as ‘idolatry of the factual’, or as ‘socialism’.²¹ On this basis, we can be fairly sure that Böhm himself would not have applauded such a development. Nevertheless, this danger of slippage, together with a technocratization, of law has certainly been a feature of the rhetorical claim to there being an Economic Constitution at the European Union level.²² And accordingly, we are left with a nagging doubt, a concern that Böhm and the ordo-liberals may unwittingly have contributed to the social and economic malaise upon which the arbitrary forces of political-economic self-propagation within our world have seized. But, perhaps more pressingly, where we look to the primary victims of Trump, Bolsanaro and the rest, we must surely also take exception to Böhm’s blind romanticism, and his failure to understand the importance of plural political expression for those marginalised within the market and excluded from economic prosperity.

We do not live in a perfect private society which can be traced back to antiquity and in which signalling systems of law and the market provide egalitarian opportunity to all. Instead, parents separated from their children on Trump’s border were also victims of the terrible wage differentials that have been established in the global market, the lack of market opportunity for them at home. Minority, black and indigenous and peoples in the Americas and beyond have never been liberated by our private market society, but have rather been expropriated and brutalised by it, as well as, in an unfunny joke of history, by the nihilists and neo-liberals who have been complicit in the efforts to hasten its destruction. Certainly, from the left, or a modern liberal-left, we can praise Böhm in his efforts to place us all in a position of powerless egalitarianism, but, his romantic reliance upon a private law society for the safeguarding of our equality is surely inadequate. Taking all traditions of (solidaristic/altruistic etc) exchange seriously, we must also identify empowering, but respectful means of radically-democratic pluralist political expression, especially where the private market society is blind to its own depredations.

¹⁹ Böhm (note 16), p. 505.

²⁰ Ibid., p. 497: “Certainly, it is helpful when experts contribute and their views are heard. Nevertheless, far greater powers must be amassed than those offered by a ‘brains-trust’ composed of a couple of dozen denizens of expertise and ministerial bureaucracy, where the task is one, either of divesting power from wildly-proliferating edifices of might, or of preventing their collapse of the social order by means of their hierarchical capture in an overarching order. Whatever the desired mode of tackling the issue, the challenge will only be mastered where the political approach chosen is knowingly and whole-heartedly supported by broad swathes of public opinion.”

²¹ Ernst-Joachim Mestmäcker, A Legal Theory without Law. Posner v. Hayek on Economic Analysis of Law, Tübingen 2007), p. 60, [Walter Eucken Institut, Beiträge zur Ordnungstheorie und Ordnungspolitik 174].

²² M. Everson/Christian Joerges, Facticity as validity: the misplaced revolutionary praxis of European law, in: Emiliós Christodoulidis/Ruth Dukes/Marco Goldoni (eds.), Research Handbook on Critical Legal Theory, 2019, p. 407.

IV. The Rule of Law, Markets and Democracy

For ordo-liberals, Eucken as much as Böhm, the rule of law is commensurate with the price mechanism; both are features of a private society securing ties that bind between the citizenry-*polis*, defending against the arbitrary will of collectives and the overmighty market-political actor. And, it is here, at least in relation to the authoritarian, his (rarely if ever her) effort to accumulate and wield arbitrary power, that a left-liberal position might support ordo-liberal order, at the least in a return to 'liberal' competition law, and a scheme of market regulation that curbs market power no matter how efficient economic concentrations might be.

Nevertheless, both the rule of law and democratic imperatives deserve a broader context. Left-liberal accommodations with market societies, such as Dahrendorf's evocation of T. H. Marshall's epochal study on citizenship and social class within his own version of the modern social contract,²³ are perhaps still a creature of nations, nationalism and a social complacency which, like the ordo-liberals, posits that conflict between different segments of society can always be overcome within developmental growth models. Dahrendorf is aware of the need to expand his model of civic, political and social rights beyond the nation state to allow for a measure of social justice in the post-national context. However, where Marshall's story of the post-feudal development of civic, then political then social rights, emphasises the conflicts inherent to the carving out of market sphere, its bourgeois-led campaign against sovereign power within new political rights, as well as the market's final containment within the social rights afforded an eternally-disadvantaged industrial class, Dahrendorf inverts the conflict-paradigm, positing social cohesion in the complex of rights, all market-induced inequalities aside. And it is perhaps here that the left-liberal model has not proven robust enough to survive the impacts of a cosmopolitan market escape from the nation state.

"[T]he historical trick to the rise of a nation state will be to find a horizontal solidarity for the existing [class] stratification and a rationale that using a state apparatus to protect the nation makes sense."²⁴ Karl Deutsch's famous dictum has found a new relevance in a world now prey to strongmen authoritarians. Their rhetoric is not simply one of making claim to being the re-awakened voice of 'the people'. Instead, they seek to remake the nation (MAGA, or make America Great Again) persuading their followers that their sorrow is all of the globalists' making. The fact of a global escape of capital from the fiscal-redistributive constraints of nation states does not cancel out the inherent dishonesty in this authoritarian position; its hypocritical claim to combat the cosmopolitan market, just as it denies its captive national audience the welfare relief it craves, as strongmen leaders feed at the table of cronyistic wealth accumulation. It is also at this exact point that the falseness of conflation of left and right positions under the term 'populism' becomes apparent. Certainly, a left may be misguided in its scepticism towards the treaties and institutions of cosmopolitanism: did the moderate left, for example, ever escape Deutsch's critique of nationalism? Nevertheless, for all possible errors, a left rejection of the inequalities of global markets is not a rhetorical trick hiding an even more egregious assault upon the rule of law, or the democratic process.

Academic study should never conflate the two and should rather seek for new ways to broaden and secure the concept of the rule of law and its embedding within democratic process. For this author, Böhm's evocation of Hermann Heller, his call to the emotional bounds of shared national cultural-experience, is a flawed liberal reiteration of a leftish ambivalence, or need for nationhood to call into being the redistributive impulses of a community of fate. Accordingly, the taming of global markets, the establishment of a firm and unassailable global rule of law, is surely far better approached within pluralist left paradigms, or the works of the lost dissidents of the early 20th Century with their belief in the democratically-liberating powers of science, technology or knowledge.

And it is here perhaps, in the forgotten or incomplete traditions of, for example, Red Vienna, or English left pluralism, that we find a putative universalism, both morally- and intellectually-distinguished from the failed utilitarian totalisations of the so-called neo-liberal position, and powerful enough to combat the dangerous counterfactual falsehoods of our Trumps, Bolsanaros, Orbans, Modis, Putins, Kaczyńskis and Johnsons. Where we dispense with myth, romanticism and rhetorical flourish as harbingers of despotic decline, we must achieve a political openness and quality of debate in order to persuade people to act in their own and their communities', as well as their stranger's, true best interests. There is naturally room in this approach for pluralism, for a private market of economic opportunity. But this private sphere may never overshadow democratic process or the existence of other private-public arenas, perhaps even a commons of shared economic endeavour. The rule of law is to be found in the delineation between spheres; a delineation made within discovered, shared and accepted knowledge: Harold Laski's science perhaps, 'giving law a moral window on the world',²⁵ or maybe even, Otto von Neurath's, technology, his mechanical foundations for the building, however flawed, of a humanised political economy.

²³ See *T. H. Marshall, Citizenship and Social Class* (1953), London 1963 and *Ralf Dahrendorf, The Modern Social Conflict*, Berlin 1988.

²⁴ Karl Deutsch, paraphrased by *Neil Fligstein, Euro-Clash, The EU, European Identity and the Future of Europe*, Oxford 2008, p. 250.

²⁵ *Harold Laski, A Grammar of Politics*, Oxford 1958, p. 571.

V. Conclusion: an Epistemological Sting in the Tail

In these final schemas, 'knowledge' is not commensurate with facts or a totalising claim to the truth. Certainly, knowledge is based in reality, privileged far above rhetoric and myth-making, allowing us an escape from concepts such as emotional belonging or nationhood, which act only to deceive, to pitch the people against the other, as well as against their own interests. Nonetheless, knowledge has nothing to do with the 'naked facts', say of industrialist perversion of market process which so exercised Franz Böhm. Nor, importantly, has it anything whatsoever to do with the inevitabilities preached in the so-called neo-liberal turn, the supposed scientific guarantor for maximised welfare, which, in the eyes of a Mestmäcker, reveals its utilitarian and totalising self through its 'idolatry of the factual'.

Rather, left thinkers like Laski and Neurath also have very much in common with Hayek, at least to the degree that knowledge, science even, is never the product of an 'immaculate conception'.²⁶ Instead, the enduring contingency of facts, determines that that knowledge can only ever be constructed within a moral outlook, or an arena of uncertainty, in which, for example, a knowledge of belonging and of a common fate must be constantly renegotiated as facts and morality are discovered anew. Borrowing shamelessly from Hayek, it is this socio-political 'discovery process' which this author, at least,²⁷ would hope is strong enough to garner respect as a rule of law in the face of authoritarian attempts to manipulate the social inequalities arising within an interdependent global marketplace. We need as complete a knowledge as possible to understand our positions of social injustice and to rectify them, either within dominant market paradigms by means of (universal) redistribution, or by the making of new private and public spheres of socio-political interaction (the commons?).

To return finally to our academic debate on populism, the same epistemological lessons hold good: Certainly, we require empirical facts on the basis of which we might begin to understand and categorise a new authoritarianism, or proto-fascism. But, at the same time, we must never forget that our academic knowledge, is also only knowledge rather than 'naked fact' if it remains open to a moral outlook, does not forget its contingency. If we acknowledge this fact, we will perhaps always be open to being compromised in the eyes of seemingly pure scientific models; but we might also perhaps relax, more confident in the knowledge that we have also acted to safeguard the rule of law and democratic expression.

²⁶ S. Turner, What is the Problem with Experts?, in: Evan Selinger/Robert Creuse (eds.), *The Philosophy of Expertise*, New York 2006.

²⁷ Support obliquely found in the theories of Joerges (note 2).