

Liberal battle form: *eidos* of competition

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In 1976 Michel Foucault elaborated the so called war-model as a schema for understanding power and politics in his lectures *'Society must be defended'*. The war model should allow an apprehension of social and political life as incessant struggle and confrontation, strategic and tactical manoeuvring: 'it is war that makes society intelligible' (Foucault 2003, 163). Yet more importantly perhaps, the war model should allow leaving behind the liberal-juridical model, a model that considers questions of power and politics as questions of legitimacy and illegitimacy. Legal systems, too, need to be analysed 'in terms of the unending movement – which has no historical end – of the shifting relations that make some dominant over others' (Foucault 2003, 109).

The system of right and the judiciary field are permanent vehicles for relations of domination, and for polymorphous techniques of subjugation. Right must, I think, be viewed not in terms of a legitimacy that has to be established, but in terms of the procedures of subjugation it implements. (Foucault 2003, 27.)

Three years later, in *The birth of biopolitics* lectures of 1979, Foucault seems to have radically changed his views on the law. Now, modern law stands for a limitation of power rather than its instrument: 'Legal theory and judicial institutions no longer serve as the multiplier, but rather as the subtractor of royal power'. Juridical theories speak of 'fundamental laws of the state' that 'exists, as it were, before the state since they are constitutive of the state' and cannot be tampered with. The law is not mere ideology, but facilitates real resistance: 'let's say that in the seventeenth and eighteenth centuries public law is oppositional'. The power of the state is opposed by way of attempts to impose limits on its exercise 'and the principle or reason of this limitation is found in juridical reason'. (Foucault 2008, 8-9.)

From 1976 to 1979 there seems to have occurred a change, and this change seems to be radical in Foucault's thinking. It also seems that in the background of this change there is another change: Foucault seems to have abandoned war

as the model and the principle of intelligibility of society, politics and power. Something had replaced it, something that Foucault called governmentality (*la gouvernementalité*) (Foucault 2007a). This suggests that the war model, and its rejection of the legal model, was only a passing episode or an isolated experiment that had no long-lasting resonance for Foucault. Yet this is far from the truth. Even at the beginning of his so called genealogical phase, in a programmatic text of 1971 entitled *Nietzsche, genealogy, history*, he had set out from the view that the legal system is a depository of wars and violence: ‘humanity installs each of its violences in a system of rules and thus proceeds from domination to domination’ (Foucault 1998, 378). Towards the end of his life, in an interview from 1981, he indicated that the problem of war and law still bothered him and that he would like to return to it:

And if God grants me life, after madness, illness, crime, sexuality, the last thing that I would like to study would be the problem of war and the institution of war in what one could call the military dimension of society. There again I would have to cross into the problem of law [...]. (Foucault 2007b, 143.)

So there are reasons to believe that the war model was sustained throughout the seventies, albeit it receded to the background and did not surface at the level of Foucault’s methodical vocabulary in the foreground. Yet it is a well known hermeneutic truth that background is important in understanding foreground. The idea of the following piece of exegesis is that the war model still worked in the background when Foucault discussed liberal economics as a current end-point of the history of governmentality in his *Birth of biopolitics* lectures. My suggestion is that Foucault considered contemporary liberal economics as a technology of governing whose effect was that war-like battle is generalised in economic form. This technology builds on a specific war-rationality, the *eidōs* of competition that in our societies disseminates all over, penetrates all corners of social life.

With respect to its culture and ethos, economic rationality belongs historically to the bourgeois and is of course antagonistic and disparate with the warrior values represented by the old aristocracy. Yet it is clear that the *eidōs* of competition really also corresponds to the structures of warrior society in that both extol and celebrate the ferocity of private individuals as actors for whom only their own success matters. To make the correspondence visible, the notion of battle-form shows that the life of societies and of individuals is ultimately seen as war by Foucault.

The problem: how to institutionalise competition?

In ‘*Society must be defended*’, Foucault explained the ‘liberal conception of political power’ in the following way:

In the case of the classic juridical theory of power, power is regarded as a right which can be possessed in the way one possesses a commodity and which can therefore be transferred or alienated, either completely or partly, through a juridical act or an act that founds a right – it does not matter which, for the moment – thanks to the surrender of something or thanks to a contract. Power is the concrete power that any individual can hold, and which he can surrender, either as a whole, or in parts as to constitute a power or a political sovereignty. (Foucault 2003, 13.)

In the above, the liberal-juridical idea of social contract is depicted as if stemming from an economic model. There is a transaction where one barter power for security and order. Three years later, in *The birth of biopolitics* lectures of 1979, Foucault discussed the relationship between liberal economics and the law in a different manner. This time, Foucault undertook to elaborate the ways in which economic liberalism connected with the juridical concept of power, not in terms of social contract, but of *Rechtsstaat* and the rule of law. For the purposes of elaborating on the liberal-juridical model of power, let us make a brief excursion to the themes of *The birth of biopolitics*, especially its seventh lecture discussing the *Rechtsstaat*.

The basic aim of the seventh lecture was to explain how twentieth century economic liberalism made strategic use of the *Rechtsstaat* and the rule of law.¹ Whereas classic economic liberalism had instructed a way of governing societies that disconnected from the juridical (as a constitution of power by social contract), the new forms of liberalism reconnected the juridical (as principles of the *Rechtsstaat*) to the governing of society on the basis of the market. Foucault wanted to explain the ways in which the new economic liberalism of the twentieth century made strategic use of the formalism of the constitutional state.

Before discussing liberalism and the *Rechtsstaat*, let us however note Foucault’s analytical distinction between the juridical justification of governing and its justification by political economy. This distinction reflects the more general distinction between the rule of law and the general good as principles

¹ The first half of *The birth of biopolitics* lectures discusses German ordoliberalism and the second half American neo-liberalism, but in the seventh lecture, forming a hinge between those two halves, F.A. Hayek as an individual thinker seems to have been the most important source for Foucault.

of justification. According to Foucault, when political economy reflects on governmental practices,

[...] it does not question them to determine whether or not they are legitimate in terms of right. It considers them in terms of their effects rather than their origins, not by asking, for example, what authorizes a sovereign to raise taxes, but by asking, quite simply: What will happen if, at a given moment, we raise a tax [...]? What matters is not whether or not this is legitimate in terms of law, but what its effects are and whether they are negative. (Foucault 2008, 15.)

The general good as conceived by political economy pertains to future effects of political action, whereas the rule of law as conceived by public lawyers pertains to prior authorisation of political action. 'The economic question', said Foucault, is always about 'the real effects' of government, whereas the juridical question is about the original rights and powers that have founded and defined the scope of someone's rule over others, as well as the spheres of freedom that remain. Hence, the time dimension of the general good is future, whereas the rule of law keeps track of the past. (Foucault 2008, 15.)

The problem of economic liberalism was how to devise a political order in which there would be 'a state under the supervision of the market rather than a market supervised by the state' (Foucault 2008, 116). Such a political order is committed to the basic outlook according to which 'there is only one true and fundamental social policy: economic growth' (Foucault 2008, 144). What emerges is the problem of 'a radically economic state' that is completely different from the problem of classic liberalism. The problem of classic liberalism was the following: 'given the existence of a legitimate state [...], how can we limit this existing state, and above all, allow for the necessary economic freedom within it?' In the place of that problem, the problem of the radically economic state of the ordoliberals was: 'how can we get [the state] to exist on the basis of this non-state space of economic freedom?' (Foucault 2008, 86-86.)

[...] the problem of neo-liberalism was not how to cut out or contrive a free space of the market within an already given political society, as in the liberalism of Adam Smith and the eighteenth century. The problem of neo-liberalism is rather how the overall exercise of political power can be modelled on the principles of a market economy. So it is not a question of freeing an empty space, but of taking the formal principles of a market economy and referring and relating them to, of projecting them on to a general art of government. (Foucault 2008, 131.)

So the space of economic freedom is the market and, in a radically economic state, one must enhance realisation of the following: what regulates the market must regulate political society overall. That is the way, the only true social policy, to public good, to economic growth. Then what is it that regulates the market? It is *competition*; therefore, competition must regulate political society overall. But what is competition?

Competition is an essence. Competition is an *eidōs*. Competition is a principle of formalization. Competition has an internal logic; it has its own structure. Its effects are only produced if this logic is respected. (Foucault 2008, 120.)

What is most important here, and distinguishes the contemporary forms of economic liberalism from classic economic liberalism, is that the positive effects of the market will not come about naturally: its logic must be ‘respected’. The market is not a natural order that will start to execute itself when regulations are merely lifted. In other words, ‘the market, or rather pure competition, which is the essence of market, can only appear if it is produced, and if it is produced by active governmentality’ (Foucault 2008, 121). Classic liberalists had believed that things would start to develop on their own, like plants grow in nature, if only the governors step back and let go. Against that, the ordoliberalists would say:

Not true, the natural order, what is understood by the natural order, what the classical economists or, at any rate, those of the eighteenth century understood by a natural order, is nothing other than the effect of a particular legal order. (Foucault 2008, 162.)

The solution: the *Rechtsstaat*

Economic processes may be analysed as ‘a matter for pure theory and formalisation’ – as an essence, *eidōs*, and in terms of their internal logic. Yet all of this can ‘really exist, in history,’ only ‘insofar as an institutional framework and positive rules have provided them with their conditions of possibility’ (Foucault 2008, 163). What the realisation of markets and competition as regulative principles of society requires is ‘the redefinition of the juridical institution and of the necessary rules of right in a society regulated on the basis of and in terms of the competitive market economy’ (Foucault 2008, 160). In short: ‘The juridical gives form to the economic, and the economic would not be what it is without the juridical’ (Foucault 2008, 163). A legal order gives birth to an economic order.

In any event, liberal economics had come up against the problem of how to forge the institutional fabric that would allow competition as an *eidos* to be extended from the realm of the market and become the regulative principle for the governing of society all over. At this point, the German idea of *Rechtsstaat* is evoked. *Rechtsstaat* responded to the needs of economic liberalism and became a constitution of a radically economic state. *Rechtsstaat* itself of course is not radically economic, but the product of eighteenth century German legal and political theory stemming all the way from the philosophy of Immanuel Kant (Stolleis 1988, 326). Nonetheless, the liberal economists saw that the doctrines of *Rechtsstaat* fit perfectly to the demands of market-society. Foucault explained that *Rechtsstaat* embodied three important doctrines for the political purposes of liberal economic theory. Firstly, a *Rechtsstaat* is ...

[...] a state in which the actions of the public authorities will have no value if they are not framed in laws that limit them in advance. The public authorities act within the framework of the law and can only act within the framework of the law. (Foucault 2008, 169.)

This, according to Foucault, transposes the origin and principle of the exercise of coercive public power from the will of the sovereign to the form of the law. This transposition is directed against despotism. In despotism, 'any injunction made by the public authorities' can be referred 'back to the sovereign's will' (Foucault 2008, 169).

Second, in a *Rechtsstaat* ...

[...] there is a difference of kind, effect and origin between, on the one hand, laws, which are universally valid general measures and in themselves acts of sovereignty, and, on the other hand, particular decisions of the public authorities. (Foucault 2008, 169.)

In other words, general legislation ('legal dispositions') is differentiated from individual decisions ('administrative measures'). Foucault did not explain what precisely is the legal meaning and effect of this differentiation, but we know of course that administrative decisions must be based on laws, and general legislation may not be promulgated with a view to individual cases only (prohibition of *lex individualis*). Foucault explained that separation of 'conjunctural, temporary, local, and individual decisions' from the sphere of 'general and permanent prescriptions' was directed against the 'police state' (the nineteenth century *Polizeistaat*) that 'establishes an administrative continuum' between all public

authorities by according in principle the same coercive value to all injunctions. (Foucault 2008, 168.)

Thirdly, and lastly, *Rechtsstaat* is ...

[...] a state in which every citizen has the concrete institutional and effective possibility of recourse against the public authorities. [...] It is a state in which there is a system of law, that is to say, of laws, but it also means a system of judicial arbitration between individuals and the public authorities. (Foucault 2008, 170.)

In some countries, Foucault had learned, judicial review of public authorities' decisions is organized in special administrative courts, while in others these decisions may be challenged in the same courts that deal with civil and criminal matters. The effective meaning of this in any case is that the law 'binds the state as much as it binds others'. (Foucault 2008, 173.)

This is the concept of law that economic thinkers, before and after the Second World War, inserted to their way of instructing a good political order. Why, for what purpose, did they undertake this? Because with the *Rechtsstaat* the liberals saw the possibility of doing away with all forms of socialism. The meaning of the *Rechtsstaat* concept of law, as economic liberalism wanted to understand it, was to rule out the collective planning of an interventionist state. In other words, legislation 'must never pursue a particular end', but 'must be conceived a priori in the form of fixed rules'. This kind of formalism makes up the social fabric of certainty (trust in the stability of the environment) for economic actors. Then the law is a fixed framework for purposive-rational action, 'within which economic agents can freely make their decisions'. But it is even more: the law must exist as a wholesale prohibition of any further fixing that would adjust this established framework according to some precepts of distributive justice, sensitive to the social injustices that this framework might bring about. If there is a *Rechtsstaat*, agents would know that the legal framework of their action 'will not change', the framework is fixed for good. Finally, 'the formal law' does not leave the legislator itself intact (*princeps legibus solutus*), but it is 'a law that binds the state as much as it binds others'. (Foucault 2008, 172–173.)

All in all, the *Rechtsstaat* concept of law, as conceived by liberal economists, means that legal 'rules are not decisions which someone takes for others' (Foucault 2008, 173). What, then, is the law?

It is a set of rules which determine the way in which each must play a game whose outcome is not known by anyone. The economy is a game and the legal

institution which frames the economy should be thought of as rules of the game. (Foucault 2008, 173.)

The government, subjected to or guided by the economic concept of the *Rechtsstaat*, is never one of the players, but ‘a provider of rules for an economic game in which the only players, the only real agents, must be individuals’ (Foucault 2008, 173). This is the way in which the *Rechtsstaat* forms a condition of possibility for the materialisation of the *eidōs* of competition. The general good that the law will generate must be the outcome of its guard against any substantive policy-making on the basis of general good. Only formal justification, never substantive policy justification, counts in the practice of law. Yet it is precisely here that one should not miss the point of junction where economic liberalism makes its essential tactical manoeuvre.

The insistence of formality in *the practice of law* is nothing essential because it is nothing new. It really made no difference: formalism is the way it had been from before; the rationality of law is formal. This appearance of no-transformation and homogeneity, at one level (where it is a fact that nothing new has been introduced), is as a matter of fact the condition for enabling real transformation (at another level, where everything will change) induced by economic liberalism in its tactical use of *Rechtsstaat*. That transformation changes everything in the *practice of politics*.

What must be seen clearly is that while nothing new happens in the practice of law, the liberal economists’ filtering of *Rechtsstaat* doctrines pruned away the element of collective decision making from the practice of politics. The *Rechtsstaat* is made to mean that politics is not to intervene (in accordance with its substantively justified policy-programmes for public good) in the life of individuals, life that should be conducted in market-relationships as competition. This is a real transformation, a tactical reversal of the juridico-political discourse.

In a constitutional state, lawyers’ ideology is formalistic because they would regard it as the task of politicians precisely to define the general good and then act on that basis. What is known as a democratic constitutional state (where ‘lawmaking is interwoven with the formation of communicative power’; Habermas 1996, 162) will not do for liberal economists any better than an omnipotent absolutist monarch, because it might ignore or disrespect the fragile *eidōs* of competition. A *Rechtsstaat* that is still based on the social contract (where individuals find out about the general will through the process of law-making) is destructive of the economic order because the notion of general will is incompatible with it. There cannot be anything but the individual will. The democratic *Rechtsstaat* is a patho-

logical tendency to social disturbance – not only because it can always intrude relations of competition, but because of its fundamental element of collective will with which individuals are asked to identify and assimilate. What economic liberals wished to see, however, was that juridical *Rechtsstaat* principles pertaining to the practice of *law* become the form of government. Legal justice should be imposed on political justice.

Curiously, economic liberalism, being a version of political economy, is nonetheless ultimately founded on a general-good type of justification. It has regard to real effects in the future, which can be negative or positive. Yet the only true general good for economic liberalism is economic growth, and this good is best achieved by competition between private entrepreneurs. To facilitate competition, as an *eidos*, one needs to make sure that politics will not get involved, that is, will not think about, or at any rate, will not act for the general good. The formal rationality of legal practice, which keeps track of the past only, is imposed on the practice of politics. All that society needs is formal law: it serves the fixed framework that facilitates free competition, but also disqualifies, banishes, the state from the field of economy – and thereby from the field of society overall.

This is the way in which the liberal economists forged a conjunction between market society and constitutional state, established ‘the possible connections between disparate terms’ (Foucault 2008, 42.). In the classical versions of liberalism, these disparate terms were disconnected, while in the new version they were reconnected. Hence, the new economic thinking applied *strategic logic*: it appropriated and made use of the eighteenth century German *Staatsrecht* doctrines (and the formal, rule of law type of justification inscribed in them) in order to pursue their own policy of the general good. Analytically speaking, this policy was a strange one indeed, a kind of no-policy: it wished to impose *no general good* as the *rule of law* on the state. *Summum bonum*.

The liberal-juridical model as a war model

Economic theory appropriated and incorporated the principle of the rule of law in its own discourse, which was not mere theory, however, but a power game. This calls for two remarks with respect to the initial antagonism between the war model and the liberal-juridical model of power that was our starting point. Firstly, the liberal-juridical model of power is no longer perceived by Foucault in *The birth of biopolitics* lectures as something against which the war-model would be put forward as a radical alternative. The liberal-juridical model of power is

inserted into political struggles, which bring on tactical transmutations of that model. In other words, the war-model embraces the liberal-judicial model.

The second remark concerns the *eidos* of competition. Clearly, for Foucault, the *Rechtsstaat* was not only a piece of tactics of the liberals in their battle against socialism. In fact, it belonged to the more far reaching strategy of making the whole of society into a kind of economic battleground. This battleground was meant for ‘that other natural man or ideal element dreamed up by the economists: a man without a past or a history, who is motivated only by self-interest and who exchanges the product of his labor for another product’. Who is the other natural man? He is a *savage* – not the noble savage (the first natural man), the Hottentot that obeys the will of nature, but ‘the savage *Homo economicus* whose life is devoted to exchange and barter’. For this savage, the *Rechtsstaat* ‘constitutes a social body which is, at the same time, an economic body’. (Foucault 2003, 194).

This kind of savage is essentially free. In this respect she is no different from the medieval Germanic warriors, whose freedom ‘was essentially the freedom of egoism, of greed [...] not the freedom of tolerance and equality for all’ (Foucault 2003, 148). Now, the question is whether the economic notion of freedom more elementarily corresponds to the warrior notion of freedom:

The first criterion that defines [warrior’s] freedom is the ability to deprive others of their freedom. What would be the point of being free and what, in concrete terms, would it mean, if one could not trample on the freedom of others? That is the primary expression of freedom. (Foucault 2003, 157.)

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