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### **Individual and Regulatory Ethics: An Economic- Ethical and Theoretical-Historical Analysis of Ordoliberalism**

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# Individual and Regulatory Ethics: An Economic-Ethical and Theoretical-Historical Analysis of Ordoliberalism

by Manuel Wörsdörfer<sup>1</sup>

**Abstract:** Based on Foucault's analysis of German Neoliberalism and his thesis of ambiguity, the following paper draws a two-level distinction between individual and regulatory ethics. The individual ethics level – which has received surprisingly little attention – contains the Christian foundation of values and the liberal-Kantian heritage of so called Ordoliberalism – as one variety of neoliberalism. The regulatory or formal-institutional ethics level on the contrary refers to the ordoliberal framework of a socio-economic order. By differentiating these two levels of ethics incorporated in German Neoliberalism, it is feasible to distinguish dissimilar varieties of neoliberalism and to link Ordoliberalism to modern economic ethics. Furthermore, it allows a revision of the dominant reception of Ordoliberalism which focuses solely on the formal-institutional level while mainly neglecting the individual ethics level.

**Keywords:** German Neoliberalism, Individual Ethics, Regulatory Ethics, Michel Foucault, Walter Eucken.

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„Nur sechs Größen oder vielmehr Gruppen von solchen bleiben als Daten für die gesamtwirtschaftliche Betrachtungsweise: Die Bedürfnisse der Menschen; die Gaben und die Bedingungen der Natur; die Arbeitskräfte; die Güter-vorräte aus früherer Produktion; ferner das technische Wissen und schließlich die rechtliche und soziale Ordnung, die den Handlungen der Wirtschaftssubjekte Richtung geben kann und Grenzen setzt. Dieses letzte Datum muß in einem weiten Sinne aufgefaßt werden: Nicht nur die Gesetze, die Sitten und Gewohnheiten sind gemeint, sondern auch der Geist, in dem die Menschen leben und sich an die Spielregeln halten.“  
(Walter Eucken 1952/2004: S. 377)

## 1. Introduction

The starting point of my considerations is Michel Foucault's *Die Geburt der Biopolitik. Geschichte der Gouvernementalität II* (The Birth of Biopolitics. History of Governmentality). The book contains Foucault's lectures at the Collège de France in 1978-1979, where he intensively discusses the evolution of neoliberalism in general and German Ordoliberalism in particular. On pp. 335, he proclaims the so called thesis of ambiguity, which has received surprisingly little attention. In a first step, I will critically reassess this thesis, hint at possible strengths and weaknesses of Foucault's argument and – in a second step – I will refine and

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advance Foucault's thesis pointing at a similar two-level differentiation between *individual ethics* (i.e. individual ethics is understood here in the sense of German Neoliberalism exhibiting a dual nature: liberal-Kantian on the one hand and virtue-ethical on the other hand referring to the Christian foundation of values.) and *formal-institutional ethics* (i.e. ordoliberal framework policy).<sup>2</sup> The intention is to retain the strengths of Foucault's thesis of ambiguity without incorporating the weaknesses.

The aims of the following essay are multi-layered: a by-product of my critique is to relativise and to invalidate the criticism of neoliberalism subsequent to Foucault's analysis of neoliberalism.<sup>3</sup> The main aims, however, are the differentiation between dissimilar varieties of

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<sup>2</sup> *Individual Ethics* correlates to the individual behavior of a person. It refers to an ethics based on internalized moral values and self-committed internal norms (i.e. active setup of internal, individual-ethical norms and passive internalization of societal, institutional-ethical norms restraining human actions). Key words with regard to the internalized norm system grounded in intrinsic motivation are individual self-control, self-commitment and self-regulation. External controls are not required; rather, internal sanctions (i.e. inner voice of conscience) are replacing external ones. Individual ethics incorporates the Smithian notion of empathy, the Kantian Categorical Imperative (i.e. universalization of mutually approvable maxims), deontological or virtue ethics and Christian ethics (i.e. solidarity, benevolence and Christian love). It functions as a coordination mechanism within small, club-like communities with face-to-face relationships and a high level of social interdependency mainly based on altruism and sympathy (and not egoism) as the basic motives of human action (cp. Weise 2000 and Noll 2002: pp. 153).

*Regulatory or Institutional Ethics* refers to external-formal institutions and the regulatory framework of a society. This kind of order of rules ethics is based on incentive-compatible cooperation (i.e. voluntary, reciprocal exchange aiming at mutual benefits) and a formal, abstract rule system (as a form of collective self- or rule-commitment) which is capable of solving dilemma structures in an incentive-driven and Pareto-superior way. External institutions and coordination mechanisms with their (threat of) external sanctions and coercion guarantee norm-conformal behavior. The regulatory framework as a cooperation fostering institution sets the incentive structure in which the individuals can pursue their self-interests (i.e. self-interested motives and not altruistic ones as the basic force of the coordination of interactions). Regulatory ethics is especially important in anonymous, loose-knit and large-scale societies where most of the transactions run through markets and exchange mechanisms based on value-equivalent compensation (cp. Weise 2000 and Ulrich 2008: chapter 9). One of the key features of regulatory ethics are the ethical criteria universal applicability (of rule-based constitutional interests) and the ability to reach a (voluntary) common consent (although the universalization requirement is at least as much important as in the field of individual ethics (cp. Kant's Categorical Imperative); see Vanberg 1999/2009 and Noll 2002).

<sup>3</sup> The main accusations concern the all-pervading *economization* of society (i.e. "... self-sufficiency and autonomy of economic rationality, which is forced upon us by the inherent logic of the market. They argue in a reductionist and deterministic fashion for a 'pure' and 'value-free' economics which has no place in its axiomatics for ethical categories" (Fearn, James in: Ulrich 2008: p. xiii)), *economic imperialism* and the *Homo oeconomicus* model. According to the neoliberalism-definition of O'Malley (2009: 3) et al., neoliberalism consists of the advocacy of the market (i.e. markets as autonomous spheres applying to their own rules), the promotion of business-like relations and market governance, the economization of formerly non-economic spheres (i.e. commodification and implementation of market-like, self-regulating forms of governance; cp. Lemke 2000), the universalization of market-based social relations (cp. Shamir 2008), the reaffirmation of individual responsibility (i.e. *empowering in a risk-based society*; cp. Lemke 2000), economized language (cp. Shamir 2008), the differentiation between *Government* and *Governance* (i.e. less government, but not less (market) governance; cp. Larner 2000) and finally the entrepreneur as the neo-liberal hero (i.e. rational choice actor, *Homo oeconomicus* and the individual equipped with specific resources investing in the competencies of the entrepreneurial self and its employability; cp. Heidenreich 2010).

Some of the objections raised against neoliberalism might be true – no doubt; yet, most of them can be rejected as related to German Neoliberalism. E.g. Röpke pushes back against apologetic economization, economic imperialism, economic narrowing and against fetishism of growth (cp. Röpke 1944/1949: pp. 385) and he explicitly refuses the model of *Homo oeconomicus* (cp. Röpke 1955/1981: p. 447) due to its mere material and egoistic profit seeking and its reductionism (i.e. reducing the complexity of human nature while ignoring the multiplicity of human motives of action; see for a similar estimation: Eucken 1934: pp. 21 and Rüstow 1957: p. 63, where he (indirectly) argues against pleonexia and chrematistics). See also Böhm (1937), where he condemns materialistic individualism, reckless profit-seeking, the glorification of economic egoism and the dog-eat-dog-society. As a result, this exploitative and anarchic *bellum omnium contra omnes* leads directly towards the state of massification and a decline in values in general and a decline of public spiritedness in particular. In total, the *Homo oeconomicus* model is far from being the dominant ordoliberal disposition of individuality.

neoliberalism and the connectivity of Ordoliberalism – as one variety of neoliberalism – to modern economic ethics. In this regard, the paper tackles the question of a potential compatibility between self-interest and public welfare or the common good. The unique answer Ordoliberalism gives is that on the supposition of an existing concord of the two levels – individual and formal-institutional ethics – can the harmony of personal and common interests be reached. Equally important is the fact, that the somehow deficient regulatory ethics level has to be complemented by the individual and virtue ethics level. With the help of a differentiated, less stereotypical and less prejudiced interpretation of Ordoliberalism it seems feasible to revise the dominant reception of Ordoliberalism which focuses solely on the formal-institutional level while mainly neglecting the individual ethics level (Foucault in this context is no exception).

### 1.1.1 1.1. Foucault's Thesis of Ambiguity

What does the *thesis of ambiguity* amount to? According to Foucault, Ordoliberalism rests on two pillars: the 'society for the market' and the 'society against the market' pillar (Foucault 2006: p. 335). The *'society for the market' pillar* can be paraphrased with the key words 'business or corporation society' ("Unternehmensgesellschaft" (p. 208)) and 'competitive market economy' ("Wettbewerbsmarktwirtschaft" (p. 248)). Thus, society is shaped by the model of entrepreneurship; competition and the Homo oeconomicus model are the ordering rationales, and the laws of the market serve as the principles of societal regulation.<sup>4</sup> The *'society against the market' pillar* contains one of the central concepts within Ordoliberalism: Vitalpolitik (Vital Policy).<sup>5</sup> According to Foucault, this component of Ordoliberalism offers compensation regarding the cold-hearted, rigorous and severe (competitive) market apparatus. The *market-free sectors* – as one integral component of that pillar – function as an anti-thetical counterweight: They supply the need for social integration and restore cultural and moral values.

What are the strengths and weaknesses of Foucault's thesis of ambiguity? The *strengths* comprise the following aspects: 1. Foucault's analysis references (correctly) to the inner ambivalences and tensions inside Ordoliberalism; 2. It points to the distinctiveness of German Ordoliberalism by highlighting the prominence of market-free and non-commercialised sectors; 3. It admits the separation between the different varieties of

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<sup>4</sup> Further key words relating to this pillar are: the market as the place of the establishment of truth ("Markt als Ort der Wahrheitsfindung" (Foucault 2006: pp. 55)), economic legitimacy of the state (i.e. "legitimacy through wealth"; pp. 124) and public authorities under the supervision of the market (p. 168).

<sup>5</sup> See Rüstow 1955; 1961. Rüstow's concept of vital policy can be described as follows: "... the true purpose of the economy lies in the service of values beyond the economy, in the service of human dignity. *Vital* is whatever promotes the *vita humana* and a life which is worthy of a human being and hence *Vitalpolitik* takes into consideration 'all the factors on which the happiness, well being and contentment of man truly depend' (Rüstow)" (Fearn, James in: Ulrich 2008: p. xiii).

neoliberalism in such a way that only Ordoliberalism is equipped with Foucault's 'society against the market' pillar or in my terminology: with the individual and virtue ethics level.

Besides the strengths, there are also some remaining *weaknesses* of Foucault's analysis: first of all, Foucault misinterprets the means-end-relation of German Neoliberalism and the essence of competition and (a socially committed) market economy; second, Foucault portrays the two pillars as opposed to each other – according to Foucault, there exists a dichotomy and a dualism within Ordoliberalism – instead of an interdependent unity; thirdly, further ambiguities are disregarded (e.g. latent tension between liberalism and paternalism, between liberalism and the elitist doctrine of the state (i.e. 'expertocracy' and meritocratic hierarchy) or between (heteronymous) religiosity and Kantian (autonomy-seeking) ethics).

As mentioned above, it is the aim of the paper to overcome the weaknesses of Foucault's analysis while fostering the strengths of his arguments. The agenda of the paper, therefore, proceeds as follows: in the next paragraph the essay tackles the question of what are the requirements of an economic and societal order (functionality vs. humanity) referring not only to the compatibility of self interest and the common good, but also highlighting the means-end-relation and the scale of values of Ordoliberalism (chapter 2). In the main part of this article (chapter 3) the distinction between individual ethics and formal-institutional ethics will be elaborated. It will become clear that the individual ethics level contains the Christian foundation of values and the Kantian program of liberty. The Christian and Kantian fundament of Ordoliberalism will mainly be explicated by referring to the work of Walter Eucken, main spokesperson of the Freiburg School of Law and Economics (i.e. Ordoliberalism in the narrower sense). After exemplifying the formal-institutional ethics level containing the key features and phrases of Ordoliberalism, chapters 4 and 5 will widen the perspective by incorporating the writings of the two main representatives of Ordoliberalism in the broader sense, namely Alexander Rüstow and Wilhelm Röpke. The paper ends with a summary of my main findings (chapter 6).

## **2.1. Workable and Humane Socio-Economic Order**

At the heart of Ordoliberalism lies the question, whether it is possible to implement a functioning and humane economic order – an order which serves the Kantian values human dignity and self-legislation as well as justice and fairness (i.e. human dignity, freedom and justice are regarded as synonyms in most of the ordoliberal publications).<sup>6</sup> Therefore, Ordoliberalism tries to solve the dilemma or the conflict of goals between efficiency, performance capability and productive capacity on the one hand and (formal) equality and

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<sup>6</sup> See Eucken 1952/2004: p. 14, p. 166 and p. 369; Eucken 1950/1965: pp. 239; Rüstow 1945/2001: p. 153.

social justice on the other hand. The primacy of ethics and the primacy of economics have to be avoided. Pies speaks in this context of ‘orthogonal positioning’<sup>7</sup>, a normative-integrative perspective which is capable of conquering the (alleged) antagonism or trade-off between freedom, security and social justice (i.e. integrative approach to economic dynamism and social cohesion). In order to realise this aim, Ordoliberalism pursues a two-stage argument similar to that of Adam Smith: the ideal economic and societal order of Ordoliberalism – the so called ‘Competitive Order’ (I will come back to Eucken’s *Ordnungstheorie* in chapter 3.3) – has to be justified by efficiency, allocation *and* ethical arguments alike pointing at the twofold requirements profile of a market-based and at the same time socially embedded competitive order. The socio-economic order has to overcome economic shortages and scarcities; it has to conquer absolute material poverty, mass unemployment and solve the Social Question; it is responsible for satisfying the basic needs of the people and for the maintenance and provision of vital goods. Furthermore, the socio-economic order has to be organised in a way that it enables an autonomous, self-reliant life in freedom (i.e. Kantian autonomy and liberty) and a humane and ‘vital political’ life according to Christian social ethics.<sup>8</sup> What is essential here is the fact, that the criterion of functionality and the criterion of humanity are linked interdependently and reciprocally – there is no such thing as a super- or subordination. What kind of role do market and competition play with regard to the twofold requirements profile of the socio-economic order?

## **2.2. The Essence of Markets and Competition**

Competition (under the rules), or as Ordoliberalism calls it ‘*Leistungswettbewerb*’ (competition on the merits), is used merely as a tool: the Ordoliberals – Eucken and Böhm as well as Rüstow and Röpke – regard competitive markets as instruments of emasculating power (“*Wettbewerb als Entmachtungsinstrument*”)<sup>9</sup>; they are important control mechanisms. Furthermore, competition is not an end in itself; rather it is a means to an end (a fact that has received little attention among scholars, including Foucault himself). Moreover, it is not only a means in economic terms; it is the most prominent and elementary means regarding the twofold requirements profile of a socio-economic order (i.e. means-end-relations). As we already know, it is the aim of Ordoliberalism to establish a functioning and humane order of rules. Competition now serves as a hinge (i.e. *Scharnierfunktion*): it enables the

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<sup>7</sup> Pies 2001: pp. 130.

<sup>8</sup> See Eucken 1952/2004: p. 199.

<sup>9</sup> See Böhm 1961: p. 22; Eucken 2001: p. 83; Lenel/Meyer 1948: XI.

accomplishment of the economic as well as the ethical goal<sup>10</sup>: on the one hand, competition enhances economic efficiency and the performance capability of a market economy. It increases the innovative and creative spirit and the overall prosperity of an economy (economic goals). Furthermore, competition creates the material prerequisites for the realisation of (positive) freedom (i.e. competition as a complement of freedom). By removing market powers, by dissolving concentration of power and by minimising coercion, competition and market mechanism make room for the free development of the individual in economic, social and cultural regard: they protect civil rights and liberties (i.e. freedom through competition) and thus, safeguard human dignity.

All this goes along with a *negation of a one-sided absolutization of economics*: Ordoliberalism strives for an economically *and* ethically justifiable order!<sup>11</sup> Therefore, Ordoliberalism cannot be blamed for super-elevating normative economic aspects or for neglecting the Zweck- or Lebensdienlichkeit of the market economy (market economy's ability to serve).<sup>12</sup> Ordoliberalism incorporates economic and ethical control mechanisms alike – reminding the reader of Smith's Wealth of Nations and Theory of Moral Sentiments: the market form of complete competition, the principle of accountability and liability, the principle of market conformity – to name just a few economic control variables.<sup>13</sup> On the ethical side the Christian foundation of values acts as a control device (cp. chapter 3.1).

### 3. Individual Ethics and Regulatory Ethics

„Christen sind zu erheblich mehr verpflichtet als zur Innehaltung der allgemeinen Ordnungsgrundsätze“  
Constantin von Dietze (unter Mitarbeit von Böhm, Eucken und Ritter) 1946/1994: S. 368

The two-level distinction between individual ethics and regulatory ethics is not an invention by the author; it is part of the oeuvre of at least two of the most prominent ordoliberal thinkers – namely Wilhelm Röpke and Walter Eucken.<sup>14</sup> E.g. Röpke differentiates in his work *Civitas*

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<sup>10</sup> Röpke (1942: p. 170) differs between *material* (i.e. raised standard of living) and *immaterial* gains (i.e. guarantee of freedom, personal independence and security, social justice) resulting from a competitive market economy. And Müller-Armack (1972/1981: pp. 163) adds the creation of social cohesion, the solving of social conflicts and the easing of tensions as further immaterial gains of a competitive order (i.e. Social Market Economy as a peace-making ordering); see also Wohlgemuth 2008: pp. 73 (i.e. ethics of competition: competition as a result and expression of individual liberty and private autonomy, competition as a result and cause of the emasculation of privileged (market) power, and competition as a source of unintended good works for unknown others).

<sup>11</sup> Referring once again to the two-stage argumentation of Ordoliberalism. In total, the ordoliberal competitive order is on both levels – the economic and the ethical one – vastly superior compared to the centrally administered economy (see Dietze/Eucken/Lampe 1941/1942: pp. 40). It can provide the society with material as well as immaterial gains.

<sup>12</sup> Cp. Ulrich 2008.

<sup>13</sup> See also Eucken's Constituent and Regulative Principles in Eucken 1952/2004.

<sup>14</sup> See also Böhm 1937: here, Böhm pleads for a combination of a highly efficient and productive economy and a society based on noble sentiments and public-spiritedness at the same time. Furthermore, he points at the embeddedness of the economic process into a broader context of a moral and legal order.

*Humana* between a formal-institutional and a moral-psychological level (p. 28) respectively between material-institutional and immaterial control mechanisms and counterweights (pp. 202). Eucken on the other hand remarks that the legal order and the state of the market alone are not sufficient – an adequate individual ethics and adequate moral standards are needed as well in order to complement the legal order (cp. *Wirtschafts- und Sozialordnung* (Economic and Social Order) and *Nationalökonomische Fibel* (National Economic Primer; both written in co-authorship with von Dietze and Lampe<sup>15</sup>). What is essential here is that both levels are not super- or subordinated to each other; rather, both Eucken and Röpke highlight the interplay, the equal status and the interdependent complementarity between individual and regulatory ethics. No dichotomy can be detected, as assumed by Foucault et al.

Let's take a closer look at the two levels and their characteristics: the *formal-institutional or regulatory level* encompasses the typical ordoliberal framework, ordering policy and Eucken's so called competitive order. In chapter 3.3 I will analyse this level in more detail. So far, it is important to note, that the regulatory level has to be supplemented by the individual ethics level due to its eventual deficiencies. This second level – the so called *individual or virtue ethics level* – can be subdivided in two sections: the first type of individual-ethical self-commitment refers to the religious-sociological background (i.e. Christian foundation of values) while the second one refers to the liberal-Kantian heritage of Ordoliberalism (i.e. Kantian understanding of autonomy, freedom and idea of man). This two-level distinction between individual and regulatory ethics is reminiscent of Smith's formal and informal control mechanisms and sanctions (i.e. institutionalized competition and market mechanisms, 'truck, barter and exchange', entering into contracts vs. impartial spectator, the notion of sympathy and informal norms of conduct/social discipline via the general public<sup>16</sup>). Furthermore, this distinction underlines the normative, meta-ethical embeddedness of Ordoliberalism and Social Market Economy<sup>17</sup>: according to the 'interdependency of orders' (Eucken), the economic order is invariably integrated in a higher meta-economical societal order.<sup>18</sup>

From an economic-ethical perspective we can conclude that the *economic plays of the game of the economic subjects are not (!) free of morality* and that the *systematic place of the moral* in a free (and socially committed) market economy is not only the basic order or in our

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<sup>15</sup> Cp. Dietze/Eucken/Lampe 1943/2008: p. 110; Dietze/Eucken/Lampe 1941/1942: p. 101 and pp. 119.

<sup>16</sup> Cp. Recktenwald 1985: pp. 112 and pp. 380.

<sup>17</sup> I.e. Ordoliberalism as one of the main pillars of Social Market Economy, the socio-economic system implemented after World War II aiming at the harmonization and reconciliation of constitutionally guaranteed freedom, market freedom, social security, social justice and solidarity (so called synthetic Irenic Formula; cp. Müller-Armack 1956; 1965/1998).

<sup>18</sup> Cp. Eucken 1926: p. 16: "encompassing spiritual or intellectual order" (umfassende(n) geistige(n) Lebensordnung).



terminology: the regulatory-ethical framework; rather the systematic place of the moral is *regulatory ethics in combination with individual ethics!*<sup>19</sup>

Not least the current financial market crisis has shown that the regulatory order is incomplete and deficient due to different reasons (i.e. missing competencies of the regulatory bodies, information asymmetries, complexity of financial market products, high innovative ability, sidestepping or bending the rules (i.e. regulatory arbitrage), inadequate regulation/regulatory deficits, etc.). Therefore, the regulatory level alone seems to be not sufficient to prevent economic crises, and the question remains open, whether the formal-institutional level has to be supplemented by individual and virtue ethics and whether codes of conduct on the corporate or branch of industry level are a proper way out of the dilemma?<sup>20</sup>

In the next paragraphs I will examine the different levels step by step. First of all I will take a closer look at the individual ethics level and especially at the religious and Kantian, normative foundation of Ordoliberalism.

### **1.1.2 3.1. Walter Eucken's Religiosity**<sup>21</sup>

A good way of approximating Eucken's understanding of religion is his biography: Eucken was a member of the Confessional Church and he was an associate of the Protestant resistance movement against the Nazi regime.<sup>22</sup> Furthermore, we are aware of certain autobiographical notes pointing at the importance of religion in the life of Eucken himself. In a letter to Rüstow, Eucken confesses that he could neither live nor work, if he did not know of God's existence and that his Christianity is similar to that of Leibniz and Kant.<sup>23</sup> And while attending a meeting of the Mont Pèlerin Society in 1947, Eucken admits that he – as a Christian – is arguing from a Christian standpoint.<sup>24</sup>

Besides the autobiographical hints at Eucken's religiosity and piety, his essays are a further proof: in his religio-sociological and crisis-writings like *Die geistige Krise und der Kapitalismus* (Spiritual Crisis and Capitalism) (1926) or *Staatliche Strukturwandlungen und die Krisis des Kapitalismus* (Structural Transformations of the State and the Crisis of Capitalism) (1932),

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<sup>19</sup> Cp. for an opposing view: Homann/Blome-Drees 1992; Buchanan 1987; Vanberg 1999/2009; a drawback of locating moral solely in the regulatory framework would be that individuals are totally relieved in terms of ethical and social responsibility. Contrary to that, Ulrich stresses the outstanding importance of ethical obligation to provide (*Bringschuld*) (Ulrich 1997/2008: p. 398).

<sup>20</sup> Codes of conduct are discussed by ordoliberal thinkers in the 1950ies and 1960ies at great length: cp. Müller-Armack 1959; 1961/1976 and Röpke 1958/1961.

<sup>21</sup> Eucken is not the only member of Ordoliberalism which adheres to Christian religion (cp. Goldschmidt 2009); cp. the indicated publications of Röpke, Rüstow (and Müller-Armack) in this paper, the primary and secondary literature concerning the Freiburg resistance circles and for the protestant roots of Social Market Economy with special emphasize on Franz Böhm: see Roser 1998.

<sup>22</sup> Cp. Blumenberg-Lampe 1973; 1986.

<sup>23</sup> Cited in: Lenel 1991: p. 12.

<sup>24</sup> Cited in: Plickert 2008: p.148.

Eucken bases his argument on Christian values. Moreover, he demands an ethical-religious renewal and spiritual reformation in order to overcome the societal crisis of the present (i.e. religiöse Erneuerung and Re-Christianisierung). The so called *Gesellschaftskrisis der Gegenwart*<sup>25</sup> is a state of social ‘massification’, mass existence and ‘stereotyping’ (*Vermassung*), proletarianisation and disintegration. The reason for the ethical vacuum and nihilism – accompanied by decadence and a decline in values – is the loss of the religious ways of life respectively the suppression of religion in the public sphere. Röpke and Rüstow speak in this context of ‘*Erbgutverbrauch*’ (i.e. wastage of the socio-cultural inheritance; loss of Christian-humanist values<sup>26</sup>) and they envision the potential danger of being incapable to regenerate the traditional constitution.<sup>27</sup> According to Eucken, Röpke and Rüstow, the present situation requires a religious-spiritual reformation, a re-Christianization and the creation of a new social way of life, which will allow the spiritual crisis to be overcome and the ethical-religious vacuum to be filled.

In his essay *Religion – Wirtschaft – Staat* (Religion – Economy – State) (1932) Eucken offers the reader new insights into his Protestant piety when he emphasizes the personal or private relationship between the individual and God<sup>28</sup> while criticizing the institutionalization of religion in general and the churches in particular.<sup>29</sup> Yet, the unique mixture of (New) Protestantism and Catholicism – autonomy of the divine soul, inwardness and religious conscience vs. supra-individual indebtedness to social orders and institutions (i.e. family, marriage, community, and the state) – is present in the ordoliberal writings as well.

In his *Grundsätze der Wirtschaftspolitik* (Principles of Economic Policy), Eucken discusses the potential ordering role of religion – besides science and the state – and in the already

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<sup>25</sup> In his early works (e.g. Tatwelt-essays), Eucken often speaks of ‘crisis of capitalism’ and ‘spiritual crisis’. In his late works however, e.g. in his *Grundsätze*-book, he frequently refers to the term of massification.

<sup>26</sup> See Röpke 1942; Rüstow 1952/1963; 1957; 2001; Müller-Armack 1948/1981. Further individual and institutional-ethical causes of the *Gegenwartskrisis*, a status of cumulative anonymity (i.e. “state of termites” (Röpke 1944/1949: p. 33)), dehumanization, uprootedness, ethical decadence, nihilism and spiritual vacuum (filled by Ersatz religions and leading to a period of an upheaval of norms and traditions), are: the pathological governmental form of pluralism (i.e. public authorities as preys in the hands of interest groups; cp. Rüstow 1932/1981: p. 224; 1957: p. 178; 2001: p. 108: “Interessentenhaufen” (see also Lippmann 1945: pp. 165), “Der Staat als Beute”, “Füttern der Interessenten aus der Staatskrippe”, “Chaos einer pluralistischen Beutewirtschaft”); re-feudalization, corporative state and plutocracy; degeneration and distortion of the market economy towards monopolistic, subsidized and interventionist capitalism (i.e. distinction between market economy and capitalism as “Neo-mercantilism” (Rüstow 1945/2001: pp. 115)); economization and technocracy (“The Cult of the Colossal” (Röpke) and “megalomane Elephantiasis” (Rüstow)); and finally, structural changes following the industrial revolution (i.e. increasing importance of global players, amalgamation, mergers and acquisitions; division of labor; specialization in the age of machinery and technology; urbanization and population growth). The topic of *Gesellschaftskrisis* is also indirectly addressed by Franz Böhm, co-founder of the Freiburg School of Law and Economics: cp. Böhm 1946; see in general: ‘The Good Society’ (cp. Lippmann 1945) as the birth of neoliberalism.

<sup>27</sup> Cp. Rüstow 1957: p. 184.

<sup>28</sup> The concept of personhood (in German: *Personalität* or *Personalismus*), so prominently represented by Catholic social ethics, might be a possible linkage between ordoliberal religiosity and their Kantian understanding of liberty; see for a similar combination of Kantianism and Catholic and(!) Protestant religiosity: Rudolf Eucken 1922: p. 50.

<sup>29</sup> Cp. for a similar argument: Rudolf Eucken 1901: pp. 15.

talked about work *Wirtschafts- und Sozialordnung* (written together with von Dietze and Lampe) the authors not only mention the term individual ethics (in this case, the writers condemn the rape and mutilation of individuals, mammon worship, unjust distribution and exploitative wages, and they distance themselves from capitalism) which has to supplement the legal and market order of society; they also demand an ordoliberal post-war socio-economic order based on Christian values (i.e. Christian humanist liberalism).

### 1.1.3 3.2. Eucken's Kantian Concept of Liberty<sup>30</sup>

Eucken's understanding of liberty bears remarkable (terminological and content-related) resemblances to the writings of Immanuel Kant.<sup>31</sup> Especially Eucken's ORDO papers from 1948 and 1949 are fundamental for this: *Das ordnungspolitische Problem (The Regulatory Problem)* and *Die Wettbewerbsordnung und ihre Verwirklichung (The Competitive Order and Its Realization)*. At the heart of Eucken's discourse on liberty are the (Kantian) terms autonomy<sup>32</sup>, self-legislation and self-determination (always linked with the term human dignity). The aim is to overcome immaturity and to reach the state of personal enlightenment and emancipation. In this regard, Eucken opposes socio-economic and political dependency, oppression and exploitation.<sup>33</sup> Liberty is, therefore, incompatible with totalitarianism and imperialistic systems. Furthermore, it cannot be reconciled with the process of social 'massification' and 'stereotyping', whereby the individual's personality is 'expunged' and a wide-scale 'de-souling' (Entseelung) and 'de-individualization' (Entindividualisierung) takes place.<sup>34</sup> In the wake of such a development, the individual becomes increasingly incapable of expressing his or her right to self-determination.

Besides the already mentioned topic of the societal crisis of our time, Eucken's program of liberty is highly related to the subject of historicism: Eucken's essay of 1938 entitled *Die Überwindung des Historismus (The Conquest of Historism)* seizes on the topos of the social crisis and links it neatly with the Kantian understanding of liberty and rationalism.<sup>35</sup> Eucken, by taking the fight to historicism and criticizing the irrationalism it represents, draws a direct

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<sup>30</sup> Cp. for more information about the (Neo-)Kantianism of Rudolf Eucken: Rudolf Eucken 1901; 1950: pp. 370 and p. 391 and Rudolf Eucken (without publication date): pp. 82-94 (i.e. Kantian realm of freedom and critical-mature thinking).

<sup>31</sup> The parallels between Kant (cp. Kant's *Metaphysics of Morals*) and Eucken can be found on the following topics: understanding of liberty (almost identical definition of freedom: cp. Eucken 1949: p. 27; Eucken 1952/2004: p. 48, 176 and 360); significance of autonomy, maturity, and the faculty of reason and prudence (Eucken's belief in rationality becomes clear when he criticizes historicism for its irrationalism and relativization of the notion of truth (cp. Eucken 1938)); the idea of man (i.e. each individual is regarded as an end in itself, it is no means to an end. Kant, Eucken and Röpke are condemning the instrumentalization, exploitation and functionalization of the individual; each person is a subject, and no object, instrument or tool (cp. Röpke 1944/1949). In this regard, Eucken as well as Röpke are referring to the Kantian Categorical Imperative (Formula of the End in Itself) and attaching great importance to the term human dignity).

<sup>32</sup> Cp. Böhm's concept of Privatautonomie in: Böhm 1966/1980.

<sup>33</sup> Cp. Eucken 1932a; 1932b; 1948a.

<sup>34</sup> Cp. Eucken 1932a: p. 86.

<sup>35</sup> Cp. Kant 1977b.

parallel to the tradition of the Enlightenment. Eucken specifically accuses the proponents of historicism, such as Sombart, Gottl-Ottlilienfeld and Spann, of expounding a fatalistic, deterministic and romanticized ideology. Eucken warns against the relativization of values, the relativization of the notion of truth, the relativity of knowledge and the danger that science will lose its ordering function (relativism accusation). Furthermore, he criticizes skepticism and the mistrust several historicists have towards the ratio (irrationalism accusation).<sup>36</sup> Since Eucken's program of liberty is analyzed elsewhere<sup>37</sup>, I will only briefly summarize Eucken's actual understanding of liberty: Liberty is – according to Eucken – a constituent of human existence.<sup>38</sup> Liberty is closely connected with humanity, human dignity and social justice.<sup>39</sup> In addition, liberty is not limitless or anarchic; individual liberty finds its boundary where another's sphere of liberty begins.<sup>40</sup> Moreover, there is no absolutization of liberty; contrary, there are several limits not least the Christian value system. For Eucken, liberty must always be coupled with a comprehensive sense of responsibility towards oneself and towards others (i.e. double form of responsibility: individual *and* social responsibility<sup>41</sup>). Finally, liberty is not just limited to *negative freedom* (i.e. freedom from coercion and intervention) – it also incorporates a *positive* notion of *liberty* strongly related to the Kantian idea of autonomy<sup>42</sup> – and it is just not limited to economics (i.e. equipment and distribution of basic goods *and* rights of disposition). Liberty is also relevant in a *political* context<sup>43</sup> and taken to mean inalienable basic and human rights enabling the free development of the individual<sup>44</sup> and closely connected with the term human dignity – the central (ordoliberal) value. *Economic liberty* is coupled with *consumer sovereignty*<sup>45</sup> and the postulate of 'coordination' of individual plans about markets instead of (authoritarian) 'subordination'.<sup>46</sup> The economic, liberal ideals, which underlie the basis of this idea, include freedom of privileges, non-discrimination and the rule of law.<sup>47</sup>

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<sup>36</sup> See Eucken 1952/2004: pp. 340.

<sup>37</sup> Cp. Wörsdörfer 2010.

<sup>38</sup> Cp. Eucken 1948a: p. 73.

<sup>39</sup> See Eucken 1948a: p. 73.

<sup>40</sup> Cp. Kant's definition of liberty in Kant 1977a: pp. 337.

<sup>41</sup> Cp. Eucken 1953: pp. 24.

<sup>42</sup> Cp. Berlin 1995/2006: pp. 197.

<sup>43</sup> Cp. Eucken 1946/1999: p. 18 (i.e. economic *and* political freedom); see also Röpke 1944/1949: p. 51, where he emphasizes the primacy of *political-cultural* liberalism and the subsidiary role played by *economic* liberalism. Cp. Rüstow's critical review of the failure of economic liberalism in: 1945/2001.

<sup>44</sup> Cp. Eucken 1952/2004: pp. 48.

<sup>45</sup> Cp. Miksch 1937/1947: pp. 214, who speaks of 'autonomous and mature consumers'; see Eucken 1953: p. 15, where he argues against the 'dethronement of consumers'; see Eucken 1950/1996: p. 340, where he classifies them as the 'directors of the economic process', and Eucken 1953: p. 18, where he speaks of consumers as the 'actual masters of the economy' (see also Eucken 1948b and 1950/1996: p. 340).

<sup>46</sup> Cp. Eucken 1952/2004: pp. 244.

<sup>47</sup> Cp. Böhm 1966/1980; Vanberg 2008: pp. 7.

At the close of this paragraph we should give Eucken himself the chance to speak. The following quotes are taken out of Eucken's criticism of state interventionism and the interventionist state, which again make clear his anti-totalitarian stance. Here, Eucken criticizes the "position of power held by the [totalistic], all-pervasive, modern, industrialized, technological state" and the "superiority of the [interventionist and concentrated (Vermachtung; Eucken 1932b)] economic state". The link between political and economic power, i.e. the politicization of the economy and the economization of politics, increases the danger of abuses of power. In addition, it goes against the central Kantian ideal. Eucken notes: "The state monitors and controls economic day-to-day activity and it [...] partly or wholly controls the economic machine. Man is merely a small piece of an anonymous, state-economic machine [...]. The individual becomes a thing and is no longer a person. The machine is an end, man the means." Here, and in other places, Eucken's advocacy of political liberalism becomes clear. He strives to protect the privacy and liberty of the individual against state intervention and collective usurpation. He asks: "Which forms of regulation guarantee freedom? Which forms can also limit the misuse of liberty? [...] Is it possible to create an economic system, in which man is not just a means to an end, not just part of a machine?"<sup>48</sup> The answer, which Eucken himself gives, is, of course, the ordoliberal competition policy based on Christian values (pointing again at the interconnectivity between the different stages of the individual ethics level and between individual and regulatory ethics).

So far, I have just analyzed the individual ethics level with its two components: liberal-Kantian and Christian ethics. In the next section I will complete my differentiation between individual and regulatory ethics by pointing at central elements of the formal-institutional ethics level.

### 1.1.4 3.3. Regulatory Ethics

The key words often associated with Ordoliberalism are part of the regulatory ethics level. To these belong the differentiation between *Ordnungs- and Prozesspolitik*<sup>49</sup>: according to the so called Freiburg Imperative, *Ordnungspolitik* is favoured, which means that the state as a legislator and rule-maker (Regelsetzer) – and not as a major player – is responsible for setting, preserving and maintaining the regulatory framework; i.e. economic policies that institutionally frame in the sense of defining the general terms under which market

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<sup>48</sup> All: Eucken 1948a: pp. 74; cp. Lenel/Meyer 1948: pp. IX: „Wir wollen – besonders nach den Erfahrungen der letzten Jahre – von keiner planwirtschaftlichen Ordnung wissen, weil sie die unabdingbaren Freiheiten des Menschen zwangsläufig mißachtet und ihn zum Sklaven der Bürokratie macht. Und wir haben auch erkannt, daß schrankenlose[!] Freiheit der wirtschaftlichen Betätigung ebenfalls zu Gegensätzen zwischen Einzel- und Gesamtinteresse führt, zur Zusammenballung von privater Wirtschaftsmacht, die wirtschaftlich und sozial nicht minder schädlich ist als die staatliche Omnipotenz.“

<sup>49</sup> See Eucken 1950/1965; 1952/2004; 1999; 2001.

transactions are carried out. In other words: the state has to focus solely on the rules of the game (procedure-oriented order of rules) instead of steering, influencing or intervening in market processes and the play itself (output-driven/results-oriented order of actions)). The aim of Ordnungspolitik (including Eucken's Principles of Economic Policy<sup>50</sup> and his Constituent and Regulating Principles) is to implement a socio-economic *Wettbewerbsordnung* (competitive order) which is capable – as a means to an end and together with the rule of law – of safeguarding individual liberty. Eucken's Principles of Economic Policy demand not only the disempowerment of political and socio-economic lobbying or pressure groups; they also ask for Ordnungspolitik and the neglect of Prozesspolitik.<sup>51</sup> The latter one is rejected for different reasons: Prozesspolitik is based on isolated and ad hoc case-by-case decisions, it functions more or less arbitrarily and selectively – and what is most important – it is subject to the particularistic influence of rent seeking or special interest groups and their influence on the legislative process (i.e. high discretionary leeway for decision making and lacking democratic legitimacy and control). This kind of interest groups based policy reduces the overall wealth of a nation (because of granting costly and exclusive privileges). Furthermore, it also endangers the liberty of each individual. Here, too, we can detect an economic *and at the same time* ethical argument (cp. chapter 2).

According to Ordoliberalism, it is essential to discuss the relationship between market and the state and to clearly define the state's tasks and the limits of the state's responsibilities. The ideal state is a strong (i.e. powerful and efficient) and independent (i.e. standing above special interest groups) constitutional state<sup>52</sup> which serves as a market police (*Marktpolizei*<sup>53</sup>), as an ordering potency or power and as a guardian of the competitive order (*Ordnende Potenz* and *Hüter der Wettbewerbsordnung*<sup>54</sup>). The state should be able to fend off particular interests, keep to the principle of neutrality and confine itself to Ordnungspolitik. The underlying liberal ideals are freedom of privileges, non-discrimination and equality before the law (quite similar to that of Constitutional Economics).

Other major characteristics of Ordoliberalism are the already mentioned *Leistungswettbewerb* (competition on the merits and in terms of better services to consumers<sup>55</sup>) and *Wettbewerb*

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<sup>50</sup> I.e. principles of state policy: 1. the state has to limit the power of rent-seeking groups, 2. all state intervention has to be policy of the economic order, not of the economic process (and economic and social policy has to be systematic and not ad hoc) (cp. Meijer 2007: p. 181).

<sup>51</sup> See Eucken 1952/2004: pp. 334.

<sup>52</sup> Röpke 1942: p. 86 and p. 286; Röpke 1944/1949: pp. 76; Röpke 1950: p. 142; Rüstow 1955: p. 63.

<sup>53</sup> Röpke 1942: p. 86; Rüstow 1957: p. 98; Rüstow 2001: p. 54.

<sup>54</sup> Eucken 1952/2004: pp. 325; cp. Röpke 1944/1949: pp. 222.

<sup>55</sup> Cp. Eucken 1952/2004: p. 247, p. 267 and p. 297; see Röpke 1944/1949: pp. 76.

als *Entmachtungsinstrument*<sup>56</sup> (competition as an instrument of disempowerment) and moreover: Röpke's principle of market conformity (*Marktkonformität*<sup>57</sup>) and economic adjustment or adaptation interventions instead of conservation or status quo interventions (*Anpassungs- instead of Erhaltungsinterventionen*<sup>58</sup>). The Ordoliberals themselves are searching for a *Third Way*<sup>59</sup> between social Darwinism of laissez faire on the one side and totalitarian collectivism, socialism and Hobbes' Leviathan on the other side. Their own description is that of Social Liberalism (*Sozialliberalismus*<sup>60</sup>), Economic Humanism (*Wirtschaftshumanismus*<sup>61</sup>) or the integrative Irenic Formula of the *Social Market Economy*<sup>62</sup>. To summarise, the individual-ethical conception of liberty which is based on the often ignored religiosity as well as Kantianism is interlinked with the regulatory ethics level with the aim to safeguard the individual-ethical ideals. Regulatory ethics is therefore a guarantor of freedom (as the cornerstone of Kantian ethics), human dignity and justice. In the next paragraph I will further elaborate the distinction between individual and regulatory ethics by focusing on the writings of Alexander Rüstow and Wilhelm Röpke, two other important representatives of German or Sociological Neoliberalism.

#### 4. Wilhelm Röpke

Typical of the publications of Röpke is his distinctive combination of *revolutionary radicalism* on the one hand and *conservatism* on the other hand<sup>63</sup>: His radicalism becomes clear when we take into consideration his anti-capitalistic stance.<sup>64</sup> According to Röpke, capitalism as the de facto status quo is a historical degeneration and distortion of the market economy pointing at the difference between capitalism – which has to be overcome – and market economy – which has to be preserved (a distinction neglected by Foucault et al.). As with Eucken and Rüstow<sup>65</sup>, Röpke refuses (stock) corporations, limited liability companies (i.e. violation of the

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<sup>56</sup> See Böhm 1961: p. 22; Eucken 2001: p. 83 and Lenel/Meyer 1948: p. XI.

<sup>57</sup> Cp. Röpke 1942: pp. 252; 1944/1949: pp. 77 and p. 350; market-conforming instruments are measures which are compatible with the market economy; they are not abolishing the working of the price mechanism.

<sup>58</sup> See Röpke 1942: pp. 295; Röpke 1944/1949: pp. 77; Rüstow 2001: p. 51.; adjustment interventions contain measures which make the adjustment process less painful and quicker.

<sup>59</sup> See Oppenheimer 1933 and Rüstow 2001: pp. 43.

<sup>60</sup> Rüstow 2001: p. 50.

<sup>61</sup> Röpke 1944/1949: p. 46.

<sup>62</sup> Müller-Armack 1956.

<sup>63</sup> Cp. Röpke 1944/1949: p. 25; see also Rüstow 2001: pp. 57.

<sup>64</sup> See also Eucken 1927: pp. 131: Eucken rejects capitalism because of its incompatibility with religion and Christianity and because of its capitalistic and utilitarian calculation. Eucken writes: „Tatsache ist weiter, daß dieser Kapitalismus eine große Maschinerie darstellt, die in ihrem Wesen mit der Religion unvereinbar ist. [...] Eingespannt in eine gewisse Sklaverei anonymer Verhältnisse beobachtet der Einzelne mit Recht überall die Herrschaft des kapitalistischen Kalküls. [...] Utilitarismus und Relativismus als Zerstörer des Geisteslebens [...]. Wir stehen heute nicht, wie so oft fälschlich gesagt wird, in einer Epoche der Umwertung aller Werte, sondern der Beseitigung aller Werte überhaupt – bis auf einen: den des Nützlichen“; see also Dietze/Eucken/Lampe 1941/1942: p. 47 and 1943/2008: p. 106, where they even avoid using the term ‚capitalism‘ at all.

<sup>65</sup> Cp. Rüstow 1957: p. 180, where he compares the GmbH with a robber band.

principle of liability<sup>66</sup>), patent laws (i.e. monopolization via patenting), and multi-national corporations (i.e. enormous potential of power and ability to abdicate responsibility). Röpke and other ordoliberal thinkers are pleading for the fostering of the small and medium sized business sector – the so called *Mittelstand* –, a broad distribution and diffusion of private property and decentralisation of power structures. The ordoliberal conservatism relates to the indispensable primary organizing principle of market economy and competition. This principle has to be conserved – although it has to be purified and the capitalistic elements have to be ‘washed up’. Furthermore, the ordoliberal conservatism relates to the Christian foundation of values (cp. chapter 3.1).

The anti-capitalistic stance in Röpke’s (and other ordoliberal) writings is interlinked with the significance of *market-free* sectors as counterweights to the market economy.<sup>67</sup> Economic policy and the non-commercialised social policy form a unified whole. Therefore, Foucault’s thesis of ambiguity (i.e. society for the market vs. society against the market) is absolutely correct – however, Foucault is misled when he assumes that both pillars are diametrically opposed to each other, rather than interdependently connected.

Besides the market-free sectors which hint at the individual ethics level, Röpke is more than clear, when he writes, that the constitution of the market, the strong state as a market police and the rule of law are not sufficient in order to reach the ordoliberal goals (e.g. realisation of the Kantian ethics of ensuring independency and liberty of the individuals). What is needed is not only the legal, political, formal-institutional regulatory framework. In addition, what is needed is an ethical framework and an (individual) economic ethics<sup>68</sup>, ergo a combination of individual and regulatory ethics or a triad of law, economics and ethics (i.e. extra-economic framework of moral, legal, political and socio-economic conditions)!

The competitive economy is described as a *Moralzehrer* (a system which drains and erodes morality and tends to undermine social cohesion<sup>69</sup>). It requires (external) moral standards and ethical norms which are generated outside the market economy. The ‘normative reserves’ cannot be ‘produced’ within the economic system. Moreover, the market is part of a

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<sup>66</sup> Cp. Eucken’s Constituent Principles in: Eucken 1952/2004; see also Miksch 1937/1947: p. 56 and p. 220.

<sup>67</sup> Cp. Röpke 1942: p. 187; Röpke 1950: p. 212; the appropriate mixture consists of an enforcement of markets (i.e. opening and liberalisation of markets and maintenance of competition; *Marktdurchsetzung*) and a limitation/ demarcation and governance/steering of markets according to ethical-normative criteria derived from vital policy (*Marktbegrenzung* and *Marktlenkung*) respectively a field of tension between competition and vital policy (cp. Ulrich 1997/2008: pp. 366).

<sup>68</sup> Cp. Röpke 1942: p. 86 and p. 286.

<sup>69</sup> Röpke 1942: p. 86; Röpke’s preface (in: Lippmann 1945): because of the assumed fact that ethical norms tend to be endangered in a market economy, Röpke demands a ‘steady renewal of the meta-economical moral funds’ (p. 33); see for a similar argument: Müller-Armack 1946/1976: p. 127; 1962/1976: p. 298 and 1952/2008: pp. 460. In this essay, Müller-Armack highlights the significance of religion when he alludes that the regeneration of values can only be achieved via (Christian) religion and that the Social Market Economy has to be filled with a Christian ethos. Besides religion, social policy is in demand to implement (non-economic) stabilizers as part of the so called Second Phase of Social Market Economy (cp. Müller-Armack 1955; 1960/1981).



higher social order – beyond supply and demand (*Jenseits von Angebot und Nachfrage*)<sup>70</sup> and economic life does not take place within an ethical vacuum. Economic integration expects an (a priori) outer-economic (social) integration (i.e. need for non-economic forms of integration).<sup>71</sup> A basic pre-disposition to trust and other social norms must be present and be perceived for a cooperative equilibrium to prevail.

To put it differently: egoism has to be cleared and restrained; it has to be channelled into canals which foster the common good.<sup>72</sup> ‘Egoism’ has to serve the general public. And the way to do this is the ordoliberal competitive order (i.e. regulatory ethics) in combination with economic ethics and ethical norms (i.e. individual ethics). There are certain preconditions (and barriers) of the market economy which have to be recognized – otherwise the market economy cannot fulfil its steering functions. Competition and concurrence, but also economic ethics in the sense of ‘moral capital’ are among those assumptions. Concurrence mechanisms demand an ethical fundament and a minimum of ethical standards.<sup>73</sup> Röpke mentions several *trans-economic values* – virtues that lie beyond the economy and that serve human dignity – which have to be met<sup>74</sup>: community spirit, civic mindedness, sense of responsibility, honesty, fairness, moderation and self-discipline, respect of human dignity, solidarity, benevolence and Christian love respectively love of neighbour.<sup>75</sup> In this context, the bonding forces of the family, churches and local communities (i.e. neighbourhood and clubs)<sup>76</sup> as well as parenting, education and religion are of eminent importance in case of embedding and enclosing markets. They are primarily responsible for the generation of these normative reserves – provided that a social policy is carried out which allows for a de-proletarianisation, de-massification, re-agrarianization, support of small and medium sized (handicraft) companies and decentralisation of socio-political structures (according to the principle of subsidiarity). The overall aim is the social embeddedness of each individual and the satisfactory ‘vital situation’ (Vitalsituation). In this regard, self-responsibility, independency, self-employment and the diffusion of private property (i.e. private property not only fosters independency and autonomy; moreover, it provides the necessary material

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<sup>70</sup> Cp. Sally 1996: p. 8: “Röpke and Rustow [sic!] were concerned with the sociological preconditions for successful economic reform, the ethical environment required for a sustainable market order and, at base, the non-economic foundations of society – ‘what lies beyond supply and demand’.”

<sup>71</sup> Cp. Lenel 1991: p. 13: In a letter from Eucken to Rüstow dating from December 1943, Eucken admits: “The economic order is not able to render the people more ethical. That has to be achieved by other forces. However, the economic order should guarantee the freedom of each individual such, that the person can act this way or that way and in a self-responsible manner” (my translation).

<sup>72</sup> I.e. channelling market economic development along a socio-ethical path and creating an economic and regulatory framework with a Christian and humanitarian outlook.

<sup>73</sup> Cp. Watrin 1999/2009: pp. 241.

<sup>74</sup> Cp. Röpke 1950/1981: p. 52.

<sup>75</sup> Cp. Foucault’s thesis of ambiguity and his ‘society against the market’ pillar.

<sup>76</sup> See Röpke 1942: p. 86.

foundations for the de facto realisation of positive rights of freedom) have to be promoted and encouraged as well as equal opportunities and equal starting conditions (Startgerechtigkeit). Another aspect of Röpke's individual ethics level which I would like to add is the so called 'Deontology of Profession and Occupation' (*Deontologie des Berufs*<sup>77</sup>) referring to the model of the honourable merchant (i.e. professional honour; honour as a nobleman). This codex of tradesman's morality is an excellent application example of individual ethics.<sup>78</sup>

## 5. Alexander Rüstow

A similar combination of individual and regulatory ethics can be found in the oeuvre of Alexander Rüstow, a further member of extended Ordoliberalism or, as it is often referred to, *Sociological Neoliberalism*.

Starting point of Rüstow's argument is the failure of paleo-liberal economic liberalism (*Versagen des Wirtschaftsliberalismus*<sup>79</sup>). *Economic* liberalism alone – according to Rüstow and Ordoliberalism – is not sufficient. What is required is a political, democratic and socio-cultural liberalism. Furthermore, formal-institutional *and* sociological requirements have to be met in order to secure the convergence between self-interest and the common good. Rüstow often speaks of the required counterweights of the concurrence mechanism, i.e. strong, framing (outer-market) integrative appeal (i.e. religion, family, et al.<sup>80</sup>). The importance of ethical bonding forces reminds the reader of Foucault's 'society against the market' pillar. Like Röpke, Rüstow stresses the existence and the prominent role of meta-economic values<sup>81</sup> like solidarity, benevolence, Christian love, justice and freedom (!) and of the societal auxiliary conditions of the market society. Markets and the economy are designed to serve the community (and meta-economic normative values). They are subordinated and taken as the means to an end (*Dienende Funktion des Marktes*<sup>82</sup>). The end in itself is the Vitalsituation and the 'boundary of the market' (*Marktrand*).<sup>83</sup> Noteworthy is that the economy's role is to serve the people and not vice versa. The task of public policy is a (meta-

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<sup>77</sup> Cp. Röpke 1958/1961: p. 189.

<sup>78</sup> Cp. for more information about codes of conduct, business ethics and Ordoliberalism: Müller-Armack 1959; 1961/1976; Simma/Heinemann 1999/2009.

<sup>79</sup> Cp. Rüstow 1945/2001; 1961; 2001: p. 99.

<sup>80</sup> Cp. Rüstow 2001: pp. 27 and p. 90.

<sup>81</sup> Cp. Müller-Armack 1948/1981: p. 447 and 506.

<sup>82</sup> Cp. Rüstow 2001: pp. 142 and chapter 2.2; Rüstow 1960; see also Dietze/Eucken/Lampe 1941/1942: pp. 119. Here, Eucken, Lampe and von Dietze allege that the economy has to serve the people, the present as well as the coming generations.

<sup>83</sup> "This term [Marktrand] emphasizes that the market is only a means to an end, whereas the Marktrand designates those areas of human life which are an end in themselves and possess a human value of their own. They are a 'hundred times more important' (Rüstow) than the market itself, as they are decisive for the development of cultural and educational patterns and the moral and social guidelines of behaviour" (Fearn, James in: Ulrich 2008: p. xiii). Thus, competition and market economy have to be bounded and moderated according to "vital-political oriented Ordoliberalism" (Ulrich 1997/2008: p. 378).

economical) amendment and design of the Marktrand and – what is equally important – a demarcation of the market boundaries.<sup>84</sup> That is what Rüstow calls Vitalpolitik (vital policy). Moreover, Rüstow not only demands the primacy of meta-economic values, he also states that it deems valid to offer a sacrifice in economic terms in order to support and enhance meta-economic values.<sup>85</sup>

## **6. Concluding Remarks: The Special Role of Individual Ethics**

The starting point of my argument was Foucault's analysis of neoliberalism in general and the thesis of ambiguity in particular. Following Foucault, German Neoliberalism rests on two pillars: the 'society against the market' and the 'society for the market' pillar. This thesis has several strengths and some weaknesses. My purpose is to maintain and strengthen the advantages of Foucault's study while at the same time to abandon its disadvantages. Foucault is absolutely right when he points at the ambivalences and tensions inside Ordoliberalism; he is right when comments on the meaning of market-free and non-commercialized sectors (cp. chapters 4 and 5 on Rüstow and Röpke), and when he distinguishes between divergent varieties within the neoliberal movement (i.e. Freiburg School of Law and Economics vs. Chicago School and Monetarism). However, Foucault seems to be misguided with regard to the essence of competition and the market mechanism (i.e. means to an end and no ends in itself), and what is essential: he is incorrect when he assumes a dichotomy<sup>86</sup> between the different levels or stages inside Ordoliberalism. Instead of proclaiming a dualism between the 'society for and against the market' pillar, it is – from my point of view – appropriate to speak of interdependency between the two kinds of ethics: individual and regulatory ethics are complementary and they are forming a unified whole.<sup>87</sup> Although, I am pursuing a different two-level distinction, my argument is based on Foucault's analysis which allows for an advancement of Ordoliberalism in the direction of modern economic ethics: To show the topicality of Ordoliberalism from an economic-ethical standpoint, I will only briefly mention some fields of future scientific research: at the heart of economic ethics lies the question of whether it is possible to implement an (irenic) socio-economic order which is capable of meeting the (ordoliberal) criteria of economic functionality and ethical humanity (cp. chapter 2.1). Another important task is to solve the potential conflict between self-interest and the common good. Here, Ordoliberalism states, that only under the

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<sup>84</sup> Cp. Rüstow 2001: p. 62 and p. 100.

<sup>85</sup> Cp. Rüstow 1960 and Müller-Armack 1946/1976: p. 84: „Unter dem Gesichtspunkt der Freiheit dürfte die Marktwirtschaft auch dann noch vorzuziehen sein, wenn ihre ökonomischen Leistungen geringer wären als die der Wirtschaftslenkung.“

<sup>86</sup> Cp. on the contrary Vogt 1999/2009: pp. 275. Vogt's starting point is the dichotomy between individual and regulatory ethics and he aspires a paradigm shift from individual-ethical virtue ethics towards an institutional-ethical Ordnungstheorie.

<sup>87</sup> Cp. Dietzfelbinger 1998: pp. 249.

condition of a far reaching compatibility of individual and regulatory ethics can this state be achieved; regulatory and individual ethics on their own are not sufficient! This combination of individual and formal-institutional ethics is one of the peculiarities of German Neoliberalism which distinguishes it from other varieties within neoliberalism<sup>88</sup> and which is so important to modern economic ethics!

Finally, one question remains open: what is the function of individual ethics? What is the crucial role of individual ethics contrasted with regulatory ethics – especially when considering the fact that today the focus (of Constitutional Economics) is on formal-institutional ethics? First of all it is important to note, that the distinction between individual and regulatory ethics so typical of German Ordoliberalism is a characteristic feature of a social philosophy which has its roots in a transitional time period with several socio-economic caesuras where the formal-institutional level is far from perfect (i.e. deficiencies of the regulatory framework). That might be one of the reasons – besides the Christian religiosity of the representatives of Ordoliberalism – for not completely disentangling or detaching individual ethics.

However, even today, individual ethics has a prominent role to play: we are living in a socio-economic order with different sub-systems and diverging ordering and regulating mechanisms. The market society based on anonymous, loose-knit and large scale society mechanisms (i.e. regulatory ethics) exists side by side with club-like and small-scale communities of solidarity with their face-to-face relationships (i.e. individual ethics). The (at first sight) large-scale societies, therefore, consist of several small group communities relying on individual-ethical norms. Moreover, individual ethics is essential from an economic perspective as well: think of trust, self-commitment, reputation, ethical integrity, norms like fairness and honesty and all the other secondary virtues. In recent times all these are subsumed under the term social capital. It is one of the lasting legacies of New Institutional Economics to have elaborated the vital role of individual ethics within the market economy<sup>89</sup>: It serves as a central precondition for the functioning of the market mechanism and it is providing the market mechanism with ethical reserves so to speak (cp. chapters 4 and 5). In some sense, individual ethics is the lubricant of the market society. Finally, individual ethics is essential when facing the problem of a deficient and fragmented (cp. the current financial market crisis<sup>90</sup>) or non-existing regulatory framework (i.e. institutional vacuum in case of

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<sup>88</sup> Cp. Meijer 1987.

<sup>89</sup> Cp. the works of North, Putnam, Coleman, Fukuyama et al.; see also Kirchner 1999/2009.

<sup>90</sup> Formal-institutional rules and external norms are quite often missing and only implemented ex post (due to different reasons; cp. chapter 3). Thus, until the formal regulation has been institutionalized, individual ethics can fill the institutional gap (cp. König 2000); see also Korff 1999/2009: p. 267: “Dennoch kann auch die bestmögliche Rahmenordnung den

revolutionary transitional societies<sup>91</sup>) or when there are wide-spread insecurities of how to react within state and market-free sectors (i.e. ample scope of behavior). Thus, individual ethics is not a matter of perfecting regulatory ethics. Rather, it is essential especially when relieving the regulatory framework via self-controlled and self-regulated internalization of values (referring to socialization and upbringing)<sup>92</sup> and in order to lower transaction costs (i.e. information, decision making and control costs). Internalized individual-ethical norms are much cheaper to control for compared to external-formal norms and sanctions. The compliance with formal institutions has to be controlled and violations have to be sanctioned. Furthermore, individual ethics is compatible with the principle of subsidiarity relocating responsibility from the macro- (i.e. regulatory framework) to the meso- (i.e. Corporate Social Responsibility; Corporate Governance Codex or other so called *Branchenvereinbarungen/-kodizes* as formalized versions of individual ethics referring again to the interdependency between individual and formal-institutional ethics) and micro-level (i.e. codes of conduct; honorable merchant).<sup>93</sup>

Of eminent importance is the relationship between individual and regulatory ethics: either they are complementary to each other which means that they are mutually enhancing and reinforcing or they are mere substitutes.<sup>94</sup> If a conflict occurs between internal and external forms of motivation, the control and transaction costs are rising tremendously and the danger comes about that individual and regulatory ethics replace each other. As a consequence this might not only lead to the evasion of external-formal norms, it might also lead to a far-reaching erosion of informal (Kantian and Christian) norms as well. In case of complementarity, informal norms and values enhance, facilitate and encourage the adherence of formal norms while at the same time reducing the costs of transactions (i.e. controls and sanctions are less likely). Traditions and ethical standards of behavior can amend and stabilize formal institutions. Therefore, it must be the aim – in order to minimize

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sittlichen Willen der Subjekte nicht ersetzen. Bleibt diese doch selbst bei größter Regelungsdichte ihrer Natur nach fragmentarisch und sonach missbrauchsanfällig. Wer meint, das Recht von der Sittlichkeit völlig ablösen zu können, bringt es damit letztlich auch um seine Bestimmung als Instrument der Freiheit.“

<sup>91</sup> A further problem comes up: formal and informal norms and institutions are subject to diverging rates of change: while formal institutions can be changed rapidly respectively straightaway (i.e. revolutionary shock-therapy-like alteration), informal institutions are relatively persistent, i.e. the rate of change is slow compared to the one of formal institutions (i.e. gradual transition).

<sup>92</sup> The internalization of standards refers to the process of socialization through which attitudes, values, and behavior patterns come to be maintained even in the absence of external rewards or punishments. As a result, social norms are followed even when violation would be undetected, and therefore unsanctioned, because the moral act, which appears to be in conflict with the immediate or direct interests of the actor himself, is valued for its own sake. One motivating force behind moral behavior is the desire to avoid feelings of guilt and shame (i.e. internal rewards and sanctions respectively self-satisfaction and guilt feelings; cp. Platteau 2000/2006).

<sup>93</sup> By putting the meso and micro level in charge (i.e. industry branch and management level), public authorities have to ensure that a process of cartelization does not occur.

<sup>94</sup> Cp. Kiwit/Voigt 1995: pp. 138.

transaction costs – to develop a regulatory framework which fits the individual-ethical standards. As mentioned above, several disadvantages of regulatory ethics (i.e. higher control and transaction costs and the possible erosion of individual-ethical norms resulting in a further increase in costs) exist, yet, these deficits might be overcome with the help of individual ethics. A further aspect of great weight is accentuated by König (2000) when he underlines the meaning of individual ethics with regard to the *formal-institutional ethical genesis and evolution* (Normengenesse) respectively *further advancement of norms* (Normenfortbildung) (i.e. socio-cultural foundations of the economic order): design and enforceability of the regulatory framework is fundamentally based on individual-ethical norms. Here, too, the complementarity between both kinds of ethics is vital; otherwise, the legitimacy of formal norms would degrade and the societal acceptance decline (this affects the enforceability of institutions as well).<sup>95</sup>

My purpose here is not to minimize or to downplay the significance of regulatory ethics<sup>96</sup>; rather, it is my aim to stress the overriding importance of the mutual obligation of individual and regulatory ethics. And that is exactly the distinctiveness of German Neoliberalism.

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<sup>95</sup> The topic evolution of norms and further advancement of norms will be the main subject of another, upcoming essay (cp. *Ordoliberalism and the Evolution of Norms*).

<sup>96</sup> Thus, regulatory ethics enables and facilitates the individual ethics and in particular the free development of an individual. As Eucken points out: “Formal-institutional ethics should allow a life according to ethical principles” (my translation of Eucken 1952/2004: p.). In that instance, regulatory ethics impinges on individual ethics. Other cases, however, are imaginable, in which reverse effects can occur. Therefore, it is essential to highlight the reciprocity and interdependency of individual and formal-institutional ethics.

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