Economic Freedom as Political Virtue: An Insight from the Perspective of Value Pluralism

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"Although logically incompatible, every choice necessarily reflects a moment of both commensuration (the recognition of quantitative difference) and incommensuration (the recognition of qualitative difference)." [**J.L. SCHROEDER**, Cardozo Law School]

I. Market process *v.* market failure

Historically market failure is seen as a condition where reliance on the spontaneous order does not deliver optimal results for the economy. Thus, it is a situation where a distribution of goods and services in the economy is conducted inefficiently. In other words, the successfulness of the market process is seen from a perspective which is external to the market process itself. The argument of this paper is that the market process should be evaluated as independent economic freedom.

According to Foucault:

> "Freedom in the system of liberalism is […] not a given, it is not a completed domain that one should respect; or when it is, it is only partial, domain-specific, in this or that case, and so on. Freedom is something that is created at every moment. Liberalism does not simply accept freedom. Liberalism takes it upon itself to create it at every moment, to let it emerge and to produce it with all the constraints, problems and costs that come with its creation."[1]

It is necessary therefore to undertake a methodological disentanglement of market means from welfare ends, with the aim of preserving the constitutional importance of the former.

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[1] **N. GOLDSCHMIDT and H. RAUCHENSCHWANDTNER**, *The Philosophy of Social Market Economy: Michel Foucault's Analysis of Ordoliberalism*, Freiburg Discussion Papers on Constitutional Economics, 2007, No 4.

This paper proposes an analytical separation of the market process from the idea of market success. The proposal is based on a methodology developed in moral philosophy by virtue ethicists.[2] It claims that any moral decision should be based on the internal essence of values. Unlike the *consequentialist tradition,* which considers that the outcome of a particular conduct is more important than the conduct itself, and *deontology*, which claims that each conduct should be governed by deductive rules, virtue ethics emphasises the internal importance of the phenomenon itself rather than its external characteristics. In the context of economic policy, consequentialists justify the market process merely because it generates beneficial results for the economy (like welfare, growth, innovation, *etc.*). According to the *deontological tradition,* the market process should be protected because of the positive requirements of the normative rules embedded in political constitutions.

Present-day welfare-centric economic systems are predetermined by the strongly redistributive rhetoric of consumer interests. In this framework the vast majority of political economists develop their argumentation following the consequentialist tradition.[3] Strong ideological opponents and proponents of free markets consensually share the view that the benchmark and the validity of the market process should be based on its effectiveness and its ability to satisfy the interests of consumers. Both camps accept that the standard of market performance is external to the market process itself. The market process is seen as meaningless if it does not generate welfare.

The main disagreement between free market libertarians and distributive interventionists consists in the (in-)ability of the market process to create wealth. Libertarian consequentialists claim that the market process does produce wealth. Their opponents do not.

[2] **D.M. HAUSMAN and M.S. MCPHERSON**, *Economic Analysis, Moral Philosophy and Public Policy*, Cambridge, Cambridge University Press, 2008; "The main value of moral theories does not lie in prescribing what to do in particular situations. Moral theories are not cookbooks for good behaviour. [They show 'how understanding moral philosophy can help economists to do economics better and how economics and ethics can help policy analysts to improve their evaluations of alternative policies.']".

[3] In the Notes on their influential book, *Fairness v. Welfare*, Kaplow and Shavell explicitly summarise the main argument of their study, submitting that their thesis "is that social policies should be assessed entirely on the basis of how they affect individuals' well-being. This claim implies that no independent weight should be granted to deontological principles. We support our thesis with three sets of arguments: a demonstration that deontological principles lead to perverse reductions in welfare, indeed, sometimes to a decline in everyone's well-being; the presentation of numerous other difficulties with the principles, including their lack of intellectually satisfying rationales; and a reconciliation of the intuitive appeal of the principles with our thesis that they should not be viewed as directly relevant to the assessment of social policy".
See: **L. KAPLOW and S. SHAVELL**, *Fairness v. Welfare*, Harvard University Press, 2002; **L. KAPLOW and S. SHAVELL**, "Notes on Welfarist *v.* Deontological Principles", Harvard Olin Discussion Paper, 2004, No 460.

However, the market process is not the exclusive way to create welfare. Arguably, a greater efficiency can be achieved through 'dirigistic' interventionist regulatory practices. In some cases the market process can be seen as an obstacle to the generate welfare.[4] The regulator can be tempted to 'improve' the numerous redundancies and inefficiencies which are often associated with the market process. Therefore the position of market consequentialists in this respect is contestable.[5]

The same can be said about market deontologists. Deontological libertarians defend the market process because the political constitution requires it. Deontological interventionists develop the idea of market restriction because this can improve other important constitutional values. In both cases the justification is developed from outside the market process itself. Thus, consequentialists measure market performance by welfare, efficiency or industrial growth, while deontologists refer to constitutional values and formal rules. Both sets of standards are external to the market process as such.

The utilitarian standards of free market are philosophically disputable.[6] These standards are significantly modified by virtue ethics, which goes far beyond the traditional limits of efficiency in its assessment of the market process. Virtue ethics perceives the market process as an important societal value with no direct external subordination. It bases its conceptual claim on the idea of the invisible hand,[7] which 'orders' economic relationships in a much better way than any regulator. The very notion of 'invisibility' implicitly implies strong elements of unpredictability, spontaneity and non-rationality. This feature limits the positive

[4] **K. POLANYI**, *The Great Transformation: The Political and Economic Origins of Our Time*, Boston, Beacon, 2001: "Nowhere has liberal philosophy failed so conspicuously as in its understanding of the problem of change. Fired by an emotional faith in spontaneity, the common-sense attitude toward change was discarded in favour of a mystical readiness to accept the social consequences of economic improvement, whatever they might be. The elementary truths of political science and statecraft were first discredited then forgotten".

[5] **R. DWORKIN**, *Taking Rights Seriously*, Harvard, Harvard University Press, 1978: "There would be no point in the boast that we respect individual rights unless that involved some sacrifice, and the sacrifice in question must be that we give up whatever marginal benefits our country would receive from overriding these rights when they prove inconvenient".

[6] **J.L. SCHROEDER and D.G. CARLSON**, *Psychoanalysis as the Jurisprudence of Freedom*, Cardozo School of Law Jacob Burns Institute for Advanced Legal Studies Working Paper, 2007, No 200: "For utilitarianism, freedom threatens the possibility of social policy. Policy requires the behaviour of those subjected to law to be predictable – manipulable through reward and punishment. Values become preferences; rationality, ends-means reasoning. Utilitarianism degrades the human subject to animality".

[7] The same rationale is encompassed in the notion of 'spontaneous order', developed inter alia by Michael Polanyi (the brother of Karl Polanyi who advocated the polar view), Karl Popper, Carl Menger and Friedrich von Hayek.

analysis of economic relations.[8] In its refined form the consideration of the market as a political virtue implies that economic analysis can be used to interpret the market process only *ex post* and within the limits of economics as an autopoietic system. Predictions of future developments rely more on the intuition of economists than on rational statistical models, which tend to be ambivalent and instrumental and therefore to depend on the purpose of the interpreter rather than on *objective* observations.[9] The more moderate political virtue view to which this paper adheres accepts the fundamental importance of deontological rules of positive law as well as the consequentialist analysis of positive economics. Yet, it also puts forward that these two approaches do not cover the phenomenon of the market process in its entirety.

II. The spirit of the market

As argued above, both the consequentialist and deontological approaches perceive the essence of markets in their applied, instrumentalised and external forms. Neither consequentialists nor deontologists are interested in the internal essence of the market since its legitimacy is based upon its outcome, for the consequentialists, or constitutional requirements, for the deontologists.[10] In contrast, the approach endorsed by this paper considers market processes as the evolutionary choice of a given society, where markets are seen as the economic facet of political freedom which constitutes a prerequisite to liberal democracy and the essence thereof. Hence, conceptually, the virtue of the market should be protected for its own sake regardless of how effective it is.

[8] For the in-depth analysis of the notion of spontaneous order, see: **R. SUGDEN**, "Normative Judgments and Spontaneous Order: The Contractarian Element in Hayek's Thought", *Constitutional Political Economy*, Sept. 1993.

[9] **D.M. HAUSMAN**, *The Philosophy of Economics: An Anthology*, 3d ed., Cambridge, Cambridge University Press, 2008: "Economists have erected a mathematically sophisticate theoretical evidence, whose conclusions, although certainly not 'necessarily erroneous', are nevertheless often off the work".

[10] **M. FRIEDMAN**, "The Methodology of Positive Economics", in **M. FRIEDMAN**, *Essays in Positive Economics*, Chicago, University of Chicago Press, 1953: "Positive economics is in-principle independent of any particular ethical position or normative judgement. […] It deals with 'what is', not with 'what ought to be'. Its task is to provide a system of generalisations that can be used to make correct predictions about the consequences of any change in circumstances. […] The ultimate goal of a positive science is the development of a 'theory' or 'hypothesis' that yields valid and meaningful (*i.e.*, not truistic) predictions about phenomena not yet observed. Such a theory is, in general, a complex intermixture of two elements. In part, it is a 'language' designed to promote 'systematic and organised methods of reasoning'. In part, it is a body of substantive hypotheses designed to abstract essential features of complex reality".

Indeed, methodologically, all societal values and interests weigh more internally than is seen from the secondary and external angle of their regulation.[11] When environmentalists talk about welfare, they instrumentalise this notion for the benefits of the ecology. The same is done by industrialists, with the aim of achieving bigger growth in a given sector of the economy. Yet, when welfare is placed into the context of market regulation, it substitutes free competition and leads to consider the latter as merely a means to achieve the former.[12] This explains the importance of distinguishing between the internal nature of a phenomenon and its external evaluation. At the external level the decision is taken as a choice; it does not change the essence of the values between which the choice is made. In the context of the market the legitimate necessity to protect people's welfare needs to be considered as a separate value. It should not be internalised within the domain reserved to market processes. Indeed, in some cases, external considerations of welfare and efficiency can take priority over the market process but this does not diminish the internal importance of the market as a political virtue.

In this regard, merely protecting the market process like deontological libertarians defend is often not sufficient. Sometimes it is necessary to make positive actions in order to design or improve its functioning. This implies that regulators should perceive the market from a variety of different perspectives and disciplines, such as psychology, moral philosophy and evolutionary theory. The most relevant instrument in this respect is competition policy as is perceived in Austrian and Ordoliberal traditions. Unlike mainstream neoclassical equilibrium economics, these two schools analyse the essence of competition in terms of the Freudian *libido*, "ordo instinct of economic life", Hayekian "competition as a discovery process", or Darwinian "competition as a nature's god". This implies that the main role in the process of competition is allocated to individual market players and the idea of entrepreneurship.

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[11] **E.M. FOX**, "Antitrust and Regulatory Federalism: Raced Up, Down, and Sideways", *New York University Law Review*, Dec. 2000: "Antitrust includes law that preserves the competitive process and its governance of markets and law that advances efficiency through markets anchored (for example) by an aggregate wealth or a consumer welfare paradigm. In this essay, I call law that advances efficiency through markets 'efficiency law'. I call law to advance goals such as preserving a society of small business, protecting small firms from exploitation and exclusion by dominant firms, providing fair access to markets, and setting fair rules of the game 'fairness law'".

[12] **J.B. KIRKWOOD and R.H. LANDE**, "The Fundamental Goal of Antitrust: Protecting Consumers, Not Increasing Efficiency", *Notre Dame Law Review*, 2008; **E. BUTTIGIEG**, "Consumer Interests Under the EC's Competition Rules on Collusive Practice", *European Business Law Review*, 2005: "Unfortunately, in the past, US and EC antitrust law only indirectly promoted and safeguarded consumer interests while occasionally their application might even have led to a result that was at variance with consumer expectations as the economic efficiency goal now pursued by both systems is not coterminous with a fully fledged consumer well-being objective that takes into account wealth transfer […] while the myriad of goals simultaneously informing EC competition law prevent it from serving as a true means of consumer well-being maximisation".

According to Kirzner:

> "Mainstream theory left entrepreneurship out of its picture because entrepreneurship seems chaotic and unpredictable. […] In order to perceive regularities amidst the apparently chaotic vagaries of real-world market volatility, it may seem methodologically sound to imagine a world with no scope for entrepreneurship. Yet, paradoxically, exactly the opposite is the case. It is only when entrepreneurship is introduced that we begin to appreciate how and why markets work".[13]

The ideas of economic individualism and spontaneous order eventually deliver benefits to the entire society. Market success stimulates wealth sharing, in order to maintain economic and social stability. Furthermore, open markets always provide a free entrance to innovative ideas. This promotes economic progress; it impels successful companies to not only benefit from their current status, but also constantly improve their commercial activities.

III. The principle of proportionality

By consecrating the high importance of the analysis and ensuing improvement of the internal nature of markets, regulators can be criticised for not acting in the society's best interest. The history of economic thought shows that market processes are not always (for some), or not often (according to others), capable of generating the best outcomes for society. The conceptual solution to this problem is based on the idea of proportionality. The recognition of the essentiality of the market process should not be conflated with its unchallengeable hierarchical superiority over all other societal values. The importance of a societal value does not grant it immunity from possible limitations. Indeed, each and every societal value has been recognised in one way or another at the institutional level.[14] And their advocates can develop legal and political arguments in favour of said values. This paper does not claim that essentiality should be reserved to the sole market process. In contrast, it claims that this option should be made available *also* in relation to the market process, whereas both

[13] **I.M. KIRZNER**, *How Markets Work: Disequilibrium, Entrepreneurship and Discovery*, London, Institute of Economic Affairs, 1997.

[14] **A. STONE SWEET and J. MATHEWS**, "Proportionality Balancing and Global Constitutionalism", *Columbia Journal of Transnational Law*, 2008, pp. 72-ff.: "A court that explicitly acknowledges that balancing inheres in rights adjudication is a more honest court than one that claims that it only enforces a constitutional code, but neither balances nor makes law. It also makes itself better off strategically, relative to alternatives. The move to balancing makes it clear: (a) that each party is pleading a constitutionally-legitimate norm or value; (b) that, a priori, the court holds each of these interests in equally high esteem; (c) that determining which value shall prevail in any given case is not a mechanical exercise, but is a difficult judicial task involving complex policy considerations; and (d) that future cases pitting the same two legal interests against one another may well be decided differently, depending on the facts".

deontological and consequentialist perceptions of the market fail to consider it to any extent, by concentrating on markets in their instrumental, applied form.

According to the principle of proportionality, each political decision-maker operates within limited resources but with high flexibility.[15] No regulator can devote its regulatory capacity to the whole set of economic interests. Each regulator faces the necessity of making choices between equally important and fully legitimate societal values. The necessity of making hard choices is encompassed in the Hegelian dilemma of the "right *v.* right". The proportionality principle, also known as 'balancing test',[16] enables the adoption of rational decisions by placing some interests at the top of the regulatory agenda. This implies that all other values, though equally important, are left de-prioritised. This political necessity should not be confused with the ontological de-prioritisation of the values themselves.

The doctrinal background of constitutional balancing is based on the value-pluralist tradition of contemporary political philosophy. It implies that the idea of balancing is inherently present in all aspects of (social and individual) life. It is also one of the main topics studied by legal theory and political philosophy alike from Antiquity onwards.

According to Berlin:

> "We are doomed to choose, and every choice may entail an irreparable loss. The world we encounter in ordinary experience is one in which we are faced with choices between ends equally absolute, the realisation of some of which must inevitably involve the sacrifice of others. […] The necessity of choosing between absolute claims is then an inescapable characteristic of the human condition".[17]

The contemporary aspects of the balancing exercise are explored *inter alia* in constitutional jurisprudence.[18]

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[15] **Lord MACMILLAN**, *Law and Other Things*, Cambridge, Cambridge University Press, 1937: "In almost every case, except the very plainest, it would be possible to decide the issue either way with reasonable legal justification".

[16] Some authors observe the difference between the proportionality principle and the balancing test.
See, *inter alia*: **F. SCHAUER**, "Balancing, Subsumption, and the Constraining Role of Legal Text", in *Symposium on Rights, Law, and Morality: Themes from the Legal Philosophy of Robert Alexy*, New College, Oxford University, 10-11 Sept. 2008, available at ssrn.com.

[17] **I. BERLIN**, "On Value Pluralism", *New York Review of Books*, 1998.

[18] **G.C.N. WEBBER**, *The Cult of Constitutional Rights' Scholarship: Proportionality and Balancing*, available at ssrn.com: "Constitutional rights' scholarship is anchored in the cult of proportionality and balancing. Despite the absence of reference to proportionality or balancing in most State constitutions or international conventions, scholars and judges alike have embraced a vocabulary of proportion, cost, weight, and balance".

According to Maduro:

> "Constitutional pluralism should not be seen simply as a solution, be it pragmatic or normative, to the problem of conflicting constitutional claims. Rather it should be conceived as something which is inherent in the theory of constitutionalism itself".[19]

The idea of balancing might appear to be counterintuitive, since the constitutional recognition of rights can be interpreted to consecrate their absolute protection, while the balancing act presupposes the limitation of these rights for the benefits of others. By perceiving markets as political virtues it is possible to place the value of free markets at the same hierarchical level as other legitimate societal interests. Unlike the consequentialist approach which treats markets only from an external position and the deontological approach which is by nature absolute and does not accept any balancing at all, the vision of the market as a political virtue includes market processes into the balancing act. In such a way, the market virtue approach disentangles the markets from the outcomes which they can eventually generate (*i.e.*, from the consequentialist subordination) as well as from the absolute rules of the system (*i.e.*, from the deontological subordination). Markets therefore are perceived as a separate regulatory value. Hence, the relationship between free market values and other economic and political values, such as consequentialist economic welfare and deontological legal certainty,[20] is recalibrated around the principle of parity.

This methodological classification should be seen as a value-neutral logical exercise. The separation of markets from economic outcomes which they could generate does not mean that market processes should be automatically protected in all instances. Actually, it purports to recall the often neglected fact that the market also belongs to the constitutional values protected by liberal democracy. Freedom is the quintessential element of a democratic system. This conceptually implies that in some (but not all) cases the freedom of the market could be prioritised in spite of the negative or neutral results which it delivers for the whole society. The notion of market freedom should not be always subordinated to welfare standards. In

[19] **M.P. MADURO**, "What is Constitutional Pluralism?", in **M. AVBELJ and J. KOMÁREK**, *Four Visions of Constitutional Pluralism*, European University Institute Law Department Working Paper, 2008, No 21.

[20] **J. AUSTIN**, *The Province of Jurisprudence Determined*, Indianapolis, Hackett, 1954: "The existence of law is one thing; its merit or demerit is another. Whether it be or be not is one enquiry; whether it be or be not conformable to an assumed standard, is a different enquiry. A law, which actually exists, is a law, though we happen to dislike it, or though it vary from the text, by which we regulate our approbation or disapprobation".

healthy economic democracy models, the market constitutes a value-in-itself. Indeed, this value cannot be protected and promoted by regulators in its entirety, but neither can any other value.[21] It might still be the case that those market practices which are more beneficial to consumers or the total welfare are more likely to receive regulatory support from the government. However, this prioritisation would be obtained only because the cumulative regulatory importance of the market as a political virtue and welfare-generation effects is higher than the importance of the market process taken separately from any utilitarian outcome. Under another scenario, when the benefits for consumers can be delivered at the price fixed on the free market, these two values are juxtaposed to each another. Theoretically, each value could win in the conflict. By opposition, under the traditional consequentialist approach, consumer welfare would be prioritised almost automatically.

As observed by the representatives of the German historical school, each society and each historical period is characterised by its uniqueness and individual qualities.[22] Therefore, the level of regulatory priority is established by each society according to its ideological, political, economic and cultural interests. In one way or another, this choice is based on the *phronesis*[23] of decision-makers, which is shaped in turn by the legal and political culture of each polity.[24] The balancing technique is often criticised by the tenants of the deontological and consequential approaches alike. According to consequentialists, the process of proportional balancing should be performed only with commensurable values which are easy to measure and reconcile. Those values which claim their specificity should be evaluated and reduced to common denominators. They should be 'translated' into the universal language of

[21] **W. GALSTON**, *The Practice of Liberal Pluralism*, Cambridge, Cambridge University Press, 2005: "According to value pluralism, objective goods cannot be fully rank-ordered. There is no common measure of value for all goods, which are qualitatively heterogeneous. There is no *summum bonum* that is the chief good for all individuals. There are no 'lexical orderings' among types of goods. And there is no 'first virtue of social institutions', but, rather, a range of public values the relative importance of which will depend on particular circumstances".

[22] **M.D.A. FREEMAN**, *Lloyd's Introduction to Jurisprudence*, London, Sweet & Maxwell, 2001: "Herder's particular originality and influence was due to his belief that different cultures and societies developed their own values rooted in their own history, traditions and institutions, and that the quality of human life and its scope for self-expression resided precisely in this plurality of values, each society being left free to develop in its own way".

[23] **H.G. GADAMER**, "In Conversation with Ricardo Dottori", in *A Century of Philosophy*, New York, Continuum, 2003: "[The concept of *phronesis* is] central concept of the Nicomachean Ethics [which] was originally translated into Latin by the word *prudentia*, and […] the term *iurisprudentia* draws its origin from the judge constantly being confronted with the problem of applying the general law to the individual case, which always deviates from the general law and poses the problem of correct application".

[24] On the methodological analysis of different models of balancing, see: **D. LUBAN**, *Value Pluralism and Rational Choice*', Georgetown University Law Center Working Papers in Business, Economics, and Regulatory Law and Public Law and Legal Theory, 2001, No 264335.

'dollars and cents'. According to the deontological vision, the balancing act should be rejected altogether because it ignores the importance and uniqueness of deontological values, which values should be protected *despite* rather than *due to* their eventual economic efficiency and calculability. The methodological clash between the two views can be explored and reconciled only from the perspective of dialectics.

IV. Dialectics of (in-)commensurability

The dialectical method of analysis implies that conflicts within an object are ontologically indispensable.[25] Conflicts constitute the essence of evolutionary development. They are unavoidable and in general productive. Dialectics internalises the tensions within the object and perceives the conflict within the phenomenon in its continuity.[26] Dialectics does not strive to *solve* the clash between the different values; on the contrary, it explains and operationalises these clashes. The dialectical method can be productively applied to all main aspects of legal theory[27] and, more specifically, to the balancing test.

According to the consequentialist vision, in order to perform the balancing act, each decision-maker should make the numerous conflicting interests commensurable. He has to 'translate' those interests into common language[28] and reduce them to a common denominator. Then the importance of each value can be easily calculated and compared with the others. This enables the regulator to reach the most *rational* decision. Because of its universality and lack of ambiguity, the language of mathematics which is "the *reine sprache*

[25] **B. OLLMAN and T. SMITH**, *Dialectics for the New Century*, New York, Macmillan, 2008: "[Dialectics starts] by taking the whole as given, so that the interconnections and changes that make up the whole are viewed as inseparable from what anything is, internal to its being, and therefore essential to a full understanding of it. In the history of ideas, this has been called 'the philosophy of internal relations".

[26] **E.T. FETERIS**, "Recent Developments in Legal Argumentation Theory: Dialectical Approaches to Legal Argumentation", *International Journal for the Semiotics of Law*, 1994: "From 1970, a new approach to legal argumentation has been developed in which legal argumentation is considered from the perspective of a discussion procedure in which a legal standpoint is defended according to certain rules for rational discussion. In approaches to legal argumentation which can be called dialectical, legal argumentation is considered as part of a dialogue about the acceptability of a legal standpoint. The rationality of the argumentation is dependent on the question whether the discussion procedure meets certain formal and material standards of acceptability. The advantage of such a dialectical approach is that argumentation can be evaluated on the basis of both general criteria for a formal discussion procedure and field and audience related material grounds".

[27] **F. MACAGNO and D. WALTON**, "Dichotomies and Oppositions in Legal Argumentation", *Ratio Juris*, 2010.

[28] **M. ALBERSTEIN**, *Measures of Legal Formalism*, Bar-Ilan University Public Law and Legal Theory Working Paper, 2009, No 4: "Discretion is an inevitable phenomenon in any decision-making".

of economics" is the most helpful for such a cost-benefit analysis.[29] In this respect, all mainstream economic approaches offer advanced mathematical models and techniques for undertaking complex multi-step balancing tests. Those values which cannot be reduced to a common denominator are included into the models as 'x'. Yet, in the process of developing the equation, each unknown 'x' is counterbalanced by another unknown 'y', by which means incommensurable values are implicitly commeasured. There is awareness of this difficulty,[30] but any attempt to mitigate pure cost-benefit analysis by introducing into the context some socially significant values is impossible in static models.[31] The universality of mathematical modelling enables the spread of economic analysis over many other social sciences. In the legal discourse this influence is particularly noticeable in the law and economics movement, also known as the more economic approach to law.

The deontological perception of social values is diametrically opposed to the law and economics vision. The main claim of the deontological approach is structural in nature.[32] That is the reason why deontology is often perceived as a sort of legal formalism. Unlike consequentialism, deontology emphasises the internal nature of social values, claiming the individuality and uniqueness of each. Deontologists acknowledge the existence of conflicts between different values, but they believe that each problem has a right solution.[33] This solution can be found in the hierarchy of values and priorities and does not require any balancing act. The hierarchy is given externally and questioning its correctness goes beyond the limits of the deontological model. Hence, for consequentialists the criterion of

[29] **I. LIANOS**, "Lost In Translation? Towards a Theory of Economic Transplants", *Current Legal Problems*, 2009: "Mathematics becomes the *reine sprache* of economics and a means of dialectic interaction between the community of mathematicians and that of mathematical economists. […] Mathematics ensures precision and openness to scrutiny for logical errors. It is *par essence* a universalistic language, closely related to the imaginary of 'economic physics' and its ideal of a 'unified science' [quoting **B.P. STIGUM**, *Towards a Formal Science of Economics: the Axiomatic Method in Economics and Econometrics*, Cambridge, Cambridge University Press]. It is allegedly ideology free".

[30] **M. RICHARDSON**, "The Second Wave in Context", in **M. RICHARDSON and G. HADFIELD**, *The Second Wave of Law and Economics*, Sidney, Federation Press, 1999: "Features of the second wave [of law and economics have become] both broader and deeper".

[31] **I. LIANOS**, "Lost In Translation? Towards a Theory of Economic Transplants", *Current Legal Problems*, 2009: "The fact that mathematics constitutes the language of economics has profound implications on the stories told by economists, that is, economic discourse. What is formalisable [*i.e.*, in this context 'commensurable'] can be subject to economic inquiry [*i.e.*, in this context the 'balancing test']; what is not, is excluded from the focus of the discipline".

[32] **J. HABERMAS**, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy*, Cambridge, Polity, 2004: "If in cases of collision all reasons can assume the character of policy arguments, then the fire wall erected in legal discourse by a deontological understanding of legal norms and principles collapses".

[33] See: **R. DWORKIN**, *Law's Empire*, Oxford, Hart, 1998; who develops in this context his famous metaphor of the omnipotent judge Hercules who by evaluating the pros and cons of each argument can eventually reach the right answer.

appropriateness is the 'rational' answer, while for deontologists it is the 'right' answer. The main deontological reason why different values cannot be balanced is that they are effectively incommensurable.[34] They claim that any attempt to reduce their essence to a common denominator leads to an over-simplification of the values which fails to account for their actual nature. In turn, this enables the discrimination of the most economically 'vulnerable' groups of individuals to the extent that their arguments are most likely to be diminished or neglected during the 'translation' process. As Justice Scalia pointed out in the frame of the United States constitutional practice, the balancing act can be compared to "judging whether a particular line is longer than a particular rock is heavy".[35] Deontological ethics dominates in such areas as religion and human rights, as well as in most left-oriented political ideologies. It is based upon the Kantian[36] idea of human autonomy and indivisibility of individual dignity. It must be added that, due to their 'all or nothing' approach, deontological arguments can be relatively easily instrumentalised by authoritarian regimes, which introduce to the public political process the terminology and methodology of social religion and command ethics. In this respect, reliance on the 'rationality' argument which is applied by law and economics is much less susceptible to interpretative abuses.

The deontological approach in economics is often associated with the socio-economic movement.[37] Unlike law and economics techniques, which expand the economic analysis to other social sciences by applying cost-benefit considerations to them, the socio-economic vision reduces the 'pragmatic' approach by introducing into the balancing process some categorical ethical and legal imperatives.

If the consequentialist and deontological approaches to the proportionality test are taken in their static mainstream form, no possibility of solving the (in-)commensurability dilemma exists. On one hand, every value-reduction process, every attempt to bring down the

[34] On the dialectical nature of commensurability debates in legal theory, see: **J.L. SCHROEDER**, *Apples and Oranges: The Commensurability Debate in Legal Scholarship*, Cardozo Law School Research Paper, Sept. 2002, No 48.

[35] **US Supreme Court**, *Bendix Autolite Corp. v. Midwesco Enterprises, Inc.*, 1988, 486 US 888, **A. SCALIA**, Concurring Opinion, at 897.

[36] Since moral philosophy does not belong to the linearly developing sciences, most of the answers which are being constantly developing nowadays have been already designed or highlighted in the Antiquity. In his famous "man is the measure of all things", Protagoras had captured the essence of the main deontological argument long before Kant, even if (of course) not "before anybody else".

[37] Though, as shown above, there is also enough room both for left-consequentialists (those who advocate social values using 'economic language') and right-deontologists (those who, on the contrary, advocate market values trough 'political language').

values to a common denominator of dollars and cents, inevitably leads to the inflation of less convertible ones. Their neglect becomes even more substantial since the most advanced societal interests are usually protected in spite of rather than due to their eventual economic attractiveness. On the other hand, the proponents of commensurability reasonably claim that values are constantly cross-balanced and compromised anyway and that the deontological approach, if applied consistently, would disable any possibility of reasonable social transactions. In this sense, commensurability inevitably occurs at every stage of human interaction. These two visions are equally justifiable and we can express our preference for either of them; yet, static holistic methods will not solve the dilemma we face. The only feasible way out of the (in-)commensurability conundrum leads to its perception in dynamic dialectical terms. Dialectical analysis does not merely recognise the importance of both approaches to the (in-)commensurability dilemma, but it also enables their mutual nourishment.

V. Comparing the incomparable

For consequentialists, the market fails when it does not deliver the most desirable economic outcome. For deontologists, market failures occur whenever the process goes beyond formal rules or discriminates officially recognised interests. From the perspective of the market virtue thinking, which is accepted as the main argument of this paper, market failures occur on the contrary when free transactions between individuals are damaged by external forces. Therefore, for the first two visions, market failures consist in the inability of markets to deliver desirable outcomes for society, while the latter vision works the other way around. The virtue ethics approach claims that *internally* the market never fails. Each act of external interference into the market process will sooner or later be internalised by the market. However, this does not mean that markets should be left unregulated. The virtue ethics approach to markets accepts regulatory interventions because the idea of market *ipso facto* presupposes rule-makers. Then again, the regulators' efforts should be conceived at two consecutive stages; namely, a first stage of de-contextualisation, which is followed by a second stage of re-contextualisation.

At the first stage, market virtue should be conceptually separated from other socio-economic values and explored as an independent phenomenon. This isolation act should be conducted in the refined market-centred sense. The objective of this de-contextualisation is to

define the essence of each particular market process, assess its components and understand what else should be done to further improve it. Market failures at this stage are seen as an external obstacle to the free functioning of markets. This exercise should be value neutral. All value-based considerations come at the second, re-contextualisation stage. Thus, at the first stage, the public prohibition of selling cigarettes to the under-aged would be perceived as an obstacle to the free market. The results which are achieved during the first phase of the analysis should not be seen as political imperatives. They must be considered simply as positive science results and by no means as normative statements. Every socially significant value is analysed at this stage separately from the others. Such isolation helps to understand the nature of things. This phase is based solely on the incommensurability principle. It should not be seen as the final product of the balancing test, but only as a first necessary step.

At the second consecutive stage, the explored values have to be placed back in the political decision-making context. At this level, they lose their self-centricity and are perceived as parts of a common good. In relation to the cigarettes market, the regulator assesses separately the arguments from the free market box, fiscal box, public health box, advertisement box, innovation box, and so on. After an internal evaluation of each separate box, the regulator, which operates with limited resources and in the presence of conflicting values, decides which proportion of each value should be accepted and to what extent. It develops an inductive algorithm of priorities. This exercise is conducted on an *ad hoc* basis every time the proportionality test is performed. This requires the full commensurability of different values and their reduction to a common denominator. These two steps are constantly conducted by policy-makers, though most of them are making these steps implicitly. This implies a dialectical interplay between the two stages which, in turn, means that the dilemma of (in-)commensurability is extended to the process as a whole.[38] In this respect, dialectics can be seen as "the art of context-keeping". [39]

[38] **J.L. SCHROEDER**, *Apples and Oranges: The Commensurability Debate in Legal Scholarship*, Cardozo Law School Research Papers, Sept. 2002, No 48: "Although logically incompatible, every choice necessarily reflects a moment of both commensuration (the recognition of quantitative difference) and incommensuration (the recognition of qualitative difference)".
[39] **C.M. SCIABARRA**, "Dialectics and Liberty", *The Freeman: Ideas on Liberty*, Sept. 2005.

VI. Conclusion

Economic freedom usually leads to success. Its successfulness however sometimes transforms into its biggest enemy. Economic prosperity is a category which can find supporters more rapidly than the notion of economic freedom does. Therefore the latter is often perceived as a means to reach former. The main argument of this paper is that freedom itself loses its internal legitimacy if it is constantly subordinated to the tangible outcomes which it can eventually generate. Such a utilitarian perception of freedom dominates present-day economic discourse. Freedom can generate welfare, indeed, but welfare maximisation is neither an unconditional nor a quintessential feature of freedom. Freedom must be perceived as a driving force for entrepreneurial discovery, and a prerequisite to democracy, rather than as a mere component of the economic success. Freedom cannot be seen as purely rational, predictable and calculable. According to Hayek, "freedom granted only when it is known beforehand that its effects will be beneficial is not freedom".[40] It must be mentioned, however, that at the same time Hayek implicitly associates himself with consequentialists -and this is the Achilles' heel of many libertarian thinkers-, by arguing that freedom should be measured along the benchmark of success; namely, "our faith in freedom […] rests […] on the belief that it will, on balance, release more forces for the good than for the bad".[41] This utilitarian rationalisation of freedom can perhaps be seen as an attempt to expand libertarian ideas, to show why they deserve protection. This being said, in terms of conceptual clarity, it can be abused as a legitimisation of authoritarian capitalism:[42] as soon as one can prove that on balance *dirigisme* would release more forces for the good than for the bad, the entrenched position of freedom would then be compromised.

The argument of this paper is different. It considers the market process as the essence and intrinsic core of liberal democracy. It disentangles market means from welfare ends and recognises the importance, constitutional status and independent stand of the former. Freedom is placed in the same categories as rights. Each constitutional right is protected not because it

[40] **F.A. von HAYEK**, *The Constitution of Liberty*, London, Routledge & Kegan, 1960.
[41] *Idem*.
[42] Kukathas recalls his personal experience of talking with Hayek, when he was a student at Oxford. During a dinner someone proposed a toast to 'Professor Hayek' and Hayek answered very simply: "Thank you very much, I hope that there will never be Hayekians in the world, because followers are always a bad idea and they are always worse than the people they followed; Marxists are much worse than Marx, Keynesians are much worse than Keynes".
See: **C. KUKATHAS**, "On Hayek's Liberalism", *Philosophy Bites Podcast*, 4 May 2008.

is efficient, useful or self-executable. On the contrary, rights are protected as a matter of evolutionary choice, as a matter of public principle, as an ethical rather than a practical value.