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Law, Objectives of Government, and Regimes of Truth: Foucault's Understanding of Law and the Transformation of the Law of the EU Internal Market

Leila Brännström, University of Lund

ABSTRACT: Drawing on *Security, Territory, Population* and *The Birth of Biopolitics*, this article aims, firstly, to consolidate our understanding of Foucault's engagement with law by fleshing out his *approach* to law and by clarifying that he distinguishes between *different kinds of law* on the basis of the *objectives* that law serves and the *regime of truth* that it embodies. Secondly, using this understanding, the article proceeds to illustrate how the *objectives* and the *regime of truth* of the EU internal market law have been displaced in the last few decades. It is argued that this body of law has increasingly come to perform the tasks of law in neoliberal government as pointed out by Foucault in these lectures, namely of expanding the domain of market values and mechanisms, and of restricting the exercise of legitimate government by opposing the rule of law to planning. In this regard, particular attention is paid to the way in which justiciable rights function as a technology of neoliberal rule within the internal market.

Keywords: Law, neoliberal governmentality, justiciable rights, EU, the internal market.

In the first volume of *The History of Sexuality*, published in 1976, and in the lecture course that he delivered at the *Collège de France* in 1975/76, *Society Must Be Defended*, Michel Foucault contended that in spite of the almost frenetic legislative activity of the last few centuries, "the juridical system of the law" had lost ground to more expansive, more continuous, and more productive mechanisms of power targeting individual bodies (disciplinary power) as well as whole populations (biopower).¹ He argued that whereas the juridical exercise of power essentially operates as "a right of seizure: of things, time, bodies, and ultimately life itself," the ascending mechanisms work to "incite, reinforce, control, monitor, optimize, and organize the forces under it."² Disciplinary power and biopower rely on norms obtained from knowledge gathered about the life of individuals as well as about the living patterns of populations, and

¹ Michel Foucault, *The History of Sexuality vol.1 An Introduction* (NY: Pantheon Books, 1978), 144; and Michel Foucault, *Society Must Be Defended: Lectures at Collège de France 1975-1976*, edited by Mauro Bertani and Alessandro Fontana (New York: Picador, 2003), 241-245. Hereafter *The History of Sexuality* is referred to as *HS 1* and *Society Must Be Defended* is referred to as *SMBD*.

² Foucault, *HS 1*, 136.

Foucault likened these norms to quasi-natural laws, norms that in contrast to law cannot, at any level of abstraction, be represented as a sovereign's declaration of will.³ However, he also added that disciplinary power and biopower do not reduce the quantity of legal acts or make the juridical institutions disappear, but instead encroach upon, and work through, them.⁴

Foucault's arguments sparked a discussion among legal scholars about his understanding of law and its role in modern government that has been going on for over two decades.⁵ Some – most notably Hunt and Wickham – concluded that Foucault, due to his failure to understand how modern law operates, did not consider law to be very important for modern government and rendered it as marginal and subordinate.⁶ With the publication of the two lecture series that Foucault delivered at *Collège de France* in 1977–1978, *Security, Territory, Population*, and in 1978–1979, *The Birth of Biopolitics*, any suggestion that Foucault underestimated the significance of law in the exercise of modern government has been proven unfounded.⁷ In the two lecture series, which are mainly devoted to the study of a number of *arts of government*⁸ or *governmentalities*⁹ since the early modern era, we find Foucault's most explicit engagements with law, which develop and shed light on, rather than modify, his earlier claims about law.

³ Cf. e.g. *ibid.*, 139–144; and Foucault, *SMBD*, 38.

⁴ Foucault, *HS 1*, 144; Cf. also *SMBD*, 241 and 38–39.

⁵ An overview of the debate can be found in Ben Golder and Peter Fitzpatrick, *Foucault's Law* (Abingdon: Routledge, 2009), 12–35.

⁶ Alan Hunt and Gary Wickham, *Foucault and Law: Towards a Sociology of Law as Governance* (London: Pluto Press, 1994). For an overview of criticism along these lines, see Golder and Fitzpatrick, *Foucault's Law*, 12–25. For overview of objections to such criticism, see *ibid.*, 26–29.

⁷ Michel Foucault, *Security, Territory, Population: Lectures at the Collège de France 1977–1978*, edited by Michel Sellenart (Basingstoke: Palgrave Macmillan, 2007); and Michel Foucault, *The Birth of Biopolitics: Lectures at the Collège de France 1978–1979*, edited by Michel Sellenart (Basingstoke: Palgrave Macmillan, 2008). Both lecture courses were published in French in 2004. Hereafter *Security, Territory, Population* is referred to as *STP* and *The Birth of Biopolitics* is referred to as *BB*.

⁸ In the two lecture series the expression “art of government” signifies the “reasoned way of governing best, and at the same time, reflection on the best possible way of governing” (Foucault, *BB*, 2), whereas the term “government” mostly refers to the exercise of political sovereignty “in the form, and according to the model, of economy” (Foucault, *STP*, 95; cf. also e.g. *BB*, 2; and Michel Sellenart, “Course Context,” in *STP*, 385–387). However, Foucault also, both in the lecture series and in his later work, used the term “government” to speak quite generally of the exercise of power as the “conduct of conduct” (cf. e.g. Michel Foucault, “The Subject and Power,” in Hubert Dreyfus and Paul Rabinow (eds.), *Michel Foucault: Beyond Structuralism and Hermeneutics* (Chicago: University of Chicago Press, 1983), 221). In this article I will use “government” to signify the economic exercise of political sovereignty and “art of government” to refer to the reasoned way of exercising political sovereignty economically and reflecting upon it.

⁹ Foucault coined the neologism “governmentality” in the fourth lecture of *STP* to signify a historically determined mode of reflecting upon the exercise of political sovereignty that emerged in the middle of the sixteenth century as well as the set of practices that materialized in connection with this body of theoretical work (cf. Foucault, *STP*, 87–110). Governmentality in this sense refers to “the institutions, procedures, analyses and reflections, calculations, and tactics” that target populations and rely on political economy as the primary form of knowledge (Foucault, *STP*, 109). However, in Foucault's work the notion progressively moves away from a narrower, historically determinate sense, to a more general one signifying the ways in which people reflect upon and put into practice calculated plans for conducting the conduct of themselves

Placing the two lecture series at its center, this article aims, firstly, to consolidate our understanding of Foucault's engagement with law by fleshing out his *approach* to law and by clarifying that he distinguished between *different kinds of law* on the basis of the *objectives* that law serves and the *regime of truth* that it embodies.¹⁰ Secondly, using this understanding, the article proceeds to illustrate how the *objectives* and the *regime of truth* of the EU internal market law have been displaced in the last few decades. It is argued that this body of law has increasingly come to perform the tasks of law in neoliberal government as pointed out by Foucault in the lectures, namely of expanding the domain of market values and mechanisms, and of restricting the exercise of legitimate government by opposing the rule of law to planning.¹¹ In this regard, particular attention is paid to how justiciable rights "structure the possible field of action" of states, firms and individuals in the internal market in a way that furthers the objectives of neoliberal governmentality.¹² The function of justiciable rights as a technology of neoliberal rule is rarely attended to by contemporary Foucault-inspired studies of government.

In what follows I will first discuss Foucault's approach to law and argue that his statements in *The History of Sexuality* about the regression of law are really about the transformation of law *and* about the demise of a certain way of organizing the exercise of political power. Second, I will analyze the nature of the transformation involved, which is related to the ascendancy of two consecutive arts of government: *raison d'État* and liberal government. Third, I will present Foucault's account of neoliberal governmentality and detail how it changes the exercise of political power and the role of law. Fourth and finally, making use of Foucault's analysis of neoliberal governmentality, I will analyze the transformation of EU internal market law.

Foucault's approach to law and how to read the waning of the "juridical system of the law"

Quite understandably Foucault never tried to provide a "concept of law" that aims to establish or identify the minimum conditions for a statement or system of statements to be considered law. Neither did he offer a general theory of law in any other sense.¹³ He did, however, often make claims about law, and if these statements are taken together, an *approach* to law emerges that recalls the ways in which he approached, for example, sexuality or the state. Foucault

and others (Sellenart, "Course Context," 387–389; and Foucault, *BB*, 186). In this article the notion is detached from the specific sixteenth-century context, but it is used only to designate the political form of government, which means that it is used synonymously with "art of government".

¹⁰ Some legal scholars have, prior to the publication of the lecture series and based on a few published texts by Foucault on governmentality, drawn upon this notion in their reconstructions of Foucault's understanding of law and in their interpretations of his claims about the waning of law in modernity. A number of such efforts are mentioned in Golder and Fitzpatrick, *Foucault's Law*, 29–35.

¹¹ In this article the changing terminology of the EU is handled by using the most recent terms. Occasional lapses to former terms do however occur where it seems appropriate.

¹² Foucault, "The Subject and Power," 221.

¹³ For the counterargument that Foucault can usefully be read as offering a theorization of law broadly conceived, see Peter Fitzpatrick, "Foucault's Other Law," in Ben Golder (ed.), *Re-reading Foucault: On Law, Power and Rights* (Abingdon: Routledge, 2013).

treats law as a *historical formation* and does not decide its distinctive features, function, or field of influence in advance. Instead he points out the historical modes of reasoning, the programs, the actions, the practices, the technologies, the institutions, and the conflicts that *objectivate* it.¹⁴

Foucault starts off with details of what was done and what was said in relation to, for example, law or sexuality, in a particular period of time and a particular context, and then reconstructs the “assumptions that underlie [the] actions, words and institutions.”¹⁵ He engages, we could say, in the elucidation of meaning and brings to the fore the implicit patterns in the discourses and the discursive practices that produce a historical formation.¹⁶ In this way he arranges what we already can see so that we can *see* the “internal economy” of a historical formation and “the systematic relations between its elements.”¹⁷ By offering a precise and close description of the verbal and non-verbal practices that make up the formation in its singularity, he is also able to uncover historical ruptures that are concealed by misleading continuities.¹⁸ However, one must keep in mind that Foucault’s reconstructions and descriptions are often done by generalizing and connecting a number of actually existing “programs” of action and reform, such as the Panopticon or the neoliberal law-reform agenda.¹⁹ Even though Foucault’s effort is “to stay as much as possible on the surface of things, to avoid recourse to ideal significations, general types or essences,” the formations that he describes, whether “discipline” or “law”, are in a sense abstractions, since the “programs” that he takes as his point of departure are never completely realized.²⁰ This is not only because reality never imitates an ideal, but also because “there are always counterprograms, conflicts and rival strategies” at work.²¹

Given Foucault’s approach, it is not surprising that law in his writings emerges as something discontinuous, amenable to different forms of knowledge that infuse it and to historical assemblages of power that deploy and make use of it.²² As he writes in *Discipline and Punish*, “it is part of the destiny of law to absorb little by little elements that are alien to it.”²³ However, law also displays continuities in Foucault’s work that mirror the stability of certain features of state law from early modernity onwards, most importantly the fact that modern

¹⁴ Cf. e.g. Foucault, *STP*, 115–134; and Foucault, *BB*, 2–22 and 29–37. See also Paul Veyne, *Foucault: His Thought, His Character* (Cambridge: Polity, 2010), 7–8.

¹⁵ Veyne, *Foucault*, 15.

¹⁶ Cf. *ibid.*, 15–16.

¹⁷ Anne Orford, “In praise of Description,” *Leiden Journal of International Law*, vol. 25, no. 3 (2012), 617–618. Cf. also Michel Foucault, “Space, Knowledge and Power,” in James Faubion (ed.) *Essential Works of Michel Foucault 1954–1984, Volume 3: Power* (New York: The New Press, 2000), 226.

¹⁸ Cf. e.g. Veyne, *Foucault*, 6 and 22–36; Thomas Lemke, *Foucault, Governmentality, and Critique* (Boulder: Paradigm, 2012), 26–27; and Foucault, “Space, Knowledge and Power,” 226–227.

¹⁹ Cf. Michel Foucault, “Table ronde du mai 1978,” in Michelle Perrot (ed.), *L’impossible Prison: Recherches sur le système pénitentiaire au XIXe siècle réunies par Michelle Perrot* (Paris: Éditions de Seuil, 1980), 48–51.

²⁰ *Ibid.*

²¹ Dreyfus and Rabinow, *Beyond Structuralism and Hermeneutics*, 132.

²² Cf. e.g. Foucault, *HS 1*, 144–145; and Foucault, *STP*, 107–108.

²³ Michel Foucault, *Discipline and Punish: the Birth of the Prison* (New York: Vintage, 1995), 22.

law is connected with the exercise of political sovereignty, which renders to it the ability to co-constitute, authorize, and give force to different modalities of power.²⁴

Even though it is not compatible with Foucault's overarching intellectual approach, in some passages in his work, especially from the mid 1970s, he seems to suggest that there is an intrinsic, transhistorical tie between "law" and a certain "negative", "repressive", modality of exercising power.²⁵ However, Foucault did not always have the law (statements that are recognized as law by the legal profession and the effects of these statements) in mind when he spoke of something as "juridical" or "legal". He also referred to a specific way of organizing the exercise of power, and a particular way of analyzing and representing power, as juridical.²⁶ There are, in other words, three distinct referents for the terms "law", "juridical" and "legal" in Foucault's works: the law; the juridical modality of power, that is, "a real set of power relations which are connected together in a particular form;"²⁷ and a specific way of analyzing and representing relations of power.²⁸

Foucault's statement about the demise of "the juridical system of the law" is about the waning of a mainly deprivative and repressive way of exercising political power, and the concomitant ascendancy of mechanisms of power primarily geared towards maximizing abilities and productivity. With this change, law, although deployed even more extensively than before, is transformed. It no longer serves the same purposes as before and is now suffused with norms that express the truth about human nature and social life, rather than conveying a sovereign's privileges or will. The next section will position this transformation of law within the

²⁴ About the meaning of co-constitution, authorization and enforcement in this context, see Golder and Fitzpatrick, *Foucault's Law*, 56–71. Cf. also Foucault, *BB*, 33–36.

²⁵ Cf. e.g. Foucault, *HS 1*, 144–145; and Michel Foucault, "Power and Strategies," in Colin Gordon (ed.), *Power/Knowledge: Selected Interviews and Other Writings 1972–1977* (New York: Pantheon, 1980), 139.

²⁶ François Ewald seems to suggest that Foucault maintained a semantic distinction between "the law" and "the juridical" (François Ewald, "Norms, Discipline and the Law," *Representations*, no. 30 (1990)). This is, however, not the case. Even so, for the sake of clarity, I will in the following reserve the term "law" and the adjective "legal" for the law and what relates to it and use the adjective "juridical" to refer to the modality and the representation of power that Foucault alternately called legal or juridical. A number of efforts to clarify Foucault's position on law by way of distinguishing between "the law" and "the juridical" are mentioned in Golder and Fitzpatrick, *Foucault's Law*, 36–37 and footnotes 138 and 141.

²⁷ Victor Tadros, "Between Governance and Discipline: The Law and Michel Foucault," *Oxford Journal of Legal Studies*, vol. 18, no 1 (1998), 81.

²⁸ In the mid 1970s Foucault often contrasted his own analyses of power relations with "a juridical conception," according to which power is a force with "negative effects". Interestingly, he described his own understanding of power in early works such as *History of Madness* and *The Order of Discourse* as juridical (Michel Foucault, "Truth and Power," in *Essential Works: Power*, 119–120; and Michel Foucault, "The History of Sexuality," in *Power/Knowledge*, 183). However, Foucault also used the notion of "the juridical conception of power" in a different sense, as the exercise of legitimate authority originating from a sovereign (cf. e.g. Foucault, *SMBD*, 25–31 and 36–37; and *HS 1*, 83–91). Analyses of power in this vein are preoccupied with the line between the legitimate and the illegitimate exercise of power and seek to either justify the public exercise of power or to identify and reveal transgressions of authority and abuses of power. Foucault argued that both juridical conceptions of power were modeled upon the way in which political power was exercised in late medieval European societies (see *Law in the juridical modality of power* below).

narrative that Foucault offers in *Security, Territory, Population* and *The Birth of Biopolitics* about changes in the exercise of political power in Western societies since early modernity. The section will, however, start off with a short sketch of the notion of law within the juridical modality of power.

The turn to government and law's transformation

Law in the juridical modality of power

Foucault traces the emergence of modern state law to the consolidation of royal power during the Late Middle Ages. Royal power managed to form “a unitary regime” with “a fixed hierarchy of power” and an identification of “its will with the law,” because it functioned on the basis of a right that transcended the heterogeneous claims of myriad clashing forces and could act as the agent of “regulation, arbitration, and demarcation.”²⁹ Foucault argues that in late medieval European societies the actual “mechanics of power” could “in its essentials” be adequately framed in terms of a sovereign/subject relationship.³⁰ The exercise of political power in these societies was characterized by subtractive and repressive interventions: seizing, prohibiting, constraining, and killing. Power was materialized through occasional uptakes of levy and through the staging of sporadic, but ostentatious and deterrent, punishments. The confiscations, constraints, prohibitions, and the imposition of levies and punishments went together with a structure of privilege, designed as a system of rights, through which relations of domination were reformulated into the exercise of legitimate titles and rights on the one hand, and the legal duty to obey, on the other. The right of the sovereign to rule over a territory and everything in it was the primary privilege in the system, a fundamental right from which all other rights were derived.³¹

The rise of government: raison d'État

Foucault describes the early modern era of absolutist rulers as a period of transition, during which the exercise of political power underwent radical changes. The primary aim of political rule was no longer to secure the sovereign's grip on her or his kingdom, and political wisdom was no longer the art of “knowing how to avoid shaving too close to the scalp” of the people living in the territory, to borrow a phrase from Paul Veyne.³² The focus instead shifted to the question of government in the sense of “the right disposition of things arranged so as to lead to a suitable end.”³³

The dominant art of government of the era, *raison d'État*, was preoccupied with safeguarding the interests of the state, rather than those of the sovereign person. The objective of

²⁹ Foucault, *HS 1*, 86–87. Cf. also Foucault, *BB*, 7–8.

³⁰ Foucault, *SMBD*, 35.

³¹ This reading of the juridical modality of power is based on Foucault, *HS 1*, 97–102, 135–145; and *SMBD*, 25–35.

³² Paul Veyne, “Foucault Revolutionizes History,” in Arnold I. Davidson (ed.), *Foucault and His Interlocutors* (Chicago: University of Chicago Press, 1997), 150.

³³ Foucault, *STP*, 96.

political rule was to augment the state's military and economic strength, and to preserve and maintain state power in the presence of external and internal threats. *Raison d'État* produced knowledge concerning how to increase the capacity and productivity of the governed so as to enrich and strengthen the state.³⁴ At this time it became commonplace, in theory as well as in political practice, to treat the whole kingdom as one economic unit. Benefitting from emerging forms of knowledge such as statistics, the exercise of government aimed at planning, controlling, and supervising the material and human resources of the country.³⁵

When the emphasis of the exercise of political power changed from seizure to growth in ability and productivity, its field of intervention grew. Government was now taking charge of activities of the population at the most detailed, individual level, in order to improve its quality (its health, its longevity, etc.) and its productivity.³⁶ "Police", the part of *raison d'État* concerned with the interior of a state, was a "world of indefinite regulation, of permanent, continually renewed, and increasingly detailed regulation."³⁷ Police regulation aimed at increasing the number of citizens, securing the supply and the quality of food and housing, preventing diseases and epidemics, constructing infrastructure, regulating professions, putting the able-bodied to work, fixing the price of goods and the conditions of sale, setting the rules of manufacture and marketing goods, etc.³⁸ Police-regulation – aiming at the general disciplinarization of society – was the background against which the disciplinary technologies of power started to be more extensively and more consistently deployed throughout society, "at the level of details", in different institutional settings.³⁹

The grammar of law in the period of transition

The greater efforts to maximize the strength and productivity of the state in absolutist Europe went hand in hand with old ways of thinking and organizing. The policies pursued were implemented mainly through regulations that imposed obligations on the population.⁴⁰ These regulations used the form of law – they articulated enforceable rules that were cast as the will of the political sovereign – but they differed from the laws of the juridical modality of power as they centered on positive obligations, and because they were "tactics" in an overall scheme of power aiming at maximizing productivity.⁴¹ Law was less justified with reference to a right giving the sovereign person the privilege to rule and increasingly with reference to the objectives that government action had to reach, and these objectives were primarily the objectives of the state as such and not of the one holding the title of sovereign.

³⁴ See e.g. Foucault, *STP*, 364–365; and Foucault, *BB*, 4–5. Cf. also Michel Foucault, "The Political Technology of Individuals," in *Essential Works: Power*, 407–412; and Foucault, "'Omnes et Singulatim': Toward a Critique of Political Reason," in *ibid.*, 314–317.

³⁵ Foucault, *STP*, 94–101.

³⁶ Foucault, *BB*, 7.

³⁷ Foucault, *STP*, 340.

³⁸ Foucault, "The Political Technology of Individuals," 409–417; Foucault, "'Omnes et Singulatim'," 317–323; Foucault, *STP*, 312–339; and Foucault, *BB*, 7.

³⁹ Foucault, *STP*, 340–341.

⁴⁰ *Ibid.*, 87–114, 339–341; and Foucault, *BB*, 5.

⁴¹ C.f. Foucault, *STP*, 99.

The resistance to the exercise of political power was, during this transitional period, also guided by old ways of arguing. The forces of opposition made reference to fundamental laws (natural, original, or hereditary), predating the state, putting “external” limits to the ambitious exercise of sovereignty. By the authority of fundamental law, subjects had natural rights that the sovereign was not allowed to transgress under any circumstances. If the exercise of political power violated these rights, it was illegitimate, and the subjects were released from their duty of obedience.⁴² In this way, during this time, law as the will of the sovereign was the form through which government was exercised in order to reach the objective of augmenting the state’s strength, and law as fundamental law was the form through which government was challenged and limitations put on it.⁴³

Liberal governmentality

During the eighteenth century the art of government freed itself from thinking in terms of prohibitions and impositions.⁴⁴ Foucault argues that this had to do with the discovery of “the reality of phenomena specific to population.”⁴⁵ Statistics showed that the population, through its movements, its customs, and its activities, has specific economic effects that cannot be reduced to the individual level or to the family level.⁴⁶ The detection of statistical regularities in the behavior of the population was in turn decisive for the development of the privileged field of knowledge for *liberal* government: political economy.⁴⁷ Political economy provided liberal government with intrinsic, and factual, principles of limitation.⁴⁸ In political economy it was presumed that the objects of governmental action do have a specific nature, a “truth”, which government must reckon with if it wants to be successful.⁴⁹ Because liberal government has to take into account “laws of nature”, such as the movement of population to where wages are the highest, it is a self-limiting, frugal, kind of government.⁵⁰ Foucault points out that the question of “truth” had of course not been irrelevant to the exercise of political power previously. The juridical modality of power was for instance limited by the “truth” of religious, hereditary, or natural law, as was *raison d’État*. Liberal government is however not only limited by the external truths of religion, morality or tradition, but also by the *internal* “truth” of the target of government action.⁵¹ The exercise of political power according to the liberal art of government must take into account norms of knowledge, which are something closer to laws of nature than to normative imperatives.⁵²

⁴² Foucault, *BB*, 7–10.

⁴³ Cf. Foucault, *SMBD*, 25–27, 34–35; and Foucault, *HS1*, 87–89.

⁴⁴ Foucault, *STP*, 103–104.

⁴⁵ *Ibid.*

⁴⁶ *Ibid.*, 104–106.

⁴⁷ *Ibid.*, 104; and Foucault, *BB*, 13–20 and 29–33.

⁴⁸ Foucault, *BB*, 10–20.

⁴⁹ *Ibid.*, 15–17, 282–285.

⁵⁰ *Ibid.*, 28–29.

⁵¹ *Ibid.*, 17–19. Cf. also Foucault, *STP*, 98–99.

⁵² Cf. Foucault, *BB*, 41.

With the rise of liberal governmentality, the previously dominant idea that it is appropriate and possible to regulate the activities of the population extensively and in detail is dismissed.⁵³ Governing well is now a matter of knowing when intervention is useful. In liberal governmentality utility is the criterion ensuring that factual truth is respected and thus is the criterion defining the sphere of competence of political power.⁵⁴ Governing well is also a matter of knowing how to intervene in a way that can make use of the already existing desires and inclinations of the population, that is to say their *interests*, instead of imposing a sovereign will on them.⁵⁵ Statistical analyses make it possible to establish what is normal for a population in different respects and to identify the factors that affect different patterns of normal distribution. Such knowledge about “natural” dispositions can then be used to achieve the desired end results at the global level without imposing a specific course of action for the individual and without the need to control individual processes in detail.⁵⁶ The “free” game of interests requires that individuals have a number of freedoms, rights, which allow them to participate in the game. They must be allowed to own, to contract, to move, to change places, to buy and sell, to start enterprises, etc.⁵⁷

For liberal governmentality the market represents a particular kind of truth-generating mechanism. If the market is left to function with the least possible interventions, exchange in the market can truthfully decide the relation between need and value, that is to say the true price “which will express the adequate relationship between the cost of production and the extent of demand.”⁵⁸ Foucault argues that since “interest” is the underlying principle of both exchange and utility, liberal governmentality works with interests. However the interest in question is not that of “an entirely self-referring state” like in *raison d’État*, but instead *interests*, “a complex interplay between individual and collective interests, between social utility and economic profit, between the equilibrium of the market and the regime of public authorities, between basic rights and the independence of the governed.”⁵⁹ In the liberal art of government the overarching objective is to serve the balanced, multifarious interests of individuals, groups, and the collectivity.⁶⁰

The grammar of liberal law

Liberal governmentality brings about a fundamental transformation of the *objectives* of the exercise of political sovereignty (not the enrichment and strength of the sovereign person or the state, but the proper balance between the numerous interests of individuals, groups and the collective) as well as of the *regime of truth* that the exercise of this power relies on (not only ex-

⁵³ See e.g. Foucault, *STP*, 341–357.

⁵⁴ Foucault, *BB*, 40–44.

⁵⁵ Foucault, *STP*, 71–75. Cf. also Foucault, *BB*, 267–286.

⁵⁶ Foucault, *STP*, 71–75. Cf. also *ibid.*, 4–5, 29–49 and 341–357.

⁵⁷ Cf. Foucault, *STP*, 48–49, 341–357; and *BB*, 63–64. All at the same time the population must also be disciplined so that it has the right kind of desires, which will enable it to play the game according to the rules (cf. *ibid.*, 67).

⁵⁸ Foucault, *BB*, 30–34.

⁵⁹ *Ibid.*, 44.

⁶⁰ *Ibid.*, 44–47.

ternal, “moral” truth, but also “natural” truth). With this transformation a shift in the grammar of law follows. Law is on the one hand a medium for making useful government interventions, and on the other hand the language into which the “natural” limitations of government are transcribed.⁶¹ In this mode of government, legal regulations are not rationalized by discourses that justify power, but by discourses that estimate the adequacy of the exercise of power and appreciate its consequences.⁶² The authority of law depends on how well it respects “laws of nature” and balances different, and colliding, interests.

A shift also occurs in the legal reasoning opposing government actions. Two strategies emerge. In the first case, “revolutionary” strategy builds on older theories of natural law; the origin of law is not located in the right of a sovereign, but in the inalienable rights of man. Further, certain limitations or exchanges of rights are accepted through “ideal or historical procedures” and the sphere of sovereignty, which is always already limited, is constituted.⁶³ In the second case, “radical” strategy does not depart from the question of rights at all, but is instead structured around the very same forms of analysis and knowledge that guide the exercise of government. Government action is criticized with reference to what is useful to engage in given *de facto* and desirable limits, given the objectives of government, given the country’s resources, population, and economy, etc.⁶⁴

Foucault argues that although the revolutionary and the radical strategies work with two disparate conceptions of law and stand in a “strategic rather than a dialectical relation” to each other, in actual historical practice, there is “a ceaseless connection and a whole series of bridges, transits, and joints” between the two.⁶⁵ Still, it is the radical strategy that has been the strongest and most decisive in “the history of public authorities in the West” and the problem of utility has, since the beginning of the nineteenth century, tended to encompass “all the traditional problems of law.”⁶⁶ This is not the place to evaluate to what extent Foucault is right about this, but surely a number of phenomena such as the contemporary prominence of the principle of proportionality in constitutional and human rights adjudication, point in this direction.

Going back to Foucault’s argument about the decline of law, we can see that it is about a reformulation of the objectives of political power, which entails a shift in the purposes for which law is used. In addition, it is also about the emergence of new regimes of truth with reference to which laws can be formulated, justified and criticized. Even though law continues to be the form in which the right of the sovereign (person, state, or people) to rule is expressed and the form in which restrictions are put on what the sovereign may do, this “right” now amounts to something like a method for achieving the objectives of government, which is the right balance of interests in the face of the truth of nature as made available by various

⁶¹ Foucault, *BB*, 10 and 38.

⁶² *Ibid.*, 15.

⁶³ *Ibid.*, 39–40.

⁶⁴ *Ibid.*, 40–41

⁶⁵ *Ibid.*, 43.

⁶⁶ *Ibid.*, 42–43. Cf. also Orford, “In praise of Description,” note 19.

forms of knowledge. The legal game of legislation, adjudication, and justification is moved to a wholly different stage, and is played according to a new and different set of rules.

Neoliberal governmentality

Competition as Grundnorm and "market criticism"

From the 1930s and until the 1960s, most Western states adopted economic interventionist policies to mitigate the negative effects produced by the market and to reach socially and politically desirable objectives. Foucault does not discuss the governmentality and law of this era, but argues that the amount of direct intervention in the market during those years sparked a number of projects of re-evaluation and re-appraisal of liberal governmentality. In these projects the state, rather than the market, was identified as the producer of adverse effects, and what needed to be fought was state planning and control of the economy.⁶⁷ Foucault points out that by the 1970s liberal governmentality had transformed itself fundamentally, and that the new style of governmentality, *neoliberal governmentality*, was deployed, at least to some extent, by most governments in capitalist societies.⁶⁸

In contrast to liberal governmentality, neoliberal governmentality does not ask how a free space can be contrived for the market in society but "how the overall exercise of political power can be modeled on the principles of a market economy."⁶⁹ The state is not construed as something external to, yet respectful of the free market; instead the state is to be supervised by the market.⁷⁰ Competition, rather than exchange, is seen as the foundational principle of the market assuring the price mechanism, and the overarching purpose of the exercise of political power is to promote economic growth by encouraging competition.⁷¹ Competition, in turn, is not understood as a given of nature, requiring a *laissez-faire* position, but as an *objective* whose attainment presupposes "an indefinitely active policy."⁷² Thus government should not only refrain from direct interventions in market processes, but should also actively bring about and secure competition in different areas of social life. For this purpose, the primary units of the social fabric – the individual, the family, the neighborhood, the community – should be addressed as benefit-maximizing competitive enterprises.⁷³

⁶⁷ Cf. *ibid.*, 105–117.

⁶⁸ *Ibid.*, 149. In the lectures Foucault presented his critical analysis of two groups of neoliberal economists: the Ordo-liberal school in postwar Germany, and the Chicago School arising mid-century in the United States. The two schools shared a main doctrinal adversary (Keynes), "objects of repudiation" (state-controlled economy, planning, and state-interventionism) and a point of departure in the works of Hayek and von Mises (cf. *ibid.*, 79). Foucault emphasized not only the similarities, but also the differences between the two groups. However, I will not be attending to these differences. For those interested, the most significant difference appears to be that the former stresses the artificiality of the market and emphasizes the need for political intervention for the functioning of the market, while the latter recasts the economic as defining the entire sphere of human life, from individual behavior to government.

⁶⁹ *Ibid.*, 131. See also *ibid.*, 116–118 and 189–190.

⁷⁰ *Ibid.*, 116, 131.

⁷¹ *Ibid.*, 118–121, 146–147.

⁷² *Ibid.*, 120. See also *ibid.*, 118–121 and 131–132.

⁷³ *Ibid.*, 147–148. Cf. also *ibid.*, 219–227.

Neoliberal government should abstain from competition-distorting interventions in the market, but at the same time intervene heavily in “the social environment of the market” with a view to modifying the social fabric “so that competitive mechanisms can play a regulatory role at every moment and every point in society and by intervening in this way its objective will become possible, that is to say, a general regulation of society by the market.”⁷⁴ The neoliberal art of government is thus not only committed to guaranteeing the freedom of the actually existing market, but also to the principles of the market beyond the marketplace, which it seeks to project onto hitherto non-economic spheres of life.⁷⁵ Thus social policy is constructed in a way that encourages the beneficiaries’ motivation to compete on the market, techniques are devised for calculating value in terms of price so that market mechanisms can be used even where there is no actual market available for the price to be practically demonstrated and paid, and so on.

Neoliberal governmentality is not only distinguished by how it frames the objective of government, but also by the regime of truth it adheres to. For neoliberal governmentality, economic analysis, that is, “human behavior as a relationship between ends and scarce means which have mutually exclusive uses,” is applicable to social life in general and not only to situations of production, exchange or consumption.⁷⁶ All human conduct is evaluated through the image of “the man of enterprise and production” and all human institutions through the model of the profit-making firm.⁷⁷ Economic analysis in this sense does not primarily aim at making social processes intelligible, but at providing a standard of criticism. “Market criticism” rather than utility is the gauge of the validity of the exercise of government, and all government actions are scrutinized in terms of efficiency, competitive advantage, supply and demand and costs and benefits.⁷⁸ Neoliberal governmentality confronts government with a sort of “permanent economic tribunal”.⁷⁹

The grammar of neoliberal law

The neoliberal art of government does not conceive of the free market as a natural or spontaneous order, but as the result of a particular kind of legal order. A legal framework that ensures efficiency and honesty and provides institutions such as property rights and freedom of contract is part of the condition of possibility of a market. Neoliberals point out that the legal framework must constantly be adapted to the progress of economic organization and technology.⁸⁰ However, besides this “classical liberal” role, law is also an instrument for social interventions that project market principles and mechanisms into hitherto non-market settings.

⁷⁴ Ibid., 145 and 147. Cf. also *ibid.*, 140–146 and 239–241.

⁷⁵ Ibid., 131, 215–233.

⁷⁶ Cf. *ibid.*, 215–261.

⁷⁷ Ibid., 147, 225–226, and 239–246.

⁷⁸ Ibid., 246–247.

⁷⁹ Ibid., 247.

⁸⁰ Cf. *ibid.*, 161–166.

Law thus functions as a medium for nullifying the possible anti-competitive mechanisms of society and for establishing more competition-encouraging ones.⁸¹

While neoliberal governmentality looks to political power, somewhat paradoxically given its rhetoric of hostility towards it, to promote competition and extend the reach of market principles, it also restrains political power by advancing and institutionalizing a particular understanding of the rule of law.⁸² The rule of law is conceptualized so as to prevent political power being exercised to *direct* economic processes broadly understood.⁸³ The only kind of legal rules allowed in the economic order are unalterable rules, binding the state as much as any other economic actor, which set up the economic playing board. The government is not allowed to change the rules of the game in order to achieve any particular economic or social effect such as reducing the gap between different social classes or encouraging a certain type of consumption or investment. Neither can the rules be rectified by reference to the adverse effects they produce. If economic rules are unalterable, only market actors can make plans for the future, and the ends of economic processes will be defined by their choices, actions and competitive capacity.⁸⁴ Any government intervention in the economic order, broadly conceived, with a view to obtaining a definite aim, any political planning, that is, is framed in neoliberal governmentality as a distortion of competition, an infringement of the rights of market actors and a violation of the rule of law.

Foucault argues that in a society regulated on the basis of and in terms of the competitive market economy, courts will become “the omnipresent public service.”⁸⁵ The “juridical demand” will rise in such a society since administrative action will recede at the same time as instances of conflict and litigation increase due to the conversion of ever more entities into competitive economic enterprises.⁸⁶ More importantly, the interpretation and evolution by the courts of the ground rules of the market will become an important part of the exercise of political power.⁸⁷ As the rules of the economic game are fixed, and the political branches of government are barred from altering them, courts will cater for the need for legal evolution and adjustment.

To sum up: In neoliberal government, market principles are elevated to the status of state-endorsed norms. In addition to constantly scrutinizing and criticizing government with reference to entrepreneurial behavior, a particular understanding of the rule of law, which outlaws government planning, also circumscribes political power. At the same time, political power is relied on and employed, by way of legislation and other means, to refashion society

⁸¹ It is not written explicitly in Foucault’s lectures on neoliberalism that law will be a medium for government interventions regulating society in terms of market principles, only that this is the purpose of government interventions in general. (cf. e.g. *ibid.*, 159–167).

⁸² *Ibid.*, 171–174.

⁸³ The rationale for this position is the “unknowability” of the totality of the economic process (cf. *ibid.*, 281–286).

⁸⁴ *Ibid.*, 171–174.

⁸⁵ *Ibid.*, 149–150 and 175.

⁸⁶ *Loc. cit.*

⁸⁷ Cf. *ibid.* 159–184, especially 175–176.

according to market principles. Neoliberal governmentality brings about a fundamental transformation of the *objective* of the exercise of political power (not the proper balance between the numerous interests of individuals, groups and the collective, but economic growth by way of encouraging competition and projecting market principles onto social life in general) as well as of the *regime of truth* within which political power is exercised (not primarily the “truth of nature,” but normative market behavior in relation to every dimension of human life). This transformation goes together with a shift in the grammar of law. The authority of law now depends primarily not on how well it respects the freedom of the market and its “law of nature” and balances different, and colliding, interests, but on how well it plays by market rules and acts in the interests of the market. The kinds of arguments that can motivate legislative activity and legal decision-making have become quite different from the ones that are authoritative in a liberal governmental setting.

Foucault himself did not say anything about the legal strategies that can be pursued in order to counteract the neoliberal exercise of government. The reliance of neoliberal law on the model of entrepreneurial behavior does however suggest that adversaries would promote a rival set of principles that can guide action, such as the public good, the good life, solidarity or even public security. Such strategies would try to exempt and withdraw different areas of social life from the domain of market principles and entrepreneurial behavior. Also, the structure of neoliberal governmentality, which sets the rights of market actors, rather than the rights of the political sovereign or the individual as such, as the most fundamental, indicates that the forces of opposition would try to limit the privileges of market actors, rather than those of the political power. Indeed, the struggle against neoliberal government action might entail a move to augment the authority of the political sovereign.

“Governmentality studies,” the transformation of law, and the technology of justiciable rights

With the exception of one lecture, “Governmentality,” Foucault’s lecture courses from 1978 and 1979 were unpublished until 2004.⁸⁸ Still, the published lecture together with a published summary of Foucault’s Stanford lectures, did inspire a whole field of research, which is often referred to as “governmentality studies” and which mainly addresses contemporary, in particular neoliberal, forms of exercising government.⁸⁹ Within this field, neoliberal government is presented as a “politics of truth,” which produces forms of knowledge, technologies for exercising power, and subjectivities. Neoliberalism is not cast “as a decline of state sovereignty but as a promotion of forms of government that foster and enforce individual responsibility, privatized risk-management, empowerment techniques, and the play of market forces and entrepreneurial models in a variety of social domains.”⁹⁰

Studies of neoliberal governmentality have been very helpful in demonstrating how

⁸⁸ See Golder and Fitzpatrick, *Foucault’s Law*, footnote 103.

⁸⁹ The summary of the Stanford lectures was published as “‘Omnes et Singulatim’”. For an overview of how the field of governmentality studies has developed, see e.g. Mitchell Dean, *Governmentality: Power and Rule in Modern Society* (Thousand Oaks: Sage Publications, 2010).

⁹⁰ Lemke, *Foucault, Governmentality, and Critique*, 84.

individuals and social groups are governed by freedom and choice, in illuminating how subjects of rule are made visible, knowable and governable, and in bringing to attention the multiplicity of the technologies of rule deployed in neoliberal government such as evaluation, supervision, mutual learning, self-improvement schemes, target setting, benchmarking, ranking, diffusion of “best practice,” etc. However, the pivotal role of law, courts, and justiciable rights in neoliberal government has been almost completely overlooked in this line of studies.⁹¹

One area, in which the transformation of law in a neoliberal direction, and its effects on the consolidation of neoliberal rule, is both manifest and well researched, is the law of the EU internal market.⁹² However, perhaps due to the marginalization of law in “governmentality studies,” this shift has rarely been attended to from the point of view of Foucault’s account of the form and function of law in neoliberal governmentality.⁹³ Given this, it seems productive to adopt such a perspective, which will bring into view the dominant regime of truth underpinning the internal market law and the overarching objectives served by this body of law – to employ political power to further competition and to extend the reach of market mechanisms and values, and, at the same time, to restrain the use of political power for other purposes by way of contrasting the rule of law to planning – while also highlighting the centrality of the Court of Justice of the EU (the CJEU) in the exercise of political power.

In addition, such a Foucauldian approach draws our attention to the way in which justiciable rights, which are increasingly deployed in EU government, function as a neoliberal technology of rule.⁹⁴ The ascendancy of justiciable rights in EU government is often discussed under the rubric of “the legalization of politics,” but seldom put in relation to the neoliberal turn of the law of the internal market, and hardly ever analyzed from the perspective of neoliberal governmentality. When rights in the EU have been analyzed as “technologies of governmentality,” the analyses have looked “beyond (hard) law” and focused on EU rights talk and on the monitoring and promotion of rights by EU agencies.⁹⁵

The Transformation of the Law of the EU Internal Market

⁹¹ Cf. e.g. Peter Miller and Nikolas Rose, *Governing the Present: Administrating Economic, Social and Personal Life* (Cambridge: Polity, 2008); and Dean, *Governmentality*.

⁹² Cf. e.g. Danny Nicol, *The Constitutional Protection of Capitalism* (Oxford: Hart, 2010).

⁹³ There are of course exceptions. See William Walters and Jens Henrik Haahr, *Governing Europe: Discourse, Governmentality and European Integration* (London: Routledge, 2005), chapter 3; and William Davies, “When is a Market not a Market?: ‘Exemption’, ‘Externality’ and ‘Exception’ in the Case of European State Aid Rules,” *Theory, Culture and Society*, vol. 30, no. 2 (2013).

⁹⁴ Cf. e.g. Daniel Kelemen, *Eurolegalism: The Transformation of Law and Regulation in the European Union* (Cambridge: Harvard UP, 2011).

⁹⁵ Cf. Bal Sokhi-Bulley, “Government(al)ity by Experts: Human Rights as Governance,” *Law & Critique*, vol. 22, no. 3 (2011). Cf. also Bal Sokhi-Bulley, “The Fundamental Rights Agency of the European Union: A New Panopticism,” *Human Rights Law Review*, vol. 11, no. 4 (2011), and Bal Sokhi-Bulley, “Governing (Through) Rights: Statistics as Technologies of Governmentality,” *Social and Legal Studies*, vol. 20, no. 2 (2011).

A predisposition toward neoliberal governmentality was already present in the original EEC Treaty (the Treaty). The common market was a project of economic, not political, integration.⁹⁶ The legitimacy of community building was based on the promise of economic growth by way of creating an undivided market and enhancing inter-state competition through eliminating market distortions and efficiently installing the price mechanism.⁹⁷ To the extent that the Treaty dealt with social policy at all, it was largely in ways that were to supplement and promote the workings of the common market.⁹⁸ The Treaty constructed a space of economic activity in which the freedoms and rights of subjects were intimately related to their capacities as economic actors (trader, service provider, investor, worker, consumer, etc.). These freedoms and rights were guaranteed by restricting the freedom of the governments of the member states. The Treaty elevated the free, and price competitive, movement of goods, services, labor and capital above political decision-making and negotiation, and states had to formally renounce certain types of market intervention as a condition for entering the common market. As we have seen, a neoliberal state is one that seeks opportunities to reduce its own room for maneuver in relation to the principles of the market, and subordination to transnational, market-creating, and competition-enhancing rules offers an excellent way of doing that.

However, the Treaty produced a limited and fragile platform for neoliberal government, which allowed for other arts of government to co-exist with, and in many instances trump, neoliberal rationality. The free movement rules included broadly formulated exemptions, recognizing the right of member states to act in the name of rival concerns. The Treaty also seemed to accept public services being shielded from its competition rules so as not to obstruct the performance of their assigned tasks. The prohibition on state aid to particular national industries or sectors, which directly challenges the price mechanism as the primary means of regulation, permitted exemptions for a wide range of purposes. In the words of Erika Szyszczak “[t]he EEC Treaty rules were a compromise: they refused to address directly the issue of state intervention in competitive markets and did not provide guidance for the complex economic and political tasks of weeding out illegitimate state intervention in the economy from legitimate forms of state intervention which were necessary and could be beneficial for European integration.”⁹⁹

⁹⁶ A number of commentators have noticed that the original EEC Treaty contained strong elements of Ordoliberalism. Cf. e.g. Walters and Haahr, *Governing Europe*, 42–57.

⁹⁷ See *ibid.*, 33–37 for an account of the methods used by the High Authority of the European Coal and Steel Community to make the price mechanism an effective technology of government.

⁹⁸ The social dimension of the Community, as envisaged in the Spaak report, rejected the idea that the Community had to play a role in the harmonization of social policy. The improvement of working conditions, for example, would have to be the effect of market integration (see Catherine Barnard, “Social Policy Revisited in the Light of the Constitutional Debate,” in Catharine Barnard (ed.), *The Fundamentals of EU Law Revisited: Assessing the Impact of the Constitutional Debate* (Oxford: Oxford UP, 2007), 110).

⁹⁹ Erika Szyszczak, *The Regulation of the State in Competitive Markets in the EU* (Oxford: Hart Publishing, 2007), 255–56. Cf. also Nicol, *Constitutional Protection of Capitalism*, 85–90.

Not only the Treaty as such, but also its interpretation and implementation, initially allowed for a relatively broad range of policy objectives to be pursued.¹⁰⁰ The focus of the EU Commission (the Commission) and the CJEU was on integrating the economies of the member states and on eliminating constraints on cross-border movements and not on the internal policies of member states. The enforcement of competition rules, for example, targeted the types of restraint agreements between manufacturers and retailers that constrained the movement of goods across borders, rather than the types of agreements between competitors that could artificially inflate consumer prices.¹⁰¹

This state of affairs was changed by new, neoliberal, ways of interpreting and implementing the existing treaties, by treaty revisions, by new legislation, and by the litigious activities of market actors. More than any other single event, the launch of the single market project in the early 1980s marked this transformation. This initiative moved the substantive policy of the EU toward expanding the scope of market mechanisms and principles and prizing “market efficiency and Europe-wide neutrality of competition above other competing values.”¹⁰² The discourse of the single market framed Europe itself as a competitive entrepreneurial unit. Europe was now an economic region within a regionalized world economy faced with problems of competitiveness and relative economic performance.¹⁰³ The discourse also recast the role of the state in relation to the market: from being perceived as a necessary corrective or complement to the market, all manner of social and economic policies came to be seen as illegitimate impediments to economic performance and competitiveness.¹⁰⁴ From the early 1980s, the new legislation adopted, the implementation efforts made, and the general direction of the case law on the internal market, have on the whole been permeated by the neoliberal regime of truth and have served the objectives of neoliberal governmentality quite neatly. I now turn to a few examples.

In the 1980s the Commission was particularly determined that the vast public sectors should no longer be shielded from competition, and by the 1990s a wave of liberalization was enforced through legislation at the EU level, which constructed competitive markets for telecommunications, energy, postal services, and more.¹⁰⁵ In a parallel development the CJEU

¹⁰⁰ Cf. e.g. Kelemen, *Eurolegalism*, 152–159, on the implementation of the Community competition rules in the first few decades and Davies, “When is a Market not a Market?” 42–46, on the implementation of state aid rules during the same period.

¹⁰¹ *Ibid.*

¹⁰² Joseph Weiler, *The Constitution of Europe: “Do the New Clothes Have an Emperor?” And Other Essays on European Integration* (Cambridge: Cambridge UP, 1999), 89–90.

¹⁰³ Walters and Haahr, *Governing Europe*, 59.

¹⁰⁴ Szyszczak, *The Regulation of the State in Competitive Markets in the EU*, 1–3.

¹⁰⁵ The first major revision of the EEC Treaty, the Single European Act (SEA) 1986, marked a crucial stage in the neoliberal transformation. The SEA introduced qualified majority voting for enacting internal market measures, which enabled the generation of a burgeoning volume of legislation that enjoyed a higher legal status than domestic law (Erika Szyszczak, “Competition and the liberalized market,” in Niamh Nic Schubhne (ed.), *Regulating the Internal Market* (Cheltenham: Edward Elgar, 2006), 88). On the creation of competitive markets in the EU, see e.g. Julio Baquero Cruz, “Beyond Competition: Services of General Interest and Euro-

abandoned its former doctrine according to which the existence of a public monopoly did not by itself violate the free movement or the competition rules if the undertaking holding the public monopoly did not discriminate against foreign market actors or abuse its dominant position. Following a series of litigations from the national level in the 1990s, the Court moved toward assuming the illegality of public monopolies if not justified by overriding reasons of public interest.¹⁰⁶

Beginning in the 1980s, the Commission also initiated a series of efforts to “open up” public procurement to ensure that the purchasing activities of the public-sector bodies would be exposed to cross-border competition. The process culminated in two major directives issued in 2004 to govern procurement procedures in the EU.¹⁰⁷ The explicit purpose of these directives is to promote competition and the principle of veridiction they embody is that of entrepreneurial behavior. The lawful criteria for awarding a contract obliges the public authority to act as a profit-maximizing market actor and severely restricts the use of public procurement as an instrument of furthering particular social or economic ends.

Also beginning in the 1980s, the competition and state aid rules started being much more actively used as tools for imposing restraints on the economic policies of the member states, while also being interpreted and implemented through a neoliberal regime of truth. For example, the Commission focused on the applicability of state aid rules to the public sector and started mapping and calculating the “true costs of state intervention” in terms of price.¹⁰⁸ In this move, the public sector was detached from the state and attached to the market.¹⁰⁹ The Commission, supported by the CJEU, declared that whenever a state provided financing to a public undertaking in circumstances that would not be acceptable to an investor operating under normal market conditions, this would constitute state aid (“the hypothetical private investor test”). An action plan adopted in 2005 presented permissible derogations from the prohibition, not as a matter of rival normative values, but in terms of what would optimize market efficiency but was not efficiently produced by the market itself (such as education or shared infrastructure). The possibility of advancing non-market justifications remained, but was subjected to a strict test of its proportionality and economic effects.¹¹⁰

pean Community Law,” in Gráinne De Búrca (ed.), *EU Law and the Welfare State: In Search of Solidarity* (Oxford: Oxford UP, 2005).

¹⁰⁶ Szyszczak, *The Regulation of the State in Competitive Markets in the EU*, 29.

¹⁰⁷ Directive 2004/18/EC of the European Parliament and of the Council on the coordination of procedures for the award of public works, contracts, public supply contracts and public service contracts and Directive 2004/17/EC of the European Parliament and of the Council coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors.

¹⁰⁸ Davies, “When is a Market not a Market?” 47.

¹⁰⁹ Already in 1980 the Transparency Directive required the member states to provide data on the financial relationships between the state and public corporations (Commission Directive 80/723/EEC on the transparency of financial relations between member States and public undertakings).

¹¹⁰ See, Davies, “When is a Market not a Market?” 46–50, and Nicol, *Constitutional Protection of Capitalism*, 117–124. In the area of competition law, the effects on consumer welfare have become the test of anticompetitive conduct (see Kelemen, *Eurolegalism*, 143–194).

The objectives of neoliberal governmentality have in addition also been furthered by the way in which market actors have used their justiciable rights and the way in which the CJEU has responded to them. Starting in the mid 1960s, a number of decisions from the CJEU established the direct effect and the supremacy of market rights.¹¹¹ These decisions supplied every market actor, in its capacity as a producer, consumer, investor, service provider, etc., the possibility of subjecting the actions of public authorities, including legislation, to the scrutiny of national courts and the CJEU to ensure that the exercise of government is in line with the ground rules of the market. The opportunities for economic actors to take action against public authorities grew considerably, beginning in the 1970s when the CJEU started extending the protection of internal market law to all arrangements having a potential negative effect on free movement, even those that did not specifically discriminate actors from other member states. The provisions for the free movement of goods, services, workers and establishment, which were formulated and originally interpreted as prohibitions of discrimination, were through a series of decisions reinterpreted in a way that comes close to a prohibition of market access restriction.¹¹² With this reinterpretation, any aspect of national regulatory policy can be challenged as a restriction to freedom of movement.

Since market actors have access to the CJEU via domestic courts and the preliminary ruling procedure, they can push the case law down a path that extends their preferred interpretation of internal market law.¹¹³ Market actors tend to only follow up on arguments from existing jurisprudence, which furthers their economic freedoms and benefits. For instance, tax litigation before the CJEU typically reduces national revenue as litigants only pursue cases reducing their tax bills. In contrast, decisions from the court that diminish the scope of market freedoms do not spark litigant activity.¹¹⁴ Thus the litigious behavior of market actors tends to work in the direction of further neoliberalization, as they are unlikely to press for anything but a widening and deepening of market principles.¹¹⁵

The response of the CJEU to the demands of market actors has by and large been a positive one. The judgments of the CJEU relating to the internal market have generally tended to protect the rights of market actors at the expense of public sectors and the decision-making authority of governments.¹¹⁶ The CJEU has also expanded the domain of the market and made

¹¹¹ On the development and implications of the direct effect and the supremacy of EU law see e.g. B. De Witte, "Direct Effect, Supremacy, and the Nature of the Legal Order," in Paul Craig and Gráinne de Burca (eds.), *The Evolution of EU Law* (Oxford: Oxford UP, 1999).

¹¹² See e.g. Catharine Barnard, *The Substantive Law of the EU: The Four Freedoms* (Oxford, New York: Oxford UP, 2010) and P. Oliver, P. and W.-H Roth, "The Internal Market and the Four Freedoms," *Common Market Law Review*, vol. 41, no. 2 (2004).

¹¹³ On this see e.g. Susanne K. Schmidt "Who Cares About Nationality? The Path-dependent Case Law of the ECJ from Goods to Citizens," *Journal of European Public Policy*, vol. 19, no. 1 (2012), 10–14.

¹¹⁴ *Ibid.*, 12. See e.g. Joined Cases C-267/91 and C-268/91 *Criminal proceedings against Bernard Keck and Daniel Mithouard*.

¹¹⁵ Cf. Kelemen, *Eurolegalism*, 194.

¹¹⁶ The Court has, for example, tended to construe the competition rules of the treaties and the liberalization directives of the 1990s in such a way as to maximize the "opening up" of markets (see Baquero Cruz, "Beyond Competition").

room for more competition by interpreting a broad range of activities as market activities and thus as falling within the realm of the internal market.¹¹⁷ Even though it can be difficult to predict the direction that the creativity of the court will take in different cases, the overarching “structural bias” of the CJEU is to further economic growth by enhancing competition and adhering to the neoliberal regime of truth.¹¹⁸

The litigious push of market actors, taken together with the shift of the substance of internal market law in a neoliberal direction, has turned the CJEU into a “permanent economic tribunal” in which market actors (and the Commission) can launch “market criticism” against any government measure deviating from market principles or not acting for the market. For the Commission and the CJEU, the expansion and extensive use of EU market rights is a welcome development, bringing Europe “home” to the citizens, showing that integration makes a difference, and thereby getting much-needed support. As Daniel Kelemen has pointed out, in the last two decades the policy objectives of the EU have increasingly been pursued through the technology of creating justiciable rights and empowering citizens and corporations to assert the rights conferred on them. The “decentralized private enforcement model” invites EU subjects to see themselves as holders and users of rights and calls upon them to defend their rights. Thus, not only does EU internal market law protect an increasing number of rights (passenger rights, consumer rights, the right to effective and speedy medical treatment, shareholder rights, anti-discrimination rights, administrative law and procedural rights, the right to compensation for state violations of EU law, etc.), the EU has also launched a number of initiatives designed to enhance access to justice for private parties before the national courts and has actively encouraged them to enforce their rights.¹¹⁹

As we have seen, Foucault identified a dual function for law in neoliberal government: to expand the market and/or its values, and to limit the government’s room for maneuver by opposing planning to the rule of law. The law of the internal market performs these functions quite neatly. On the one hand, law has been an instrument for expanding the market and inserting market values into new areas of social life. On the other hand, law has imposed limits on what can be politically willed so that competition is not “distorted” by planning. One technology of rule forcefully at work in this area is the arming of market actors with a considerable number of justiciable rights, which are raised above political decision-making. The access of the Commission and market actors to the CJEU has turned the institution into a “per-

¹¹⁷ The CJEU has, for example, applied the rules of the internal market to healthcare services covered by national health insurance schemes. On the emergence and scope of this right, see e.g. Alina Kaczorowska, “A Review of the Creation by the European Court of Justice of the Right to Effective and Speedy Medical Treatment and its Outcomes,” *European Law Journal*, vol. 12, no. 3. (2006). There are, however, also cases where the CJEU has exempted certain activities from the rules of the internal market. Pension insurance, for example, has been exempted from the rigors of competition law altogether if an insurance provider is not classified as an undertaking because it does not engage in economic activity, but rather pursues redistributive, political, aims (see Case C-218/00 *Cisal di Battistello Venanzio*).

¹¹⁸ About the notion of “structural bias” see Martti Koskeniemi, *From Apology to Utopia: The Structure of International Legal Argument* (Cambridge: Cambridge UP, 2005), 606-608.

¹¹⁹ Cf. Keleman, *Eurolegalism*, 38–92.

manent economic tribunal” in which the exercise of government is continuously submitted to “market criticism” and neoliberal objectives are furthered. As a result, the ability of governments to carry out policies whose means or aims deviate from those of the competitive market is impaired. States can, for example, only pursue social, employment, health, or environmental policies in ways compatible with the constraints established by the law of the internal market and their use of some of the most reliable tools of employment and social policy – nationalization, subsidies, bailouts for near bankrupt firms and the protectionist use of tariffs and product or service standards – has been severely restricted.¹²⁰ Justiciable rights are part of the arsenal of technologies of rule ensuring that governments do not try to pursue political or social ends at odds with neoliberal governmentality. In addition, the law of the internal market also requires that the state organizes itself and acts as a market actor – just like any other enterprise. Since governments cannot change the rules of the market game, courts, especially the CJEU, are the final interpreters and developers of these rules. Just as Foucault predicted, the materialization of a society in terms of the competitive market economy has given the courts a prominent role in government.

Concluding reflections

The neoliberal transformation of law and the technology of justiciable rights have played a decisive role in the transfer of wealth and control from the public to market actors in EU countries since the early 1980s – a shift with far-reaching distributional consequences. Some aspects of this transformation can be made intelligible using the resources that Foucault offers us in his account of neoliberal governmentality, an account that attentively captured how the neoliberal discourses existing at the time of his lectures made use of, and changed, law and rights. However, by using Foucault’s account to analyze the transformation of the law of the internal market and the role of the technology of justiciable rights in it, I do not want to suggest that he has provided us with the ultimate map of present-day neoliberal governmentality, nor with the final truth of the work that law does in the government of the internal market.

Attention to *historical discontinuities* is a distinguishing mark of Foucault’s work. However, for natural reasons, his account of neoliberal governmentality does not register the discontinuities in this project since the time of his lectures. His account does not have much to say about two of the most characteristic contemporary developments shaping present day government in Europe: financialization of government and the management of financial and

¹²⁰ Competing public interests are permitted to “trump” free movement only if (a) they are interests that the CJEU recognizes as “an overriding requirement of public interest”; and (b) the national measures advancing those interests satisfy the standard of proportionality (that is, only if there are no alternative means of achieving the requirement that would be less of a hindrance on free movement) (see e.g. Nicol, *Constitutional Protection of Capitalism*, 95–99). In addition, EU law has been interpreted in ways that forces governments to pursue their policies in fields that fall outside the scope of EU competence, only in ways compatible with it (see e.g. Loïc Azoulay “The ‘Retained Powers’ Formula in the Case Law of the European Court of Justice: EU Law as Total Law?,” *European Journal of Legal Studies*, vol. 4, no. 2 (2011), 192; and F. W. Scharpf “The European Social Model: Coping with the Challenges of Diversity,” *Journal of Common Market Studies*, vol. 40, no. 4 (2002), 648).

sovereign debt crises. These factors have already affected the law of the internal market, although the effects are sometimes presented as temporary in nature. The events of the fall of 2008, for example, required the Commission “to develop an unprecedented stance towards state aid, which maintained an endorsement of the neoliberal principles and techniques of the market, while granting member states the right to intervene in the markets however they saw fit at very short notice.”¹²¹ In the years that have followed the rescue of European banks in 2008, EU institutions appear to have acted more *for* the market although much less *by* market rules.

What seems indispensable for making sense of how the workings of law and justiciable rights have changed in the context of crisis management, enmeshed in the language of capital valuation and credit worthiness, is a Foucauldian approach to law, which would grapple with the very concrete discourses and discursive practices that shape today’s government and law, making visible their objectives and regime of truth.

Leila Brännström
Faculty of Law
University of Lund
P.O. Box 207
221 00, Lund
Sweden
leila.brannstrom@gmail.com

¹²¹ Davies, “When is a Market not a Market?” 51.