

MARKETS, COMPETITION LAW and DEMOCRACY

Professor Eleanor Fox

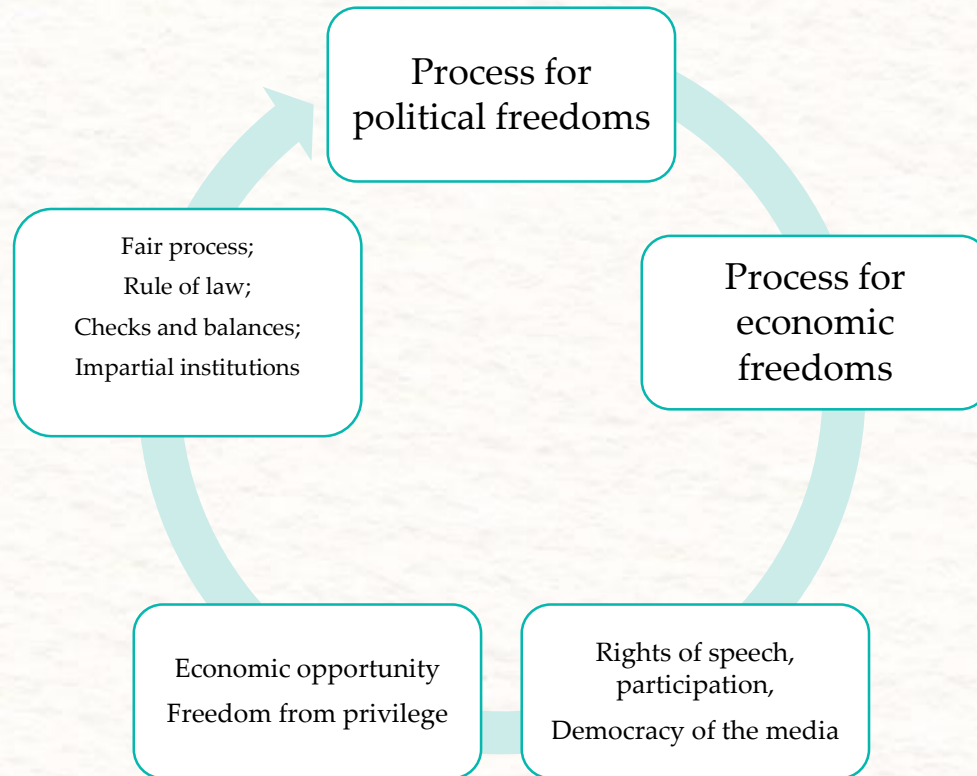
New York University School of Law

Conference on Rule of Law Challenges in the EU: Implications for Economic Law
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Thesis

- Democracy safeguards rights, and a system of governance by and for the people
 - This means impartiality, transparency, and rule by laws not men
- Markets safeguard a fair and efficient process for making and delivering goods and services, for the benefit of everyone in the system (but not for protection)
 - Strong markets tend to safeguard democracy
- Constitutional law and norms guard against usurpations by political power that would undermine the processes of democracy,
 - and antitrust/competition laws guard against usurpations by economic power that would undermine the processes of the market
- Illiberal populism threatens to unravel the safeguards

Gateposts of the system



- The ecosystems intertwine
- Democracy as the foundation for rights and freedoms
- Markets with the check of antitrust as economic democracy
- For both to work: We need rules of law and institutions to enforce them

Thesis cont'd

- Our forebears – American and European (EC) - understood the symbiosis
- Our jurists, from time to time, speak up for the symbiosis
- But then we have patches of forgetfulness
 - Nationalism creeps in; we forget the humane and reciprocal benefits of community
 - Power is exploited by the powerful
 - Safeguards get chipped away
 - Democracy gets threatened
 - And the impartial market system that can so robustly support democracy (a thousand voices) gets compromised by concentrated economic power that intertwines with autocratic political power

OUTLINE: markets, democracy, institutions– the checks against arbitrary power

- 1 The symbiosis in the US
- 2 The symbiosis in the EU
- 3 Developing and transitional countries
- 4 The challenges of populism
both European and US style
- 5 Pulling together the “populisms”
- 6 The work to be done

1 The symbiosis in the United States

- “If we will not endure a king as a political power, we should not endure a king over the ... sale of any of the necessaries of life. If we would not submit to an emperor, we should not submit to an autocrat of trade”
 - Senator Sherman to US Congress 1890
- For its first century, US policy makers made the analogy: antitrust as economic democracy
- 1950 merger amendment: safeguarding the market so we will not have another Hitler or Stalin
- Turn of the tide beginning in 1980
 - Pursuit of efficiency w/laissez faire
 - Setting the stage for the backlash today – the American populist movement

US cont'd

- Institutions, independence, and rule of law
 - Strong for a century
 - Challenges in times of current administration
 - but the inroads are not grave

2 The symbiosis in the European Union

- The aftermath of World War II
 - And the brilliant idea of the European Communities
- Containing the economic power that would frustrate a common market
 - Public and private: TFEU 101, 102, 106, TEU 4
 - Centrality of openness, access, freedom from privilege
- (Lightly) attempting to safeguard political democracy TEU 7

3a Transitional countries: an added check on arbitrary power

- In the move from communism to democracy
 - markets were so cluttered with SOEs, privileges and state restraints
 - Several MS competition laws include a little “106”, and competition authorities have special authorization to challenge state and local restraints
 - Most of the restraints challenged are clear anticompetitive obstructions
 - Such as municipalities’ post appropriating adjacent markets

3b Developing countries: South African example and cautionary tale

- South Africa has the strongest competition law system in sub-Saharan Africa
- Post-apartheid – The plan to move to markets and competition law was motivated in part by the need to transform society (bring in and up the left out majority); in part for competitiveness
- The system has been transparent with appropriate limits to discretion and strong rule of law
- But the radical transformation of society has not occurred; a populist movement would look to antitrust to accomplish it
- Pending amendments would give the minister of economic development much power – to launch market inquiries, to appoint members of Tribunal to handle the inquiries; would enlarge discretionary exemptions; would mesh social with economic analysis for SME and black economic empowerment

5 Pulling together the “populisms”

- US: A story of two populisms
 - 1) “The antitrust laws are not working for me (the people)”; break up the huge agglomerations; new Brandeis movement, Open Markets Institute
 - But there is also a more conservative sentiment that US antitrust has been too economically conservative and is not seeing new sources and abuses of power
 - There could be change, but this is not a threat to rule of law
 - 2) The illiberalisms of the current administration along with disregard of rule of law: Sue CNN because I don’t like them; sue the press
 - We think this will pass, with our strong independent institutions – but it is dangerous

Populisms cont'd: South Africa

- The populism of South Africa: institutional independence may be threatened, even benignly
 - Good people want the transformation; the society needs it; proponents of the amendments may not fully realize either the essential limits of markets and antitrust or how rule of law can be weakened by dispersing power to ministries
- Many officials in place, in the Commission, on the Tribunal and in the courts will fight hard to put rule of law methodologies in place, to preserve the integrity of the institutions

6 The work to be done

Illiberal populism, democracy and Eastern Europe

- **What to do?**
- The need to highlight the values of democracy and always argue for them
- Markets are an ally, if guided by fair rules of law to prevent abuses of power and promote access; promote merit; suppress privilege
 - The virtue of the symbiosis: individual freedoms and protection of due process
 - The virtuous fight for independence of institutions including agencies and courts
- The benefits of the EU system, even without strong teeth; but fight for teeth

Freedoms

Economic, Political

Due process

Rule of law

Institutions

Checks and balances