

# Social Market Economy and Human Rights: A Global Perspective



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## 1 Introduction: The Inherent Challenge of a Social Market Economy

Irrespective of the various connotations attributed to the concept of the social market economy since its emergence, it has consistently remained a target for ideas seeking a *third way*, one between extensive market freedom and rigorous state regulation. Effort has always been given to finding a compromise, to reconcile the constant contradiction caused by this dichotomy (Geppert and Hennecke 2021; Koslowski 2000). Conceptually, the challenge has always remained the same. It was and still is necessary to orient the concept in such a way that it represents an effective answer to the social challenges of its time, without negating itself by identifying completely with one pole or the other. In doing so, the theory, on the one hand, always runs the risk of being dismissed as an empty formula to socio-political meaningfulness due to concern for its compromise position or, on the other hand, of losing its compromise position by threatening to undermine its market economy premises with overloaded notions of justice. This conflict was already evident in the writings by the pioneers of the social market economy and ordoliberalism and has lost none of its relevance. Today, the question of the alignment of the regulatory model between more far-reaching liberalisation and state regulation arises again, and as every attempt is made to provide new answers to the constant conflict of

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Not freedom but order is the highest principle, since only in order freedom becomes real. (Heinrich Pesch 1918, 132)

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finding a balance between the poles, challenges arise that are different from those of just a few decades ago.

## 2 A Historical Sketch<sup>1</sup> to the Challenges of the Present Day

If we look at the political shaping of the economic and social order of the early Federal Republic of Germany in the decades after the war, the influence of the normative ideas of the social market economy model at the time and its ethical foundation, above all the Catholic Social Doctrine (*Katholische Soziallehre*), is very clear. Essentially, the realisation that the economic upswing of the 1950s did not easily lead to a reduction in income and wealth inequality within the early Federal Republic of Germany gave the political reality an increasingly strident social policy form. Liberalisation measures did lead to a considerable increase in the level of prosperity. However, they were also accompanied by the risk that significant sections of society would not participate sufficiently in these prosperity gains. This risk was to be avoided, especially in view of the precarious conditions that became a breeding ground for National Socialism. Therefore, at the beginning of the Federal Republic, there was a clear consensus between the political reality and the normative postulates of the model of social market economy to the effect that the market economy should be increasingly regulated in order to overcome the proletarian living conditions of the pre-war period and to create social stability through a broader participation in economic growth. The *third path* thus took the de facto form of a fundamental liberalisation flanked by a whole series of social policy reforms. In addition to the pension reform of 1957, which led to, for example, a noticeable reduction in old-age poverty and the expansion of social security systems in cases of unemployment, the change in employment systems was of vital importance (Abelshauser 2011, 498 et seq.). Thus, internal co-determination through the growth of the importance of trade unions; the structuring of employment relationships through collective agreements, as well as statutory protection against dismissal became essential features of the regulatory order; and the increasing dissolution of a proletariat still typical of the Weimar Republic became an enormous success of the social market economy. In addition to the state, companies also took on socio-political and thus morally relevant roles. During the economic upswing, workforces experienced a new level of social security in the form of appropriate wage levels, a narrowing of the income gap within companies and permanent employment contracts. For the first time, intra-company structures showed a level that was increasingly in line with the long-standing demands of the labour movement. In this way, a multitude of ethical impulses from the concept of a social market economy at the time flowed decisively

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<sup>1</sup>Mainly from Christian Hecker, *Soziale Marktwirtschaft und Soziale Gerechtigkeit: Mythos, Anspruch und Wirklichkeit*

into the political design process and established a noticeably value-based regulation of the market economy.

However, at the end of the twentieth century and the beginning of the twenty-first century, the German economic and social model increasingly encountered problems. The (economic) preconditions of the economic and socio-political standards that had been achieved changed in a post-industrial society increasingly dominated by globalisation processes. Markets became interwoven with a highly integrated and closely interconnected network of private sector actors, far beyond the borders of the nation state (Kolev and Obst 2020, 3). What was new, of course, was not transnational trade as such, but the extent, scope and speed of globalisation processes, which also changed the role of the state and market actors. As a result of new competitors entering the market, once dominant companies lost their leading market positions and consequently neglected their role as morally relevant actors. The level of social protection that had been provided until then gradually collapsed. Particularly devastating were job losses and the increase of temporary and short-term employment contracts. Long-term investment in the human capital of the workforce had become less attractive. Instead, orientation was increasingly directed towards the Anglo-Saxon model of shareholder value approach and thus towards the expectations of shareholders. In contrast, the socio-political reforms in the 1950s and 1960s were replaced by growing privatisation and deregulation, which gained momentum since the mid-1990s. This also reduced the de facto influence of the state (CESCR 2011). With globalisation, the nation state found itself in a volatile condition that clearly exceeded its capacity to independently influence decisions and developments (Benhabib 2005, 8). The downsides of the dense network of global value chains were no longer adequately covered by the once so successful socio-political regulatory framework and its normative foundation. Not the actual offer but the effect of welfare state standards and guarantees diminished in relation to the new areas of responsibility gained through globalisation (Hönke 2016, 473). Voices became more vocal, calling for a regulatory model's normative alignment of social market economy that would do justice to the structural conditions and challenges caused by the impact of the accelerated globalisation processes, and these voices continue to be heard today (Lorch 2014; Hüther 2021; Bandt 2021).

In the early days of the social market economy following the Second World War, the social question was still primarily related to the relative poverty of national wage labourers. The aim of a social economic policy was to fight for a foundation of wealth redistribution principles, such as wage replacement benefits, limits on working hours, paid holidays and social and unemployment insurance, and most importantly to be an attractive alternative to the socialist ideas of society that were popular at the time (Azmanova 2014, 597). As a result of the change in prosperity levels, the quite ambitious goals achieved and the changed structures of global markets and societies, social injustice and the precarious conditions experienced today are measured differently and above all go beyond the borders of the nation state. Economic problems must therefore be understood in their global interdependence. Müller-Armack's dictum that the market economy must be civilised by society and social order (Müller-Armack 1952, 462) must be broadened to the extent that it is

now necessary to civilise a market economy that has been unleashed from the confines of the nation state and its particularistic normative approaches of market regulation and social standards. Therefore, the normative alignment and the foundation of values of the concept and regulatory model of social market economy must be at least partly renewed.

To this end, it must be explained why such an ethical-normative foundation is still needed at all, what ideas originally underpinned the regulatory model of the social market economy and why they have become outdated in the course of time and now need to be updated (under 3). The idea of human rights and their codifications as an alternative to Christian social teachings elaborate ethical catalogues or purely constitutional economic models, which will then be proposed as a contemporary and valuable normative foundation (under 4). This will be followed by a more detailed examination of the advantages of aligning the social market economy model with such a human rights foundation (under 4.2). The focus will be on which problems a corresponding normative foundation can solve in contrast to alternative approaches.

### **3 Normative-Ethical Embedding of the Market Economy**

#### ***3.1 The Necessity of a Social Corrective***

Despite differing views on the desirable degree of state intervention, all important pioneers of ordoliberalism and social market economy agree that markets depend on an ethical foundation for the fulfilment of social tasks, which cannot be produced by themselves. Alfred Müller-Armack in particular emphasises that the market economy must be corrected by means of a system of ethical standards independent of the market in order to enforce an appropriate degree of justice vis-à-vis neutral market principles (Müller-Armack 1956, 243). Similar to the state as a means of order, the market economy is also not a “last resort”, neither an ultimate goal nor an entity justified in itself, but also a means of shaping and guaranteeing complex social life (Zacher 1981, 716). Thus, as a means of order, the market economy, then as today, necessarily relates back to cultural life, in other words, to the foundation of values, the determination, containment and realisation, which is inherent in every society (Zacher 1991, 580). In this respect, Wilhelm Röpke speaks of the market as an ethically neutral world that is dependent on the “moral reserves” of the individual members of society (Röpke 1958, 19, 139) and is thus strongly reminiscent of passages from Hegel’s *Grundlinien der Philosophie des Rechts*, in which the market is described as an expedient system in which, regardless of all its usefulness, morality and especially equality are lost, thereby forcing a “primacy of politics” that must take advantage of a rising level of prosperity for the benefit of the lost values (Hegel 1833, § 185, 201, 244, 289). To this day, these findings have not lost their relevance and denote the fundamental dispositional nature of the market economy model from

society. In the current debate, the social market economy model should therefore still be understood not only as an economic but also as a social order and not only as a model of economic policy but also as a model of socio-political policy, in line with Müller-Armack's characterisation.

### 3.2 *The Challenge of a Social Corrective*

At the same time, this highlights the challenge inherent in the concept of the regulatory model of a social market economy. In its socio-political dimension, the theory of social denotes an idea impregnated with justice. One could also say that it expresses normative propositions about *the* social and, thus, *the* just. The model of order, apart from its implicit role of protecting the very principles of the market, is supposed to substitute what the purely technical structure of the competitive order within the free market lacks (Müller-Armack 1960, 252). This is, inter alia, its central task. However, we do not have the just, we do not have the good and thus we do not have a fixed meaning for the social market economy attribute of the social (Kelsen 1975; Baumann 2003, 158 et seq.).

Originally, the regulatory model of the social market economy was based on a foundation of Christian/occidental values, as can be seen in Müller-Armack's conception of the *Weltanschauung*. According to Müller-Armack, the point of orientation of a normative framework can only be "eternal values", to which everything, including the economic order, must be subordinated (Müller-Armack 1948, 506). The design of the economic order, according to his cultural sociological study *Das Jahrhundert ohne Gott*, demands a clearer commitment to the purposeful values of Christianity (Müller Armack 1948, 507). Alongside Müller-Armack's recourse to the Christian/occidental tradition, there are other approaches among the pioneers of the social market economy and ordoliberalism, of which some are strongly elaborated and largely rooted in religious principles. Röpke advocated a foundation of inviolable values resulting from the natural moral (*sittlichen*) order (Röpke 1955, 270 et seq.), and Walter Eucken measured regulatory policy, inter alia, by how it can be brought into harmony with a God-ordained natural order (Eucken 1952, 176). In some cases, values were explained in a catalogue-like manner, from chivalry to moderation to concrete guidelines for fairness, concepts some of which have been preserved in economic ethics to the present day.

The departure from the transcendental anchoring of the regulatory model of social market economy seems to have become inevitable. Christian values are no longer as prevalent in society as they were during the post-war period. In the modern secular-constitutional state and an increasingly pluralistic society, they do not find enough acceptance to support a modern model of order. In the space of moral plurality and different competing spheres of values, a Christian-based orientation of the social market economy model already lacks the premises of coming closer to necessary universal acceptance, and also alternative normative approaches often suffer from a particularism that only thinks of the actual scope of the regulatory

model of social market economy in a truncated national way. The threat of such approaches, which do not attempt to do justice to an increasingly rapid process of globalisation, lies in the fact that in the competition between models of economic orders for the favour of global market players, they risk a mutual undercutting of normative, especially social standards. The danger of harsh competition of particularistic value systems is fundamentally described by Isaiah Berlin: “If [...] the ends of men are many, and not all of them are in principle compatible with each other, then the possibility of conflict – and of tragedy – can never wholly be eliminated from human life, either personal or social. The necessity of choosing between absolute claims is then an inescapable characteristic of the human condition” (Berlin 1969, 169). And its consequence is described more brutally by Max Weber: “After all, between values, everywhere and always, it is not just a matter of alternatives, but of an irreconcilably deadly battle, just as between God and the devil” (Weber 1968, 507). Neither Berlin’s anthropological consequence nor Weber’s dystopian-sacral rigorism needs to be endorsed to at least recognise the problem of a persistent difference and competition of values and ethics within the realm of economic orders in a globalised world. An effective solution under those structural conditions of modernity is therefore ultimately only conceivable transculturally and multilaterally. As a result, today, the normative orientation of a practical regulatory model of a social market economy is therefore relegated to the necessity of an approach that is as reconciliatory as possible, at best consensual, which can reconcile different spheres of values and approaches to justification. Basically, Müller-Armack’s social irenic (*Soziale Irenik*) already points to this necessity by expressing that in a normative-ethical foundation of a social market economy, different ideological positions would have to be mediated. Exclusionary positions of “intellectual isolation”, as Armack puts it, must be surmounted (Müller-Armack 1948, 578). This is a claim that Müller-Armack’s concept of the social market economy, at least over time, could not meet; nevertheless, it is a principle that a modern approach must consider all the more urgently. This, eventually, raises the question of what type of normative foundation can be derived from if there is no single reality of values.

#### 4 Human Rights as a Universal Foundation of a National Regulatory Model

The following will examine to what extent the idea of human rights, as laid down in the Universal Declaration and its descendants,<sup>2</sup> is suitable as a normative source for the concept of a social market economy, and it will explain to what extent its

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<sup>2</sup>In particular, the International Covenant on Civil and Political Rights (1966) and the International Covenant on Economic, Social, and Cultural Rights (1966) but also the International Covenant on the Elimination of All Forms of Racial Discrimination (1965); Convention on the Elimination of All Forms of Discrimination Against Woman (1979); *Convention Against Torture and Other Cruel, Inhumane or Degrading Treatment and Punishment* (1984); *Convention on the Rights of the Child*

contents correspond in particular to the principle of a *third way* inherent in the concept of social market economy. While value terms such as justice, solidarity and fairness and spelled-out catalogues of ethics are frequent subjects of debate on the degree of “containment” of a market economy, no comparable attention has been paid to (socially oriented) human rights, as occasionally deplored by Peter Ulrich (Ulrich 2018, 508) or Franz Xaver-Kaufmann (Kaufmann 2015, 177 et seq). Yet human rights offer both theoretical and practical advantages in several respects that positively distinguish it from other normative orders and alignment approaches.

#### ***4.1 Starting Point: The Market-Relevant Content of Human Rights***

The cultural philosopher and theologian Ernst Troeltsch, influenced by the historical catastrophe of World War I, argued that all natural and transcendental norms had proved to be impotent, a naturally powerless illusion, incapable of even slightly halting the war (Troeltsch 1924, 2–5, 47). Troeltsch found, as Arnd Pollmann puts it, the European value system being buried on the blood-soaked and poison-gas-fogged battlefields and millions of people of several nations being sacrificed to the interests of warmongering governments (Pollmann 2010, 109), searching for a remnant of common values that could withstand the general despair and contribute to overcome the monstrous (Troeltsch 1924, 1). Thereupon, as is well-known, Troeltsch and others have claimed that man should not reflect on what is inherent in the German as a German, the Russian as a Russian and the American as an American but what makes man human: his free and creative self-creation and, along with it, the claim of respect of everyone against everyone to respect this creative potential of human dignity. For this, a new order was needed based on the idea of an enduring and governing system of values, a supranational morality (*Völkermoral*), as Troeltsch puts it (Troeltsch 1924, 14–16). However, it took a second historical catastrophe and years of barbarism for the international community to agree on the foundations of such an order and, again, decades until this order developed beyond the reason of its creation – the scourge of war, which brought unspeakable suffering to humanity, as it says in the preamble – and radiated into several areas of global social life, in particular beginning to address the socio-economic problems of the globalised world and its markets.

Since then, starting with the Universal Declaration of Human Rights in 1948, an inconceivable global deliberation and normativisation process has been set in motion, in which individuals have been shifted out of their hitherto completely state-mediated status, recognised as legal entities in their own right at national and international levels, and provided with a multitude of fundamental rights, whose

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(1989); *International Convention on the Protection of the Rights of Migrant Workers and Members of Their Families* (1990); *International Convention on the Rights of Persons with Disabilities* (2006)



violation depends on far less than torture or dehumanisation. Human beings, now, do not have to be, paraphrasing Jean Améry, plundered, emptied, disoriented and deprived of their everyday language of freedom (Améry 1966, 38) in order to invoke an imperative of the human rights order. Instead, human rights must be recognised for what they are and have become: moral but also truly legal restrictions on individual and thus economic actions, limitations necessary to make human integrity and freedom actually real (Böckenförde 1997, 272 et seq.). Human rights are therefore, in the words of Ralf Dahrendorf, “those unconditional rights [...] that simultaneously transcend the forces of the market and put them in their place” (Dahrendorf 1992, 567). This may seem surprising at first, given their fundamental character as mainly defensive rights against state action. However, the original core of individual liberty rights in the sense of a negative concept of freedom has evolved over time to include a number of economic, social and cultural rights, which in particular contain provisions that affect the position of the individual within a market economy system. In the realisation that self-determination, self-creation and the dignity of human beings are not only threatened by state action but increasingly by private economic actions and economically precarious conditions, the concept of human rights has increased to the extent that in order to meet these new guarantees and to create a broader level of protection, it tames its inherent liberalist tradition. Essentially, following the work of Thomas H. Marshall, only the impetus inscribed in the human rights idea of a fuller measure of equality and self-determination is realised, which simply cannot be satisfied by the liberalist side of human rights alone (Marshall 1950, 43–47, 75–82).

## ***4.2 On the Benefits of a Human Rights Approach***

### **4.2.1 Problems of Market and Morality**

To recognise the actual advantages of this human rights approach within the regulatory model of a social market economy, it is first necessary to break down the actual difficulties of a normative-ethical framework of a market economy in general and then the approach of a social market economy model.

There is no question that the market economy is still imperative today. The constituting value of a market economy for moral action applies in principle and, thus, in the area of human rights in specific. Christie Weeramantry, for example, accurately points out that there is an economic substratum to all human rights, without which rights cannot possibly exist in practical terms, regardless of the theory that they are based on (Weeramantry 1999, 27). The free market can, therefore, be considered necessary for certain moral outcomes, but often is not sufficient. An unbridled market leaves too much room for the exploitation of moral behaviour (Hohmann 2014, 4). Due to the lack of reciprocity of moral principles potentially encountered in the market by different players, moral action usually works to the detriment of the morally acting party. In more concrete terms, this dilemma can be described by the



fact that a company which, under competitive conditions, bears disproportionately higher costs for moral grounds than its competitor who does not feel committed to the same moral standards is threatened with competitive disadvantages and, in the longer term, even with becoming noncompetitive (Homann and Blomse-Drees 1992, 36). A market player, who is basically only bound to the principles of competition, will only act in accordance with moral standards – not necessarily, but regularly – if he/she can rely on the fact that other market players will also observe these standards and that any competitive disadvantages will be relativised or cancelled out by the additional costs incurred on all sides. This dynamic is further enhanced by the process of globalisation, since in a more homogeneous national market, it is more likely that there will be a convergence of moral principles and values than in the global markets, where a wide variety of cultural, ethical and political-economic backgrounds come together. This facilitates a rigorous alignment with the purely competitive imperative of the market to become even more likely.

This behaviour does not have to be attributed to malicious intentions or immoral attitudes on the part of market players, as is so often assumed, and thus to an apparent anthropological pessimism. Marx quite fittingly expressed that even a highly moral, highly conscientious person cannot, as a rule, behave in competition in any other way than to seek his own economic advantage. However, because economic action as such is not necessarily moral, it cannot be concluded that the market economy should be abandoned for moral reasons. Rather, the concept of a legal regulatory framework or order comes into play instead. Unlike moral norms, the compelling force of legal norms relieves the individual of the fundamentally necessary willingness to commit himself. Such a regulatory framework, therefore, does not require – as Georg Lohmann puts it – *Moralisch-sein-müssen* on the part of market players (Lohmann 2012, 11 et seq.). As a result, the imperative of competition remains largely untouched. By requiring each market participant, within the scope of the law, to behave in a certain (moral) way and enforcing this by means of sanctions, it solves the dilemma of norm-compliant behaviour outlined above and ensures the stabilisation of expectations and a balanced competitive relationship among market participants. The productive but also imperfect force of the invisible hand of the market is combined with the visible hand of the law (Mestmäcker 1978). In this synthesis, the market economy, especially in the form of the social market economy, arguably rises to its theoretically most moral form.

However, as already pointed out, this is not the solution but the actual challenge. A concept of regulatory order like the social market economy that refers, as has been shown, to values and is, therefore, dependent on the needs and structures of the respective societal state requires continual calibration. Currently, three major problems can be identified in this normative realignment of the social market economy model, for which human rights provide relatively convincing answers compared to other normative approaches:

- (a) First, a regulatory model of market economy as a target point of normative directives needs a foundation that does not think solely in terms of boundaries of national markets but does justice to the interconnectedness of markets,

corporate structures, responsibilities and value and supply chains. A particularistic approach is no longer sufficient for that. Rather, a universalised set of values and normative rules are needed that take globalised structures into account and can claim transnational validity and respect for itself, so that in the long term, market players can be held accountable for where their responsibility is substantiated.

- (b) If we accept the view that the moral dilemma of the free market as described above can only be countered by the instrument of law for now, the problem arises that law cannot be meaningfully grounded in ethics or values. A purely value-based foundation encounters many objections. In the context of the alignment of the regulatory model of the social market economy, the economic critique of concepts of ethical and value notions, as prominently advocated by Hayek, for example, and which has some appeal in the present, becomes particularly relevant here. A seemingly paradoxical solution must consist of, on the one hand, utilising the compelling force of law without implementing unfiltered values or ethical approaches and, on the other hand, substantiate not only the legal norms in a purely rational way, since, again, the concept of a social market economy is an order that is inherently dependent on values.
- (c) Ultimately, normative approaches within the regulatory model of the social market economy often lose their practical usefulness either by exhausting themselves in ideals and abstract value concepts, thus giving free rein to political capriciousness, or by spelling out such demanding normative standards that the indispensable substrate of the market economy, free competition, threatens to wither away. Here, as well, is a need for a *third way*, which suggests a synthesis between the two extremes. In the face of modern global challenges and new social questions, it seems necessary to maintain the existential standards and safeguards of a dignified existence of former normative approaches to the social market economy, but not to burden the instrument of social compensation or perpetuate a dependence on the benefits, which ultimately endanger the civic self-respect of the individual and, thus, political stability (Ulrich 2015, 7). This requires measures elsewhere to enable individuals to enter the market economy system on an equal footing and with a largely equal starting point.

#### **4.2.2 Potential and Feature of the Normative Foundations of Human Rights**

##### Human Rights as a Global Minimum Consensus on Moral Economic Practice

States can no longer effectively escape the constraints of globalisation (Sommermann 1998, 421), despite all the isolated protectionist measures. This also makes a market economy, and ultimately the regulatory model of a social market economy, no longer conceivable on an exclusively national basis approach. A regulatory framework whose ideal ends at state's borders, while market actors benefit and establish responsibility beyond its borders, remains deficient. Furthermore, the original foundation

of a social market economy has become lifeless over time. As has been shown, the earlier model, which was mainly oriented towards Catholic social teachings, still benefited greatly at that time from a relatively homogeneous society and a certain dependence of the political reality on new socio-political impulses.

Human rights, however, have become part of global consciousness, both as legal concepts and as reflections of moral and even religious thought (Buergethal and Thüerer 2010, 411). Their concrete application and enforcement have become a daily matter around the world. They have experienced an unprecedented degree of juridification, and this, in a pluralised, multipolar world, continues to be infused with religious fervour. Unmistakably, they are based on a unique unanimity that can be described with John Rawls's concept of an "overlapping consensus" – a consensus that is fed by transculturally experienced reflections about historically grown injustice (Rawls 1999, 340; 1993, 134–147; Gutmann 2012, 295–230). This means that, irrespective of the question of their justification, most societies, due to the intersection of common ethical and legal principles on which the human rights order is rooted, are largely in agreement with its content. Despite all the conceded setbacks in their implementation (Lohmann 2020, 138 et seq.) and cultural divergences in their regional adaptation (Goeke 2021, 25 et seq.), they have nevertheless grown into a common mould and become an effective global normative yardstick. Indicators thereof are not only the widespread ratification behaviour of the state community and the constant incorporation of human rights standards into national legal systems. Their general presence and the constant invocation of their normative validity and universality throughout all societies are a symptom of their cross-cultural and cross-societal resonance. Given the enormous pressure for legitimacy, even autocratic systems tend to no longer legitimise violations of human rights standards by denying them (Gosepath 2009, 21; Höffe 1999, 17).

Consequently, the idea of human rights as a normative approach to the social market economy fits in with the principle of Müller-Armack's social irenics better than any other approach. One of the most central and challenging premises, which Müller-Armack himself was ultimately unable to consistently uphold in his Christian-influenced foundation of the social market economy, was that despite a secularised age characterised by a value-pluralism, as already characterised by Max Weber early on, the shaping of the social order should be understood in a mediating way (Müller-Armack 1950, 575–579, 585). This principle of mediating opposing positions in the *third way* finds its expression par excellence in the idea of human rights. Amartya Sen has shown that human rights represent a unique balance between classical liberalist rights of freedom and socially shaped participation rights, which are mutually dependent (Sen 1999, 11). Thus, rights of freedom remain empty and abstract if they are not explicated into social and economic participation rights and made equally realisable and attainable for all. But they remain paternalistic if they cannot be determined, set and secured through the exercise of (political) participation rights. And at the same time, participation and social rights in turn demand the safeguarding of a wide range of freedom rights – to ensure free competition and thus the foundation for general prosperity. The attempt to reconcile and complement the conflicting principles of freedom and social balance is

therefore just as inherent in human rights as it is in the regulatory model of the social market economy itself.

### The Janus Face of Human Rights: Dualism of Law and Morality

In principle, the mere implementation of values and all the more ethical catalogues into law, to restrain and balance the market economy, albeit equally binding on all market participants equally, is highly problematic. The starting point of values and value thinking is not the justification of law but the justification of individual-ethical action (Böckenförde 1991, 81). Values lack a rational basis of discursive conciliation and deliberation, which is indispensable for a justification of law if the law is to be a democratic peace order and an order that preserves the necessary principles of the market economy. As much as values naturally influence the process of creating law, merely reinterpreting values as law would reduce it to methodically unverifiable subjective views and thus run the risk of degenerating into subjectivity and arbitrariness. It is particularly problematic that values are generally not subject to a rational standard by which they can be comprehensibly communicated and weighed against each other. It could arguably be claimed that freedom and human dignity are higher values than mere life and that culture is a higher value than material prosperity. Yet, a dignified life led in freedom is inconceivable without securing life itself, and culture can only develop based on an economy that enables those who create culture to nourish themselves from this very culture. A balancing of values thus remains vague and ultimately leads to areas of “value feeling” that do not satisfy the rational dimension of creating law. Merely putting fairness, moderation, equality and similar criteria into law does not do justice to this demand.

Given that legal perspective, it is also possible to relate to and explain the criticism voiced by many economists of the attribution of values such as social, justice or humanity to a market economy model of order and thus ultimately the reflection of these values in state mechanisms of regulation. Müller-Armack, for example, argued that the social market economy must be characterised by active administrative intervention where the “socially necessary state” would not be achieved by the market economy alone (Müller-Armack 1946, 133). But what the notion of the social or socially necessary normatively prescribes again requires interpretation, which is almost infinitely open to such concepts. The problems that go along with this have been famously highlighted by Hayek, who criticised those notions, preceding the market economy, and emptied it of its actual substance (Hayek 1976, 67, 78–84). Morally charged concepts and values, Hayek argued, would semantically link to indeterminable categories of the just, the fair, the appropriate and the good, which, again, would only raise new questions about their definition and determinability, thereby eroding the actual constitutive and prosperity-preserving principles of a market economy if they, once cast in law and thus in a coercive order, intervened in the market. Other approaches, however, have also shown problems. Normative approaches that rely solely on moral appeal lack effectiveness, as delineated above. To uphold the constitutive principles of the market, market players

must be equally bound by the law. If an appellative approach is to be adhered to, the problem of efficacy is shifted to the level of the acquisition of virtue, a universal moral education, and thus to an even further distance, to the vicinity of a Kantian world society. Still others show particularistic approaches, which basically cling antiquatedly to the original normative foundations of social market economy and thus contribute little to the solution of current problems, which are fundamentally different from the circumstances of that time.

Human rights are now both law and morality. They are Janus-faced, looking on the one hand to the law and on the other to a consensually coagulated morality (Habermas 1998, 177). Taken in isolation, each face meets with justified objections, as has been shown. One lacks effectiveness, while the other either lacks a rational basis or falls short of the requirements of rapid globalisation processes. Human rights are, on the one hand, not only moral abstractions or catalogues of values, but, as the result of a demanding process of deliberation, they are inscribed with the demand to be law, i.e. a claim to institutionalisation (Gosepath 2009, 24). At the same time, their creation is based on similar impulses and normative reflections that precede a value or a moral norm. However, unlike the creation of a value or a purely moral norm, which only becomes subject of a discussion about its juridification after its creation, the legal dimension is inherent in the conception of human rights from the very beginning, or in other words, a legal dimension is always imperatively included in the conception of human rights. Generally, human rights are conceivable in several dimensions – politically, morally and historically – but never without their legal dimension, without which they would be reduced to a mere moral norm and negate themselves through the abandonment of their genuine claim to be realised as a legally enforceable human claim. This forms a dialectic – in a Hegelian sense – of human rights between values that cannot simply be translated into law and a legal justification that, due to its purpose, cannot be exempted from its value basis.

In their moral dimension, human rights, unlike differentiated ethical catalogues such as those found in Röpke's works, for example, do not prescribe explicit individual ethical courses of action. Following Michael Sandel's requirements for an effective (moral) framing of a market economy model (Sandel 1993, 19), human rights fulfil the sometimes rather peculiar condition that no spelled-out conception of the good or the just is prescribed by them. Instead, they allow each subject to define goals and modes of action for themselves. No virtue or motivation is demanded of the individual, if the basic claims to respect of everyone against everyone, which allow the self-definition of the individual subject in the first place, are ensured (Habermas 1992, 116). This leaves the market participants room for manoeuvre and the competitive imperative largely intact. At the same time, human rights are not limited to abstract concepts and value notions. Their legal dimension already forces them into a certain degree of definiteness in their normative content that defends them against a critique, such as Hayek's. Rather, human rights have been spelled out through a demanding process of transnational deliberation in an extensive phalanx that is not exhausted in an orientation function. Hence, the foundations of a market economy are protected by granting individuals and, through the

translation of human rights into domestic fundamental rights, in part also legal entities, private property (Art. 17 UDHR) and self-determination, for example, in the form of the right to participate freely in the social exchange of goods and services and without discrimination in the labour market (Art. 23 UDHR) or protection against forced and compulsory labour and modern slavery (Art. 8 ICCPR). They then seek the greatest possible equality of opportunity by granting a right to education (Art. 26 UDHR) to reduce educational privileges. They demand equal pay for equal performance, in particular equal pay for men and women for the same job and promotions based on merit, ability and length of service (Art. 7 ICESCR). Special protective measures are prescribed for the benefit of regularly disadvantaged or exploited groups such as children, young people or pregnant women (Art. 10 ICESCR). They contain social and labour law provisions, which have a particularly significant, restrictive effect on the market. For example, human rights establish a relative minimum wage, which must allow the worker, relative to his or her circumstances, to secure a material existence commensurate with human dignity (Art. 23 UDHR). In addition, safe working conditions, such as occupational hygiene or a limit on working hours, are guaranteed (Art. 12 ICESCR). Moreover, rights to form trade unions (Art. 8 ICESCR) or social insurance (Art. 9 ICESCR) are also included.

While many of these standards have been successfully implemented within Germany in the course of the history of the social market economy model and others are at least the subject of legislative debate, they have been partially relativised during globalisation, through the outsourcing of corporate action outside the influence of a national regulatory framework. Of course, this also applies to alternative nationally limited regulatory models of other states. For this reason, there is an increasing, albeit often ineffective, number of measures that show a general tendency to counteract the negative social side effects of global production through the national implementation of legal obligations towards companies (Salminen and Rajavuori 2019). So far, such regulations have remained largely particularistic and extremely specific in their scope of application. A first step towards a holistic approach is the planned European Supply Chain Act, which is basically an enforcement instrument for the implementation of human rights standards. According to the first draft papers,<sup>3</sup> the goal is a market system that complies with the normative requirements of the human rights order. In view of the complexity of global supply chains and the danger of distortion of competition in trade with non-EU parties, even a European approach cannot replace a global one and is more likely to cause difficulties, at least in the beginning. Given that it seems more important to anchor a universal foundation in the regulatory model of the social market economy that also works towards global standards obligations for national companies and corresponding regulations in third countries. Although the absence of such standards also fuels national prosperity, it is partly at the expense of human integrity.

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<sup>3</sup> Communication from the Commission to the European Parliament, the Council and the European Economic and Social Committee – Decent work for a global just transition and sustainable recovery (COM(2022) 66 final)



## Factual Liberation of the Individual

In addition to existential and social standards, which are also demanded by other normative concepts, at least in their nation-state dimension, the idea of human rights, apart from the extension of the sphere of responsibility of corporate action to its actual sphere of influence and profit, has another dimension that alternative approaches are often lacking. First, human rights certainly have inherent limitations. Their liberalistic dimension of freedom rights already imposes limits on a normative design with respect to the formation of a social regulatory framework. Therefore, the human rights idea appears more frugal overall than many justice-theoretical conceptions (Tomuschat 2014, 74). In its formulation of economic, social and cultural participation rights, the idea of human rights, thus, cannot be interpreted as aiming at a perfectly equal distribution of income and wealth (Pollmann 2012, 436). Human rights neither demand an egalitarian distribution of goods, nor do they force the state to owe concrete integration results in the market or to impose such an obligation on companies. This would render the human rights idea to be normatively overloaded, jeopardising its transcultural consensus and interpreting beyond its actual conception, which seeks above all to set the individual free, to empower beings and to make them capable, but not to serve paternalistically according to concrete schemes for the distribution of goods. The idea of human rights, in its form of economic, social and cultural rights (ESCR) in particular, is nevertheless inherently corrective insofar as a far-reaching equality of starting points (*Startgerechtigkeit*) – for all potential players – is not realised. If this claim is satisfied, they can tolerate highly unequal outcomes and, in this respect, despite all the differences between human rights and justice theory concepts, are reminiscent of Rawls's early work:

The essential idea here is that the problem of distributive justice should be viewed as a problem of distributing or assigning rights in the design of the general system of rules defining and regulating economic activities. It is not a problem of distributing given amounts of income or batches of goods to given individuals with certain patterns of tastes and wants. (Rawls 1993, 117)

It was evident to Rawls, as it was to many others, that redistribution or equal distribution without incentives, as opposed to the possibility of accumulating income and wealth, would reduce overall welfare. At the same time, he saw that the accumulated results of many individuals, apparently fair agreements and accumulations of wealth, combined with social tendencies, historical contingencies and political missteps, can change the actual possibilities of citizens over time so that the conditions of free and equal agreements no longer exist as (imaginarily) agreed upon at the starting point of the game (Rawls 1992, 54; 1999, 122). This, ultimately, results in different societal starting points over time, which are contrary to an actual liberalist idea, as even Hayek explicitly admitted (Hayek 1976, 84–85; Rawls 1999, 6–7, 82). Essentially, this is just the recognition that the freedom of action and self-determination that an individual possesses are inevitably conditioned by the social, political and economic conditions that they have at their disposal or to which they



have succumbed (Sen 2020, 9). This results in inequalities that a social market economy has so far only addressed to a limited extent. The idea that a regulatory order based on general rules of the game, such as that of the social market economy, is allowed to raise the question of justness of those rules and the behaviour of its players, but thereby rendering meaningless the downstream question of the integrity of the results that come about under these rules, must thus be called into question. This is because it only works insofar as all players start the game under the same conditions, on the same playing board, with the same number of dice. Otherwise, the supposedly fair rules, since they apply equally to all, work in different ways, effectively becoming unequal rules that work differently, despite the same scope of application, and rely on fiction as their claim to justice. And even Hayek, at this point in his opus magnum, takes refuge in the dystopia that such a *Startgerechtigkeit* would force the state to control the entire physical and human environment of all people, culminating in a nightmare (Hayek 1976, 85).

The idea of human rights is thus concerned with a more radical and realistic equality in origin, which subsequently relies on the premise of the idea of performance and competition. This is also the background against which new generations of human rights can be explained, which do not merely cushion the downsides of the free market but want to set the individual free in precisely that claim to a freedom of achievement through successive educational measures, increasing remuneration of education and compensation instruments such as scholarship systems (Art. 13 ICESCR), access to information and participation in culture and science (Art. 15 ICESCR), the elimination of structural forms of (racist) discrimination (ICERD, CEDAW, CRPD), the equal development of children (Art. 5 CRC), political participation and thus participation in the shaping of a market-economy regulatory order itself (Art. 25 ICCPR). And albeit only vaguely, the outlines of such an approach can even be found in the work of some of the pioneers of the social market economy. Alexander Rüstow, for example, points out that the competition for performance that constitutes a market economy requires a starting point of equity (Rüstow 1950, 97). The fact that Rüstow's understanding is certainly not identical with today's interpretations of the term does not change the fact that such an approach was in principle already considered in the early conceptions of a social market economy.

## 5 Conclusion

The question of the normative alignment of the regulatory model of the social market economy has now been posed at regular intervals for a good 70 years. The fundamental question of the framing and injection of moral principles around or into market economies in general has been posed since its inception, as in Hegel's *Grundlinien der Philosophie des Rechts* and Emil Durkheim's early work on the social division of labour. Naturally, the answers have always varied, and yet, then as

now, they always seem to be answers of gradual character. It is always a question of defining the extent to which an individual's negative freedoms must take a back seat to guarantee normative standards, especially social standards. In the current debate, Peter Ulrich has pointed out how difficult it is to fathom and endure this tension (Ulrich 2018, 512). On the one hand, it is necessary to endure the relative independence of the market economy in all areas of life, its logic and standards and the (negative) freedoms required for this as fundamental guarantor of goods and prosperity. On the other hand, the market economy system, which does not serve itself and not exclusively the individual, but society, must be oriented beyond its basic functions towards the realisation of values with the help of law. Now and in the years to come, the normative void that has opened at the centre of the regulatory model of the social market economy will have to be filled if the model is to effectively survive and not give in to the prophets of doom about its normative arbitrariness. In view of the challenges described here, the idea of human rights and its shaping in various codifications seem to be suitable as a normative foundation for this. Three main arguments were given in favour of this.

Human rights, on the one hand, safeguard proven achievements of the social market economy but also extend these to the effective sphere of responsibility of economic actors beyond the actual boundaries of a national regulatory framework and previous normative approaches. The interdependence of markets and production and market actors, basically following the system imperative of global competition, has been able to partly escape the normative requirements of a national regulatory order. How those gaps can be closed, at least prospectively, in real policy terms can be seen, certainly still in its infancy, in the idea of global supply and value chain laws. For this, human rights have a unique validity in the world even if one considers their inadequate enforcement in many areas of the world. In a sense, they function as a formalised and globalised ethic in the creation of which cross-culturally shared moral concepts were cast into legal form in a highly demanding process of deliberation involving a large part of the international community. Ultimately, they aim to free the individual and enable him or her to maintain their own integrity, thereby reducing the need for welfare services. Those who perceive themselves less and less as self-determined subjects and more and more as anonymous recipients of foreign decision-making powers that take care of them tend to lose their civic self-respect sooner or later. The feeling of humiliation is usually particularly profound where people cannot secure their existence through an adequate income according to societal standards. A mere compensatory redistribution would let the regulatory model of the social market economy stagnate in the nimbus of benevolence. Thus, in line with the tension inherent in the social market economy, human rights provide an ambivalent approach alignment and foundations of the concept of social market economy. However, they seem to swing a little bit more in the direction of the social not as care but as enabling. In paraphrasing one of Lorenz von Stein's dictums, they are aiming for a freedom that is a real one only in those who possess the conditions of it, the material and mental goods as the preconditions of self-determination.

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