

ECONOMY AND LAW IN A PLURAL WORLD

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Abstract: *The basic idea of free market economy as developed by Smith¹ and Ricardo² is attractive. Competition among those engaging in economic activities will induce them to offer always better products for an always cheaper price. Not only the consumers will profit from this but also those producers who are most successful in keeping up with this development, because their profit will rise. In contrast, those producers who are not successful in offering sufficiently good products at a sufficiently favourable price will make no profit but loss.*

Keywords: *free market economy, economic activities, Competition, producers, good products.*

I. Liberal market economy – the utilitarian approach

The basic idea of free market economy as developed by Smith³ and Ricardo⁴ is attractive. Competition among those engaging in economic activities will induce them to offer always better products for an always cheaper price. Not only the consumers will profit from this but also those producers who are most successful in keeping up with this development, because their profit will rise. In contrast, those producer who are not successful in offering sufficiently good products at a sufficiently favourable price will make no profit but loss.

If such losses continue for a longer time, and if these producers do not have sufficient financial reserve enabling them to counterbalance their losses, they will have to close down their production and eventually to drop out from the producing sector of the economy. From the point of national economy, this is not to be considered a disadvantage but an advantage because capital is transferred from those who are less well suited to use their capital in a profitable way to those who are better suited to do so. In a long-term perspective, this seems to ensure that existing resources are used in the best way, i.e. most profitable way, which is at the same time the most low-priced one for consumers.

II. Objections against liberal market economy

Against this theory which – from a purely economic point of view – would lead to the greatest happiness of the greatest number and thus would correspond to the utilitarian postulate⁵ a number of doubts arise.

¹ Adam Smith (1723-1790). See JOACHIM STARBATTY, Smith, in: *Staatslexikon der Görres-Gesellschaft*, 7th ed., Vol. 4, Freiburg-Basel-Vienna 1988, 1185 et seqs..

² David R. Ricardo (1774-1823). See KARL-HEINZ SCHMIDT, Ricardo, in: *Staatslexikon der Görres-Gesellschaft*, 7th ed., Vol. 4, Freiburg-Basel-Vienna 1988, 916 wt seqs.

³ Adam Smith (1723-1790). See JOACHIM STARBATTY, Smith, in: *Staatslexikon der Görres-Gesellschaft*, 7th ed., Vol. 4, Freiburg-Basel-Vienna 1988, 1185 et seqs..

⁴ David R. Ricardo (1774-1823). See KARL-HEINZ SCHMIDT, Ricardo, in: *Staatslexikon der Görres-Gesellschaft*, 7th ed., Vol. 4, Freiburg-Basel-Vienna 1988, 916 wt seqs.

⁵ Vgl. OTTFRIED HÖFFE, Utilitarismus, in: *Staatslexikon der Görres-Gesellschaft*, 7th ed., Vol. 5, Freiburg-Basel-Vienna 1989, 574 et seqs.; A. HÜGLI/B.-CH. HAN, Utilitarismus, in: JOACHIM

VI. Labour considered a “commodity”

The most important one of these doubts relates to the role which man is given in this system. Man must be considered not only as entrepreneur or consumer but also as worker. It is a fact that the production of goods requires not only commodities in the original meaning of the term; what is also needed is human labour. A good can be produced the more favourable – and that means, the cheapest – way the lower the costs of the commodities and the costs of labour are. And commodities themselves cannot be seen without the labour it involved, since they had to be excavated or harvested and thereafter brought to the producer.

Producing more favourably, i.e. producing more cheaply means to buy commodities at the cheapest possible price and to have it processed in the cheapest possible way. If we pay special attention to the aspect of labour, this means to pay as few workers as possible the smallest possible wages.

VII. Impoverishment of the working population

It has been these insights into the logical development of a system of a so-called free, i.e. liberal and unhampered market economy, for the decisive position of producers and their capital sometimes also called the system of capitalism,⁶ which led Karl Marx⁷ to the central theories of his criticism of capitalism. According to the theory of concentration, the continuous drop out of those producers who are no longer capable of successfully competing with others leads to a concentration of capital in always fewer hands. According to the theory of impoverishment or pauperization workers will receive lower and lower wages from the producer who are forced to keep up their competitiveness (i.e. their ability to successfully compete), until wages are so low as to guarantee no more than the physical reproduction of their productive force.⁸

Yet, what interests in this context is not so much whether Marx was necessarily right when he predicted that these conditions would lead sooner or later to a spontaneous revolution by the desperate workers, but another, more important question: Can human work really be treated according to the same rules than those applying to commodities? Can it really be the legitimate goal of economic activities to produce cheaper and cheaper goods, for the sake of lower and lower wages for workers?

In fact, man must not be considered only from the isolated aspect of his contribution to economy, not as a mere *homo oeconomicus*, and the worker must not be considered only from the aspect of his productive force. Rather, the worker – as anybody else – is entitled to have his dignity as a human being respected; and this requires that conditions at his place of work must correspond to this dignity and that his earnings are such as to enable him to live a dignified life.⁹

Incompatible with the dignity of man

RITTER/KARLFRIED GRÜNDER/GOTTFRIED GABRIEL (eds.), *Historisches Wörterbuch der Philosophie*, Vol. 11, Darmstadt 2001, 503 et seqs.

⁶ Vgl. KARL HEINRICH KAUFHOLD/PETER KOSLOWSKI, Kapitalismus, in: *Staatslexikon der Görres-Gesellschaft*, 7. Aufl., Bd. 3, Freiburg-Basel-Wien 1987, 294 ff.

⁷ Vgl. ERNST NOLTE, Marx, in: *Staatslexikon der Görres-Gesellschaft*, 7. Aufl., Bd. 3, Freiburg-Basel-Wien 1987, 1026 ff.

⁸ Vgl. allgemein NIKOLAUS LOBKOWICZ/ERNST NOLTE, Marxismus, in: *Staatslexikon der Görres-Gesellschaft*, 7. Aufl., Bd. 3, Freiburg-Basel-Wien 1987, 1032 ff

⁹ Vgl. dazu umfassend JOHANNES MESSNER, *Das Naturrecht. Handbuch der Gesellschaftsethik, Staatsethik und Wirtschaftsethik*, 7. (unveränderte) Aufl. Berlin 1984, IV. Buch: Wirtschaftsethik, 1038 ff. (Der Lohn).

These considerations demonstrate that the natural law notion of human dignity¹⁰ also in this context offers a benchmark by which the conditions of labour can be measured both individually (i.e. with regard to the particular worker) and collectively (i.e. with regard to the legal and factual conditions existing in a particular society, a particular country, but also in a particular regional community and, finally, also in the international community as a whole. It is pleasing to see that it has been possible, towards the end of World War II, to come, in the context of the International Labour Organisation, to the recognition of the principle that “labour is not a commodity”; but it is regrettable and in a way indicative of the limited perception of this fundamental principle that it has taken quite a long time from the creation of the International Labour Organization immediately after World War I to the principle’s general acceptance.¹¹

III. Social market economy – the natural law approach

After the bad experiences with liberal unfettered market economy, but also in delimitation against the collectivistic economic system of the communist countries, there was developed, in the free part of Europe, the concept of the social market economy which was implemented in many countries, amongst them Germany and Austria in the vanguard.

IV. Renaissance of liberal market economy after 1989

It is deplorable that the fall of the so-called real socialism which led 1989 to the political turn in Europe, i.e. to the dissolution of the Eastern bloc, then to the transformation of the former communist countries into states of reform, finally also to the break-up of the Soviet Union and of the People’s Republic of Yugoslavia, was heralded – by leading groups in the United States, among them economists of the Harvard School of Economics – as the victory of the capitalist system, and that the neoliberalism propagated by them became the model for the reconstruction of a world economic system the modernization of which had then been on the agenda for quite some time already and which now received its firm legal framework by the creation of the World Trade Organization (WTO) in 1995¹² and the conclusion of the basic treaties related to it (namely the “new” GATT, GATS and TRIPS¹³).

V. New objections against liberal market economy

Unlimited economic growth an illusion

Under the just mentioned circumstances globalisation has also its darker sides. In order to conceal the slow but steady deterioration of the situation of working part of the population in industrial countries, which results in longer working hours and lower wages, mainly two measures have been resorted to: the outsourcing of production to low-wages countries and automation. However, both measures mean that workers will be set free on the domestic market, with the temporal effect that the level of workers’ wages may be preserved, but of course only for fewer and fewer workers. In order to compensate this, producers try to produce new and more intelligent products, thereby gaining a lead over other parts of the world which would permit higher prices and would justify a higher level of wages. In addition, the service sector shall be enlarged in comparison with the industrial

¹⁰ Vgl. Vgl. dazu umfassend JOHANNES MESSNER, *Das Naturrecht. Handbuch der Gesellschaftsethik, Staatsethik und Wirtschaftsethik*, 7. (unveränderte) Aufl. Berlin 1984, IV. Buch: Wirtschaftsethik, 1038 ff. (Der Lohn).

¹¹ In the Declaration of Philadelphia of 1944, the International Labour Organization recognized that “labour is not a commodity”. This principle was received into the revised Statute of the ILO.

¹² See. PETER-TOBIAS STOLL, *World Trade Organization*, in: RUDOLF BERNHARDT (ed.), *Encyclopedia of Public International Law*, Vol. 4, Amsterdam et al. 2000, 1529 et seqs.

¹³ Cf. *ibid.*, 1537 et seqs.

sector. This and the coil of the annual economic growth keep the system going. Everything is based on the hope that the longing of man for always more and always better goods will never be completely satisfied.

VIII. No inexhaustible resources

Such a concept fails to recognize that we do not dispose of inexhaustible and unfailing resources. This was not so apparent in former times when the limits of resources had not been reached. In my home country Austria we have the legend of the mountain of ore. According to that legend, a benign mountain troll had once given the following choice to the people of the region: “Gold for ten years, silver for hundred years, ore for ever.” The moral of the story is that people then were clever enough to choose “ore for ever”. Yet, the mountain of ore had to be abandoned some decades ago, because the economic ore, i.e. ore worth being exploited, was depleted. So there was no “ore for ever”.

Excess of population (growth)

And the same is true for other resources. On 27 September of this year we have commemorated the “Global Overshoot Day”, as a reminder that we have consumed the total resources for 2011 after only two thirds of the year. If we shall not be able to make accessible new resources in space – on the moon and other celestial bodies –, we will leave a world completely depleted to the following generations, a world that will not be able to sustain them. And if population growth will continue the same way it did during the last hundred years, we will need colonies on the moon and on the mars or we will wage world-wide wars for the resources left.

IX. Alternatives to liberal market economy

Free market economy in the meaning of liberal market economy therefore is a system that cannot be upheld in a long-term perspective.

Centrally planned economy no alternative

This does not mean that market economy as such has no future; because market economy is that system which offers to those engaged in economic activities the incentive to gain greater profit through greater efforts or better performance, respectively. And its counterpart, centrally planned economy, has to fail because the only incentive it offers is to earn the fixed wages through the least possible efforts (by just fulfilling the planned production target). And the planned production target will necessarily be oriented – for understandable social considerations – on the achievement potential of the weakest link in the chain, leaving the higher achievement potentials of all other chain links unused.¹⁴

Alternative Ordo-Liberalism

What is needed, therefore, is an economic system that preserves the advantages of market economy but excludes the negative aspects of free or liberal market economy. Among the latter are the in principle dissatisfactory situation of workers and the reckless exploitation of natural resources, but also certain abuses as cartel agreements among producers, which have as their object or effect the prevention, restriction or distortion of competition, and the abuse of a dominant position in the market, which all are suited to reduce or remove the advantages for consumers.

Bonum commune as the orientation

In this connection, the following central postulations of natural law have to be taken into consideration: freedom of the individual that must be able to display itself also in economic life, and justice which grants to everyone an adequate share in the outputs of

¹⁴ Cf. PAUL-GÜNTHER SCHMIDT, *Planwirtschaft*, in: *Staatslexikon der Görres-Gesellschaft*, 7th ed., Vol. 4, Freiburg-Basel-Vienna 1988, 414 et seqs.

economic activities, independently of whether he participates in the latter as entrepreneur and employer or as worker and employee. These basic postulations of natural law are moral demands on the members of society, but they have also to be regarded natural legal claims which have to be transformed into positive law, a task that falls to the political forms of society's organization, i.e. – in ascending order – to the state, to regional (and today especially to supranational) organisations and, finally, to universal organisations and institutions.

Fulfilment of this task falls primarily within the state's main purpose, the establishment and preservation of the common good; for the very *raison d'être* of the state is the realization of the three aspects of the common good – security, freedom, and welfare.¹⁵ However, since states are not – because of the comprehensive interdependence among them – able to individually fulfil the task of establishing and preserving the common good, the traditional notion of the *bonum commune* has to be enlarged into the notion of the *bonum commune humanitatis*,¹⁶ the realization of which is a task for the international community as a whole, a task which it primarily tries to fulfil in an organised form, i.e. through universal and regional organisations.¹⁷

X. From social to eco-social market economy

I have mentioned before that in (Western) Europe, after World War II, free or liberal market economy has been substituted by social market economy. This was done by new legal regulations intended to have everyone share in the advantages of the market, independently of whether they were entrepreneurs or workers, and whether they were producers or consumers.¹⁸ This approach was also reflected in the treaties on supranational integration, especially in the Treaty establishing a European Economic Community of 1957.¹⁹

1. Sharpening of ecological consciousness

During the early decades following World War II, economic reconstruction was the main focus in Europe. It was only in the seventies of the twentieth century, under the impression of the “oil crisis” of 1973/74 in the wake of the Jom-Kippur-War, that an ecological consciousness slowly developed, based on fears that the ecological system might be polluted or altogether destroyed through excessive industrial activities and that increasingly ruthless exploitation would lead to a shortage of natural resources.²⁰

¹⁵ Cf. WALTER KERBER/ALEXANDER SCHWAN/ALEXANDER HOLLERBACH, *Gemeinwohl*, in: *Staatslexikon der Görres-Gesellschaft*, 7th ed., Vol. 2, Freiburg-Basel-Vienna 1986, 857 et seqs.

¹⁶ Vgl. ALFRED VERDROSS, *Der klassische Begriff des bonum commune und seine Entfaltung zum bonum commune humanitatis*, *Österreichische Zeitschrift für öffentliches Recht*, Vol. 28, 1977, 143 et seqs.

¹⁷ Cf. HERIBERT FRANZ KOECK/PETER FISCHER, *Das Recht der Internationalen Organisationen*, 3rd ed. Vienna 1997.

¹⁸ Vgl. REINHARD BLUM, *Soziale Marktwirtschaft*, in: *Staatslexikon der Görres-Gesellschaft*, 7th ed. Vol. 4, Freiburg-Basel-Vienna 1988, 1240 et seqs.

¹⁹ Vgl. WERNER KLEIN/SPIRIDION PARASKEWOPOULOS/HELMUT WINTER (eds.), *Soziale Marktwirtschaft – Ein Modell für Europa. Festschrift für Gernot Gutmann zum 65. Geburtstag*, Berlin 1994.

²⁰ Vgl. WOLFGANG HABER, *Ökologie*, in: *Staatslexikon der Görres-Gesellschaft*, 7th ed., Vol. 4, Freiburg-Basel-Vienna 1988, 151 et seqs..

2. The emerging of ecological parties

And it was not before the eighties that parties with a pronouncedly ecological orientation (the “greens”) were able to gain ground in the European political landscape.²¹

3. Eco-social market economy in Europe

At this time, social market economy was widened into eco-social market economy;²² and these ideas were reflected in the legislation of many states. It has also made its way into the Treaty on European Union and the Treaty on the Functioning of the European Union where the protection of the environment ranks among the objectives of the of the Union²³ and is dealt with in numerous provisions.²⁴

The concept of eco-social market economy also constitutes a basis for that Part of the constitutional treaties of the European Union which is devoted to the co-operation with developing countries.²⁵

XI. Eco-social market economy versus WTO system

Transfer of these eco-social ideas of the European Union to the sphere of global economy is hampered by the Union’s membership in the World Trade Organization where it is subject to those rules of the game that were laid down in the nineties under the influence of the above-mentioned neo-liberalism and the observance of which is insisted upon in particular by the United States.²⁶

VII. Economy and ethos (ethics)

Today’s debate concerning the correct shaping of global economy and the role of the market is mostly dictated by superficial and short-term interests, and does not allot the necessary room for ethical question connected therewith. Moreover, there does not exist agreement on whether ethical approaches should take precedence over merely economic considerations, and, if so, which particular ethical approach or approaches should be chosen.

Global economy – global ethos

This notwithstanding, the idea of a world ethos for world economy implies a common basis of different ethical approaches, because a world ethos cannot be based on one single ethical concept or system as it has developed in the course of time under the specific

²¹ Cf.. SASKIA RICHTER, *Entwicklung und Perspektiven grüner Parteien in Europa. Anschlussfähige politische*

Kraft in sich wandelnden Systemen, Berlin 2009.

²² Confer *inter alia* JOSEF RIEGLER (ed.), *Antworten für die Zukunft. Ökosoziale Marktwirtschaft*, Vienna 1990.

²³ Af. Art. 3 para. 3 TEU: „The Union shall establish an internal market. It shall work for the sustainable development of Europe based on balanced economic growth and price stability, a highly competitive social market economy, aiming at full employment and social progress, and a high level of protection and improvement of the quality of the environment. It shall promote scientific and technological advance.”

²⁴ Cf.especially Part III, Tutle XX of the TFEU, which in its entirety is devoted to the environment (Arts. 191 et seqs.)

²⁵ Part V, Tite III (Arts,. 208 et seqs.) TFEU is governed by the claim of Art. 21 para. 2 lit. d TEU: “ [...] foster the sustainable economic, social and environmental development of developing countries, with the primary aim of eradicating poverty [...]”.

²⁶ As to these rules, cf., on the one hand, ERNST-U. PETERSMANN, *World Trade, Principles*, in: RUDOLF BERNHARDT (ed.), *Encyclopedia of Public International Law*, Vol. 4, Amsterdam et al. 2000, 1542 et seqs.; on the other, PETER-TOBIAS STOLL, *World Trade, Dispute Settlement*, in: RUDOLF BERNHARDT (ed.), *Encyclopedia of Public International Law*, Vol. 4, Amsterdam et al. 2000, 1520 et seqs.

conditions of a particular society, even if this society claims to be at the forefront of the development of mankind. For such a concept would be influenced by certain special religious, philosophical and cultural conditions that were decisive for just this particular society but which are – looked upon from global point of view – a “regional” occurrence.

VIII. Global ethos in a pluralist world

Criticism of such a concept – here specifically of that of free or liberal market economy – is, however, in order not to be regionally limited, possible only on the basis of common values which are supra-regional and in a certain way global. When the Christian-occidental community of states was confronted at the early modern times, because of the discovery of the New World with its non-Christian state-like entities, Francisco de Vitoria²⁷ and the “classic” school of Salamanca founded by him established natural law as the basis for the relations of communities with different religions.²⁸

IX. The natural law approach

If we take it that in fact there are only two methods for viewing the order between people – as it exists, in a binding form, in domestic law which, however, has its equally binding basis in international law which may even supersede domestic law, as is the case with the law of supranational organizations –, namely either that which is exclusively oriented on positive law (the positivist approach) or that which undertakes to deduce adequate rules from the essence (the “nature”) of man and society, and if we accept that the positivist approach is unable to satisfy the demand for “adequate rules”, there is only one method left, and this is the so-called natural law approach.²⁹

Indeed, it can be demonstrated that natural law (if not expressly, yet implicitly) had been at the basis of many developments in the international community after World War II,³⁰ facilitated, of course, by the fact that international law is in itself equitable and therefore

²⁷ Cf. HERIBERT FRANZ KOECK, Vitoria, in: *Staatslexikon der Görres-Gesellschaft*, 7th ed., Vol. 5, Freiburg-Basel-Vienna 1989, 764 et seq.

²⁸ Cf. ALFRED VERDROSS, *Abendländische Rechtsphilosophie*, 2nd ed. Vienna 1963, 92 et seqs.

²⁹ Cf. HERBERT SCHAMBECK, Idee und Lehren des Naturrechts, in: JOSEPH HÖFFNER./ALFRED VERDROSS/FRANCESCO VITO (eds.), *Naturordnung in Gesellschaft, Staat, Wirtschaft, Festschrift für Johannes Messner*, Innsbruck-Vienna-Munich 1961, 437 et seqs.; SCHAMBECK., Der Stand der Naturrechtsdiskussion heute, in: EDWARD KROKER/THEODOR VEITER (eds.), *Rechtspositivismus, Menschenrechte und Souveränitätslehre in verschiedenen Rechtskreisen*, Vol. IX, Vienna-Stuttgart 1976, 11 et seqs.; SCHAMBECK., Naturrecht und Verfassungsrecht, in: DOROTHEA MAYER-MALY/PETER M. SIMONS (eds.), *Das Naturrechtsdenken heute und morgen, Gedächtnisschrift für René Marcic*, Berlin 1983, 911 et seqs.; SCHAMBECK., Zur Lehre von der Gerechtigkeit und der Natur der Sache bei Johannes Messner, in: RUDOLF WEILER/AKIRA MIZUNAMI (eds.), *Gerechtigkeit in der sozialen Ordnung. Die Tugend der Gerechtigkeit im Zeitalter der Globalisierung*, Berlin 1999, 153 et seqs.; also in: HERBERT SCHAMBECK/RUDOLF WEILER (eds.), *Naturrecht in Anwendung. Vorlesungen im Gedenken an Johannes Messner, Gründer der „Wiener Schule der Naturrechtsethik“*, Vienna-Graz 2009, 417 et seqs.

³⁰ This is supported by the recognition that protection human rights in any particular state is a concern of the international community as a whole, as well as by the acceptance that there exist basic rights and duties of states pertaining to any community organized in a state-like manner quite independently of its recognition as a state by other states. These basic rights and duties may be summarized by “peace and co-operation”. Cf. J.N. RUDA, States, Fundamental Rights and Duties, in: RUDOLF BERNHARDT (ed.), *Encyclopedia of Public International Law*, Vol. 4, Amsterdam et al. 2000, 673 et seqs..

often able to produce results much more adequate than sticking to written positive legal rules would ever permit.

X. Objections against the natural law approach

Against this development which we could call the renaissance of natural law, only two objections are raised in principle. One objection comes from the camp of the positivists and uses the well-known argument that ultimate values cannot be discerned and that, therefore, the only solid basis is positive law, while everything else is nothing but ideology. The other objection comes from the camp of those ideologies which – while not agreeing in substance with the classic natural law doctrine – but claim for themselves to be based on objective values. Here belong all those who reproach classic natural law to impersonate but the Judeo-Christian tradition are therefore not to be binding for people and states of other cultural areas.

XI. Answers to the objections: dynamic natural law

Of course, these objections of principle could have long been refuted, at least on the level of practice, by demonstrating that natural law has to offer adequate rules (or at least principles) for all men of all times and all cultures.³¹ But this presupposes that the dynamic character of natural law is perceived and recognised, a dynamic that reacts in a flexible manner to the

Development of civic and political society and is able to always offer appropriate solutions. Natural law, therefore, must not be regarded a static collection of principles but a dynamic order offering adequate answers for the problems that arise *hic et nunc*, then and there in any given situation.³²

³¹ Cf. especially HERBERT SCHAMBECK, *Der Begriff die „Natur der Sache“*. Ein Beitrag zur rechtsphilosophischen Grundlagenforschung, Vienna 1964; SCHAMBECK., *Der Begriff der „Natur der Sache“*, in: RUDOLF WEILER (ed.), *Die Wiederkehr des Naturrechts und die Neuevangelisierung Europas*, Vienna 2005, 162 et seqs.

³² Vgl. ALFRED VERDROSS, *Statisches und dynamisches Naturrecht*, Freiburg 1971; HERBERT SCHAMBECK, *Naturrecht in Zeitverantwortung*, in: WERNER FREISTETTER/RUDOLF WEILER (eds.), *Mensch und Naturrecht in Evolution*, Vienna-Graz 2008, 15 et seqs.