

The Kantian Republic as a social constitutional State¹

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The economy is too serious a matter
to be left entirely to its own devices.

I.

As an empirical social science, economics cannot do without the inclusion of findings from other social sciences in its theory, and even less so in its social application. Similarly, the areas of social application form a causal nexus in which interventions in one area have repercussions in other areas. I would therefore also prefer to speak generally of social politics, within which then the various types of politics can be distinguished conceptually, even if they cannot be strictly separated in practice.² Now, as already Aristotle recognized, the economy is indeed the lowest of the human spheres of life, but at the same time it is absolutely indispensable, as it generates the means necessary for a specifically human, i.e. self-determined life. Therefore, also an economy-related politics is an integral, but at the same time subordinate component of social politics in that referring to economic expediency (e.g. promoting growth) is not sufficient to justify its measures. Rather, like all socio-

¹ When I speak of a „constitutional State“, I don't mean just any State whose use of force is limited by a constitution. Rather, I mean a liberal democratic State governed by the rule of right. (In German and especially used with regard to Germany: „Rechtsstaat“.

Strictly deviating from the usual Anglosaxon terminology, the Cambridge Edition of Kant's works always translates Kant's „Recht“ into „right“ and his „Gesetz“ into „law“. Accordingly, in the context of the terminology used in **Kant's Doctrine of Right**, one would not study „law“ (**lex, Gesetz, loi, legge**), but „right“ (**ius, Recht, droit, diritto**). That means: what Anglosaxon lawyers (in German: **Rechtsanwälte**) call „public law“, „national law“, „international law“, „penal law“, „private law“, „contract law“ becomes in the CE „public right“, „right of the state“, „right of nations“, „right to punish“, „private right“, „contract right“. Accordingly, „rightful“ (rechtlich) is the adjective for the noun „right“ (Recht). „Lawful“ or „legal“, however, will be used for the German adjective „gesetzlich“. To give an example: as a consequence of the Nuremberg Laws, the German Jews were still in a lawful condition, but no longer in a „rightful condition [...] of distributive justice“ (RL 06.307)..

The CE translator rightly remarks: „The most serious problem of translation in *The Metaphysics of Morals* is the term *Recht*.“ I would therefore recommend reading the „translator's note on the text“. See also my „On the Cambridge Edition of Kant's works / Why a complete revision of its translation is urgently needed“, in: Annual Review of Law and Ethics, 32 (2024)

Since the CE is currently the authoritative translation of Kant's works into English, I will also use its ‚continental‘ terminology in this article

² See on this *Kurt W. Rothschild*, „The absence of power in contemporary economic theory“, in: Journal of Socio-Economics, 31 (2002) 433-442; *Hans Albert*, „The neglect of sociology in economic science“, in: Kurt W. Rothschild (Ed.), *Acemoglu Harmondsworth*: Penguin Books, 1971, 21-35; Hans Albert rightly speaks elsewhere of a „general sociology as a science of social control, and thus also of the order of society“ (*Hans Albert*, „Die Idee der politischen Ökonomie und das Problem der rationalen Politik“, in: Gesellschaft zur Förderung der Westfälischen Wilhelms-Universität zu Münster (Ed.), *Feier zur Verleihung des Ernst Helmut Vits-Preises* 30. November 1976,13).

political measures in general, it must be judged by whether it serves the final end of society as a *res publica*. To anticipate it, this end is not the economy, but „that lawful constitution which secures everyone his freedom by laws“³. All this does not detract from the specific value of the various policies (such as monetary policy, fiscal policy, labor market policy, etc.) and of the various results (such as productivity, growth, full employment, etc.); but this value is always the value of a means to an end, not an end in itself.

Like all social sciences, economics is an empirical science that uses theory-based nomological hypotheses and empirical research to understand and explain a specific aspect of social reality and, if possible, to use it also for making predictions. It can only establish that something *is* one way or another and explain it by referring to certain causal relationships. To make a normative statement on this basis (it *ought* to be this way or that way) would be a so-called naturalistic fallacy. The economist would be in the same position here as the nuclear physicist, who (mind you) as a *physicist* would make a moral (ethical or juridical) assessment of the nuclear bomb.

The same applies to „economic policy“ as applied economics. Here, too, the economists as such, with their social-technological competence, can only say what effects (including risks and side effects) certain economic policy measures are likely to have, or what measures would be necessary to achieve certain economic policy or other political goals. However, the objectives themselves, i.e. the normative aspect of economic politics, are not and cannot be their concern.⁴

Whenever an economist, whether working in academia or in business, makes economic policy proposals, these are by no means founded solely on supposedly purely economic knowledge, as if their quality or necessity were based solely on market laws („practical constraints“), but always at the same time on certain normative guidelines, which in turn require justification. If, for example, efficiency in the sense of profit maximization or an increase in the „wealth of nations“ is not only

³ TP 08.298. For Kant's works I shall use the following abbreviations:

Anth = Anthropology from a Pragmatic Point of View; EaD = The End of All Things; IaG = *Idea for a Universal History from a Cosmopolitan Point of View*; KrV = Critique of Pure Reason; MS = The Metaphysics of Morals; NRFeyer = Naturrecht Feyerabend; Refl = Notes; RL = Doctrine of Right; TL = Doctrine of Virtue; SF = The Conflict of the Faculties; TP = On the Common Saying: That may be Correct in Theory, but it is of no Use in Practice; VARL = Drafts on the Doctrine of Right; VATP: Drafts on the Common Saying; VAZeF = Drafts on Toward Eternal Peace V-MS/Vigil = The Metaphysics of Morals Vigilantius (lecture notes); ZeF = Toward Eternal Peace.

The number before the (first) period refers to the volume of the *Academy edition*, the number after it refers to the page. A second point is followed by a reference to the line. Additions made by me within quotations are enclosed in square brackets. Such brackets are also used to indicate omissions.

CE = Cambridge Edition; pmt = partly my translation; m/tr = my translation; m/it = my italics. Letters in bold are all mine

⁴ With regard to the tendency of many economists to make economic policy recommendations, it must be said that such recommendations always presuppose a value judgement about what is economically or socially desirable or necessary. However, as an empirical science, economics is not qualified to make value judgements and thus such recommendations. What is dangerous about this is, that the addressees of the recommendations take them seriously precisely because they stem from experts in the field of *economics*, whereas as a matter of fact experts in the field of *social philosophy* would come into consideration. It should be noted that the argument here is not against making value *judgements* on economic policy, but only against the fact that the wrong expertise is being used, i.e. that there is in fact a lack of expertise. The economist as a *social scientist* has professional competence with regard to *means to assumed ends*.

an (important) subject of economic research, but is declared to be the goal of all economic activity,⁵ then this is based on extra-economic assumptions.

It is these assumptions that determine which economic policy issues are considered relevant at all, and which then, of course, also have a decisive influence on the answers. Therefore, before any concrete economic policy is implemented, it must be clarified according to which principles the commonwealth and its economy should be organized. Such a clarification belongs to the domain of philosophy.⁶ However, when ethicists, including theologians, repeatedly speak out here, it should be noted, that for solving the problems raised here, any doctrine of ethical or (in the narrower sense) moral principles with reference to behaviour in the economic field is out of the question. The rules, the rights and claims, the orders and prohibitions at stake here are not ethical, but juridical in nature. And so this is a matter of philosophy of right – applied to economic life.

II.

The final end, I have alluded to, is not, as Kant emphasizes, „the *welfare* of [the State's] citizens and their *happiness*“, but the State's „*well-being*“⁷ („*salus reipublicae*“), which is „that condition in which its constitution conforms most fully to principles of right; it is that condition which reason, *by a categorical imperative*, makes it obligatory for us to strive after.“⁸

„*Salus civitatis (not civium) suprema lex esto* does not mean that the physical well-being of the community (the *happiness* of the citizens) should serve as the supreme principle of the State constitution; for this well-being, which each individual depicts to himself according to his personal inclination in this way or that, is no good at all for an objective principle, which requires universality. The dictum says only that the *rational well-being*, the preservation of the *State constitution* once it exists, is the

⁵ Critical of this *Hans Albert*, „Grundprobleme rationaler Ordnungspolitik. Vom wohlfahrtsökonomischen Kalkül zur Analyse institutioneller Alternativen“, in: Hellmuth Milde / Hans G. Monissen (Eds.), *Rationale Wirtschaftspolitik in komplexen Gesellschaften*, Stuttgart: Kohlhammer, 1985, 53-63.

⁶ Myrdal was completely right in his sharp criticism of value judgments in economics. But he was equally wrong to extend his argument to the philosophy of right and of politics.

⁷ Kant uses in this context the term „Wohl“, which can mean „welfare“ as well as „well-being“. But he uses it only with regard to the citizens, not to the State. For the State, he chooses, somewhat surprisingly for the reader at first, the German word for „salus“ (reipublicae), i.e. „Heil“ (des Staats) („salvation“ [of the State]). Both the Latin and German expressions extend into dimensions quite different from those of the expression „Wohl“ (well-being; welfare), not least also into theological resp. religious dimensions, which are particularly clear and strongly expressed in the German word „Heiland“ in the sense of „Heilsbringer“ (savior or redeemer); and for Kant presumably the positive counterpart to Hobbes' „Leviathan“. Nevertheless, under no circumstances should any theological or religious meaning be attached to Kant's considerations. What he says in the next paragraph of the sentence „All authority is from God“ also applies to his discussion of „Heil des Staats“ („salus reipublicae“, „salvation of the State“), that it is about an „idea as a practical principle of reason“ – about the idea of an autonomous State, that is, a State „which forms and preserves itself in accordance with laws of freedom“. – „The [„Heil“] of the State is something entirely different from that of the people. The former concerns the whole with regard to their subordination to laws and the administration of justice, the latter concerns the private happiness of each individual; to attend to the latter is one of the merits of a prince.“ (Ref. 7430, 19.372 [Mid-1770s!]; m/tr) To attend to the first is a duty for all citizens and, if it happens, a merit.

⁸ RL 06.318. – „what is under discussion here is not the happiness that a subject may expect from the institution or administration of a commonwealth but above all merely the right that is to be secured for each by means of it, which is the supreme principle for which all maxims having to do with a commonwealth must proceed and which is limited by no other principle.“ (TP 08.298)

highest law of a civil society as such; for this endures only as a result of that constitution.“⁹

„[W]elfare possesses no *principle* either for him who receives it or for him who dispenses it (one places it here, the other there), inasmuch as what matters in welfare is the *material* of the will, which is empirical, and which is thus unfit for the universality of a rule. A being endowed with freedom in the consciousness of his superiority over the irrational animal, can and should therefore, according to the *formal* principle of his will, demand no other government for the people to which he belongs than one in which the people are co-legislative; that is, the right of human beings who are supposed to obey must necessarily precede all regard for well-being, and this right is a sacred thing, that is exalted above all price (of utility), and one upon which no government, however beneficent it may persistently be, is permitted to infringe.“¹⁰

Kant only left sporadic comments on specific economic and social-political issues, from which it is not even immediately clear what he thought in particular about the right of the State to intervene in the distribution of property¹¹ (including quantitative and qualitative restrictions). However, like no other philosopher, he provided, with the help of his concept of external right, the philosophical justification for a constitutional State („republic“¹²).

„[T]he concept of an external right as such proceeds entirely from the concept of *freedom* in the external relation of people to one another¹³ and has nothing at all to do with the end that all of them naturally have (their aim of happiness) and with the prescribing of means for attaining it; hence too the latter absolutely must not intrude in the laws of the former as their determining ground. *Right* is the limitation of the freedom of each to the condition of its harmony with the freedom of everyone insofar as this is possible in accordance with a universal law; and *public* right is the sum of *external laws* which make such a thoroughgoing harmony possible.“¹⁴

It is therefore advisable to make use of the principles¹⁵ Kant developed, when it comes to normative questions of economic and social politics.¹⁶

For its self-preservation as a public right order, the State is, concerning the long-term fulfillment of its tasks, generally dependent on conditions that it must create

⁹ Anth 07.331 (pmt).

¹⁰ SF 07.87 (pmt). *The Conflict of the Faculties* was Kant's last work that he himself published (1798).

¹¹ In the following, I understand property to mean any kind of rightful power of disposal over external mine or yours in the broadest sense: over income, capital and real estate assets, but also over a rented apartment, a seat in the theatre or on a bench at the lakeside, and of course also over intangible assets (intellectual property); see also RL 06.274.04-05; 06.289 et seq.

¹² See KrV 03.247 (B 372 f.); RL 06.340; Anth 07.331.

¹³ „All laws of right must proceed from the freedom of those who are to obey them.“ (VATP 23.129; pmt)

¹⁴ TP 08.289 f.

¹⁵ See in detail *Georg Geimann, Kant und kein Ende*, vol. 3: Pax Kantiana oder Der Rechtsweg zum Weltfrieden, Würzburg: Verlag Königshausen & Neumann, 2012. Available via

<https://athene-forschung.unibw.de/?query=Geismann&srcnodeid=85049&id=85049>

¹⁶ See also the outstanding essay by *Jürgen von Kempfski*, „Über den Liberalismus“, in: *Merkur* 1953; reprinted in: *Jürgen von Kempfski, Recht und Politik*, Schriften 2, Frankfurt/Main: Suhrkamp, 1992, 300-320.

itself. This is particularly the case with regard to safeguarding basic civil rights. Relating to this, the State also has the special task of shaping the economic process in such a way, that this safeguarding is guaranteed and not on the contrary jeopardized.

What Kant said about the relationship between the state of private right and the state of public right seems to be neither clear nor consistent. At one point, he says that „the matter of private right“ is „exactly the same in both [states]“¹⁷ and that „a civil constitution is just the rightful state, by which what belongs to each is only secured, but not actually settled and determined.“¹⁸ A little later, however, he speaks of „a state in which what is to be recognized as belonging to [a person] is determined *by law* and is allotted [to the person] by adequate *power*“¹⁹. And already in the essay „On the common saying“ it had been said: „the *right* of human beings under *public coercive laws*, by which what belongs to each can be determined for him and secured against encroachment by any other.“²⁰ The question thus arises as to whether the distribution of property itself is a pre-state one, which the State merely has to protect, or whether the State has a right of intervention with regard to acquiring and owning property, – a right for which the principle would then have to be demonstrated.

By the aforementioned „matter of private right“, however, Kant is by no means likely to have meant a concrete distribution of what is externally mine or yours (äußeres Mein und Dein), being historically accidental and nevertheless binding for the State, but rather a distribution yet to be determined by law, whereby this determination is to be made in accordance with the (distribution-)principles of private right, that already apply in the state of nature (of mere private right²¹) and continue to apply in the civil state (of public right). Accordingly, the context, in which the passage quoted above appears, is as follows: „[public right] contains no further or other duties of human beings among themselves than can be conceived in [private right]; the matter of private right is exactly the same in both.“²² – Any guarantee of property by the State „presupposes what belongs to someone's own (to whom it secures it). Prior to a civil constitution (or in *abstraction* from it) external objects that are mine or yours must therefore be assumed to be *possible*“.²³ It is after all precisely the function of the state of public right to give ‚effect‘ to innate and acquired private right, which in the state of nature, i.e. prior to the civil constitution (or in *abstraction* from it), is

¹⁷ RL 06.306.33 (pmt).

¹⁸ RL 06.256 (pmt).

¹⁹ RL 06.312 (pmt).

²⁰ TP 08.289.

²¹ Cf. ZefF 08.383.20; 08.385.06. – In the case of ZefF, we find a serious mistake in the CE-title. Instead of „eternal peace“ it says „perpetual peace“. The juridical peace, established with the civil state, is an ideal of reason independent of all temporal constraints, an „eternal“ (timeless) task that confronts humanity a priori. One could also speak of a „duratio noumenon“ (EaD 08.327). „Eternal peace“ is a purely juridical concept and belongs to the intelligible world, not, like „everlasting [perpetual] peace,“ to the phenomenal world. And unfortunately, the (temporal) duration of even an „eternal“ peace once established on earth can be short.

²² RL 06.306.

²³ RL 06.256 (2nd italics mine).

indeed already valid right, but not also effective right. Something to be mine or yours, internally and externally, exists *conclusively* only in the State. But while the internal is innate, the external must be acquired. Whether an external object has actually been acquired (in terms of matter and form) and is therefore rightfully possessed is to be decided by the State,²⁴ and this in a predetermined manner. A negative decision therefore does not mean dispossession, but rather the refusal of acquisition.

The empirical act of apprehension on one's own authority of an object that belongs to no one and the related unilateral giving a sign (Bezeichnung; declaratio) are a necessary, but not also a sufficient condition for the subsequent appropriation (Zueignung). *Exclusively* this appropriation *establishes* private right, and it can be achieved only through the (in idea or in reality) united will of all; and through this united will alone does physical acquisition become rightful acquisition. Taking control (occupatio) of a piece of land, belonging to no one, is therefore as such a principle of (provisional) distribution only in the *state of nature*, insofar as here this original acquisition, because of its temporal priority, „has in its favor the rightful *presumption*“, and the external object taken into possession „holds *comparatively* as rightful possession“, – but in anticipation of a civil state and thus of a „will of all actually united for giving law“. ²⁵ Whether a piece of land of any size, of which one has empirically taken possession by simply putting up a flag (declaratio), also becomes conclusively a rightful possession, is, despite temporal priority, by no means ‚prejudiced‘ by physically taking possession, but this must first be decided by the civil legislator;²⁶ „[f]or a right against every possessor of a thing means only an authorization on the part of someone's particular choice to use an object, insofar as this authorization can be thought as contained in a synthetic general will and as in accord with the law of this will.“²⁷ „The *possibility* of merely rightful possession is given as a priori although its *rightful determination* is possible not through anyone's power of choice but only through outer positive laws and thus only in the civil condition.“²⁸ With reference to the „prior occupans“, Kant says in a draft on the doctrine of right: „The limits of entitlement, however, are determined on one's own authority, but in relation to participants possible in the future“. ²⁹

„Abstracting from‘ the civil constitution means at the same time ‚looking to‘ „natural right“, which „can be derived for [the civil constitution] from a priori principles [and] cannot suffer any abrogation through the statutory laws of the [civil constitution]“. ³⁰ By basing its legislation on these a priori principles, the State has the rightful possibility to determine the matter of private right in a generally binding

²⁴ What is externally mine or yours are already in the state of nature subject to „internal laws of right“, „namely to limit the freedom of rightful possession to the condition that it make possible that unification [of choices]. [...] That any object of the power of choice outside me must be acquirable is an identical proposition for otherwise it would not be an object of the power of choice, or freedom would altogether exclude itself from its use which is a self-contradiction. – But how much I may acquire remains thereby undetermined, for if I could acquire everything altogether then my freedom would not limit others' freedom but rather annul it.“ (VARL, 23.278)

²⁵ See RL 06.257; 06.264; and Kant's starting point for his remarks on private right, namely the fundamental § 2 on the „postulate of practical reason with regard to right“. – Incidentally, readers of the Cambridge Edition should be warned. Unfortunately, this edition has included Bernd Ludwig's completely untenable textual changes in its version of the Doctrine of Right; as a result, § 2 no longer exists in the CE, which actually ruins Kant's train of thought. A list of the major changes made by Ludwig in the *Doctrine of Right* is given in the CE of Kant's *Practical Philosophy*, pp. 356-57. – An extremely careful and thorough critique of that ‚publicatio precox‘ edition penned by editor Michael Wolff will appear in the new Academy edition in the volume with the Doctrine of Right.

²⁶ For more on these considerations and their correlation, see: *Arthur Ripstein*, Force and Freedom. Kant's Legal and Political Philosophy, Cambridge, Mass.: Harvard U. P., 2009, 34-41.

²⁷ RL 06.269.

²⁸ VARL 23.288 (m/it).

²⁹ VARL 23.241 (m/tr).

³⁰ RL 06.256 (m/tr).

manner. It is true, that the State does not create private right, but only safeguards existing private right. But whether that, which was acquired („provisionally“) „according to everybody's own *concepts of right*“, is to be recognized as truly existing („conclusive“) private right, is settled and determined by the State as „public (*distributive*) justice“³¹ and secured by it as the executive authority.³² The „favor of the law [...] for determining the limits of rightfully possible possession“, which is referred to in the doctrine of private right, „does not extend beyond the point at which *others* (participants) consent to the establishment of the [rightful condition].“ Only for so long that favor „carries with it all the effects of an acquisition in conformity with right“.³³

Whether the „rightful *presumption*“, which physical possession has in its favor in the state of nature, leads to it being „made into rightful possession through being united with the will of all in a public lawgiving“,³⁴ is only decided in the State, which determines whether it has actually been acquired „in accordance with universal principles of [private and public] natural right“.³⁵ It is not the case that the transition to the State as a state of secured right would inevitably turn a provisional right into a conclusive right. Rather, according to Kant, the state of nature and the civil state differ, as mentioned above, insofar as in the former, something can be acquired exclusively provisionally, while only in the latter, something can be acquired conclusively. *When* something is acquired, the acquisition in the civil state becomes a conclusive one; but *whether* something has been acquired, is only in this state determined by law; and with regard to this determination the positive legislator, for his part, is bound³⁶ to the idea of the „original contract“³⁷. „[I]n terms of their form, *laws* concerning what is mine or yours in the state of nature contain the same thing that those in the civil state prescribe, *insofar as the civil state is thought of by pure rational concepts alone*: only that in the civil state the conditions are specified under which those laws are put into effect (in accordance with distributive justice).“³⁸ „The

³¹ RL 06.312 (m/it). This justice, which only determines everyone's right, is something completely different from the „distributive justice“ that Hayek abhorred as a „mirage“. See *Friedrich A. v. Hayek, Law, Legislation and Liberty*, vol. 2: The Mirage of Social Justice, London / New York: Routledge Publishers, 1976.

³² See RL 06.312. In order to avoid misunderstandings, it should be emphasised that the reference here is always to the „*respublica noumenon*“, i.e. to the „the State *in idea*, as it ought to be in accordance with pure principles of right. This idea serves as a norm (*norma*) for every actual union into a commonwealth (hence internally).“ (RL 06.313; pmt); „a Platonic *ideal (respublica noumenon)*, [...] not an empty figment of the brain, but rather the eternal norm for all civil organization in general, and averts all war.“ (SF 07.91) Real States deviate from this norm to a greater or lesser extent. For this very reason, all State action must be under the constant control of the citizens and be measured against this norm.

³³ RL 06.267 (pmt).

³⁴ See RL 06.257.

³⁵ RL 06.366.

³⁶ „[T]he refusal to distinguish among different types of acquired rights to property was the basis of the belief that slave owners should be compensated (and not slaves).“ (*Thomas Piketty, Capital and Ideology*, Cambridge, Mass./London: Belknap/Harvard UP, 2020, 225) In this case, however, Kant would say that ownership of a slave could never have been acquired because such an acquisition is simply excluded by the „original contract“.

³⁷ See for this TP 08.295; 08.299; ZeF 08.344; 08.350. This original contract is not one that has been concluded or is to be concluded empirically with regard to its content and legitimisation. Rather, it is „*only an idea* of reason, which, however, has its undoubted practical reality, namely to bind every legislator to give his laws in such a way that they *could* have arisen from the united will of a whole people and to regard each subject, insofar as he wants to be a citizen, as if he has joined in voting for such a will.“ (TP 08.297) For details see *Georg Geismann, Kant und kein Ende*, vol. 3, (fn. 15), 69 et seqq.

³⁸ RL 06.312-313 (pmt; m/it).

provisional right continues in its consequences in the civil state and is incorporated into the right of the latter, *insofar as it does not conflict with the nature of the latter*.³⁹ „Hence mine and yours is only provisional until this unification [of everyone’s will to a general will] is established, but it is nevertheless subject to inner laws of right, namely *to limit the freedom of rightful possession to the condition that they make possible that unification*. [...] Only the *a priori* necessary unification of the will *for the sake of freedom* and certain determinate laws of their agreement can make acquisition possible, since the object of choice is previously thought by reason within the unified choice, and *this unified will determines for each what is his*.“⁴⁰ To be able to talk of private right at all, be this even merely provisional, the general will, being articulated in the State, must be presupposed (in the idea) already for the state of nature. Thus the question always arises anew for politics „as doctrine of right put into practice“⁴¹ as to whether a given distribution of external mine or yours *can be thought of as willed by a general (united) will*.⁴²

Well, generally, Kant is not regarded as a proponent of the „welfare State“. And that is correct, if one understands this to mean a State, whose task it is to ensure the „happiness“ of its citizens, in regard to which and how each would have it constituted, men think quite differently, so that „their wills with respect to it cannot be brought under any common principle and so under any external law harmonizing with everyone’s freedom.“⁴³ Kant's rejection of that kind of „welfare State“ („imperium paternale“) is based on its consequences contrary to freedom.⁴⁴ If the welfare of citizens and the distribution of goods related to it are nevertheless made the subject of State legislation, then legitimately *merely* as means⁴⁵ to secure for everyone the rights of man and of the citizen and thus to achieve „a perfectly *just civil*“

³⁹ VARL 23.293 (m/tr; m/it). This reference to the *nature* of the civil state cannot be taken seriously enough.

⁴⁰ VARL 23.278-79 (pmt; m/it); cf. also RL 06.257; 06.263-64

⁴¹ ZeF 08.370.

⁴² Cf. RL 06.258.25-26; 06.263.26-30; 06.269.13-16; VARL 23.237.30-34; 23.288.22-32; 23.323.33-34. In this regard, Hayek states: „There is no obvious reason, why the fact, that a group has come together to ensure law and order and to provide certain services, should entitle the individual members to a certain share of the group’s prosperity.“ (*Friedrich A. v. Hayek, Die Verfassung der Freiheit [The Constitution of Liberty]*, Tübingen: Mohr (Paul Siebeck), 1971, 123 [m/tr]) Well, with this empiricist approach, according to which a group supposedly came together at some point, the normative question of a right cannot even be meaningfully posed; and the considerations, presented here, on the modern legitimisation of State rule, i.e. on the right of the State, are obviously alien to Hayek. Typically, he does not even raise the question of why any member of the group should submit to law and order, given by whomsoever, and accept the concrete provision of services. Beyond the emptiness of Hayek’s position in terms of philosophy of right, it is also subject to sharp empirical criticism. See for this *Daron Acemoglu / James A. Robinson, The Narrow Corridor. How Nations Struggle for Liberty*, New York: Penguin Press, 2019, 464 et seqq. („Living with the Leviathan“). – By the way, Hayek, for whom no word was more important than „freedom“, apparently had no problem advising Chilean dictator Pinochet, whose crimes against humanity he knew about.

⁴³ TP 08.290; see also RL 06.215 f.; TP 08.298; SF 07.87; Anth 07.331; V-MS/Vigil 27.532; further *Gunnar Myrdal, Das politische Element in der nationalökonomischen Doktrinbildung*, 2nd ed., Bonn-Bad Godesberg: Neue Gesellschaft, 1976, 31 et seqq. Even the famous „pursuit of happiness“, as declared in the American Declaration of Independence alongside life and liberty as an „unalienable right“, is not and cannot be a right. Neither is it rightfully possible to prioritise any aim, such as happiness in this case, nor to exclude it. However, every end, including happiness, is subject to the aforementioned rightful restriction.

⁴⁴ See TP 08.290 f.; TL 06.454.06-18.

⁴⁵ See TP 08.298.21-25.

*constitution*⁴⁶. Although Kant's own ‚socio-political‘ proposals are, tied to his time, limited to the poor, foundling homes and church organizations and – in an appendix to the second edition of the *Doctrine of Right* – to foundations in the sense of charitable institutions (hospitals,⁴⁷ churches,⁴⁸ orders⁴⁹ and entailed estates⁵⁰), his reasoning corresponds exactly to the considerations made here.

It is here not about something like ‚material justice‘⁵¹, nor is it about independent principles of a ‚social State‘⁵² being equally ranked to those of the constitutional State, but solely about the question of whether the State is entitled and even obliged to intervene in the social structure of income and wealth in order to fulfil its tasks assigned to it by the idea of the general will. Neither is private property to be converted into common property through ‚redistribution‘; nor does this serve to establish social equality or to allocate property according to (objectively hardly determinable) merit, and most certainly not to promote the happiness⁵³ of the citizens. Rather, redistribution serves exclusively to ensure their external freedom.⁵⁴

⁴⁶ laG 08.22. By the way, the CE-title for laG is again misleadingly wrong. Kant doesn't say „with a cosmopolitan aim“, but „from a cosmopolitan point of view“. In Kant's time, the German word „Absicht“ could mean „aim“, „intention“, „purpose“; but it could also been used as an equivalent for „Hinsicht“ = „respect“, „point of view“. The CE is full of cases, where Kant says „Absicht“ meaning „Hinsicht“, while in the English version one reads „purpose“ or „aim“ or whatsoever. In the *Doctrine of Right* alone I found 6 serious errors: pp. 297.23; 318.20; 350.26; 444.16; 446.11; 487.32.

⁴⁷ Kant already argues, „that the poor and the sick [...] are cared for better and more economically when they are helped with certain sums of money (proportioned to the needs of the time) [...], than when [...] they are provided splendid institutions, serviced by expensive personnel, which severely limit their freedom. (RL 06.367).

⁴⁸ „For a church itself is an institution built merely upon belief, so that when the illusion arising from this opinion [to partake of the grace through the church] disappears through popular enlightenment, the fearful authority of the clergy based on it also falls away and the State, with full right, takes control of the property the church has arrogated to itself, namely the land bestowed on it through bequests. However, the feudal tenants of the institution that hitherto existed have the right to demand compensation as long as they live.“ (RL 06.369).

⁴⁹ „when a State alters its constitution, someone [a nobleman] who thereby loses his title and precedence cannot say that he was deprived of what was his, since he could call it his only under the condition that this form of State continued; but a State has the right to alter its form (e.g. into republicanism).“ (RL 06.370 [pmt])

⁵⁰ „also here, the State has a right and indeed the duty: as reasons for reforming itself gradually become apparent, not to let such a federative system of its subjects, as if they were viceroys [...], revive when it has once become extinct.“ (RL 06.370 [pmt]).

⁵¹ In contrast to ‚formal justice‘, this does not merely mean a consistently and completely equal distribution of the sphere of external freedom, but rather an allocation with reference to the respective end of the use of freedom. In purely juridical terms, ‚material justice‘ would be the allocation of the individually required means for the ends declared to be right. However, such an allocation fails because no generally binding statement can be made either about such ends or about what is individually necessary.

⁵² The term „social state“ is derived from what is mentioned in Articles 20 and 28 of the German Constitution, well known in German as „Sozialstaat.“ The five pillars of this social state are health insurance, long-term care insurance, pension insurance, unemployment insurance, and accident insurance. My own concept of the social state, developed below, goes far beyond that of the German Constitution. I take it in a similar way as Piketty: „I prefer the notion of >social state< because it includes education, other public services, public infrastructure, and not just social security, strictly speaking.“ (*Thomas Piketty / Michael J. Sandel, Equality. What it means and what it matters*, Polity Press 2025, 15 (Piketty).

⁵³ „A government established on the principle of benevolence toward the people [...] - that is, a *paternalistic government* (*imperium patemale*), in which the subjects [...] are constrained to behave only passively, so as to wait only upon the judgment of the head of state as to how they *should be* happy and, as for his also willing their happiness, only upon his kindness - is the greatest *despotism* thinkable (a constitution that abrogates all the freedom of the subjects, who in that case have no rights at all).“ (TP 08.290 f.)

⁵⁴ „the public well-being [„öffentliche Heil“; *salus reipublicae*] that must *first* be taken into account is precisely that lawful constitution which secures everyone his freedom by laws, whereby each remains at liberty to seek his happiness in whatever way seems best to him, provided he does not infringe upon that universal freedom in conformity with law and hence upon the right of other fellow subjects.“ (TP 08.298.15-20) See also *Julius*

It is required not for ethical reasons, but for reasons of right; not because the State, according to Kant, is a „welfare State“, but because it is a State under the rule of right („republic“). For the distribution of external mine or yours in the State determined by „public justice“⁵⁵, too, the „touchstone of conformity with right“ is, that „[it] *could* have arisen from the united will of a whole people.“ If the distribution is „so constituted that a whole people *could not possibly* give its consent to it [...], it is unjust“.⁵⁶ It is therefore about the determination (by universal law) of the conditions, under which external mine or yours (income, property, etc.) can be rightfully acquired at all in terms of quality and quantity, or, in the case of existing property titles, has actually been acquired. Not private property itself, but only the possibility of acquiring and owning it, is a natural right.⁵⁷ With that, nothing is yet rightfully determined about kind and amount.

The „social State“ can only be an integral part of the constitutional State; and this not only in the sense, that it must be in accordance with the principles of right, but that its specific ‚social‘ characteristics are necessary for reasons of *right* and according to the rules of *right*. They must be required by the principle of the rule of right itself. Thus Kant once says of provisional right: „which, however, cannot go further than a possible *iustitia distributiva* can decree (actually through the united will of all [...])“⁵⁸.

The fact that natural right is just as valid in the civil state as in the state of nature, does not mean, that the distribution of property found in the State is sacrosanct.⁵⁹ Rather, the legitimacy of the distribution depends on its conformity with the natural right principles of both private and public right. The sameness in the state of nature and in the State therefore exists for the right of nature, for the laws regarding what is mine or yours and for the (rule-compliant) subject matter of private right; but not for the concrete rights claimed in the state of nature on the one hand and the concrete rights determined by law in the State on the other. For this very reason, according to § 44 of the Doctrine of Right, an acquisition is provisional as long as it is not

Ebbinghaus, „Sozialismus der Wohlfahrt und Sozialismus des Rechtes“, in: *Idem*, *Gesammelte Schriften*, vol. 1: *Sittlichkeit und Recht. Praktische Philosophie 1929-1954*, Bonn: Bouvier, 1986, 231-264.

⁵⁵ RL 06.306.

⁵⁶ TP 08.297 (pmt).

⁵⁷ The same applies to the testamentary disposition of a person's property.

⁵⁸ VARL 23.281 (m/tr).

⁵⁹ „The synthetic principle of outer right can be nothing other than: All distinction of mine and yours must be derivable from the unifiability of possession with the idea of a common power of choice under which stands anyone else's power of choice regarding the same object. – For, because the power of choice of the one party cannot as such be assumed to necessarily agree with that of the other in relation to the same object in accordance with a universal law in accordance with mere laws of freedom (and hence in accordance with the concepts of right), unless each regards himself as required to refrain from any use of outer usable things which could also be objects of others' powers of choice (which however in accordance with the above contravenes freedom), thus under the presupposition of the possibility of an external mine and yours, the condition of their possible agreement in accordance with laws of freedom in the synthetic unity of their powers of choice is the idea in relation to which determination of the limits of mine and yours outside me and thus on which alone can be based all outer contingent right: i.e. only through the idea of a unified power of choice can we acquire. [...] This idea of a united power of choice as that upon which must rest all presumption of an outer right is qua principle and maxim necessary with regard to right even though the unification itself is contingent with regard to right.“ (VARL 23.215) – „But yet one has a right to compel others to preserve, together with their own life, most meagerly our lives as well, because property is only a share in the communal endowment of nature.“ (Refl 7193, 19.268 [m/tr]).

determined and secured by public right.⁶⁰ Although the principles of determination are given to „public justice“ by natural right, the determination itself takes place first and only through this justice.

This does not at all mean, that the State intervenes in a legitimate distribution of property, but rather that the State, in compliance with rational standards of right, establishes and enforces rules according to which property can be legitimately acquired or retained. The State is a „social State“ exclusively within the scope of its tasks as a State that ensures the rule of right. Its politics can be understood as „doctrine of right put into practice“⁶¹. As such, it is not supposed to make people (more) happy; rather, it is supposed to protect them in the exercise of their lawful external freedom from constraints, which in turn are conditioned and made possible in the first place by the same public-right order, that is supposed to protect them, thus by the State itself.

The Vigilantius lecture notes from 1793/94 state: „Thus Professor Kant maintains that in the State, a poor man has gained the right to demand support from the wealthy; for if he were left unrestrictedly to his choice [as in the state of nature], it would be perfectly open to him to earn so much for himself that he could make provision for hard times; but the State has now limited his wages and possible earnings by taxation, whereby the rich man gets more advantages than he could in a state of equality; thus the poor man earns only enough for his current needs, and his savings are taken away from him.“⁶²

And in the essay „On the Common Saying“, Kant once raises the question – admittedly only in passing – with respect to the large (or small) landowners, „how it could with right have come about that someone received as his own more land than he could himself make use of with his own hands [...], and how it came about that many human beings who could otherwise have acquired a lasting status of possession were *thereby* reduced merely to serving him in order to be able to live?“⁶³ It is the historically recurring question about a distribution of external mine or yours as the effect of a property distribution according to positive right,⁶⁴ an effect which possibly cannot be thought of as generally willed.

It does follow from the right of humanity, which is sometimes referred to in this context, that one must not kill or injure another person at will, or inflict suffering on them by arbitrary restriction of their freedom; but not that this person also has a right to be helped in an emergency. This means, that in the state of nature one does have the duty of *virtue* to love one's neighbour and thus also, and especially, to provide assistance in an emergency. But a duty of *right* to do so can only exist, if at all, in the civil state; and it would then require its own justification.

⁶⁰ See RL 06.312.

⁶¹ ZeF 08.370.

⁶² V-MS/Vigil 27.540 (pmt).

⁶³ TP 08.296 (m/it).

⁶⁴ „In its concrete regulatory content, every law necessarily has an impact on the kind of social distribution of power and is already in its emergence also moulded by a prior distribution of social power.“ *Gerhard Luf*, *Freiheit und Gleichheit. Die Aktualität im politischen Denken Kants*, Wien / New York: Springer, 1978, 72.

„*There is only one innate right. Freedom* (independence from being constrained by another's choice), insofar as it can coexist with the freedom of every other in accordance with a *universal law*, is the only original right belonging to every man *by virtue of his humanity*.“⁶⁵ A right of the State to intervene in property follows by no means directly from this natural private „right of *humanity*“, which is accorded to every human being merely as a *human being* and which *precedes* all public-right order forming its rightful basis. That right of the State rather follows solely from „the rightful attributes of a *citizen* [belonging to every man *by virtue of his citizenship*], inseparable from his essence (as a citizen)“⁶⁶, into which the right of humanity is specified under the condition of the „original contract“⁶⁷, which is *by the right of humanity itself*, and therefore rightfully, *necessary*⁶⁸: „1. The *freedom*⁶⁹ of every member of the society as a *human being*. 2. His *equality*⁷⁰ with every other as a *subject*. 3. The *independence*⁷¹ of every member of a commonwealth as a *citizen*.“⁷² („lawful freedom“, „civil equality“, „civil independence“).⁷³ The „rightful state“, created by the original contract, „is that relation of human beings among one another that contains the conditions under which alone⁷⁴ everyone can *have a share* in his rights [innate as well as acquired]“. ⁷⁵

And it is also not property as such, that gives rise to a ‚social obligation‘. It does indeed not follow from the mere concept of property, that I must restrict myself in my use of it vis-à-vis any other person. But to exclude such a restriction also for the state of public right would mean, „that through property the formation of a general will could

⁶⁵ RL 06.237 (second italics mine).

⁶⁶ RL 06.314.

⁶⁷ RL 06.315. TP 08 passim: „pactum sociale“; „contractus originarius“; „pactum unionis civilis“. Rousseau's „contrat social“.

⁶⁸ The necessity of such a contract was originally recognized by Hobbes, for whom, however, it had a completely different content. Kant adopted the content from Rousseau, who in turn did not recognize its necessity. See *Georg Geismann*, „Kant als Vollender von Hobbes und Rousseau“, in: *Der Staat*, 21 (1982) 161-189; *Julius Ebbinghaus*, „Das Kantische System der Rechte des Menschen und Bürgers in seiner geschichtlichen und aktuellen Bedeutung“, in: *Archiv für Rechts- und Sozialphilosophie*, vol. 1, 1964, 34 et seqq.

⁶⁹ „external (rightful) *freedom* is [...] the warrant to obey no other external laws than those to which I could have given my consent.“ (Zef 08.350), a right to co-legislatorship.

⁷⁰ „external (rightful) *equality* within a State is that relation of its citizens in which no one can rightfully bind another to something without at the same time submitting himself to a law by which he in turn *can* be bound in the same way by the other.“ (Zef 08.350)

⁷¹ „owing his existence and preservation to his own rights and powers as a member of the commonwealth, not to the choice of another among the people. From his independence follows his civil personality, his attribute of not needing to be represented by another where rights are concerned.“ (RL 06.314)

⁷² TP 08.290(-296) (m/it).

⁷³ RL 06.314. „If they are not *free*, then it is *possible* for anyone to be restricted or deprived by law in their freedom to seek happiness. If they are not *equal*, then this means that some are *really* restricted in their freedom to seek happiness, in favor of others. If they are not *independent* in their earnings, then it is *necessary* that everyone can have the freedom, to seek their fortune, only at the expense of the corresponding freedom of any other person.“ (*Julius Ebbinghaus*, „Sozialismus der Wohlfahrt und Sozialismus des Rechtes“, [fn. 54], 257 f. [m/tr]).

⁷⁴ For Kant, as for Hobbes before him, the state of nature is a „state *devoid of justice*“ (status iustitia vacuus; RL 06.312), the fundamental and permanent absence of secured peace in terms of right.

⁷⁵ RL 06.305 f. (pmt).

be made *impossible* in every particular case and consequently altogether.⁷⁶ But this is in fact a contradiction; for no property at all is conceivable except in relation to an *at least possible* general will, because no acquisition of objects can be conceived as having originally arisen from a unilateral act of will. [...] *the restrictability of my freedom of disposal by laws of public right is contained in the rightful possibility of property itself.* [...] It is not property that entails obligations, but – as far as external⁷⁷ freedom is concerned – solely the law of the community of right“.⁷⁸ Also the „social State“ can only be established in the way in which the right of the State is established, i.e. via the idea of the original contract⁷⁹ and of the a priori united will of all expressed therein. Every possible task entrusted to the State, „a *moral whole*“⁸⁰, must satisfy the condition of being able to be necessarily willed by everyone,⁸¹ and thus be consistent with the idea of a civil state. In principle, one can say that all those, but only those lawful restrictions on freedom – and this also includes possible intrusions (on private property and its distribution – are rightful and thus legitimate, that are necessary for the maintenance of the (republican) public-right order, and that means also and above all: for securing the external freedom of everyone. „All true social politics is liberation politics.“⁸²

From the duty of right, based on the juridical inconsistency of the state of nature, to leave this state and enter into a state of public right,⁸³ follows for the people (as the multitude of human beings united in a civil society) the further duty of right to maintain this state once it exists, because it is „the only condition in which each can be assigned *conclusively* what is his“⁸⁴. „To the supreme commander there belongs *indirectly*, that is, insofar as he has taken over the duty of the people, the right to impose contributions on the people for its own preservation [as a civil society] [...].“⁸⁵

⁷⁶ Cf. VARL 23.278: „[...] how much I may acquire remains thereby [...] that any object of the power of choice outside me must be acquirable“ undetermined, for if I could acquire everything altogether then my freedom would not limit others' freedom but rather annul it.“

⁷⁷ It is only about right, not about virtue.

⁷⁸ Julius Ebbinghaus, „Sozialismus der Wohlfahrt und Sozialismus des Rechtes“, (fn. 54), 242-43 (m/tr).

⁷⁹ „a rational principle for appraising any public rightful constitution“.

⁸⁰ IaG 08.21.

⁸¹ An example of a tax burden, that can and that cannot be generally agreed on, is to be found in TP 08.297 note.

⁸² Julius Ebbinghaus, „Sozialismus der Wohlfahrt und Sozialismus des Rechtes“, (fn. 54), 257 (m/tr).

⁸³ „That among human beings whose powers of choice stand in outer relations there must be a right (and indeed a public right [!]), i.e. that they must will that there should be such a right so that one can presuppose this as their will, lies in the concept of the human being as a person regarding whom my freedom is limited and whose freedom I must secure.“ (VARL 23.278)

⁸⁴ RL 06.341.

⁸⁵ What Kant notes immediately after this, is crucial for Kant's concept of republic. He starts with the general will of the people, having united itself (through a social contract). General will and original contract are the two pivotal elements around which the discussion on the right of the State and within the State will revolve. It is not, as has been thought, an ethical, but a juridical appendix to the doctrine of the right of a State. In these remarks, Kant is concerned with „the effects concerning *rights* [!] that follow from the nature of the civil union“ (see RL 06.318.16-17). Supporting the poor or those in need is a duty of the State even if their condition does not endanger the stability of the State, provided that it is the civil state *as such* that has brought them into this situation in the first place, just as the wealth of Gates or Musk presupposes the civil state as such.

The general will of the people has namely⁸⁶ united itself into a society which is to maintain itself perpetually; and for this end it has submitted itself to the internal authority of the State in order to maintain those members of this society who are unable to maintain themselves. For reasons of State, the government is therefore authorized to constrain the wealthy to provide the means of maintenance to those who are unable to provide for even their most necessary natural needs: since their [the wealthy's] existence is at the same time [to be regarded] as an act of submitting to the protection of the commonwealth and to its provision, necessary for their existence, a submission to which they have committed themselves, on which the State now bases its right to contribute, what is theirs, to maintaining their fellow citizens.⁸⁷

In this context, it's true, Kant speaks, with regard to the means of subsistence, only of „the most necessary natural needs“⁸⁸ which must *in any case* be satisfied in order to be able to make use of one's external freedom and to pursue any purposes at all, i.e. to be a person. But beyond securing the livelihood of all citizens, it is about really safeguarding freedom.

The reason for establishing a civil society and submitting to its laws is not just pure physical self-preservation as a living being, but self-preservation *as a person*, i.e. as an externally free being *capable of pursuing and realising self-imposed ends*, – self-preservation as a self-determining human being and citizen. Accordingly, the State – and not as a charitable Samaritan, but as the guarantor of the external freedom of *persons* – has the right and the duty of right to pursue the self-preservation of civil (republican) society. And for safeguarding the fundamental civil rights implied therein, it may in turn also be necessary to interfere with the freedom of disposal under private right, especially if a threat or violation of these fundamental rights is caused by the State itself. If, for example, its legislation (in the broadest sense) makes it impossible for me – directly or indirectly through its effects – „to have an object of my choice as mine“, then I am wronged by it.⁸⁹

For example, laws whose purpose is to restrict market power (monopolies, cartels, trusts)⁹⁰ are based on principles of right and not merely on the desire for more competition. And when a global economic crisis, as it happened, not only destroys enterprises, but also jeopardizes the continuation of the rule of right, then strict framework conditions („regulation“) for stabilizing and controlling the market economy and the reduction of the concentration of economic power are justified in two ways: by the basic rights of the citizens and by the State's duty of self-preservation.

The *natural, private* right of humanity to external freedom, which precedes and underlies the „basic law“⁹¹ of the State and thus the three basic *political, public* rights,

⁸⁶ This word is lacking in the Cambridge Edition, although it indicates that a reason will be given for what was claimed in the preceding paragraph.

⁸⁷ RL 06.325 f. (pmt).

⁸⁸ That the literature predominantly discusses only State measures against *poverty* (see for instance: Sarah Williams Holtman, Kantian Justice and Poverty Relief, in : Kant-Studien, 95 (2004) 86-106), is probably due to the fact that Kant only addressed this topic *specifically*, and, in this instance, filled almost an entire page (see RL 06.325 f.).

⁸⁹ See RL 06.256.

⁹⁰ See e.g. Daron Acemoglu / James A. Robinson, The Narrow Corridor (fn. 42), 480 et seqq.

⁹¹ TP 08.295.

consists in the lawful independence of all with regard to the pursuit of their possible goals of action. Without the necessary means, however, it is impossible to achieve them. And since these means include in particular the power of disposal over (material and immaterial) goods, the lawful guarantee of freedom must also extend to the possibility of obtaining such power of disposal. Now, the living conditions prevailing in the State can make it impossible for a citizen to organise his life according to his own goals.⁹² The condition, in which this person finds themselves, is then no different from the state of nature: their original right is without effect.⁹³ And therefore, with regard to this person, the State does not fulfil its duty of *right*, arising from its „basic law“ concerning the fundamental political rights.

„External (rightful) *freedom*“, as the „the warrant to obey no other external laws than those to which I could have given my consent“⁹⁴, at the same time rightfully excludes that type of State which – for example through its tax legislation or by interventions in the free market – purports to take ‚paternalistically‘ care of the welfare and happiness of its citizens.⁹⁵

„Similarly, external (rightful) *equality* within a State is that relation of the citizens according to which no one can rightfully bind another to something, without at the same time submitting to the law, so that he in turn can also be bound in the same way by the other.“⁹⁶ However, an inequality of distribution of property⁹⁷ made possible by State legislation, can lead to citizens being dependent on the discretion of other citizens with regard to the quality and quantity of what they can acquire and thus finding themselves in a state of inequality that is incompatible with the idea of the general will. The State does have to observe the principles of natural private right in its legislation, but it must do so in the light of the idea of the social contract, to whose conditions the right of disposal over external objects which are mine or yours is bound with the entry into the civil state.

„[T]he attribute of civil *independence* [(as the condition for co-legislatorship⁹⁸), means] owing one’s existence and preservation to one’s own rights and powers as a member of the commonwealth, not to the choice of another among the people. [...]

⁹² Accordingly, the difference between poverty and wealth is not simply the difference in the bundle of goods available, but the difference in the opportunities to realise one's own goals. Poverty therefore not only consists in a low (real) income and – not to be forgotten! – assets, but also in illiteracy, in poor health, in malnutrition, in low life expectancy and similar obstacles to self-determination. Also unemployment, even if social assistance is provided, is also a factor, especially as it can also massively impair the will and the ability to help oneself. For „capitalism without poverty“ and „capitalism with equal opportunity“ see: *D. W. Haslett, Capitalism with morality*, Oxford: Clarendon Press, 1994.

⁹³ Cf. TP 08.301.29 f.

⁹⁴ ZeF 08.350 fn.

⁹⁵ Former Soviet Foreign Minister Gromyko once succinctly formulated the principle of a „paternalistic government“ (TP 08.290): „Our purpose [...] is the well-being of the people, whether they like it or not.“ (quoted from: Richard McKeon [Ed.], *Democracy in a World of Tensions, A Symposium Prepared by Unesco, Paris 1951*, 489); and long before Gromyko Kant himself: „as it were, to make the people happy against its will“ (TP 08.298 f.; see also SF 07.86 f.).

⁹⁶ ZeF 08.350 (m/tr).

⁹⁷ Property in the broadest sense indicated above (fn. 11).

⁹⁸ See TP 08.294; RL 06.314 f.

each is in possession of himself and is not dependent upon the absolute will of another alongside him or above him.“⁹⁹

III.

There are signs¹⁰⁰, it is true, that the long-lasting dominance of the simple equation of neo-classical models and reality is now waning in economic research. Increasingly, the models have been seen as representing a borderline case and have been either modified and supplemented or replaced by others. However, this does not change the fact, that neo-classical patterns of thought (free market, perfect competition, complete information, perfect utility- or profit-maximisation, price mechanism, market equilibrium) still¹⁰¹ or – reanimated and even robust – again dominate the practical public discussion of economic issues, whether the participants are politicians, practicing economists, scientific advisors, or economic journalists.

What is fatal for social politics is first the internal scientific problem itself. The model thinking that is practised misses the economic, or rather: the social reality, because it operates „in an institutional, motivational and cognitive vacuum.“¹⁰² Even more fatal, however, is the fact that these patterns of thought largely function as *normative* guidelines for economic and social politics.¹⁰³

The fact that the free market economy based on private property¹⁰⁴ is vastly superior to the „central administration economy“¹⁰⁵, is undisputed today. The last two decades of the 20th century have only made this perfectly clear once again. However, the excesses of the supposedly free market, or perhaps better: its perversions have also become drastically apparent in the very last decades. The so-called „Manchester liberalism“, which was orientated towards interests and not towards right,¹⁰⁶ had a renaissance with the slogan „de-regulation“ under the long-established, but then, since at least the Reagan/Thatcher era, negatively perceived name of „neo-liberalism“. The particular threat associated with this is, that it also discredits the

⁹⁹ RL 06.314; 06.317 (pmt).

¹⁰⁰ On this already: *Daniel Bell / Irving Kristol* (Eds.), *The Crisis of Economic Theory*, New York: Basic Books, 1981.

¹⁰¹ This is not at all surprising, as many were socialised under the rule of the neo-classical paradigm. Keynes put it in a nutshell as early as 1936: „in the field of economic and political philosophy there are not many who are influenced by new theories after they are twenty-five or thirty years of age, so that the ideas which civil servants and politicians and even agitators apply to current events are not likely to be the newest.“ *John Maynard Keynes*, *The General Theory of Employment, Interest and Money*, London: Macmillan Publishers, 1936, 384.

¹⁰² See *Hans Albert*, *Traktat über rationale Praxis*, Tübingen: Mohr (Paul Siebeck), 1978, 126; further: *Hans Albert*, „Individuelles Handeln und soziale Steuerung. Die ökonomische Tradition und ihr Erkenntnisprogramm“, in: Hans Lenk (Ed.), *Handlungstheorien interdisziplinär IV*, München: Wilhelm Fink, 1977, 177-225; *Hans Albert*, „Modell-Denken und historische Wirklichkeit. Zur Frage des logischen Charakters der theoretischen Ökonomie“, in: *Hans Albert* (Ed.), *Ökonomisches Denken und soziale Ordnung*, Tübingen: Mohr (Paul Siebeck), 1984, 39-61.

¹⁰³ On this already *Gunnar Myrdal*, *Das politische Element in der nationalökonomischen Doktrinbildung*, (fn. 43); further on the „hypostatisation of the economic perspective“ *Hans Albert*, „Reine Theorie und politische Ökonomie: Die Problematik der ökonomischen Perspektive“, in: Idem, *Marktsoziologie und Entscheidungslogik*, Neuwied am Rhein / Berlin: Luchterhand, 1967, 49 et seqq.

¹⁰⁴ Often misleadingly referred to as „capitalism“.

¹⁰⁵ Often misleadingly referred to as „socialism“.

¹⁰⁶ See *Jürgen v. Kempfski*, *Recht und Politik*, (fn. 16), 313.

system of the competitive economy as such and that calls for State intervention might be heard again.

Neo-liberalism not only still dominates important areas of economic thinking and life.¹⁰⁷ It also became, without any significant changes, the ideology that generally determined the policies of the subsequent, supposedly „left-wing“ governments of the USA, Great Britain and Germany, i.e. the Democrats, Labour and the SPD, Bill Clinton, Tony Blair and Gerhard Schröder. Accordingly, they also „did not challenge the central premise of the Reagan-Thatcher era – that market mechanisms are the primary instruments for achieving the public good.“¹⁰⁸ „And so, when they adopted neoliberal trade policies and the deregulation of finance during the 1990s and early 2000s, they were enacting that project and uncritically embracing the market faith. And so we never really had a public debate about where markets serve the public good and where they don't belong.“¹⁰⁹ Even Olaf Scholz, who initially served as finance minister under Chancellor Merkel and then as chancellor himself, joined the neo-liberal round. He regarded Schröder's Agenda 2010 as „social democratic policy“, which can probably be taken as a definitive departure from such a policy. It is therefore not surprising that Scholz, who himself comes from the upper middle class, ensured as First Mayor of Hamburg that shipowners were allowed to retain all of their employees' income tax for five years.¹¹⁰ To avoid any misunderstanding: it's not that he ensured that the employees of the shipping companies did not have to pay income tax for five years.

¹⁰⁷ „To be sure, markets do not necessarily rest on meritocratic assumptions. The most familiar arguments for markets are about utility and freedom. [...] But the market triumphalism of the 1980s prompted the articulation of a third, meritocratic rationale: Provided they operate within a fair system of equal opportunity, markets give people what they deserve. [...] Over the past four decades, the language of merit and deservingness has become central to public discourse. One aspect of the meritocratic turn displays the hard side of meritocracy. This aspect finds expression in the demanding notions of personal responsibility that have accompanied attempts to rein in the welfare state and to shift risks from governments and companies to individuals. A second aspect of the meritocratic turn is more aspirational. It finds expression in what might be called the rhetoric of risking, the promise of those who work hard and play by the rules deserve to rise as far as their talents and dreams will take them. The rhetoric of personal responsibility and the rethoric of rising, having animated political argument in recent decades, eventually contributive to the populist backlash against meritocracy.“ (*Michael J. Sandel, The Tyranny of Merit, What's Become of the Common Good, Penguin Books: 2021, 62 et seqq.*)

Prototypically the initiator and managing director of the Hayek Society and chairman of the Hayek Foundation, *Gerd Habermann, Der Wohlfahrtsstaat. Ende einer Illusion, München: FinanzBuchVerlag, 2013*; further *Karl Homann, „Grundlagen einer Ethik für die Globalisierung“, in: Heinrich v. Pierer / Karl Homann / Gertrude Lübke-Wolff, Zwischen Profit und Moral – Für eine menschliche Wirtschaft, München / Wien: Hanser, 2003, 35-72; 105-138; Idem., Das ethische Programm der Marktwirtschaft, Magdeburg: Norbertus, 2008. – A critique of Homann's position by: Georg Geismann, Einmischung ist Bürgerpflicht. Eingriffe und Angriffe 1963-2013, Würzburg: Königshausen & Neumann, 2014, 131 et seqq. – For the extremely orthodox and, as it were, uninvolved, shrugging-off, asocial neoliberalism, I refer to N. Gregory Mankiw's various publications. One of them (at an astonishing level for a Harvard professor) appeared under the title „Defending the One Percent“ in: *Journal of Economic Perspectives*, vol. 27/3, 2013, 21–34. A letter, which I sent to Mr. Mankiw a few months later, wasn't deemed worthy of a reply. But what on earth could he have reasonably answered! – For a fundamental critique of Mankiw's position, see also: *Michael J. Sandel, The Tyranny of Merit, 136 et seqq.**

¹⁰⁸ *Michael J. Sandel, The Tyranny of Merit* (fn. 107) 21. – „Bill Clinton and Barack Obama in the United States, and Margaret Thatcher and John Major in the United Kingdom, all came from modest backgrounds but quite effectively supported the interests of the top 1 percent. Where does the influence of the rich then come from? The answer is quite clear: through the funding of political parties and electoral campaigns.“ (*Branko Milanovic, Capitalism, Alone. The Future of the System That Rules the World, Cambridge, Mass. / London: Harvard UP, 2019, p. 57.*)

¹⁰⁹ *Michael J. Sandel, Equality*, (fn. 52), 39 f.

¹¹⁰ See *Michael Hartmann, Die Abgehobenen. Wie die Eliten die Demokratie gefährden, Frankfurt/New York: Campus, 2018, 153.*

The so-called ‚market radicals‘ have too much faith in the „invisible hand“ and considerably overestimate the self-regulating and self-healing powers of the market, even if one takes into account that they are content with a negative¹¹¹ concept of freedom which is, moreover, limited to economic activity, whereby they, in addition, believe that in the „free market economy“, which they treat as something sacrosanct, in principle everyone has this freedom.

With regard to economic reality, there can be absolutely no question of a ‚natural‘ harmony of interests.¹¹² When Adam Smith, in his economic opus magnum, brought the (still often mentioned¹¹³) „invisible hand“ into play¹¹⁴ (only once, by the way), he had an ideal type of market with truly „free and universal competition“¹¹⁵ in mind. However, competition has never been and never will be truly atomistic competition, including complete market transparency.¹¹⁶ In reality, there are more or less large deviations from the ideal type, both in the economy as a whole and in the various submarkets.¹¹⁷ The logic of market mechanisms does not apply to public goods anyway, which, incidentally, are notoriously subordinate to private goods when it comes to financing. ‚Performance-based competition‘ can easily be replaced by ‚obstructive or harmful competition‘¹¹⁸ with a monopolistic or oligopolistic thrust. Therefore, the so-called market mechanism is anything but a guarantee for the freedom of everyone secured by law. „The invisible hand of the market can become effective only, if the invisible hand of the system of rights supports the market.“¹¹⁹ Even a „spontaneous social order“¹²⁰, which some economic theorists refer to as a result of continuous adaptation to market developments, does not eliminate the need

¹¹¹ When Kant defines freedom as „independence from being constrained by another’s choice“ (RL 06.237), he does not merely *mean negatively* the absence of unlawful external coercion, but at the same time *positively* the presence of the possibility of determining one’s life according to one’s own aims. Many people just don’t have, or only to a very limited extent, the scope of action necessary for such a determination.

¹¹² For criticism of this, see *Gunnar Myrdal*, *Das politische Element in der nationalökonomischen Doktrinbildung*, (fn. 43).

¹¹³ „The market will do it.“ For criticism concerning the price mechanism and its alleged automaticity, see *Hans Albert*, in: Kurt W. Rothschild (Ed.), *Power in Economics*, (fn. 2), 34.

¹¹⁴ „led by an invisible hand to promote an end which was no part of his intention“ (*Adam Smith*, *An Inquiry into the Nature and Causes of the Wealth of Nations*, vol I, book IV, ch. 2, London: Everyman’s Library, 1964, 400).

¹¹⁵ *Adam Smith*, *Wealth of Nations.*, vol. I, book I, ch. 11, part 1, p.134.

¹¹⁶ But only then does the talk of competition as an „instrument of disempowerment“ (*Böhm*) gain weight.

¹¹⁷ On the problems this poses for both economic theory and economic policy, see for example *Hans K. Schneider / Christian Watrin* (Eds.), *Macht und ökonomisches Gesetz*, 2 vols., Berlin: Duncker & Humblot, 1973.

¹¹⁸ *Walter Eucken*, *Die Wettbewerbsordnung und ihre Verwirklichung*, in: *ORDO*, Jahrbuch für die Ordnung von Wirtschaft und Gesellschaft, 2 (1949) 25.

¹¹⁹ *Jürgen von Kempfski*, *Recht und Politik*, (fn. 16), 360. The invisible hand „is not the hand of some god or some natural agency independent of human effort; it is the hand of the law-giver, the hand which withdraws from the sphere of the pursuit of self-interest those possibilities which do not harmonize with the public good.“ (*Lionel Robbins*, *The Theory of Economic Policy in English Classical Political Economy*, London: Macmillan, 1952, 56).

¹²⁰ For this already 1972: *Dietrich Kebschull*, „Die ökonomische und politische Macht multinationaler Unternehmen“; in: *Hans K. Schneider / Christian Watrin* (fn. 117), 763-808. In the meantime, the situation has worsened dramatically, but the fundamental points of criticism put forward by Kebschull and in the subsequent discussion have lost none of their weight.

for regulatory policy by the State and – now, in view of globalised market activity and multinational corporations, much more urgent – internationally.¹²¹

However, before any possible tasks of a regulatory policy¹²² on the part of the State can be discussed, the corresponding main task of the State must be identified.

To avoid any misunderstanding from the outset: As I said, this is by no means about a material justice that cannot even be achieved on earth. What weight should be given on its scales to the various natural and social advantages and disadvantages? The risk of failure, be it a capital, business or investment risk, be it an income or employment risk, belongs to the freedom to participate in free competition.

Nor is it argued here in favor of a „welfare State“ in the sense of an ‚all-providing State‘, whose task it is to ensure the „happiness“ of its citizens; for already the individual citizen himself lacks a guide for achieving this. Any purposes, such as the happiness or welfare of the individual or the general public¹²³, can never be the principle or final end of a (legitimate) system of rule. If they nevertheless become, insofar as they can be determined, the subject of State legislation and policy, then legitimately *exclusively* as a necessary *means* to achieve and maintain a state of freedom of everyone in accordance with a universal law. The „well-being of the State“ („salus rei publicae“), regularly invoked in this context, consists only in the „preservation of the mere lawful form of a civil society“¹²⁴ in which everyone can strive for their own private welfare (salus civium), as they like, within the framework of the limitation of freedom by universal laws. If, however, the State is burdened with the task of promoting the happy or virtuous lives of its citizens, it loses precisely by this the mentioned preservation function, and indeed any function at all. Whoever wants, in association with any other people, to seek and find inner peace (happiness or virtue), must first, together with *all* others, establish a community of right for all, guaranteeing the freedom of all. „Right comes before self-interest and before the

¹²¹ „The idea that the lawfulness inherent in the market economy order at the same time also automatically generates the overall order of politics and of society, fails to recognise that the instruments of the market economy order are limited to production control and therefore have only a technical character within the overall political and social framework of shaping elements. It also fails to recognise the enormous importance of this overall framework for the functioning, indeed even for the merely technical functioning, of the market economy order. On the other hand, the opposite idea, which believes that, when intervening in the market economy system of income distribution and when making decisions affecting the overall political-social framework, no particular consideration needs to be given to the inherent lawfulness of the market economy order, fails to recognise the mutual dependence between economic order and income distribution and between the specifically market economy part and the specifically political part of the economic order.“ *Franz Böhm*, „Marktwirtschaft – von links und von rechts“ (1953), in: Wolfgang Stützel et al. (Eds.), *Grundtexte der Sozialen Marktwirtschaft*, Stuttgart / New York: Gustav Fischer, 1981, 435 (m/tr). The „social State“, favored here, is neither an excessive „welfare State“ nor a „laissez-faire State“ that relies on de-regulation. Rather, both pose a threat to it, whereby the second has seemed to me to be the more dangerous for years.

¹²² Speaking of an economic regulatory policy can easily suggest that there is a clearly definable area, the economy. However, since economic behaviour, whatever it may be, is always integrated into a natural, social and political environment and is linked back to it in many ways, also regulatory policy must take this into account. In this respect, one should rather speak of policy regulating the society.

¹²³ For criticism of the ‚communist fiction‘ (common in economics), according to which society is understood as a collective subject concerned with the optimal welfare of the community, as allegedly expressed in the so-called national product and its distribution, see *Gunnar Myrdal*, *Das politische Element in der nationalökonomischen Doktrinbildung*, (fn. 43).

¹²⁴ *Kant*, letter to Heinrich Jung-Stilling (after March 1st 1789) (fragment and draft), 11.10 (m/tr). For Kant, „civil society“ is another term for „State“ („societas civilis“, „civitas“).

common good“¹²⁵; person before individual and before collective; freedom before happiness and before virtue.¹²⁶ Therefore, for Kant, the limitation of citizens' external freedom for the sake of their (alleged) happiness is the „greatest *despotism* thinkable (a constitution that abrogates all the freedom of the subjects, who in that case have no rights at all)“¹²⁷.

In positive terms, the fundamental civil right of external freedom means that everyone in the State has the right to do whatever they want, *even if it harms others*, and thus to pursue their own happiness as they¹²⁸ see fit, *provided only* that their actions do not contradict the possibility of a use of freedom according to universal laws.¹²⁹

However, what is very much at stake with regard to the main task of the State is, on the one hand, the right of every citizen to participate in the ‚output‘ to be provided by the State as *res publica* and, on the other hand, the duty of every citizen to participate in the ‚input‘ of the *res publica* required for the fulfilment of that provision. The ‚input‘ is the totality of the performances that must be provided by the people of the State in order to make the ‚output‘ possible. This in turn consists of the totality of the instruments, provided by the State (legitimised precisely by this), that are necessary to secure everyone's freedom as determined by law.

A well-functioning society necessarily includes a well-functioning economy, but for this very reason, *economic* efficiency, insofar as it exists,¹³⁰ is not sufficient on its own.¹³¹ With regard to the so-called *free* market economy, this means, that it is at the same time a *social* market economy (and vice versa) only then, when freedom is, as

¹²⁵ Julius Ebbinghaus, „Der Nationalsozialismus und die Moral“, in: Idem., in: *Idem*, Gesammelte Schriften, vol. 1: Sittlichkeit und Recht. Praktische Philosophie 1929-1954, Bonn: Bouvier, 1986, 123.

¹²⁶ „Here the topic is not the promotion of morality, certainly not the promotion of happiness, but merely to forbid war.“ (VAZeF 23.162)

¹²⁷ TP 08.291

¹²⁸ „A condition in which the judgment upon this is not his own but is assigned to another is not possible *in right*.“ (VARL 23.292 [m/it])

¹²⁹ Cf. TP 08.290.29-33; 08.298.17-20; TL 06.382.12-16; V-MS/Vigil 27.539 f.

¹³⁰ Regularly, negative external effects are, if only because of the difficulty of grasping them, hardly or not at all included in their determination, even if they are of the greatest social relevance. „As soon as one leaves behind the traditional abstractions of neoclassical price analysis and begins to consider the neglected aspects of unpaid social costs, it becomes clear that the social efficiency of private investment criteria, and thus the supposedly positive result of the allocation process in a free market economy, is largely an illusion. For if entrepreneurial expenditures are unable to cover the actual total costs of production, because there is a tendency to shift part of them onto the shoulders of others, then the traditional cost-benefit calculation is not only simply misleading, but it serves as an institutionalised cover for large-scale plundering that leaves behind everything that the early utopian socialists and even their Marxist successors had in mind when they criticised the exploitation of man by man under the emerging system of free enterprise.“ (K. William Kapp, *The Social Costs of Business Enterprise*, Nottingham: Spokesman, 1978. I did not have access to the English original, hence my translation from the German version. However, the original text is easy to find: chpt. 14: „Summary and implications“, subchpt. 2: „Social costs and equilibrium analysis“) In this publication, still an indispensable standard work, Kapp discusses as social costs air and water pollution, renewable and exhaustible resources, resource utilisation, the human factor of production, technological change, unemployment, overcapacities, ruinous competition, the planned shortening of the lifespan of goods, sales promotion (advertising), wrong choice of location and overconcentration in conurbations. – On the problem of taking external effects into account, see Ronald H. Coase, „The problem of social cost“, in: *The Journal of Law and Economics*, 3 (1960) 1-44.

¹³¹ For this see Kurt W. Rothschild, „Kritik marktwirtschaftlicher Ordnungen als Realtypus“, in: Erich Streißler / Christian Watrin (Eds.), *Zur Theorie marktwirtschaftlicher Ordnungen*, Tübingen: Mohr (Paul Siebeck), 1980, 13-37.

rightfully necessary, not understood as „wild, lawless freedom“¹³² in a ‚pluralistic plunder economy‘¹³³, but as freedom of everyone under universal laws of freedom.¹³⁴ A market economy and the policies of the State aimed at it, that do not have freedom according to universal laws as their ordering principle, are contrary to right.¹³⁵

For this very reason, it is not only the abuse of economic power that must be combated, but economic power in general,¹³⁶ if it results in a limitation of the external freedom of those, over whom it is (or can be) exercised, in a way that violates fundamental rights.¹³⁷ The primacy lies with the freedom of everyone in accordance with universal laws. In particular, the equal right to acquire property at will finds its limit here – not the other way round!¹³⁸

In a ruling from 1962, the German Federal Constitutional Court stated: „The concentration of economic influencing and decision-making possibilities, embodied in the size of the companies and the amount of capital invested, has the consequence, that the entrepreneurial behaviour of group managements has an impact, beyond the fate of the individual company, on the entire national economy and the business cycle, even on the labor market and on price- and monetary policy. Nevertheless, the legislator has decided in favor of the entrepreneurial freedom also of the group. However, the responsibility towards the common good, as stipulated in particular in Art. 14 para. 2 of the German Constitution (GG) and for the individual stock corporation in § 70 para. 1 of the German Stock Corporation Act (AktG), applies all the more to group management.“¹³⁹

This context also includes the question of whether the decision-making power should lie solely with the capital side resp. with the management appointed by it,¹⁴⁰ or also, and in

¹³² RL 06.316.

¹³³ *Alexander Rüstow*, „Zwischen Kapitalismus und Kommunismus“, in: ORDO, Jahrbuch für die Ordnung von Wirtschaft und Gesellschaft, 2 (1949) 103.

¹³⁴ Like freedom in general, also economic freedom can only exist through State order. A free economy is therefore the opposite of a State-free economy.

¹³⁵ It should be clear, that the position advocated here is at odds with the usual dichotomy of individualism – statism or market-friendly – State-friendly. It is unconditionally pro-freedom and, moreover, *conditionally both* pro-market and pro-State, insofar as the market and the State each serve general freedom. Republicanism would be the appropriate term for the advocated position.

¹³⁶ Generally on the role of power in the economic process: *Walter Eucken*, Grundsätze der Wirtschaftspolitik, 6th edition., Tübingen: Mohr (Paul Siebeck), 1990, 169 et seqq.; *Kurt W. Rothschild* (Ed.), Power in Economics, (fn. 2).

¹³⁷ See also: *Kristian Kühl*, Eigentumsordnung als Freiheitsordnung. Zur Aktualität der Kantischen Rechts- und Eigentumslehre, Freiburg / München: Alber, 1984, 267 et seqq.

¹³⁸ On the impact of wealth distribution and thus of power distribution on the elasticity of labor supply and thus on income distribution, see *Erich Preiser*, „Besitz und Macht in der Distributionstheorie“, in: Idem., Bildung und Verteilung des Volkseinkommens, 3rd edition., Göttingen: Vandenhoeck & Ruprecht 1963, 227-246. The conclusion of the essay reads: „A policy, that helps the dispossessed to own property, not only gives them a share of the pension, but also increases the elasticity of the labor supply with the result, that the ratio of labor income to national product increases and that of property income decreases. Of course, employment and thus national product decrease, but leisure time increases. On the whole, with reduced labor time, the income of those who work *and* own property increases, while the income of those who *only* own property decreases.“ (ibid. 246). Thus, the laws governing the acquisition and ownership of private property are anything but neutral in relation to the ‚game‘ on the ‚free market‘; rather, they have a more or less significant influence on the ‚price mechanism‘ and, through this, on the actual distribution of both wealth and income. See also: *Thomas Piketty*, Capital in the Twenty-First Century, Cambridge, Mass. / London 2014; *Thomas Piketty*, Capital and Ideology (fn. 36); *Branko Milanovic*, Global Inequality. A New Approach for the Age of Globalisation, Cambridge, Mass. / London: Harvard University Press, 2016; *Facundo Alvaredo* et al. (Eds.), World Inequality Report, Cambridge/Mass. / London: Belknap Press, 2018.

¹³⁹ BVerfGE 14, 263 [282] (Feldmühle-Urteil).

¹⁴⁰ In fact, it lies more with management, which neither takes risks nor bears liability.

reality, with the production factor labor; in other words, the question of employee participation and its specific form.¹⁴¹ With regard to the change in the property rights of capital owners resulting from the Co-Determination Act, the German Federal Constitutional Court decided on March 1st 1979, that „the more the property object has a *social reference and a social function*, the greater the authority of the legislator to determine its content and its limits [...]. The decisive factor here is the aspect, expressed in Article 14 (2) of the German Constitution (GG), that use and disposal in this case do not merely remain within the sphere of the owner, but affect *the interests of other members of the juridical community*, who are dependent on the use of the property object. Under this condition, the constitutional rule of a use, oriented towards the common good, includes the rule to show consideration for the non-owner, who in turn needs the use of the property object *to secure his freedom and to organise his life responsibly* [...]“¹⁴² Here, too, we see the need to abandon the often invoked principle of the immunity of property.

More than a century ago, Anatole France had already got to the heart of it with his sarcastic talking of the „majestic equality of the law, which forbids both rich and poor alike sleeping under bridges, begging on the streets, and stealing bread“¹⁴³: the rightfully granted freedom, which somebody is *actually* able to exercise, depends, among other things, on their individual economic circumstances and therefore also on whether and to what extent the State also secures these for them. „Freedom is only real in those, who possess the conditions for it, the material and spiritual goods as the prerequisite for self-determination.“¹⁴⁴ Without actually being able to exercise it, the right to freedom is worthless. For this reason, we must speak of a *privilege* of freedom with regard to those who own and inherit as opposed to those who are socially dependent. „Freedom and equality of right do not eliminate economic inequality among people, but rather promote it by offering the possibility of different economic development. In the absence of State intervention, social inequality can turn into social lack of freedom, if the exercise of freedom is in fact no longer possible vis-à-vis the holders of social power.“¹⁴⁵ Beyond purely rightfully securing the use of freedom, which as such only makes this use possible, it is therefore necessary to create certain social conditions without which freedom cannot truly be exercised. Even more than the starting opportunities, the chances of realising one's own goals in life are unequally distributed.¹⁴⁶ In the same way, as has long been the case with

¹⁴¹ See for this *Thomas Piketty, Capital & Ideology* (fn. 36), 972-975; „authentic power sharing and voting rights within firms“ (ibid. p. 47). Milanovic considers an „increasing worker ownership through employee stock ownership plans (ESOPs) or other company-level incentives that would encourage employee-shareholding.“ (*Branko Milanovic, Capitalism, Alone*, (fn. 108), p. 48.

¹⁴² BVerfGE 50, 290 (340-41) (m/tr; m/it). See also *Gérard Gäfgen*, „Zur volkswirtschaftlichen Beurteilung der Entscheidungsteilnahme in Unternehmungen: Die deutsche Mitbestimmungsregelung als Beispiel“, in: Horst Steinmann et al. (Eds.), *Die Kosten der Mitbestimmung*, Mannheim / Wien / Zürich: Bibliographisches Institut, 1981, 9-37.

¹⁴³ „Cela consiste pour les pauvres à soutenir et à conserver les riches dans leur puissance et leur oisiveté. Ils y doivent travailler devant la majestueuse égalité des lois, qui interdit au riche comme au pauvre de coucher sous les ponts, de mendier dans les rues et de voler du pain.“ - *Anatole France, Le lys rouge*. Calmann-Lévy, 1894, chap. 7, p. 118)

¹⁴⁴ *Lorenz von Stein*, *Geschichte der sozialen Bewegung in Frankreich von 1789 bis auf unsere Tage*, vol. 3, Darmstadt: Wissenschaftliche Buchgesellschaft, 1959, 104.

¹⁴⁵ *Dieter Birk*, *Das Leistungsfähigkeitsprinzip als Maßstab der Steuernormen*, Köln: Deubner, 1983, 133 (m/tr).

¹⁴⁶ „In a book entitled *Equality* (1931), R. H. Tawney, a British economic historian and social critic, argued that equality of opportunity is at best a partial ideal. >Opportunities to ‚rise‘<, he wrote, >are not a substitute for a large measure of practical equality, nor do they make immaterial the existence of sharp disparities of income and social condition.“ (*Michael J. Sandel, The Tyranny of Merit*, [fn. 107], 224). – „Although [...] taxation of inheritance is a particularly good policy for leveling the playing field and increasing equality of opportunity, it is an illusion to

political power in a constitutional State, also *economic* and any other kind of property- or position-related *social* power must be controlled, and limited or even eliminated precisely where it hinders or even makes in fact impossible the use that another person wishes to make of their rightful freedom.¹⁴⁷

„It is the reneging on some crucial aspects of this implicit value system [liberal capitalism], namely a movement toward the creation of a self-perpetuating upper class and polarization between the elites and the rest, that represents the most important threat to the longer-term viability of liberal capitalism. This threat is a danger both to the system’s own survival and to the general attractiveness of the model to the rest of the world.“¹⁴⁸

It is true, that it is necessary to make a conceptual distinction between economic power as market power and political power as the power of State authorities. But in social reality, there are interactions of various kinds between the two, often of far-reaching implications, but often difficult to understand. In addition, other power factors, that are significant for the overall state of a society, are public opinion expressing its ‚ideas‘ in many different ways, as well as the individual or organised criminal energy present in society (for example in the form of tax evasion, corruption, extortion, money laundering, etc.). „Strictly speaking, an area of economic life cannot be delimited at all with the help of economic categories, because these categories are applicable to all actions in general and thus also to all *social* processes.“¹⁴⁹

„The more economic and political power in liberal capitalism become united, the more liberal capitalism becomes plutocratic and comes to resemble political capitalism. In the latter, political control is the way to acquire economic benefits; in plutocratic, formerly liberal, capitalism, economic power is used to conquer politics. The end point of the two systems becomes the same: unification and persistence of the elites.“ That’s why Milanovic demands: „Strictly limited and exclusively public funding of political campaigns. The objective is to reduce the ability of the rich to control the political process and form a durable upper class.“¹⁵⁰

„Big money also flowed copiously into presidential campaigns, abetted by a 2010 U.S. Supreme Court decision that struck down limits on campaign contributions. In 2012, more than 40 percent of all money spent in federal elections came from the wealthiest of the wealthy – not the top 1 percent, or even the top tenth of the 1 percent, but from the top 1 percent of the 1 percent. Given the long presidential primary season, early money is especially important. As the 2016 election cycle got underway, almost half of all the money donated to presidential candidates, Republican and Democratic, came from just 158 wealthy families. Most had made their fortunes in finance or energy.

believe that such taxation will by itself be sufficient to equalize the life chances of children born to rich and poor parents. [...] High income and wealth inequality in the United States used to be justified by the claim that everyone had the opportunity to climb up the ladder of success, regardless of family background. This idea became known as the American Dream. The emphasis was on equality of opportunity rather than equality of outcome.“ (*Branko Milanovic, Capitalism, Alone* [fn. 108],p. 40)

¹⁴⁷ For this also: *Ernst-Wolfgang Böckenförde*, „Freiheitssicherung gegenüber gesellschaftlicher Macht. Aufriß eines Problems“, in: *Idem, Staat, Gesellschaft, Freiheit*, Frankfurt/Main: Suhrkamp, 1976, 336-348.

¹⁴⁸ *Branko Milanovic, Capitalism, Alone*, (fn. 108), p. 11.

¹⁴⁹ *Hans Albert, Traktat*, (fn. 102), 113.

¹⁵⁰ *Branko Milanovic, Capitalism, Alone*, (fn. 108),p. 217.

Money not only buys elections; it also buys access to the agencies that make the rules that govern the economy. From 2000 to 2010, U.S. companies, led by finance, defense contractors, and tech companies, tripled spending on lobbying and public relations. From the standpoint of the republican ideal, the domination of politics by money, legal though it be, is a kind of corruption. The oligarchical capture of representative government is corrupt because it diverts government from the public good and deprives citizens of a meaningful say in how they are governed.¹⁵¹

The need to minimise social inequality is not based on a right to social equality, but on the right to equal freedom. For it is this equal freedom that, despite any equality before the law that may exist, is jeopardised by power- and dependency-relationships resulting from social inequality

Conclusion:¹⁵² As part of its task of ensuring freedom for everyone, especially in the economic sphere, the State as a civil community has in particular the right and the duty, to prevent private and also public (its own) positions of economic power from being used to suppress the *real* freedom of others with reference to the freedom of economic activity. It also has the right and the duty to demand, in order to fulfil its task, a 'tribute' from its citizens, the amount of which depends not only on a citizen's capability, but also on their participation in the State's 'output', i.e. on the benefits that they 'owe' to the State in the past and present. The State, we are talking about here, is by no means a 'night watchman', merely responsible for the protection of life and property in a market society that is otherwise completely independent of and unmolested by the State. On the contrary, the State is also and especially an active guarantor of economic activity that is compatible with universal freedom. For this very reason, it must be a powerful and efficient State.

However, great caution is also required with regard to the State entrusted with this task, and it must therefore also be institutionally ensured that it does not abuse the power entrusted to it for this task. *Subsidiarity* of activities in public hands is *one* effective means, especially where those, directly affected by a planned measure, are best placed to make an appropriate decision. Also referendums and plebiscites can be of great use here.¹⁵³

A market economy, especially one without distortions of competition, is only possible, if and because the market participants do not live in a state of nature, but in a State on whose quality the functioning of the market depends entirely. For the benefits, that the citizens of the *res publica* derive from the goods provided by it, they must pay contributions corresponding to their respective benefits. Although in many cases it is quite difficult, if not impossible, to determine the correspondence positively, it is quite easy to do so *ex negativo*. One only needs to imagine, that the CEO of a major firm in Silicon Valley, who earns millions a year, were born and grown up in a virtually Stateless condition such as Chad or Mali and would live and work there, to immediately know, or at least suspect, what he even owes only to the mere existence of a State as a system of securing rights, and all the more so to the

¹⁵¹ *Michael J. Sandel*, *Democracy's Discontent. A New Edition for our Perilous Times*, Cambridge Mass. / London: Belknap Press, 2022, p. 323.

¹⁵² For the terminology see *James M. Buchanan*, *Die Grenzen der Freiheit – Zwischen Anarchie und Leviathan*, Tübingen: Mohr (Paul Siebeck), 1984, 97 et seqq.

¹⁵³ See also Walter Eucken, *Grundsätze der Wirtschaftspolitik*, (fn. 136), 175 et seqq.; 327-334.

current American State for providing a variety of goods, public and also private. To name just the most important things: a functioning public right order in general and, in particular, an area of private right protected by it, with a wide range of basic conditions that are also only possible in a State (infrastructure, markets, stock exchanges, environmental protection, national defence, educational institutions, healthcare systems, etc.). What Kant says about the aristocrat applies to the CEO as well: „a nobleman as such is conceivable only in a State, not in the state of nature“.¹⁵⁴

The situation in which both would have been in a Stateless ‚condition of nature‘ has been described by the English philosopher Thomas Hobbes almost four centuries ago: „Whatsoever therefore is consequent to a time of Warre, where every man is Enemy to every man; the same is consequent to the time, wherein men live without other security, than what their own strength, and their own invention shall furnish them withall. In such condition, there is no place for Industry; because the fruit thereof is uncertain: and consequently no Culture of the Earth; no Navigation, nor use of the commodities that may be imported by Sea; no commodious Building; no Instruments of moving, and removing such things as require much force; no Knowledge of the face of the Earth; no account of Time; no Arts; no Letters; no Society; and which is worst of all, continuall feare, and danger of violent death; And the life of man, solitary, poore, nasty, brutish, and short.“¹⁵⁵

The opportunities for development, that the CEO or whosoever in the USA or elsewhere had and have, are to a large extent not based on their own performance, but are a preliminary performance by and out of the *res publica*.¹⁵⁶ It is true, that the market society as such is not a mutually supportive society. However, the condition of its possibility is the *res publica* as an overarching supportive community. As its members, the market participants pay their supportive contribution – also, but not only, on the basis of their market success.¹⁵⁷

With reference to Vanberg’s thesis, formulated following Hayek,¹⁵⁸ that in a market economy order „in the spontaneous exchange network of the market no common product is generated [at all], which [then] would have to be divided among the involved actors in a separate act of distribution“, the question arises as to whether

¹⁵⁴ RL 06.370.

¹⁵⁵ *Thomas Hobbes*, *Leviathan*, ch. 13 („Of the Naturall Condition of Mankind, as concerning their Felicity, and Misery“), Cambridge UP, 1904; see also: RL 06.345. – In their very captivating book „The Narrow Corridor“ (fn. 38) Daron Acemoglu and James A. Robinson repeatedly refer to Thomas Hobbes and his confrontation of the state of nature with the civil state. But they fail to understand that he writes as a philosopher of right and not, like themselves, as a social scientist. They are, it’s true, right in saying that Hobbes’s ‚solution‘ is insufficient. But it does not occur to them to refer to Rousseau and to Kant (see above fn. 68). It is important to add here, that Acemoglu and Robinson’s book offers an almost inexhaustible source of empirical material, without which the normative considerations on freedom, equality and rights would have no application whatsoever. (See especially their book: *The Narrow Corridor* (fn. 42), pp. 143-146).

¹⁵⁶ „Indeed, the stock market value of technology firms [like Google] includes patents and knowhow that might not exist were it not for basic research financed with public money and accumulated over decades.“ (*Thomas Piketty*, *Capital and Ideology*, (fn. 36), 665.

¹⁵⁷ A judgement of the Federal Constitutional Court of Germany states accordingly: „The Basic Law’s conception of man is not that of an isolated sovereign individual; rather, the Basic Law has decided the tension between the individual and the community in the sense of the community-relatedness and community-boundness of the person, without touching their intrinsic value. [...] The Basic Law guarantees neither the economic policy neutrality of governmental and legislative power nor a ‚social market economy‘ that can be controlled solely by market-compliant means.“ (BVerfGE 4, 7 [15 et seqq.] of July 20th 1954 [m/tr]) On the relationship between (market) society – determined by the principle of *interest* – and the State – determined by the principle of *freedom* – see: *Lorenz von Stein*, (fn. 144), vol. 1, 29-46.

¹⁵⁸ See *Viktor J. Vanberg*, „Einführung: Marktwirtschaft und »soziale Gerechtigkeit«“, in: *Idem* (Ed.), *Marktwirtschaft und soziale Gerechtigkeit*, Tübingen: Mohr (Siebeck), 2012, 2 (m/tr).

here the market mechanism, not to say the market automatism, is not overestimated and the importance of regulating institutions underestimated.¹⁵⁹

On the one hand, order in human coexistence is not at all just „the unforeseen result of individual's actions.“¹⁶⁰ „[T]he content of the byelaws, the choice of the umpire, the determination of the powers and the regular application of the decisions of this umpire are incomparably more decisive than the spontaneities of equilibrium and the effects of automatisms.“¹⁶¹ On the other hand, the market participants do receive their return from separate economic activities. But the sum of the individual returns is essentially co-determined by a collective factor: the *res publica*. The contribution of this factor to this sum would emerge, if one could determine, how high the sum would have been in a *status naturalis*.

The first philosopher to draw positive conclusions from the idea of the *polis* was the Platonic Socrates when, in a fictitious dialog¹⁶² with *the laws and the political community*, he gave his reasons for not wanting to take the opportunity to escape from prison in order to save his life. Some ten years ago, the French actor Depardieu acquired Russian citizenship, because he considered the planned 75% income tax for top earners in France to be confiscatory.¹⁶³ Well, Socrates would have paid the tax voluntarily and continued to prefer Mount Olympus to the Urals.

An equally positive counterpart to Hobbes' line of thought mentioned above was formulated by US President Obama in a speech on July 13th 2012: „If you were successful, somebody along the line gave you some help. There was a great teacher somewhere in your life. Somebody helped to create this unbelievable American system that we have that allowed you to thrive. Somebody invested in roads and bridges. If you've got a business – you didn't build that. Somebody else made that happen. The Internet didn't get invented on its own. Government research created the Internet so that all the companies could make money off

¹⁵⁹ See especially *Friedrich A. v. Hayek*, „Der Atavismus »sozialer Gerechtigkeit«“ in: Idem, *Wissenschaft und Sozialismus. Aufsätze zur Sozialismuskritik*, Tübingen: Mohr Siebeck, 2004, 197-208. Hayek persistently speaks there of „free competition“, „free market“, „free market prices“, whereas it is precisely the prerequisite of a „freedom“ of competition, of the market and of market prices that is highly problematic.

¹⁶⁰ See *Friedrich A. v. Hayek*, *Individualismus und wirtschaftliche Ordnung*, Erlenbach-Zürich: Eugen Rentsch, 1952, 17.

¹⁶¹ *F. Perroux*, „The domination effect and modern economic theory“, in: Kurt W. Rothschild (Ed.), *Power in Economics*, (fn. 2), 73.

¹⁶² See *Plato*, *Crito* 49-53.

¹⁶³ According to the German Federal Constitutional Court: „Tax laws are in any case to be measured in their freedom-restricting effect against Art. 2 para. 1 GG. However, it must be taken into account that tax laws interfere with the general freedom of action precisely in its manifestation as personal development in the property right sphere and in the professional sphere (Art. 14 para. 1, Art. 12 para. 1 GG). This means that a tax law must not have a ‚strangling effect‘: the protected right to freedom may only be restricted to such an extent, that the holder of the fundamental right (taxpayer) retains a core element of the success of his own activities in the economic sphere in the form of the fundamental private benefit of what has been acquired and the fundamental right of disposal over the rightful positions created in terms of assets. It follows from this, that the taxpayer subject to income tax must, after fulfilment of his income tax liability, be left with as much of his earnings as he needs to cover his necessary living expenses and – taking into account Article 6 (1) of the Basic Law – those of his family (»minimum subsistence level«).“ (BVerfGE 87, 153 [169] from September 25th 1992 [m/tr]; see also BVerfGE 30, 250 [271 f.] from September 3^d 1971; BVerfGE 38, 61 [102] from July 17th 1974) In a later judgement, the court speaks of a „humane“ or „socio-cultural subsistence minimum“ and states: „The fundamental right to the guarantee of a humane subsistence minimum under Article 1 (1) GG (Basic Law) in conjunction with the welfare State principle of Article 20 (1) GG guarantees every person in need of assistance the material conditions that are essential for their physical existence and for a minimum level of participation in social, cultural and political life.“ (BVerfGE 1 BvL 1/09 from February 9th 2010 [m/tr]) A tax rate of 75% on top incomes in Germany could hardly be described as having a „strangling effect.“

the Internet. The point is, that when we succeed, we succeed because of our individual initiative, but also because we do things together.”¹⁶⁴

With complete justification, one may assume that, under conditions of a Stateless state, the mentioned CEO would hardly be paid some hundred times more than his shrewd chauffeur and his strapping caretaker are currently paid. Perhaps his income would even be lower than theirs. In short, the level of income does not simply reflect the respective market value of an income recipient, but also – and the higher that level the more – the benefit this person has from the public goods and thus the advantage he has through the *res publica*. And the corresponding curve is certainly highly progressive. The wealth produced in a country is the collective achievement of the entire working population and by no means merely that of a highly paid so-called economic elite.

Imagine a young man from the Bahamas, who is very successful there as a singer and now applies for US citizenship. The American authorities are prepared to grant the application on the condition that the young man agrees to a top income tax rate of 90 %. They tell him, that he earns 50.000 dollars a year in the Bahamas and pays 20 % tax on this, leaving him with 40.000 dollars. In the USA, with a population almost a thousand times larger, there would be a completely different market for him and his talent. Should he earn an annual income of 5.000.000 dollars there, he would be left with 500.000 dollars after deduction of 90 % tax. I'm pretty sure that the singer would gladly accept the authorities' condition. He would certainly be able to easily support himself and his family with his net income. It can also be said, that he would be taxed according to both the ability-to-pay principle and the equivalence principle.

In principle, after what has been said, the question is no longer whether, but only in which way (quantitatively and qualitatively)¹⁶⁵ the State may and should intervene¹⁶⁶ in the social income and wealth structure and thus in the distribution of property (in the broadest sense) in order to fulfil its task, whereby a ‚redistribution‘ should not, as already indicated, serve to promote the happiness or prosperity of the citizens, but to really ensure their rightful freedom.¹⁶⁷ The kind of ‚liberalism‘

¹⁶⁴ Source: „Remarks by the President at a Campaign Event in Roanoke, Virginia.” July 13th, 2012; <https://obamawhitehouse.archives.gov/the-press-office/2012/07/13/remarks-president-campaign-event-roanoke-virginia>

¹⁶⁵ None of the solutions proposed below are likely to be undisputed, but the importance of the problems themselves and the need to solve them can hardly be disputed.

¹⁶⁶ What Baker has shown for the USA, also applies in principle to Germany: „both conservatives and liberals want government intervention. The difference between them is the goal of government intervention, and the fact that conservatives are smart enough to conceal their dependence on the government.” (*Dean Baker*, *The Conservative Nanny State: How the Wealthy Use the Government to Stay Rich and Get Richer*, Washington, DC: Center for Economic and Policy Research, 2006, 1)

¹⁶⁷ The notorious question of the State's right to intervene in „freedom *and* property“ therefore proves to be incorrectly phrased. The confusion expressed therein can be traced back to John Locke and to the American Declaration of Independence, which followed him with deviations. For Locke, the purpose and task of the State was „to preserve the property“, and by this he understood „life, liberty, and estate“, as rights of man equal and inalienable. (*John Locke*, *The Second Treatise of Government*, § 87, Oxford: Basil Blackwell, 1966, 43)

However, as already mentioned, only freedom (according to universal laws) comes into consideration as an absolute or unconditional right. The right to life and the right to property are tied to the condition of conformity with this freedom. If, on the other hand, one considers also the power of free disposal over private property to be sacrosanct, as has often been the case in liberalism up to the present day, then one is faced with a dilemma that is unsolvable both in terms of rights and in terms of economic and social policy. Every good, every asset not only has a value; its possession also always means power. Private property is thereby potentially a threat to freedom and must in this respect be controlled and, if necessary, restricted. See also *R. A. Brady*, „The Power Hierarchy of Big Business“, in: Kurt W. Rothschild (Ed.), *Power in Economics*, (fn. 2), 170. For „sacralization“ and „proprietary ideology“ see: *Thomas Piketty*, *Capital and Ideology*, (fn. 36), 120 et seqq.

advocated here is therefore also not, as is so often the case, limited to economic or market freedom caused by competition, but refers to the entire political-social network of relationships in a society. It received its principle-based theoretical justification from Kant.¹⁶⁸

A market economy and free competition are by no means justified in themselves. Rather, their means and results must be in accordance with the principles of a republican community. Thus, also and in particular the freedom of economic activity finds its rightful limit in civil freedom of everyone. In order to ensure just this, appropriate rules, set by the State, are required for the course of the economic process.¹⁶⁹

The fact that it is not „the State“ that sets the rules, but rather its „representatives“, leads us to the first crucial question: Who are the representatives? Who appoints them?

An excellent book of Nicholas Carnes on this subject with regard to the United States „provides a long-overdue look at how inequalities in the social class makeup of American political institutions affect public policy in the United States.“ Carnes explores „how the shortage of people from the working class and the sharp overrepresentation of white-collar professionals affect the economic policies our government enacts.“ His findings „provide the first evidence that the unequal social class makeup of our political institutions affects who wins and who loses in the policy-making process. Like ordinary Americans, lawmakers from different classes tend to think, vote, and advocate differently on economic issues. The numerical underrepresentation of the working class in our legislatures consequently skews economic policy making toward outcomes that are more in line with what more privileged Americans want. These long-standing realities of American political life have serious implications both for contemporary debates about the government's role in economic affairs and for larger questions about policy making, representation, and political equality in the United States. Scholars, political observers, and those interested in reforming our system of government cannot afford to continue ignoring the fact that the working class is vastly underrepresented in public office, that policies that affect Americans from all walks of life are made by a white-collar government.“¹⁷⁰

Carnes comes to the conclusion: „The unequal representation of social classes in our legislatures [...] matters because [class-based] differences ultimately affect the kinds of economic policies our legislatures enact, which in turn have enormous consequences for the distribution of resources and power in the United States. [...] Spending on social programs designed to help the less fortunate probably would have been billions of dollars higher if

„Capital ownership also determines power relations. This applies directly to ownership of business assets and means of production, but also to ownership of housing, the framework for reproduction of private and family life, as well as to ownership of the State through government bonds, each in different ways.“ (*Thomas Piketty, Natur, Kultur und Ungleichheit, München: Beck, 2022, 14 [m/tr]*)

¹⁶⁸ See also *Jürgen v. Kempfski, Recht und Politik*, (fn. 16).

¹⁶⁹ How few legal regulations, which apply equally to everyone, hinder competition, can be seen, for example, by strolling through the canals of Amsterdam. It is thanks to strict building regulations that the historic city centre looks as if it has been cast from a single mould. It owes its immense diversity and beauty to the free competition between builders that was subject to these regulations. Goethe's words also apply here: „None proves a master but by limitation / And only law can give us liberty.“ (*Johann Wolfgang von Goethe, Selected Poems, London: Lothar Kreyer 1983, 165*) If you want to experience the opposite of Amsterdam, all you need to do is drive along a country road in Belgium, where there was obviously no regulation to prevent people from giving free rein to their arbitrary building judgement. There is immense variety here too, but beauty didn't stand a chance. You have to travel to Bruges or Antwerp or Ghent for that.

¹⁷⁰ *Nicholas Carnes, White-Collar Government. The Hidden Role of Class in Economic Policy Making, Chicago: The University of Chicago, 2013, 2 f.*

state and local policy makers were drawn from the same class backgrounds as ordinary Americans.¹⁷¹

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Over time, the plenary of the German Bundestag (House of Representatives) has become increasingly an „elite“ in terms of its professional background, far from being a representation of the population in its entirety. While in 1949, alongside many academics, also still many farmers, craftsmen, and laborers were represented, academics have since become increasingly dominant. – In the Bundestag, elected in February 2025, they comprised more than 80% of the deputies. Women are represented with only a third and students, trainees and pensioners with 2,5 percent out of 630 deputies. The most significant case of underrepresentation concerns the so-called „working class“ with less than 1% of the plenary. Almost three quarters of all deputies work in the area of „business organization, law, administration“ and are accordingly lawyers, tax consultants, or they come from the financial world. If they would be instead social workers, educators and carers, then things would probably be quite different in Germany.

Members of parliament are often convinced they understand the situation and interests of the working class simply because they occasionally talk to people from that class. However, they overlook the fact that their own lived experience plays a significant role in shaping their judgments.¹⁷² Thus, one has, for example, different associations and correspondingly different perspectives regarding climate change, depending on whether one spends their workday in an office with air conditioning or as a worker on a construction site or a farmer on his land. As long as these perspectives are not also represented in parliament, the good intentions of middle-class and upper-middle-class parliamentarians are of little use. If, however, what is truly important to the „lower classes“, is not translated into policy by the Bundestag, then a typical consequence at the next election is either abstention or voting for an extreme (usually right-wing) party.

IV.

At this point, it seems pertinent to make some concrete considerations on the regulatory policy of the social constitutional State and to combine them with corresponding proposals, always bearing in mind that the State and its laws must ensure, beyond the mere physical self-preservation of its citizens, also and especially their self-preservation as persons. It goes without saying, that these proposals, insofar as they are made on a trial basis,¹⁷³ are subject to the proviso, that their realisation is not expected to have counterproductive (side) effects,¹⁷⁴ which, by the way, may also be of a non-economic nature. Admittedly, with regard to such expectations, it must always be borne in mind that interested parties, especially the

¹⁷¹ *Ibidem*, 135..

¹⁷² Neither Ex-Chancellor Olaf Scholz, a wealthy man with a briefcase and cultivated taciturnity, nor Ex-Chancellor Schröder, a would-be wealthy man in a fur coat and with a Havana cigar, ever gave the impression of being „social democrats“, as *there once were – many years ago*. – Sandel comes to the same conclusion: The anger of many working people without university degrees „was directed especially against mainstream center-left parties that responded to inequality with what I call >the rhetoric of rising<, exhorting those left behind to better themselves by getting a degree. This was the Democratic Party in the US, the Labour Party in Britain, the Socialist Party in France [and I would add the Social-Democratic Party in Germany] – parties now more identified with the values, interests, and outlook of the well-educated, credentialed, professional classes than with the working-class voters *who once constituted their primary base*.“ (*Michael J. Sandel, Equality*, [fn. 52], 51 [m/it]).

¹⁷³ On the one hand, they could be supplemented by many others, but on the other hand, not all of them need to be realised, not each immediately and not each to the extent proposed.

¹⁷⁴ For example, in the case of massive tax increases, a reduction in the willingness to invest; uncontrollable tax avoidance, evasion, flight; and migration into the shadow economy; or, in the case of high social benefits, a weakening of labor motivation.

organised lobby, regularly exert a massive influence on the ‚correct‘ assessment of the effects.¹⁷⁵

Ensuring the freedom of all citizens by no means only requires things that have long been taken for granted, such as social support¹⁷⁶, medical care, improved educational facilities, etc., but also a comprehensive legal and institutional framework for the fullest possible economic competition in order to avoid dysfunctions in the market mechanism. The maxim for this must be: do not intervene, but regulate by law and this over the long term! Or in Rüstow's formulation: no „inhibitory intervention contrary to the laws of the market“, but „adjustment intervention in the direction in which the market laws have effect, in order to ensure its smoothest possible course“.¹⁷⁷

Adam Smith already spoke of such conditions, determined by law, and aptly compared them to firewalls, designed to prevent the spread of fire. Although he considered both to be a violation of „natural liberty“, he nevertheless considered this necessary because of the threat to the „security of the whole society“, resulting from the use of liberty.¹⁷⁸ According to the principles advocated here, however, there is not even a violation, since there is no right at all to such liberty. It is not about interfering in the free play of the allocation of resources and the distribution of goods, but solely about setting and supervising of the rules under which this play must take place. Only this should be entrusted to the legislative bodies and supervisory authorities. The power over economic decisions, on the other hand, should remain entirely in the hands of market participants. The criticism, levelled here at the market mechanism, is a criticism of the system, not of individuals. It is not about the ‚bad‘ managers, who would then be contrasted with ‚good‘ civil servants. It is about the human-all-too-human element that is *systemically* caused, but whose undesirable consequences need to be neutralised by system regulation.

Adam Smith already commented on the problem in a way that no ‚ORDO-liberal‘ could do better: „To widen the market and to narrow the competition, is always the interest of the dealers. To widen the market may frequently be agreeable enough to the interest of the public; but to narrow the competition must always be against it, and can serve only to enable the dealers, by raising their profits above what they naturally would be, to levy, for their own benefit, an absurd tax upon the rest of their fellow-citizens. The proposal of any new law or regulation of commerce which comes from this order, ought always to be listened to with great precaution, and ought never to be adopted till after having been long and carefully examined, not only with the most scrupulous, but with the most suspicious attention. It comes from an order of men, whose interest is never exactly the same with that of the public,

¹⁷⁵ The efforts to radically reform the European banking system have made this particularly glaringly obvious in their lack of success. – Particularly when it comes to increasing taxes on high incomes or wealth, there are notorious warnings of the end of the free market economy and thus of growth and prosperity in a Cassandra-like manner, as if it were the Decline of the West.

¹⁷⁶ Weede rhetorically raises the question of whether generous support for the needy, which „must necessarily be at the expense of the successful [!] and high achievers [!], [...] must not create an increasing number of shirkers [!]“; and if the pursuit of justice [!] leads to „making demands on others or the State [...], then this pursuit jeopardises in any case the functioning of a free market economy and has a certain affinity to envy [!]“. (Erich Weede, „Was kann die soziologische Gerechtigkeitsforschung zur Akzeptanz einer freien Marktwirtschaft sagen oder gar beitragen?“, in: Viktor J. Vanberg [Ed.], [fn. 158], 299 f.)

¹⁷⁷ Alexander Rüstow, *Zwischen Kapitalismus und Kommunismus*, (fn. 133), 132; see also: *Idem*, *Das Versagen des Wirtschaftsliberalismus*, Marburg: Metropolis, 2011, 146.

¹⁷⁸ Adam Smith, (fn. 115), vol. I, book II, ch. 2, 289.

who have generally an interest to deceive and even to oppress the public, and who accordingly have, upon many occasions, both deceived and oppressed it.”¹⁷⁹

V.

The conditions of the regulatory framework could include, to name a few important ones:

- a tightened competition (antitrust¹⁸⁰) law enforced by severe penalties,¹⁸¹ with the appropriate supervisory authorities to monitor market activity as a whole, as well as a strict competition control, including the breaking up of monopolies¹⁸² and of interlocking companies and the prohibition¹⁸³ of cartels, – all that in particular in order to prevent artificial scarcity of goods, power-determined income advantages and the elimination of open markets,¹⁸⁴ as well as the distortion of competition by „rent-seeking“, often in connection with lobbying.
- a reform of patent law due to its distorting effects on competition (no open markets): the periods of protection should be shortened and the possibility of compulsory licences should be expanded or a contracting obligation combined with reasonable licence fees should be introduced, whereby the patent office would be responsible for setting the contractual terms in the event of a lack of consensus.¹⁸⁵
- Liability of those persons who make the key economic decisions¹⁸⁶

The risk that is unavoidable in competition is perhaps at the same time the most important controlling factor in the economic process. Alongside monopolies and cartels, limitations of liability presumably pose the greatest danger to a free competitive order, because they make it particularly easy to pass on losses, incurred as a result of wrong decisions, to others who are not at all responsible for these decisions. For this reason, corporate forms and general terms of business should be banned insofar as they make it possible to evade liability.

¹⁷⁹ Ibidem., vol. I, book I, ch. 11, conclusion, 231 f.

¹⁸⁰ For this see *Daron Acemoglu / James A. Robinson, Why Nations Fail. The Origins of Power, Prosperity, and Poverty*, New York: Crown Business, 2012, chpt. 11 „The Virtuous Circle“, subchpt. „Breaking up Trusts“.

¹⁸¹ Obstructive competition and infringements of competition law, for example through cartel formation, should not only be punished with fines (for the company), but also as criminal offences for the persons responsible.

¹⁸² See for this: *Franz Böhm, Wettbewerb und Monopolkampf*, New Edition Baden-Baden: Nomos, 2010.

¹⁸³ In the case of mere abuse legislation, the burden of proof would lie with the antitrust authority.

¹⁸⁴ On the macro-economic influence of decisions by oligopolistic giants, that are not accountable to the public for their decisions, see: *M. D. Reagan, „Business power and influence“*, in: Kurt W. Rothschild (Ed.), *Power in Economics*, (fn. 2), 141 et seqq.

¹⁸⁵ See *Walter Eucken, Grundsätze der Wirtschaftspolitik*, (fn. 136), 268-69; *Gernot Gather, „Reform der Patentgesetzgebung?“*, in: *ORDO, Jahrbuch für die Ordnung von Wirtschaft und Gesellschaft*, 2 (1949) 270-307; *Friedrich A. v. Hayek, Individualismus und wirtschaftliche Ordnung*, (fn. 160), 149 f.; *Dean Baker, The Conservative Nanny State*, (fn. 166), 47-57 (with alternatives to patent and copyright protection as an incentive for innovation and creativity). In this context, Baker also provides a corresponding justification for the corporate income tax: „Nanny state conservatives like to describe the corporate income tax as a form of »double taxation« since profit is taxed both at the corporate level and when it is paid out to individual shareholders. In reality, the corporate income tax is a voluntary tax that is a payment to the government in exchange for the privileges [„the most important of which is limited liability“] granted by corporate status. If shareholders did not feel that the value of these privileges exceeded the tax, then they would restructure corporations as partnerships, which are not subject to a separate income tax.“ (Ibid. 7).

¹⁸⁶ For details: *Walter Eucken, Grundsätze der Wirtschaftspolitik*, (fn. 136), 279 et seqq.

Special attention must therefore rightly be paid to *public limited* companies.¹⁸⁷ As early as 1949, Eucken wrote: „In contrast to the modern tendency to limit liability, it is necessary that shareholders, who hold a major stake in a joint-stock company, are liable for the debts of this company.“ Personal success liability for success would also be necessary for the management board of a public limited company, if it is „responsible for steering the economic process with its plans and decisions.“¹⁸⁸

— a corporate criminal law, as it has been introduced in various European States¹⁸⁹

— Sharing power in firms

Piketty recommends „to have at least 50% of voting rights in corporations going to workers' representatives, even if they have no capital share. In addition, the other 50% going to shareholders should be strongly regulated, in the sense that a single shareholder should not have more, maybe, than 10% of the vote in large firms. So that, in effect, will democratize the decision-making process in companies in a way that is quite radical.“¹⁹⁰

— the prohibition of certain types of personal union and a radical restriction of the number of individually possible supervisory board positions, thus the elimination of power-guaranteeing networks of ruling elites

— the prohibition of using contractual freedom to eliminate competition or to contractually restrict contractual freedom, and thus also the prohibition of general terms of business that deviate from the legal requirements for the purpose of taking advantage of the contractual partner

— stricter requirements regarding the capital cover of banks and other financial institutions and, altogether, a considerably stricter regulation and supervision of banks¹⁹¹

It is not only the much-vaunted performance of the management board of a bank that determines its profit, but also its debts and the risks taken, i.e. in the worst case, the gambler's luck. The higher the indebtedness and the higher the risks – and government guarantees and subsidies as well as benefits from corporate taxation are an additional and fatal incentive for both – the greater the bank's profit *in the event of success*, but the greater the bank's loss *in the event of failure*, which in the event of insolvency often affects apart from the creditors also the taxpayers.¹⁹² Therefore, irrespective of competition control

¹⁸⁷ Röpke speaks of „share and interlocking capitalism“ („corporate capitalism“, „holding companies“) and argues in favor of restricting public limited companies to that function, that alone can justify such a dangerous „creature of the legal system“: „the function of raising capital in cases where *large-scale production* is unavoidable“. (*Wilhelm Röpke*, Die Gesellschaftskrisis der Gegenwart, 5th Edition., Erlenbach-Zürich: Eugen Rentsch, 1948, 369 et seqq.)

¹⁸⁸ *Walter Eucken*, Grundsätze der Wirtschaftspolitik, (fn. 136), 282 et seqq.

¹⁸⁹ See: https://www.cliffordchance.com/content/dam/cliffordchance/PDF/European_Technical_Bulletin.pdf. – *Dominik Brodowski* et al. (Eds.), *Regulating corporate criminal liability*, Cham: Springer, 2014; *Hans de Doelder*, *Klaus Tiedemann* (Eds.), *La criminalisation du comportement collectif*, in: *XIVe Congrès international de droit comparé = Criminal liability of corporations: XVIth International Congress of Comparative Law*, The Hague, Kluwer, 1996; *Brandon L. Garrett*, *Too Big to Jail: How Prosecutors Compromise with Corporations*. Harvard University Press, 2014; *Mark Pieth / Radha Ivory* (Eds.), *Corporate criminal liability: emergence, convergence, and risk*, Dordrecht: Springer, 2011.

¹⁹⁰ *Thomas Piketty*, *Equality*, (fn. 52), 30; for more see: *Thomas Piketty*, *Capital and Ideology*, (fn. 36), 972-975.

¹⁹¹ See for this: *Anat Admati / Martin Hellwig*, *The Bankers' New Clothes: What's Wrong with Banking and What to Do about It*, Princeton: Princeton UP, 2013.

¹⁹² Insofar as the insolvency of a company and, even more so, a general financial crisis at the same time damages society as a whole, this also means a restriction of general freedom. Anyone who has condoned the

considerations, „too big to fail“ companies¹⁹³ should be broken up and, at the same time, small and medium-sized enterprises should in general be supported and their establishment and development promoted through economic and financial policy.

VI.

A further central task of State economic, financial and social policy, alongside regulatory policy, is to prevent excessive asymmetry in prosperity.¹⁹⁴ This asymmetry¹⁹⁵ – it should be explicitly stated here – does not necessarily have to be a consequence of market failure, but can also occur in efficiently functioning markets, for example as a result of the prevalence of a hypostatized concept of private property, which allegedly could never become a threat to freedom, because it would be itself nothing but the expression of freedom. Even freedom operating in a market with good competitive conditions does not necessarily lead to freedom of everyone in accordance with a universal law of right. This freedom, however, and it alone, is the norm by which all actions and their consequences in the *res publica* are to be measured, including any market result, however ‚freely‘ it may have come about. It is therefore also not enough to point out, that the pursuit of profit is the real engine of economic progress and that private property and competition are necessary conditions for this. The decisive factor is, whether the respective effects, intended or not, are generally beneficial or detrimental to freedom. Here too, the primacy of *politics* over the economy applies.

In the long term, social upheavals can be difficult for a society to cope with. A socially relevant inequality of income and wealth easily leads to a polarization between low-income and low-wealth groups of the population and other groups of the

resulting damage through their market behaviour, for example as a risk-taking securities trader, is guilty of wrongful deprivation of liberty if this occurs, and should be held accountable accordingly.

¹⁹³ „The largest [financial] institutions by now are not just too big to fail in the sense that failure could cause disaster but [...] they may also be too big to save in the sense that rescuing them would overburden taxpayers. Large banks and other financial institutions are by far the largest corporations in the world by asset size, and they are also arguably among the most complex.“ (*Anat Admati / Martin Hellweg*, *The Bankers New Clothes*, (fn. 191), 89) „Insurance giant AIG was on the hook for billions of dollars of credit default swaps, insurance contracts on mortgage-based securities that had tanked. Shortly after receiving a taxpayer bailout of more than \$170 billion, AIG announced plans to pay out \$165 million in bonuses to the executives who had brought the company, and the financial system, to the brink of ruin. [...] Public anger over the bailout would find other political expression – on the left, in the Occupy movement and the candidacy of Bernie Sanders; on the right, in the Tea Party movement and the election of Trump.“ (*Michael J. Sandel*, *Democracy's Discontent*, [fn. 151], pp. 312 f.)

„But Obama did not play out the moral logic of his position: pay the ransom but prevent future hostage-taking episodes by freeing the economy from the hold of big finance. In practice, this would have meant breaking up the banks, reinvigorating antitrust law, enacting a financial transaction tax, limiting stock buybacks, reducing tax breaks for borrowing, and other measures to rein in the power of Wall Street.“ (*Ibidem*, 317)

¹⁹⁴ Our main sources for this issue will be the two outstanding books of *Thomas Piketty*, *Capital in the Twenty-First Century*, (fn. 138); *Thomas Piketty*, *Capital and Ideology*, (fn. 36).

¹⁹⁵ It can be seen on the one hand in the increasing size of the lower and the upper classes at the expense of the middle class, and on the other hand in the increasingly unequal distribution of income and wealth, as shown by the development of the Gini coefficient for income and – considerably more so in terms of level and increase – for wealth. – According to the German Institute for Economic Research (DIW), the richest 1% of the German population owns one-third of the total wealth; the richest 10% owns more than half. *Forbes* magazine estimates the wealth of BMW heiress Susanne Klatten at €21 billion, which is around 200.000 times greater than the median wealth.

population being held responsible by the former groups for precisely that. This, in turn, can ultimately destabilize society and the State.¹⁹⁶

„In a State which is desirous of being saved from the greatest of all plagues – tumult, or rather discord; – there should exist among the citizens neither extreme poverty, nor, again, excess of wealth, for both are productive of those plagues. Now the legislator should determine what is to be the limit of poverty and wealth.“¹⁹⁷

„A city aims at being, as far as possible, composed of equals and peers, which is the condition of those in the middle, more than any group. It follows that this kind of city is bound to have the best constitution since it is composed of the elements which, on our view, naturally go to make up a city. The middle classes enjoy a greater security themselves than any other class. They do not, like the poor, desire the goods of others; nor do others desire their possessions, as the poor desire those of the rich, and since they neither plot against others, nor are plotted against themselves, they live free from danger. [...] the best form of political association is one where power is vested in the middle class, and, secondly, that good government is attainable in those cities where there is a large middle class—large enough, if possible, to be stronger than both of the other classes, but at any rate large enough to be stronger than either of them singly; [...] It is therefore the greatest of blessings for a city that its members should possess a moderate and adequate property. Where some have great possessions, and others have nothing at all, the result is either an extreme democracy or an unmixed oligarchy; or it may even be, as a result of the excesses of both sides, a tyranny.“¹⁹⁸

„If the object is to give the State consistency, bring the two extremes as near to each other as possible; allow neither rich men nor beggars. These two estates, which are naturally inseparable, are equally fatal to the common good; from the one come the friends of tyranny, and from the other tyrants. It is always between them that public liberty is put up to auction; the one buys, and the other sells.“¹⁹⁹

The question is repeatedly raised in our society as to whether someone „deserves“ the remuneration they receive. The answer, that the profit (in German: *der Verdienst*), achieved on the market, is the appropriate reward for the merit (in German: *das Verdienst*), would certainly not be adequate.²⁰⁰ This is because the price, achieved on the market for a good, merely reflects the value, that the good has for those who demand and pay for it. Admittedly, it is quite doubtful, whether there is a real market mechanism at play in case of the horrendous manager remunerations. It would be more accurate to say, that this game follows rules set by the players themselves, often within the framework of cross-linkage.²⁰¹ As far as the growing

¹⁹⁶ See also *Steffen Mau*, *Lebenschancen. Wohin driftet die Mittelschicht?*, Frankfurt/Main: Verlag Suhrkamp, 2012, 193; *Michael Hartmann*, *Soziale Ungleichheit - Kein Thema für die Eliten?*, Frankfurt/Main – New York: Verlag Campus, 2013.

¹⁹⁷ *Plato*, *Nomoi*, 5th book, 744d (Transl. Benjamin Jowett [pmt], Double 9 Books, New Delhi 2023; Kindle Edition)

¹⁹⁸ *Aristotle*, *The Politics*. 1295b (Transl. Ernest Barker, Oxford World's Classics, 1995; Kindle Edition).

¹⁹⁹ *Rousseau*, *The Social Contract*, Book II, Chap. XI (Transl. D. H. Cole, Grapevine India, Delhi 2025; Kindle Edition)

²⁰⁰ A ‚fair‘ distribution is possible neither according to merit nor according to need. But even the ‚performance‘, provided via a market price mechanism that is free from competitive distortions, does not lead to a distribution result that is appropriate to the republican idea. This would require a redistribution which, however, would not have to be orientated towards needs, merits or market performances, but solely towards the principle of general safeguarding of freedom (as a regulative idea).

²⁰¹ The usual argument in favor of a multi-million euro salary for top managers, that it reflects their productivity and that their performance is worth the price, is extremely weak. Firstly, there is no evidence that these managers are so much more productive than their colleagues a few decades ago, who had to make do with far less. Secondly, even the „failures“, if they really have to leave, often receive severance package worth millions. Also, the success, that you actually achieve, is often not just based on your own work performance, but

wealth of the upper class is concerned, it is in any case to a considerable extent based not on competitive performance, but on performance-independent profits²⁰² from financial market transactions and on inheritance²⁰³, whereby in Germany income tax is considerably higher than inheritance tax for children and grandchildren.²⁰⁴ While internationally 33% of wealth is inherited, the figure for Germany is 75%. Nevertheless, 54% of the Germans consider the inheritance tax to be too high; only 9% as too low; and 19% as just. The percentages of the tax are for spouses, children, grandchildren, parents and grandparents up to €75.000 – 7%; €600.000 – 15%; €6 millions – 19%; €26 millions – 27%; above €26 millions – 30%. The corresponding percentages for unrelated persons are: 30%; 30%; 30%; above €13 millions – 50%.²⁰⁵

First of all, a common *petitio principii* must be pointed out with regard to the talk of ‚top performers‘: performance or productivity is measured by the amount of income and/or tax paid, and this amount in turn is justified by performance.²⁰⁶

Furthermore, in connection with the level of remuneration of such ‚top performers‘, it is regularly disregarded that in an economy based on the *division of*

on luck, ruthlessness, market power, etc. – „Often owned by illustrious multimillionaires themselves, these publications are generally filled with stereotypical glorifications of wealth well deserved and useful inequality.“ (Thomas Piketty, *Capital and Ideology*, [fn. 36], 174.)

²⁰² See Emmanuel Saez / Gabriel Zucman, *The Triumph of Injustice. How the Rich Dodge Taxes and How to Make Them Pay*, New York: W. W. Norton, 2019. The authors suggest counteracting „the race to the bottom that’s currently raging“: „a sharply progressive wealth tax to curb the forms of rent extraction associated with extreme and entrenched wealth, an effective taxation of globe-straddling companies to reconcile globalization with tax justice, a national income tax to fund the modern social state and alleviate the crushing cost of health care.“ (p. 195) – Milanovic distinguishes „in descending order of opprobrium“ six ways „that people might become billionaires *without making lives of the rest of us any better*“: inheritance, political position, political connections, political lobbying, monopoly and tax evasion. (Branko Milanovic, *The World under Capitalism, Observations on Politics, History, and Culture*, Cambridge: Polity Press, 2025, 147 f. (m/it). – „The main conclusion of my investigation is that, despite some progress in curtailing it in recent years, tax evasion is doing just fine. There has, in fact, never been as much wealth in tax havens as today. On a global scale, 8% of the financial wealth of households [\$7,6 trillion out of \$95,5 trillion; p. 35] is held in tax havens. According to the latest available information, in the spring of 2015 foreign wealth held in Switzerland reached \$2,3 trillion. [...] Fifty-five percent of all the foreign profits of US firms are now kept in such havens. Since multinationals usually try to operate within the letter – if not the spirit – of the law, this profit shifting is better described as >tax avoidance< rather than outright fraud.“ (pp. 3 f.) „For a customer, the main reason to deposit securities in a Swiss bank is and has always been for tax evasion.“ (p.17) (Gabriel Zucman, *The Hidden Wealth of Nations. The Scourge of Tax Havens*, Chicago / London: University of Chicago Press, 2015)

²⁰³ „Those with a good education and a high income are more likely to inherit and they also inherit more.“ (Jens Beckert, *Erben in einer Leistungsgesellschaft*, Frankfurt/Main – New York: Campus, 2013, 19; m/tr)

²⁰⁴ This means that an inheriting child will only reach the entry tax rate of 14% on the income tax table if, in addition to the allowance of €400,000, they inherit a further €600,000, i.e. a total of €1,000,000. With an annual income of €1 million, the top tax rate of 45% has long since applied.

²⁰⁵ Source: Deutsches Institut für Wirtschaftsforschung [DIW], published in DIE ZEIT Nr. 52, December 4, 2025.

²⁰⁶ „The market performance under consideration here is [...] dependent on a combination of factors, that are largely due to circumstances beyond the control of the individuals concerned. The fact, that certain performances are scarce and therefore achieve a high price, depends on the overall situation. And the fact, that certain individuals can come up with such performances, depends on their endowment with certain skills and resources, which in turn is only partly due to their own previous activities. [...] All incomes in a society are always dependent on the overall socio-cultural context.“ Hans Albert, *Traktat*, (fn. 102), 149 f.; see also: Hans Albert, „Erwerbsprinzip und Sozialstruktur. Zur Kritik der neoklassischen Marktsoziologie“, in: *Jahrbuch für Sozialwissenschaft*, 19 [1968] 43 et seqq.) For Khurana, the special performance of top managers, their ‚charisma‘, is a myth that they have purposefully cultivated. (Rakesh Khurana, *Searching for a corporate savior: the irrational quest for charismatic CEOs*, Princeton / Oxford: Princeton University Press, 2002). See for this also: Steffen Mau, (fn. 166), 54 et seqq.; 67 et seqq.

labor, an individual ,performance‘, for example concerning an increase of a company's profit, which is similar to the so-called advertising success, can hardly be determined in view of the countless influencing factors that come into consideration,²⁰⁷ especially in the form of all other indispensable employees, and therefore also cannot be attributed. An increase of a company's profit or stock market value cannot be attributed to an individual. The company's success is also often not based on the performance of the company, be it now the management or the perhaps excellent skilled workers, but just luck, not the ‚luck favoring the efficient‘, but luck thanks to a favorable market situation. It is also a notorious mistake to think that differences in income and/or assets are solely attributable to differences in natural talent, whereas in fact assets in particular are often acquired through inheritance, marriage and stock market or real estate speculation and not through one's own labor. On the other hand, there are also many kinds of real performances (material as well as immaterial value-creating activities), whose value for the society is de facto not determined or taken into account or which cannot be determined according to market principles at all or not appropriately.

In one of his famous essays Kant argues against „*hereditary prerogative*“: „Every member of a commonwealth must be allowed to attain any level of rank within it [...] to which his talent, his industry and his luck can take him; [...] Now since birth is not a *deed* of the one who is borne [...]: hence there can be no innate prerogative of one member of a commonwealth over another as fellow subjects, and no one can bequeath to his descendants the prerogative of the *rank* which he has within the commonwealth“.²⁰⁸ No doubt, Kant is right: „birth is not a *deed* of the one who is born“; but what about talent, industry, and luck? Well, that neither talent, given at birth, nor luck are deeds, goes without saying.²⁰⁹ And where industry takes you is not necessarily based on attributable deeds. For some, industry is no achievement at all; some lack the physical or psychological strength for industry; and some are extremely industrious, but don't get far in the market (e.g. van Gogh). And the most important question is not even in sight here: what is the value or benefit of certain occupations, pursued with much or with little effort, for the community?²¹⁰

The words „deserve“ and „merit“ should anyhow be better completely avoided in this context or, if uttered, cautiously and in a soft voice, given the fact, that the many different natural as well as social advantages and disadvantages of talent, strength of

²⁰⁷ „Would Bill Gates and his fellow techno-billionaires have been able to build their business without the hundreds of billions of dollars of public money invested in basic research over many decades? Would the quasi-monopolies they have built by patenting public knowledge have reaped such enormous profits without the active support of legal and tax codes?“ (Thomas Piketty, *Capital and Ideology*, [fn. 36], 28.

²⁰⁸ TP 08.292 f.

²⁰⁹ A page earlier Kant had said: „But [the] thoroughgoing equality of individuals within a state, as its subjects, is quite consistent with the greatest inequality in terms of the quantity and degree of their possessions, whether in physical or mental superiority over others or in external goods and in rights generally (of which there can be many) relatively to others; thus the welfare of one is very much dependent upon the will of another (that of the poor on the rich)“. Well, an inequality in physical or mental superiority becomes a social problem only when it leads to an inequality in external goods and in rights generally, relatively to others. The following considerations will focus, not least, on whether resp. to what extent this inequality is contrary to the thoroughgoing equality of individuals within a State.

²¹⁰ Compare, for instance, industry and income of a steelworker or a country doctor with those of a CEO, let alone those of a hedge fund speculator.

mind and health or of origin, environment and other decisive kinds of circumstances in life are all nothing but pure luck. „Meritocratic hubris reflects the tendency of winners to inhale too deeply of their success, to forget the luck and good fortune that helped them on their way. It is the smug conviction of those who land on top that they deserve their fate, and that those on the bottom deserve theirs, too. This attitude is the moral companion of technocratic politics.“²¹¹ „[M]eritocracy [...]: It's corrosive of the common good [...] it encourages the successful to view their success as their own doing, to inhale too deeply of their own success, to forget the luck and good fortune that helped them on their way, to forget their indebtedness [...] to those who make their achievements possible.“²¹² „Among those who land on top, it induces anxiety, a debilitating perfectionism, and a meritocratic hubris that struggles to conceal a fragile self-esteem. Among those it leaves behind, it imposes a demoralizing, even humiliating sense of failure. These two tyrannies share a common moral source – the abiding meritocratic belief that we are, as individuals, wholly responsible for our fate: If we succeed, it is thanks to our own doing, and if we fail, we have no one to blame but ourselves. Inspiring though it seems, this strenuous notion of individual responsibility makes it hard to summon the sense of solidarity and mutual obligation that could equip us to contend with the rising inequality of our time.“²¹³ The idea „that market outcomes reflect the true social value of people's contribution to the common good“²¹⁴ is a myth often propagated by neo-liberal economists.

This myth cannot be verified because social usefulness, and certainly this type of usefulness, cannot be quantified. But if we compare the work and income of a CEO with the work and income of a nurse or a primary school teacher, there is no need to measure usefulness. The practical reasoning of a 16-years-old is sufficient to realise that the fact that in 2023 the average annual income of the 10 members of the VW board of directors was more than 100 times higher than the income of, say, a school teacher, cannot possibly correspond to a difference in the personal performance of the various individuals. And that's not even mentioning the countless ‚activities‘ that the market rewards, but which actually contribute nothing to the common good,²¹⁵ and in fact often harm it even.

According to Sandel, Adair Turner, chair of Britain's Financial Services Authority, „has estimated that in advanced economies such as the U.S. and the U.K., only 15 percent of financial flows go into new productive enterprises rather than into speculation on existing assets or fancy derivatives.“²¹⁶ Its [this figure's] implications are not only economic but also moral and political. Economically, it suggests that much financial activity hinders rather than promotes economic growth. Morally and politically, it reveals a vast discrepancy between the rewards the market bestows on finance and the value of its contribution to the common good.“²¹⁷

Although the housework performed by a paid domestic helper is included in the national accounts as a contribution to the gross national product, that of the wife is not, not to

²¹¹ *Michael J. Sandel*, *The Tyranny of Merit* (fn. 107) 25; see also *Idem*, *Equality*, (fn. 52), 48.

²¹² *Michael J. Sandel*, *Equality*, (fn. 52), 49.

²¹³ *Michael J. Sandel*, *The Tyranny of Merit* (fn. 107) 183 f. See also, for a comprehensive and decisive critique: *Ibidem*, chapter „Success Ethics“, pp. 113-153.

²¹⁴ *Michael J. Sandel*, *The Tyranny of Merit* (fn. 107) 213.

²¹⁵ See *Michael J. Sandel*, *The Tyranny of Merit*, (fn. 107), 216 et seqq.

²¹⁶ For details see *Michael J. Sandel*, *Democracy's Discontent*, (fn. 151), 296 f.; 306 f.

²¹⁷ *Michael J. Sandel*, *The Tyranny of Merit* (fn. 107) 218. For this issue see especially *Michael J. Sandel*, *Democracy's Discontent*, (fn. 151), 296 f. and the chapter „Wall Street versus Main Street“, 304 et seqq.

mention her work in raising children, i.e., creating indispensable human capital. The German government's 5th Family Report states accordingly: „Assuming a realistic potential labor force in the former Federal Republic of Germany in 1990 of 38,7 million [...], and further assuming that these workers incurred costs of care and support up to the age of 19 in line with current conditions, this results in a contribution by families to the formation of human capital or the formation of the national labor force amounting to DM 15.286 trillion. In contrast, the value of reproducible tangible assets in 1990 at replacement prices amounted to DM 6.9 trillion.“²¹⁸

There is no ‚market mechanism‘ that leads to the necessary result when it comes to remuneration measured in terms of the benefit to society as a whole, for example in the areas of care and nursing, education and training.²¹⁹ There is certainly no shortage of demand for labor. But without state-funded support measures, the demand is not even visible in its urgency, let alone covered. The argument that special performance must be rewarded with special remuneration, which is often used, albeit not very convincingly, in particular with regard to managers' salaries, becomes almost trivial when it comes to a doctor who needs to be motivated to move to a remote province as a „country doctor“.

The same applies to goods, by the way. Economists are primarily or even exclusively interested in market goods. But there are many scarce goods that are not traded on the market and therefore do not fetch a price, but which are of utmost importance for people's lives and their society and therefore also of utmost behavioural relevance – alongside and often even ahead of the pursuit of utility²²⁰ or profit maximisation (which is solely relevant in economics): freedom, friendship, social interaction, power, influence, fame, prestige, reputation, recognition, self-esteem, self-affirmation and much more.²²¹

Hayek rightly argues, that the remunerations, resulting from a free market, would not reflect (moral) merit. Rather, the market remuneration for any performance would correspond to the „value that they have for those who can use them“ or the „advantage that we derive from the performance of others“.²²²

However, first we have to ask the question how free the market is, how free the respective market participants are in their decisions and how fair the rules prevailing on the market actually are. For a truly *free* ‚play of forces‘ to take place on a market, it is not enough for competition to be ‚fair‘, i.e. in accordance with the rules. Rather, it is crucial that the rules of this competition – which are of course the same for everyone – are themselves ‚fair‘. Procedural justice does not already exist, if the market

²¹⁸ „Familien und Familienpolitik im geeinten Deutschland – Zukunft des Humanvermögens“, German Bundestag Printed Matter 12/7560, 145 (m/tr). In this context, Borchert quotes Friedrich List, the eminent economist of early German liberalism, who said that „those who raise pigs are productive members of society, while those who raise children are unproductive.“ (*Jürgen Borchert, Sozialstaats-Dämmerung, München: Riemann, 2013, 45 et seqq. [m/tr]*)

²¹⁹ See for this also *John Kenneth Galbraith, The Affluent Society, Penguin, 1999, 242 et seqq. German!!!*

²²⁰ Mere considerations of utility will not get you anywhere in economics. For this reason, no form of utilitarianism is suitable for satisfactorily answering the socio-political questions posed here. See for this: *Lionel Robbins, „Interpersonal comparisons of utility“, in: The Economic Journal, 48 (1938); Gunnar Myrdal, Das politische Element in der nationalökonomischen Doktrinbildung (fn. 43); Amartya Sen, Utilitarianism and Welfarism“, in: The Journal of Philosophy, 76 (1979) 463-489.*

²²¹ See the richly detailed book by *Michael J. Sandel, What Money Can't Buy: The Moral Limits of Markets, London: Penguin books, 2012; see also Hans Albert, Erwerbsprinzip (fn. 172), 36. Albert also shows there that the assumption of profit maximisation, central in neoclassical business theory, inadequately addresses three issues that determine entrepreneurial behaviour: motivation, information and social context (Ibidem, 43 et seqq.)*

²²² *Friedrich A. v. Hayek, Die Verfassung der Freiheit, (fn. 42), 118 f. (m/tr). Vincent van Gogh got nothing for his works during his lifetime; some works are now trading at prices between \$50 million and \$100 million; – thus, once „bad luck“, once „good luck“. According to the doctrine of a fair market value, one would have to say: He got both times what he deserved. Admittedly, van Gogh certainly would have preferred the reverse order.*

process takes place in correct compliance with any (arbitrary) rules. Rather, only very specific rules come into consideration, namely those that ensure freedom as an opportunity for realisation, as the possibility of being able to realise one's own legitimate purposes (compatible with the freedom of all others in accordance with a universal law).

The distinction, sometimes proposed, between personal constraint and constraint by circumstances does not help here. Nor does the talk of ‚willing‘ exchange partners (*volenti non fit iniuria*); for the willingness, that is supposedly expressed in the exchange that takes place, can be extremely unfree, a kind of grudging acceptance, nothing but the expression of market powerlessness in the face of a market power that leaves no choice at all. There is no essential difference between the alternatives ‚money or life‘ and ‚pittance or eke out a miserable existence‘. The secured equality of right is a necessary, but not a sufficient condition for real external freedom. Equality of right also includes equality of means to enforce one's rights.

Rothschild writes about the neglect of the problem of power in economic theory: „Reference to and treatment of power problems are ingredients of economic studies, but this is almost completely restricted to a narrowly defined economically hyphenated power, in particular monopoly power and bargaining power in goods and labor markets. This means it is restricted to specific and immediately market- and price-relevant power phenomena which can be easily endogenized into a theory of competitive markets as deviations from perfect competition. But many power phenomena reaching beyond the immediate price formation processes are connected with the economic sphere. Power can be and is used in fighting for profitable positions in the market and for maintaining them, for influencing the framework which determines the working of market mechanisms, and power is also important as an aim of economic activity.“²²³

It is true, economics has to limit itself to describing and explaining social reality as it is, without making normative statements. With regard to that limitation, however, it has to expand its concept of social reality beyond the supposedly purely economic,²²⁴ also taking into consideration economically relevant activities, that take place outside the market, and taking into account the fact, that the market power of the players is distributed extremely unequally.

Secondly, it is still more important to point out that even a free and fairly regulated market economy, and above all a civil society as such, require conformity with the idea of the original contract for their legitimacy, and are therefore bound by the above-mentioned fundamental rights.

If the entrepreneur A offers people X, Y, Z an hourly wage of 5.50 euros for the work demanded by him, they will presumably agree to the deal in the absence of elasticity of supply,²²⁵ and they will do so ‚freely‘, since A does not ‚force‘ them to do anything.²²⁶ However, in the market economy, which is protected by a State's system of rights, they are forced to refrain from doing what they could do and rightfully (!) would be allowed to do in a contractless state of nature: to take the money, needed to cover their necessary living expenses, from A or B by force if they were strong enough. The market relationship between A and X, Y, Z with the resulting outcome is sanctioned by the State, but it contradicts the

²²³ Kurt W. Rothschild, „The absence of power“, *Power in Economics*, (fn. 2), 433.

²²⁴ „What is perhaps needed [... is ...] a simple change of perspective, a deliberate revision of the fundamental economic approach. A change that radically does away with the distinctions between economic, political and sociological angles.“ Hans Albert, „The neglect of sociology in economic science“, (fn. 2), 30.

²²⁵ The usurious interest rate for a bank loan with a lack of elasticity of demand corresponds to wage usury.

²²⁶ For a very good description and analysis of such a contractual situation in the context of a critique of Buchanan's ‚economism‘ see: *Wolfgang Kersting*, *Die Politische Philosophie des Gesellschaftsvertrages*, Darmstadt: Wissenschaftliche Buchgesellschaft, 1994, 342 et seqq.

idea of the original contract.²²⁷ This idea also includes the justification for a statutory minimum wage.

„One may take a share in the *general injustice*, even though one does nobody any wrong according to the civil laws. So if we just practice beneficence to an unfortunate wretch, we have not made a free gift to him, but given him what we have helped to take away from him through a *general injustice*. For if none might appropriate more of this life's goods than an other, there would be no rich, but also no poor. Thus even acts of benevolence are acts of *duty* and indebtedness, arising from the *rights* of others.“²²⁸

„Having the resources to practice beneficence which depends on the goods of fortune is, for the most part, a result of certain human beings being favored through the injustice of the government, which introduces an inequality of wealth that makes others need their beneficence. Under such circumstances, does a rich man's help to the needy really deserve to be called beneficence at all, on which he so readily prides himself as something meritorious?“²²⁹

If the purpose of the State is exclusively to secure the rightful external freedom of its citizens, then the „social State“ (and thereby also the development of all the predispositions of the human being²³⁰) serve exclusively to secure this freedom. This would, of course, also include the correction of economic and social inequalities (injustices) that arose originally and solely through and with belonging to a condition of general safeguarding of rights. (A poor devil can no longer hunt in the nearby forest at will – as in the condition of nature – since this forest is State property or State-guaranteed private property of someone else.)

Thirdly and finally, with regard to the highly questionable concept of *performance equity*, which is in particular so often used by ‚market liberals‘, it should be remembered, that by no means only the criterion of so-called economic efficiency, measured by success on the market (market income), a criterion which is related to pure market activity and has been recognized as extremely problematic,²³¹ comes into consideration as a yardstick for this kind of equity, but also the criterion of social function related to the community.

The ‚republican‘ importance of the second criterion becomes immediately apparent if one compares the exorbitant market income of the already mentioned hedge fund speculator, whose „performance“ is without any social function whatsoever, to the market income of a nurse or a primary school teacher. The first article of the „Déclaration des droits de l'homme et du citoyen“ of 1789 stated: „Les distinctions sociales ne peuvent être fondées que sur l'utilité commune.“

The slogan „Performance must be rewarded again“ is meaningless. What we certainly know is, that market prices do not correspond to the real value of the market products. The real values themselves will though remain forever an enigma. This is especially true, of course, for products that are not traded on any market at all.²³²

²²⁷ The decisive characteristic of the will expressed therein is, that it *necessarily* includes the will of everyone as a *possibility*, i.e. that everyone *can necessarily* agree to the content of the contract. It is indeed *possible*, that X, Y, Z agree to a treaty establishing a State, which does not exclude them from being restricted in their freedom by A at his discretion. But it is not *necessarily possible*; for they also can not agree without coming into conflict with their own will. On the other hand, they can necessarily consent to a contract that guarantees their freedom (in accordance with a universal law) under all circumstances; it is impossible, that they cannot possibly consent, to wit, because they cannot possibly come into conflict with their own will by consenting.

²²⁸ V-Mo/Collins 27.416 (pmt; m/it).

²²⁹ RL 06.454 (pmt).

²³⁰ See IaG 08.22 f.

²³¹ See for this *Michael J. Sandel*, *The Tyranny of Merit*, (fn. 107) 137 et seqq.

²³² For more see below.

Possible measures²³³ to prevent excessive wealth asymmetry²³⁴ are:²³⁵

— equal access to *all* educational institutions at *all* levels

Milanovic recommends: „A significant increase in funding for and improvement in the quality of public schools, whose cost must be low enough to be accessible not only to the middle class but also to those in the bottom three deciles of the income distribution. The objective is to reduce transmission of advantages across generations and make equality of opportunity more real.“²³⁶

„A prerequisite for equitable educational provision is that access to the best schools should be independent of parental income. Above all, however, the quality of educational institutions must be standardized.“²³⁷ Alvarado noted specifically for the USA that the pattern of the course of income inequality, observed there, was „primarily due to massive inequality in education.“²³⁸

Sandel describes the situation at elite universities in the United States as follows: „Most students at selective colleges and universities are from affluent families; very few are from low-income backgrounds. More than 70 percent of those who attend the hundred or so most competitive colleges in the United States come from the top quarter of the income scale; only 3 percent come from the bottom quarter. – The wealth gap in college enrollment is most acute at the top. At Ivy League colleges, Stanford, Duke, and other prestigious places, there are more students from the wealthiest 1 percent of families than from the entire bottom half of the country. At Yale and Princeton, only about one student in fifty comes from a poor family (bottom 20 percent). – If you come from a rich family (top 1 percent) your chances of attending an Ivy League school are 77 times greater than if you come from a poor family (bottom 20 percent). Most young people from the bottom half of the income scale attend a

²³³ Of course, these measures are subject to the proviso that they do not themselves impair free competition as a control instrument or have counterproductive effects. In Germany, for example, fear of the migration of production factors amid increased mobility led to the corporation tax rate, which had stood at 56% in 1989 and 40% in 2000, being reduced first to 25% and then to 15% since 2008.

²³⁴ In the USA, the share of the richest 10% in national income raised between 1980 and 2018 from 34% to 48%; at the same time, the corresponding share of the poorest 50% fell from 20% to 12%. (Thomas Piketty, *Capital and Ideology*, [fn. 36], 637). „From 1987 to 2017, the average wealth of the hundred millionth richest people in the world (about thirty out of 3 billion adults in 1987 and about fifty out of 5 billion in 2017) grew by 6,4 percent a year globally, and the average's person wealth grew by 1,9 percent a year. The skyrocketing of the largest fortunes was even more marked if one looks only at the United States, Europe, and China.“ (Thomas Piketty, *op. cit.*, 686.) The top decile of private wealth owners in the USA owned 74% of all private wealth, – compared with 2% for the bottom 50% and with 26% for 90% of the adult population. „The lack of diffusion of wealth is a central issue for the twenty-first century, which may undermine the confidence of the lower and middle classes in the economic system – not only in poor and developing countries but also in rich ones.“ (Thomas Piketty, *op. cit.*, 687) See also *Branko Milanovic, Visions of Equality. From the French Revolution to the End of the Cold War*, Cambridge/Mass. / London: Belknap Press, 2023, 287-297.

²³⁵ See for the following also: *Hagen Krämer, „Spitzeneinkommen zwischen ökonomischem und normativem Marktversagen. Marktorientierte und soziale Legitimation von Topmanager-Gehältern“*, in: Hochschule Karlsruhe, *Diskussionsbeiträge aus der Fakultät für Wirtschaftswissenschaften*, 1/2013, 1-25. – Persson und Tabellini conclude that income inequality hinders economic growth. This is „largely determined by the accumulation of capital, human capital and knowledge usable in production. The incentives for such productive accumulation hinge on the ability of individuals to appropriate privately the fruits of their efforts, which in turn crucially hinges on what tax policies and regulatory policies are adopted. In a society where distributional conflict is more important, political decisions are likely to result in policies that allow less private appropriation and therefore less accumulation and less growth. But the growth rate also depends on political institutions, for it is through the political process that conflicting interests ultimately are aggregated into public-policy decisions.“ *Torsten Persson / Guido Tabellini, „Is inequality harmful for growth?“*, in: *American Economic Review* 3/1994, 600. See also *Daniel Susskind, Growth. A Reckoning*, London: Penguin, 2025.

²³⁶ *Branko Milanovic, Capitalism, Alone* (fn. 108), p. 217.

²³⁷ *Branko Milanovic, Global Inequality* (fn. 138), chpt. 5/3 (m/tr from the German version p. 233)

²³⁸ *Facundo Alvarado et al., World Inequality Report 2018* (fn. 116), abstract chpt. 2 (m/tr from the German version). See also Thomas Piketty, *Capital and Ideology*, (fn. 36), 1007 et seqq.; *Lauren A. Rivera, Pedigree. How Elite Students Get Elite Jobs*, Princeton/Oxford: Princeton UP, 2015; *Michael Hartmann, Die Abgebobenen* (fn. Xy) 47 et seqq.

two-year college or none at all.²³⁹ At the same time, Sandel states that „America’s leading colleges and universities [...] are not effective engines of upward mobility. [...] This is especially true at elite private colleges. Although attending a place like Harvard or Princeton does give a poor kid a good chance of rising, such places enroll so few poor kids to begin with that their mobility rate is low. [...] One might expect things to be different at the major public universities. But they, too, enroll so many already-affluent students that they contribute little to upward mobility.“²⁴⁰ „Of Americans whose highest academic qualification was a high school diploma, only 68 percent were employed in 2017.“²⁴¹

Compared to the USA in particular, but also to France²⁴² and England²⁴³, Germany does not have any elite universities or colleges to which access would be considerably easier for the wealthy in terms of the costs of studying. The *numerus clausus* refers to the quality of the „Abitur“ (high school diploma). However, for years there have been more and more private colleges that are not at all distinguished by high academic quality like the elite American universities, but of which some offer their graduates a better springboard to professional success than public universities.²⁴⁴ Their advantage is probably most evident in a curriculum geared toward a specific professional field. It should also be mentioned here that the difference in quality between the various German universities is almost negligible when compared to the difference between elite US universities and the countless state universities in the provinces.

Of these elite universities, Piketty says: „The concentration of educational investment in elitist institutions is particularly extreme in the United States, where admissions procedures are opaque and public regulation is almost entirely lacking.“ But also with regard to higher education in general he comes to the following conclusion: „In 2014, the rate of access to higher education (percentage of individuals age 19-21 enrolled in a college, university, or other institution of higher education) was barely 30 percent for children of the poorest 10 percent in the United States and 90 percent for the richest 10 percent.“²⁴⁵ Milanovic states: „The high cost of education, combined with the actual or perceived educational quality of certain high-status schools, fulfills two functions: it makes it impossible for others to compete with top wealth-holders, who monopolize the top end of education, and it sends a strong signal that those who have studied at such schools are not only from rich families but must be intellectually superior.“²⁴⁶

As far as public universities in Germany are concerned, there is a difference in opportunities between rich and poor only after graduation or doctoral studies. „The decisive social selection takes place much more strongly during one’s professional career than in the other three countries. In Germany the personality traits, that are already decisive for admission to elite universities, really only come into effect during one’s professional career. Ultimately, however, they ensure the same social composition of top management as in countries with elite educational institutions. The social opening up of higher education institutions, associated with the expansion of education, and the sharp increase in social climbers among university graduates in recent decades have therefore not been reflected in a social opening up of the economic elite. As our own study of entire cohorts of doctoral graduates from four decades has shown, social background from a middle-class or, even better, upper-middle-class family remains decisive for access to top positions in large companies. [...] The chance

²³⁹ *Michael J. Sandel*, *The Tyranny of Merit* (fn. 107), 166 f.; see also *Michael J. Sandel*, *Democracy’s Discontent*, (fn. 151), 393.

²⁴⁰ *Ibidem*, 167 f.

²⁴¹ *Ibidem*, 199

²⁴² See *Thomas Piketty*, *Capital and Ideology*, (fn. 36), 754 et seqq..

²⁴³ See *Thomas Piketty*, *Capital and Ideology*, (fn. 36), 844 et seqq.

²⁴⁴ Private universities play no role whatsoever in Germany in recruiting elites in the fields of politics, justice, and administration; this even applies to the economic sector. Rather, one could speak of a certain primacy of certain public universities.

²⁴⁵ *Thomas Piketty*, *Capital and Ideology*, (fn. 36), 35.

²⁴⁶ *Branko Milanovic*. *Capitalism, Alone*, (fn. 108), p. 60.

of obtaining a position on the board of a large corporation is more than twice as high for children of the upper middle class as it is for someone from the general population. [...] Those with doctorates from families of board members and/or managing directors have a 17 times higher chance than their fellow students from working-class families.²⁴⁷ „[T]he meritocratic promise [...] was not a promise of greater equality, but [only] a promise of greater and fairer mobility.“²⁴⁸

Michael Hartmann came to the important conclusion that, although the reform of the German educational system in the 1970s brought about a social opening of secondary schools and universities, including the possibility of doing a doctorate, it had not yet had any effect on the recruitment of top positions, except in politics and science. The result leaves no room for doubt: the percentage of PhDs from the upper middle class and the upper class, who reached top positions in business or the judiciary, is significantly higher than that of PhDs from the lower class and lower middle class. This means that the family environment is a decisive factor in such an advancement.²⁴⁹ This is also undoubtedly the case in France and the UK. Equal opportunities with regard to the doctorate is one thing, equal opportunities with regard to top positions is another. After the doctorate and independently of it, further careers are subject to social selection. And the higher the position in business or the judiciary, the greater the weight of the social background,²⁵⁰ with cutthroat competition²⁵¹ from top to bottom.²⁵²

With regard to the elites in the major Western industrialised countries, Hartmann comes to the following conclusions: they are „predominantly socially exclusive and homogeneous. Social exclusivity and homogeneity among the elites were and remain a crucial prerequisite for the implementation of neo-liberal policies. The attitude of elites towards social inequality and neo-liberal policies is decisively shaped by their social background. The answer to political disenchantment and right-wing populism can only lie in a fundamental departure from prevailing neo-liberal policies. This requires a radical renewal of the parties on the left,

²⁴⁷ Michael Hartmann, *Die Abgehobenen*, (fn. 110), 64 f. (m/tr). – Michael Hartmann, *Der Mythos von den Leistungseliten. Spitzenkarrieren und soziale Herkunft in Wirtschaft, Politik, Justiz und Wissenschaft*, Frankfurt / New York: Campus Verlag, 2002: „Those who face greater difficulties in gaining entry into high-level management positions due to their social background lose even more ground as their careers progress. The results so far clearly show that there is a very close correlation between social background and attaining a high-level management position in German business. (p. 70) The closer one gets to the actual levers of power, the more pronounced the social selection becomes. (p. 81) Those with doctorates who reach high-level management positions in leading companies during their careers and thus clearly belong to the economic elite in the narrower sense are subject to particularly rigorous social selection. [...] The higher the position in business, the greater the weight of social background. (p. 87) (m/tr).“

²⁴⁸ Michael J. Sandel, *The Tyranny of Merit*, (fn. 107), 85.

²⁴⁹ „Every individual's personality is a product of dynamic interaction with the cultural and educational opportunities made available in early life. [...] each person comes to maturity with an economic endowment he cannot be said to deserve. In our society, starting points are irrevocably shaped by parental wealth and position. But nobody deserves his parents.“ (*Bruce Ackerman / Anne Alstott, The Stakeholder Society*, Yale UP, 1999, 23). – Milanovic suspects that in the future, coming from a family with *good connections* will be even more important than coming from a *wealthy* family. See *Branco Milanovic, Global Inequality* (fn. 138), chpt. 5 / subchpt. 2.

²⁵⁰ See for this: *Pierre Bourdieu, La distinction. Critique sociale du jugement*, Paris: Les Éditions du Minuit, 1979. *Pierre Bourdieu, Distinction: A Social Critique of the Judgement of Taste*; Routledge 2010; *Michael Hartmann, Der Mythos von den Leistungseliten*, (fn. 247), especially 70; 81; 87; 93; 151; 157 et seqq.

²⁵¹ See for example: *Anat Admati / Martin Hellwig, The Bankers New Clothes* (fn. 191), 304, note 17.

²⁵² See *Michael Hartmann, Der Mythos von den Leistungseliten* (fn. 247); *Idem, Eliten und Macht in Europa*, Frankfurt/Main – New York: Campus, 2007; *Idem, Soziale Ungleichheit – Kein Thema für die Eliten?*, Frankfurt/Main – New York: Campus, 2013. A study by a Hartmann student shows, albeit limited to North Rhine-Westphalia, a considerable intensification of social selection in the field of science as well, namely „a dominant [professorial] recruitment from socially less widespread high social classes and a very low recruitment from broad sections of the population such as workers“. The dominance is particularly pronounced in law and medicine, where the professors appointed between 2001 and 2010 came almost exclusively from the highest social classes. The same applies to junior professorships as a whole. And „female professors tend to have a higher social background than male professors.“ See *Christina Möller, „Wie offen ist die Universitätsprofessur für soziale Aufsteigerinnen und Aufsteiger?“*, in: *Soziale Welt* 64 (2013) 341-360 (m/tr).

starting at the grassroots level, and a resulting massive social opening of the political elite.²⁵³

— the abolition of unrestricted inheritance rights²⁵⁴

The right of inheritance can certainly be recognised as part of the right of property and yet, as with property in general, its formulation can be left to the positive legislator, who in turn would have to be guided by principles of freedom and the tasks arising for the State from this. It is here not about strengthening State power by weakening competing private power, but about promoting and strengthening a republican system of fundamental rights.

The bequeathing of political power has long been abolished, but the bequeathing of economic power has not. And yet, any kind of economic power, even where it is not already by its sheer size a distortion of competition, poses a threat to the *res publica*. For example, the differences in wealth,²⁵⁵ brought about by the bequeathing of wealth, which are often reproduced across generations, lead, beyond the inevitable *naturally* caused inequality, to a (certainly reducible) inequality caused by *positive right*, so that a poor member of a commonwealth de facto does not have the opportunity „to attain any level of rank [...] to which his talent, his industry and his luck can take him.“²⁵⁶ To call both kinds of inequality ‚coincidences of birth‘ is simply misleading. The difference between them is, that the first is completely independent of all human willing and unalterable and is neither based on a right nor confers such a right, while the second depends entirely on the testator's will to acquire and to bequeath (resp. on the positive legislator) and is both based on a (property) right (of the testator) and confers a (property) right (of the heir). Furthermore, the biological advantage as such is only a *potential* ability yet to be realized through one's own efforts, whereas the advantage given with an inheritance already represents the *effortlessly realized* ability. The Declaration of the Rights of Man and of the Citizen of 1789 rightly states not merely that all men are born equal, but that they are „equal in respect of their rights“²⁵⁷. This is opposed by the right of inheritance and, in particular, as for instance in Germany, the right to a statutory share.

In order to at least eliminate exorbitant inequalities, inheritances of children could be limited to a maximum amount of two million euros²⁵⁸ per person²⁵⁹, for example. In addition, a

²⁵³ Michael Hartmann, Die Abgehobenen, (fn. 110), 29 f. (m/tr).

²⁵⁴ See on the topic as a whole: D. W. Haslett, Is Inheritance Justified?, in: Philosophy and Public Affairs, 15 (1986) 122-155; D. W. Haslett, Capitalism with Morality, Oxford: Oxford UP, 1997; Jens Beckert, Unverdientes Vermögen. Soziologie des Erbrechts, Frankfurt/Main – New York: Campus, 2005. Radical proposals can also be found among the two ORDO-liberals Alexander Rüstow, Zwischen Kapitalismus und Kommunismus, (fn. 133), 146 et seqq.; Wilhelm Röpke, (fn. 156), 297 et seqq.; 306; 363. Interestingly, and quite rightly, it was Barbara Höll of the extrem left-wing PDS (Party of Democratic Socialism) who referred to the ORDO-liberal Walter Eucken in the German Bundestag debate on June 14th 1996 when she called for the introduction of an inheritance tax. See, further, already the debate on the right of inheritance in the French National Assembly of 1791 and in particular the contributions of Mirabeau and Robespierre (for this: Jens Beckert, Unverdientes Vermögen, [fn. 254], 44 f.; 348 f.). – Hayek's arguments in favor of the right of inheritance, far away from classical ORDO-liberalism, are surprisingly weak and can rather be explained in biographical terms: the private inheritance of wealth would be essential for a „wide dispersion of capital property“ and as an „incentive for capital accumulation“; moreover, „a certain continuity of living standards and external ways of life is also essential“ for the passing on of „cultural assets“. (Friedrich A. Hayek, Law, Legislation and Liberty, (fn. 31), 110 f.) Against Hayek (as a ‚caricature‘ of Keynes): Albert O. Hirschman, Leidenschaften und Interessen. Politische Begründungen des Kapitalismus vor seinem Sieg, Frankfurt/Main, 1987, 143.

²⁵⁵ See for this: Jens Beckert, „Lachende Erben? Leistungsprinzip und Erfolgsorientierung am Beispiel der Eigentumsvererbung“, in: Idem, Erben in einer Leistungsgesellschaft, (fn. 203), 65 et seqq.

²⁵⁶ TP 08.292. As early as 1890, Alfred Marshall expressed his regret about the inefficiency of inequality this caused: „The children of the working classes go to the grave carrying underdeveloped abilities and faculties; which, if they could have borne full fruit, would have added to the material wealth of the country.“ (Alfred Marshall, Principles of Economics, London: Macmillan, 1890, IV, IV, 2; here quoted from Daniel Susskind, Growth, (fn. 235), 193 f.

²⁵⁷ „Les hommes naissent et demeurent libres et égaux en droits.“

²⁵⁸ If the person managed to achieve a 3% return on these inherited assets, this would be an annual unearned income of 60.000 euros. If they lived off the substance, they would have 50.000 euros a year for 40 years.

draconian tax could be imposed²⁶⁰ on an estate of ten million euros or more, if it does not fall to the *res publica* at all, which in turn could use the proceeds²⁶¹ to support the children of the lower classes, provided they have nothing to inherit, and otherwise either to finance more of its tasks or to reduce the rates for other taxes, particularly value-added tax and other excise duties.

However, the – probably not very popular²⁶² – suggestion of limiting the inheritance per child to 250.000 euros should also be considered. This would at least enable the middle class, particularly in the context of their duty of care, to support their children in terms of the performance they themselves still have to render. Admittedly, it should be taken into consideration that, in view of the rising age limits, most inheritance cases do not involve children in need of support, but rather adults, or even older people. Therefore, also the following proposal should be seriously considered: for creating the greatest possible equality of starting opportunities, essential for the proper functioning of a free market economy, every citizen on entering adulthood would receive, in the form of a trusteeship, a certain sum (e.g. 100.000 euros) for their free disposal, which would have to be repaid at the end of one's life with compound interest from the inheritance, insofar as there is any.²⁶³

In his book „Capital and Ideology“, Piketty introduces „the concept of temporary ownership and permanent redistribution of property“.²⁶⁴ Further details can be found in the concluding chapter with the programmatic title „Elements for a Participatory Socialism“²⁶⁵ for the Twenty-First Century“.²⁶⁶

In his influential 1906 State of the Union address, US President Theodore Roosevelt, referring to the progressive inheritance tax he wanted to introduce, declared: „in my judgement the pro rata of the tax should increase very heavily with the increase of the amount left to any one individual after a certain point has been reached. It is most desirable to encourage thrift and ambition, and a potent source of thrift and ambition is the desire on the part of the breadwinner to leave his children well off. This object can be attained by making the tax very small on moderate amounts of property left; because the prime object should be to put a constantly increasing burden on the inheritance of those swollen fortunes which it is certainly of no benefit to this country to perpetuate“.²⁶⁷ President Franklin D. Roosevelt argued similarly in 1935 in a speech to Congress: „The desire to provide security for one's family is natural and wholesome, but it is adequately served by a reasonable inheritance. Great accumulations of wealth can not be justified on the basis of family and

²⁵⁹ In favor of a restriction of this kind already the liberal *John Stuart Mill*, *Principles of Political Economy*, book II, ch. 2, § 4. In September 2025, the German Minister of Economics Katherina Reiche, Member of the CDU and Lobbyist, in all seriousness rejected an increase in inheritance tax, arguing that it would damage Germany's position as a business location.

²⁶⁰ Among other things, it would have to be ensured that in particular the continuation of small and medium-sized enterprises would not be jeopardized as a result.

²⁶¹ A takeover of companies by the State is not envisaged here.

²⁶² Flach spoke of the difficulty that „exists in certain barriers of consciousness among the masses, who, if they only own an allotment, already believe themselves to be in solidarity with the billionaires in defence against all attacks on »property and inheritance rights«.“ (*Karl-Hermann Flach*, *Noch eine Chance für die Liberalen Oder: Die Zukunft der Freiheit*, Frankfurt/Main: Fischer, 1971 [m/tr]). The author was General Secretary of the (liberal) FDP (Free Democratic Party) at the time. Their so-called „Freiburg Theses“ bear his signature. With his early death in 1973, the radical liberalism, Flach advocated, slowly but inexorably began to wither away within the FDP, until nothing at all could be recognised of it. It is therefore not surprising that Flach's polemic has long been out of print and that the FDP has obviously never pushed forward a new edition.

²⁶³ See for this the well-thought-out elaboration of this proposal by *Bruce Ackerman / Anne Alstott*, *The Stakeholder Society*, Yale UP, 1999.

²⁶⁴ *Thomas Piketty*, *Capital and Ideology*, (fn. 36), 285.

²⁶⁵ Ebbinghaus speaks of „civic socialism“, which is based exclusively on grounds of right; in contrast to „charitable“ or „ethical socialism“, which is out of the question for a determination of civil liberties *by the State*. See *Julius Ebbinghaus*, „Sozialismus der Wohlfahrt und Sozialismus des Rechtes“, (fn. 54), 260 f.

²⁶⁶ *Thomas Piketty*, *Capital and Ideology*, (fn. 36), 968-1034.

²⁶⁷ Quoted from: *Jens Beckert*, *Erben in einer Leistungsgesellschaft*, (fn. 203), 210.

personal security. In the last analysis such accumulations amount to the perpetuation of great and undesirable concentration of control in relatively few individuals over the enjoyment and welfare of many, many others. Such inherited economic power is as inconsistent with the ideals of this generation as inherited political power was inconsistent with the ideals of the generation which established our Government.”²⁶⁸ It was then President George W. Bush who abolished in 2010 the estate tax introduced in 1916.²⁶⁹

— Limitation of the maximum earnings in a company to x times the lowest earnings²⁷⁰

Thus, the lower the remuneration of the lowest-paid employees, the lower the remuneration of the management would be.

According to Krämer²⁷¹, the Carl-Zeiss-Werke in Jena had stipulated in its statute of 1896 (!), that the income of managers should not exceed the average labor income in the company by more than ten times.²⁷²

The statute also forbade, let it be noted, board of directors remuneration dependent on company profits, i.e. bonuses. Increasing profits is precisely the task for which a manager receives his – usually quite high – salary. There is no good reason for an additional reward in the form of a bonus. It would be as if a surgeon received a bonus, if he not only operated, but was also successful. The „performance incentive“, which is always cited as a reason, albeit also often without persuasive force, has – as the other side of the coin – a regularly associated increased willingness to take risks, especially if, in case of a negative success rate, the person concerned is neither penalised with a malus nor even personally liable.²⁷³ It has also long been known about ordinary insurance agents or bank advisors that, as far as their income is linked to the success rate, they align their actions solely with this and no longer with the interests of their customers.

Incidentally, as Michael Hartmann has shown, the usual justification of top managers' salaries with reference to the risk, that they would otherwise move abroad, is based on a myth. If we take the eight countries of Germany, France, the UK, Italy, Spain, the USA, Japan and China together, the proportion of foreigners among the CEOs of the 100 largest companies or groups of companies in each country is no more than 5 per cent. If those with the same native language and the same or very similar cultural background (such as

²⁶⁸ Quoted from: *Jens Beckert*, *Erben in einer Leistungsgesellschaft*, (fn. 203), 224.

²⁶⁹ In 2009, it amounted to 45% with a tax-free amount of 3.5 million dollars. Under Franklin D. Roosevelt in 1933, it was 60% for estates over 10 million dollars. In 1935, two further progressive stages were introduced at 20 and 50 million dollars; the tax rate for the second stage was 70%. Finally, in 1940, the rate rose to 77% and was already due from an estate value of 10 million dollars. See: *Jens Beckert*, *Erben in einer Leistungsgesellschaft*, (fn. 203), 225 et seq.

²⁷⁰ Should this measure not be an option, because it is not in line with the market, it would also be possible to leave manager salaries at their current level, although they too are hardly in line with the market, and then set the tax on income of five million euros or more progressively, starting at 75%. Matthias Müller, CEO of VW, demonstrated the perverse concept of property and, more importantly, property *acquisition*, that at least the upper class seems to have, when he declared in March 2018 that there were two reasons for his high remuneration (10 million euros): the relevance of the company to the national economy and the risk associated with the position. As a boss, he said, *you always have one foot in prison*. When asked about a salary cap of, say, five million euros, he replied: „In Germany, there is an urge to regulate everything politically. But where will that end? We already had something like that once in the form of the DDR [German Democratic Republic]. Everything was regulated there, too.“

²⁷¹ *Hagen Krämer*, *Spitzeneinkommen zwischen ökonomischem und normativem Marktversagen. Marktorientierte und soziale Legitimation von Topmanager-Gehältern*, in: Hochschule Karlsruhe, *Diskussionsbeiträge aus der Fakultät für Wirtschaftswissenschaften*, 1/2013.

²⁷² Plato thought of the fourfold (see: *Plato*, *Nomoi*, 5th book, 744 d). The fact, that two thirds of participants in a referendum in Switzerland in November 2013 rejected the idea of limiting the maximum salary of top managers to twelve times an ordinary worker's salary, is probably not only due to the business associations' declaration that, if the initiative would be accepted, large corporations could withdraw from Switzerland, which would lead to considerable job losses. The rejection is also reminiscent of Flach's comment cited in fn. 262.

²⁷³ See with regard to financial institutions *Anat Admati / Martin Hellwig*, (fn. 191), 192 et seq.

Austrians and German-Swiss in the case of Germany) are excluded, the proportion falls to 2 per cent. The level of transnationality is even lower among ordinary board members. The main reason for this is probably the „unbroken dominance of traditional national career patterns and systems with all their rules that have often been in place for decades“. Hartmann comes to the conclusion that „the justification of high manager salaries with the laws of the transnational market for top managers still does not have much to do with reality. It clearly serves above all the purpose of publicly justifying these exorbitant incomes, which are based on power relations in the society.“²⁷⁴ Holder of multiple mandates in boards of directors and supervisory boards as well as among majority shareholders and the multiple interconnections between companies are a visible expression of these power relations.

„Incidentally, income inequality has increased in almost all regions of the world in recent decades, albeit at varying speeds.“²⁷⁵ „In the late 1970s, CEOs of major American companies made 30 times more than the average worker; by 2014, they made 300 times more.“²⁷⁶ „In 1980, when Reagan was elected president, CEOs of major companies made 35 times the pay of the average worker. In 1992, when Clinton was promising to limit executive pay, CEOs made 109 times as much as a typical worker. By 2000, Clinton’s last year in office, the pay ratio had more than tripled (to 366:1). CEOs made as much in a day as the average worker in a year.“²⁷⁷

— A drastic tax progression²⁷⁸ with regard to income²⁷⁹ from labor, capital and inheritance and with regard to assets²⁸⁰, with a simultaneous reduction of the rates for certain indirect taxes; and besides, instead of a contribution-financed a tax-financed system of social contribution in favor of low income recipients and families with many children, with progressive participation of *all* income recipients.

Piketty points out „that the distribution of property – real estate, securities, and business assets – is always much more concentrated than the distribution of income. While the richest 10 percent globally earn between 25 and 70 percent of income, they account for between 60 and 90 percent of wealth. In contrast, the poorest 50 percent account for between 5 and 25 percent of income, while their share of wealth remains below 5 percent. In terms of business assets, the means of production, the top 10 percent account for as much as 80, 90, or more percent; the next 40 percent own the rest; and the bottom half owns almost nothing.“²⁸¹ Haslett noticed already 1986, that „two things are clear: wealth is distributed far more unequally in the United States today than is income, and this inequality in the distribution of wealth is enormous.“²⁸²

„The top 1 percent of Americans received around 9 percent of national income in the 1970s. By 2015 this number had increased to 22 percent. The increase has been even more striking

²⁷⁴ See Michael Hartmann, „Die transnationale Klasse – Mythos oder Realität?“, in: Soziale Welt, 60 (2009) 285-303 (300). See also: Idem, Der Mythos von den Leistungseliten, (fn. 247) 13; Idem, Die Abgehobenen (fn. 110), 90 et seqq.

²⁷⁵ See Facundo Alvaredo et al., World Inequality Report (fn. 116), abstract chpt. 2 (m/tr from the German version).

²⁷⁶ Michael J. Sandel, The Tyranny of Merit, (fn. 87), 197.

²⁷⁷ Michael J. Sandel, Democracy’s Discontent, (fn. 151), 301.

²⁷⁸ Vehemently against such a progression: Friedrich A. v. Hayek, „Die Ungerechtigkeit der Steuerprogression“, in: Schweizerische Monatshefte, 36 (1952) 508-517. In turn against Hayek: Daron Acemoglu / James A. Robinson, The Narrow Corridor (fn. 42), 464 et seqq. Strongly in favor of progression: Alvaredo et al., World Inequality Report 2018, (fn. 116), part V, chpt. 2.

²⁷⁹ A different treatment is conceivable for company profits, if these are reinvested.

²⁸⁰ On the right and on the conditional obligation of the State to tax assets as well see: Ernst Wolfgang Böckenförde’s dissenting opinion on the German Federal Constitutional Court’s ruling of June 22nd 1995, issued thirty years ago, is well worth reading. (BVerfG, 22.06.1995 - 2 BvL 37/91).

²⁸¹ Thomas Piketty, Natur, Kultur und Ungleichheit, (fn. 167), 21 et seqq. (m/tr from the German version).

²⁸² D. W. Haslett, Is Inheritance Justified?, (fn. 254), 124.

for the share of the top 0,1 percent, which went up from around 2,5 percent in the 1970s to almost 11 percent of national income in 2015.²⁸³

The top marginal rate applicable to the highest incomes was on average 23 percent in the United States from 1900 to 1932, 81 percent from 1932 to 1980, and 39 percent from 1980 to 2018. The corresponding rates for Great Britain were 30, 89, and 46 percent; for Germany 18, 58, and 50 percent; and for France 23, 60, and 57 percent. – The top marginal rate applicable to the largest inheritances averaged 12 percent in the United States from 1900 to 1932, 75 percent from 1932 to 1980, and 50 percent from 1980 to 2018. The corresponding rates for Great Britain were 25, 72, and 46 percent; for Germany 8, 23, and 32 percent, and for France 15, 22, and 39 percent.²⁸⁴

As we know, the tax rates applicable in the USA between 1932 and 1980 did not lead to the destruction of capitalism, – on the contrary, the American economy flourished.²⁸⁵ – „[I]t should be stressed that productivity growth in the United States and United Kingdom was higher in the period 1950-1990 than in 1990-2020, thus casting serious doubt on the argument that reducing top marginal tax rates spurs economic growth. In the end it is fair to say that the move to a less progressive tax system in the 1980s played a large part in the unprecedented growth of inequality in the United States and United Kingdom between 1980 and 2018.²⁸⁶ The share of national income going to the bottom half of the income distribution collapsed, contributing perhaps to the feeling on the part of the middle and lower classes that they had been abandoned in addition to fueling the rise of xenophobia and identity politics in both countries. These developments came to a head in 2016, with the British vote to leave the European Union (Brexit) and the election of Donald Trump.“²⁸⁷

For Germany, an addition is required here. „[T]he only time Germany taxed the highest incomes at a rate of 90 percent was in the period 1946-1948, when German fiscal policy was set by the Allied Control Council, which was dominated in practice by the United States.“²⁸⁸ Since then, the top rate fell steadily until 2005 to 42% (from €52.000 upwards). In 2007, the so-called „Reichensteuer“ („wealth tax“) of 45% was introduced in addition (on amounts over €250.000). However, these tax rates do not reflect reality. In 2021, income millionaires in Germany (34.500 taxpayers) recorded a total gross income of around €98 billion, on which they paid around €35 billion in taxes.²⁸⁹ That is an effective tax rate of 36%. At a rate of 45%, they would have paid over €9 billion more in taxes. The notorious assertion, that a more progressive taxation of the „super-rich“ would only bring „peanuts“, is at best a protective measure. With these „peanuts“, for example, the federal budget for education and research, around €20 billion, could be considerably expanded. Incidentally, there is no compelling reason to limit the rate to 45%.

With regard to income from capital assets in particular, it should be noted that the standardised tax rate of 25% (flat-rate withholding tax) significantly reduces the effective tax

²⁸³ C / James A. Robinson, *The Narrow Corridor*, (fn. Xy), 480.

²⁸⁴ Thomas Piketty, *Capital and Ideology*, (fn. 36), 448 f.

²⁸⁵ „[T]he experience of the twentieth century showed that [...] steeply progressive taxes are not only compatible with rapid growth; more than that, they are an important component of a developmental strategy based on relatively equal access to education and an overall reduction in inequality.“ (Thomas Piketty, *Capital and Ideology*, [fn. 36], 990.

²⁸⁶ The top decile share in total national income increased in the USA between 1980 and 2018 from 34% to 48%, while the share of the bottom 50% decreased from 20% to 12%. (Thomas Piketty, *Capital and Ideology* [fn. 36], 492) In 1970, the average income of the poorest 50% was \$15.200 per year per adult, that of the richest 1% \$403.000, for a ratio of 1 to 26. For 2015, the corresponding figures are \$16.200 and \$1.305.000; for a ratio 1 to 81. (op. cit., 526) Piketty says: „[I]f the United States is now more inegalitarian than Europe, it is solely because primary incomes are more unequally distributed there. [...] [I]t is at least as essential to look at >predistribution< policies (which affect primary inequality) as at >redistribution< policies (which reduce inequality of disposable income for a given level of primary inequality.“ (op. cit., 529)

²⁸⁷ Thomas Piketty, *Capital and Ideology*, (fn. 36), 33.

²⁸⁸ Thomas Piketty, *Capital and Ideology*, (fn. 36), 453.

²⁸⁹ See Statistisches Bundesamt, *Jährliche Einkommensteuerstatistik* (for 2021), Wiesbaden 2025.

rate, especially for those earning over €100.000. „Between 2008 and 2009, the introduction of the flat-rate withholding tax led to a reduction of over two thirds in the income from capital assets reported in income tax returns.“²⁹⁰ In 2009, recipients of capital income between €100.000 and €1.000.000 only paid tax on a total of €850 million at their personal tax rate, compared to €5,2 billion at the 25% flat rate withholding tax; the corresponding figures for recipients of income over €1 million were €550 million and €4.3 billion respectively.²⁹¹ It is difficult to find a reasonable justification for the de facto higher taxation of income from labor compared to unearned income.

Piketty rightly points out a rarely mentioned, yet crucial function of a progressive income tax, namely to make „it possible to regulate the economic power that arises when you have an enormous salary gap or income gap between the most well-paid people in the private sector and those in government. We were talking earlier about the effect of the monetary gap on dignity and social regulation, but it’s also a question of efficiency. If you want to have the right people in your public-regulation agencies and they’re paid 20 times less than people in Google, or wherever, you have a problem.“²⁹²

If we consider this point in light of Kant’s *res publica*, whose highest end is its „Heil“ („salus“, „salvation“) as „that condition in which its constitution conforms most fully to principles of right“²⁹³, then the most important persons resp. groups of persons are those who are directly responsible for this condition, namely within the framework of the three authorities (*trias politica*): the legislature, the executive, and the judiciary. „All three authorities in a State are dignities, and since they arise necessarily from the idea of a State as such, as essential for its establishment (constitution), they are *civic dignities*.“²⁹⁴ These authorities include, of course, power. However, since a power of disposal over funds (be it as income or assets), subject to these authorities, is also power, the question arises as to whether, for the sake of the dignity of those civic dignities, it should be legally excluded that any income in the *res publica* can reach the level of the income of representatives of those dignities. Since economic power easily becomes political power once it reaches a certain size, this exclusion would also avert that danger.

— Progressive wealth tax and circulation of capital²⁹⁵

„Property (real estate, securities, business assets) is extremely concentrated. Business assets, the means of production, are even more concentrated. The top 10 percent own 80, 90, or more percent, while the bottom 50 percent own virtually nothing. The social system was always characterized by an extreme concentration of economic power. The redistribution of property primarily affected inequality between the richest 10 percent and the next 40 percent, but barely reached the bottom half.“²⁹⁶

Piketty argues for the „model of participatory socialism“, which „rests on two key pillars: first, social ownership and shared voting rights in firms, and second, temporary ownership and circulation of capital. [...] The idea that strictly private property exists and that certain people have an inviolable natural right to it cannot withstand analysis. The accumulation of wealth is always the fruit of a social process, which depends, among other things, on public infrastructure (such as legal, fiscal, and educational systems), the social division of labor, and the knowledge accumulated by humanity over centuries. Under such conditions, it is perfectly logical that people who have accumulated large amounts of wealth should return a

²⁹⁰ Statistisches Bundesamt, Jährliche Einkommensteuerstatistik (for 2009), Wiesbaden 2013, 17.

²⁹¹ Ibid., 19.

²⁹² Thomas Piketty, *Equality*, (fn. 52), 18.

²⁹³ RL 06.318.

²⁹⁴ RL 06.315.

²⁹⁵ See Thomas Piketty, *Capital and Ideology*, (fn. 36), 975-979.

²⁹⁶ Thomas Piketty, *Natur, Kultur und Ungleichheit*, (fn. 167), 23 (m/tr from the German version).

fraction of it to the community every year: ownership thus becomes temporary rather than permanent.²⁹⁷

— Diffusion of wealth and universal capital endowment

„Last but not least, a progressive wealth tax is an indispensable tool for ensuring a greater circulation of wealth and broader diffusion of property than in the past. [...] In Europe, the top decile's share of private wealth decreased from 80–90 percent in 1900–1910 to 50–60 percent in 2010–2020. Not only is that still a considerable share for just 10 percent of the population, but the fact is that the beneficiaries of this reduction of wealth inequality were almost exclusively people in the fiftieth to ninetieth percentile (whose share rose from barely 10 percent to 30–40 percent of the total). By contrast, the diffusion of wealth never really touched the bottom 50 percent whose share of total private wealth has always been around 5–10 percent (or even lower) in all countries and periods for which data are available. [...] The limited diffusion of wealth implies that the bottom 50 percent have minimal opportunity to participate in economic life by creating and running a business. This is not the ideal of participation that a just society should strive to achieve.“²⁹⁸

„In 2013, the Forbes list of billionaires included 1426 people worldwide whose net assets was one billion dollars or more. Together with their families, these individuals represent one hundredth of one hundredth of the world's richest one percent. Their total assets is estimated at \$5.4 trillion. According to a 2013 report by Credit Suisse, the world's total assets is estimated at \$241 trillion. This means that this tiny group of individuals owns about 2 percent of the world's wealth. In other words, these billionaires collectively own twice as much as all the people on the African continent.“²⁹⁹

The hourly wage that a person would have to receive in order to earn the (tax-free) average wealth of the ten richest Germans (approx. 10 billion euros) is, if this person were to work 8 hours a day for 230 days a year for 40 years, around 150.000 euros; mind you: *hourly wage!* The current Chancellor of Germany earns a total gross *annual salary* of just under €500,000.

This inevitably raises the idea of reintroducing a wealth tax.³⁰⁰ The total real assets of the private household sector in Germany amounted to around 11 trillion euros in 2012.³⁰¹ If only around 3 trillion, i.e. half of the assets of the top decile, were to be taxed at a rate of 1%, the result would be a tax revenue of 30 billion euros, a tenth of the federal budget and considerably more than the budget for „transport, construction and urban development“. About the same amount would also result if only the assets of the 100 richest Germans were taxed, but at 10%.³⁰²

In their World Inequality Report, authors Alvarado, Chancel, Piketty, Sael, and Zucman use a wealth of relevant empirical data to report on „trends in global income inequality“, the „development of public and private capital“, the „global development of wealth inequality“, and „measures against economic inequality“.³⁰³ They show that „progressive *income* taxation

²⁹⁷ Thomas Piketty, *Capital and Ideology*, (fn. 36), 989 f.

²⁹⁸ Thomas Piketty, *Capital and Ideology*, (fn. 36), 979 f.

²⁹⁹ Branko Milanovic, *Global Inequality* (fn. 138) chpt. 1, subchpt. „The real global plutocrats: the billionaires“ (m/tr from the German version, p. 50).

³⁰⁰ See for this: Thomas Piketty, *Capital in the Twenty-First Century* (fn. 138), especially 515 et seqq.

³⁰¹ Source: Statistisches Bundesamt, Deutsche Bundesbank, *Vermögensbilanzen 1991–2012*.

³⁰² „Note that there is no reason why the tax rate on fortunes above 5 million euros should be limited to 2 percent. Since the real returns on the largest fortunes in Europe and around the world are 6 to 7 percent or more, it would not be excessive to tax fortunes above 100 million or 1 billion euros at rates well above 2 percent. [...] If a more ambitious goal is preferred – say, to reduce wealth inequality to more moderate levels than exist today (and which history shows are not necessary for growth) – one might envision rates of 10 percent or higher on billionaires.“ (Thomas Piketty, *Capital in the Twenty-First Century*, (fn. 138), 529 f.) However, Piketty himself rightly points out that it would have to be a Europe-wide tax with corresponding changes to European political institutions, if the measure is not to be undermined by tax evasion, especially in the form of tax avoidance.

³⁰³ See „Contents“ of the book.

is a proven means of combating growing income and *wealth* inequality at the top.³⁰⁴ At the same time, however, they point out that progressive wealth taxation faces obstacles, including tax avoidance. „A global financial register listing the owners of shares, bonds and other financial assets would put an end to the opacity of global financial flows.“³⁰⁵

The absorption of exorbitant increases in income and wealth does not necessarily have to lead to direct redistribution, for example by giving the siphoned off funds to the lower social classes. Rather, without using „deficit spending“, that money could be used for the performance of governmental tasks in conjunction with a simultaneously possible reduction in State debt, in particular for those tasks that aim to ensure that everyone has the opportunity to shape their lives in „independence from being constrained by another’s choice“,³⁰⁶ i.e. freely as they see fit.³⁰⁷ Article 22 of the Universal Declaration of Human Rights states: „Everyone, as a member of society, has the right to social security and is entitled to realization, through national effort and international co-operation and in accordance with the organization and resources of each State, of the economic, social and cultural rights indispensable for his dignity and the free development of his personality.“³⁰⁸ It would be a necessary and decisive step on the way to a liberal and, in this sense, social constitutional State.

VII.

Kant’s political philosophy revolves primarily around the problem of *establishing* a State. This problem, „no matter how hard it may sound, is *soluble* even for a people of devils (if only they have understanding) [...] Such a problem must be *soluble*. For the problem is not the moral improvement of human beings but only the mechanism of nature, and what the task requires one to know is how this can be put to use in human beings in order so to arrange the conflict of their unpeaceable dispositions within a people that they themselves have to constrain one another to submit to coercive law and so bring about a condition of peace in which laws have force. It can be seen even in actually existing states, still very imperfectly organized, that they are already closely approaching in external conduct what the idea of right prescribes, though the cause of this is surely not the interior of morality³⁰⁹ (for it is not the case

³⁰⁴ *Alvaredo et al.*, World Inequality Report 2018 (fn. 116), part V, chpt. 2 (m/tr from the German version; m/it).

³⁰⁵ *Alvaredo et al.*, World Inequality Report 2018 (fn. 116), part V, chpt. 3 (m/tr from the German version).

³⁰⁶ RL 06.237. In Article 2, the German constitution speaks of „free development of personality“, not of capital.

³⁰⁷ In this regard, the main task of the State would be to promote the notoriously subordinated growth of human capital at all levels of development, if only to avoid a new wave of pauperism with all its terrible and socially dangerous consequences.

³⁰⁸ Piketty identifies „three reasons, why inequality is a problem [...]: One is about access to basic goods for everyone. The second is about political equality – voice, power, participation – and then [...] a third: dignity. [...] I think there would still be a problem, in particular for basic dignity and in the human relations and power relations that come with inequality. Monetary distance is more than just monetary distance.“ (*Thomas Piketty*, *Equality*, [fn. 52] pp. 4 f.)

³⁰⁹ Compare, for example, Germany before and after 1945. It certainly cannot be said that the Germans were morally a better people after 1945 than before. The West Germans came under a good constitution in the Federal Republic and – definitely to their advantage – for several years under the supervision of the Western Allies. And slowly, slowly, they learned to appreciate and to live with and according to the rules and values of a democratic society under the rules of law.

that a good State constitution is to be expected from morality; on the contrary, the good moral education of a people is to be expected from a good State constitution)³¹⁰.

Sandel criticizes Kant's position as insufficient: „By insisting that we are bound only by ends and roles we choose for themselves, it denies that we can ever be claimed by ends we have not chosen – ends given by nature or God, for example, or by our identities as members of families, peoples, cultures, or traditions. [...] According to this conception, freedom consists in pursuing my own interests and ends, whatever they may be, consistent with a similar liberty of others. This individualistic conception is at odds with the civic republican idea that freedom means sharing in self-rule, having a voice in shaping the forces that govern our lives.“³¹¹

Sandel fails to notice the fact that Kant, in his *Doctrine of Right*, is concerned with *establishing* a republic of people as they are in the state of nature. It is about the worst-case, in which even, as it were, a people of devils has to be counted with. Only when this worst-case scenario has been resolved, i.e. after transforming the ›emergency community‹, in which people initially gathered, into a State, at best into a constitutional State, further necessary steps can be considered.³¹²

These steps essentially consist of gradually evolving of this State from a mere ›community of rights‹ into a ›community of solidarity‹. They elevate by that the republic to a kind of ›community bound by fate‹, – similar to what Plato imagined about the polis. „In a *patriotic* [in contrast to a *paternalistic*] way of thinking everyone in a State (its head *not excepted*) regards the commonwealth as the maternal womb, or the country as the paternal soil, from which and on which he himself has sprung and which he must also thus leave behind as a cherished pledge, only in order to protect its rights by laws of the *common* will, but not to consider himself authorized to subject the use of it to his unconditional discretion.“³¹³

The rights and duties in the so-called „liberal“ and „neoliberal“ States restrict the individual use of freedom to compliance with general laws. In contrast, in the Kantian republic as a community based on solidarity, there are, in addition, rights and duties of a completely different kind. What this is about is exactly what Kant had in mind when he spoke of the „Heil“ („salus“) of the State.

The measure of development and progress in a *res publica* is the increase in (negative and positive) freedom for everyone. The growth of the gross national product, the increase in average and median income, technical progress and industrialization: all of these can, as a means to an end, be of great importance for that increase. But it's always about this end.³¹⁴ Also the GDP and its growth³¹⁵ only

³¹⁰ ZeF 08.366 (pmt).

³¹¹ Michael J. Sandel, *Democracy's Discontent*, (fn. 151), 256; 285.

³¹² For Sandel's own steps see the chapter „The Triumph and Travail of the Procedural Republic“ in op. cit, 201-249.

³¹³ TP 08.291 (pmt; last two italics mine). Kant's highly elevated language here corresponds to his talk of the „salus“ of the State, which is not found in his writings before the 1990s. We are far away from „welfare“ and „well-being“.

³¹⁴ On the connection between freedom as an end and as a means and its significance in relation to economic and social policy see: *Amartya Sen*, *Development as Freedom*, New York: Vintage Books, 2000, chapter „The Ends and the Means of Development“.

have a relative value, namely because or insofar as they are conducive to general individual freedom. Beyond that, however, this freedom has an absolute value; it is the final end of a *res publica* and thus the guideline and standard for everything that happens in there.³¹⁶

By the way, the GDP should not be identified with the prosperity of society: when we talk about development and progress, we need to think about something more than just GDP or employment levels, namely about the whole social infrastructure – fields like healthcare, education, science and the arts, crime prevention, environmental protection, social costs, citizens' 'quality of life' and immaterial prosperity like participation in various forms of social, political and cultural life. Whatever is included in GDP is still miles away from the values actually created in these areas.³¹⁷

„This is what decommodification is all about and has been about historically. You take entire economic sectors out of the power of the profit motive. And the good news is not only that it worked, but that today these are very large economic sectors. Education plus health make almost 25% of the economy, much bigger than all manufacturing sectors together in developed countries. And they operate largely outside the profit logic, outside the shareholder-ownership model. And it works very well. In a country like the US where the health sector operates much more under the profit logic, you spend almost 20% of GDP on health alone, but with terrible outcomes as compared to European countries where systems are under the public logic. So, this decommodification worked historically. It was intimately related to redistribution and to the compression of the income and salary scale, and it happened through social democratic mobilization and trade union mobilization that were quite radical *at the time*.“³¹⁸

Sandel rightly says, that the strongest arguments against utilitarianism were put forward by Kant.³¹⁹ He, who shares this critique, then arrives at a critique of the

³¹⁵ Especially against that growth: *Timothée Parrique*, *Slow Down or Die: The Economics of Degrowth*, London: Profile Books, 2025; see also *Daniel Susskind*, *Growth* (fn. 235).

³¹⁶ Of course, the economic (social science) expert may and should raise objections of a *socio-technological* nature against regulatory policy projects by showing that they do not have the desired effects or will even have the opposite effect. But he cannot, *as such an expert*, place the assumptions made in economics (equilibrium, Pareto optimum, efficiency, full employment, growth, etc.) as *values* in competition with that guideline and standard. On the general criticism of neoclassical „pure economics“ with its utilitarian approach and thus of the „idea of maximizing the collective benefit or satisfying the needs of all members of society“, of the concept of the social product (as an expression of an alleged public welfare or common interest) and the associated neglect of social conflicts of interest, of the idea of the Pareto-optimal equilibrium, of the assumption of a given income distribution and the non-consideration of external effects, see the chapter that argues convincingly both in terms of scientific theory and social science: „Die Anatomie des Wohlstandes und die Wirtschaft“, in: *Hans Albert*, *Traktat* (fn. 102), 112-137. See also: *Ernst Friedrich Schumacher*, *Small is Beautiful. Die Rückkehr zum menschlichen Maß. Alternativen für Wirtschaft und Technik*, revised Edition, Heidelberg: Stiftung Ökologie & Landbau, 2001.

³¹⁷ See especially the chapter about „The Secret Life of GDP“ in: *Timothée Parrique*, *Slow Down or Die*: (fn. 315). In the chapter „Market contra Society“, subchapter „The Sphere of Reproduction“ he writes: „The sphere of commodity production is embedded in the larger sphere of social reproduction, which in turn is embedded in the economy of the living or the sphere of ecological reproduction.“ (m/tr from the German edition)

³¹⁸ *Thomas Piketty*, *Equality*, (fn. 52), 12 f. (m/it).

³¹⁹ *Michael J. Sandel*, *Public Philosophy. Essays on Morality in Politics*, Cambridge, Mass./ London: Harvard UP, 2005, 149.

„Kantian liberals“³²⁰ and indirectly of Kant himself. Finally, he presents, corresponding to the positions of „Kantian liberals“ and „communitarian critics“ respectively, the confrontation: „politics of rights“ – „politics of the common good“.³²¹

I am addressing this to first clear up a misunderstanding. Sandel initially ignores a decisive distinction made by Kant, namely that between „doctrine of right“ (which is the subject of the „Metaphysical first principles of the doctrine of right“) *as such* and „politics“ as „doctrine of right *put into practice*“.³²²

What Sandel is engaged in, would be, in Kantian terms, „the doctrine of right put into practice,“ that is, politics. And just in Kant’s doctrine of right he finds very little of that. However, especially in the case of the doctrine of right, the reader is faced with the question of what the characteristics of politics practiced on its basis are. Sandel puts forward the following objection: „For Kantian liberals, then, the right is prior to the good, and in two senses. First, individual rights cannot be sacrificed for the sake of the general good; and second, the principal of justice that specify these rights cannot be premised on any particular vision of the good life. What justifies the rights is not that they maximize the general welfare or otherwise promote the good, but rather that they comprise a fair framework within which individuals and groups can choose their own values and ends, consistent with a similar liberty for others.“³²³

If one considers, for the moment, the doctrine of right in isolation, Sandel’s juxtaposition of „the right“ and „the good“ would make no sense at all. The only rights that are equally granted to all people are the one innate right of humanity and then the three basic civic rights of freedom, equality and independence. In contradiction to them, nothing can be good; they themselves are the absolute good and the guiding rule for everything that wants to be considered as right.

When we then turn to politics, the first stage to strive for is what is known as a modern constitutional State. In this respect, it is known – and the results presented here demonstrate this beyond doubt – that all existing constitutional States exhibit more or less significant shortcomings regarding the realization of the three basic civic rights. This situation should be the first to be resolved: „the public well-being [„das öffentliche Heil“; *salus reipublicae*] that must *first* be taken into account is precisely that lawful constitution which secures everyone his freedom by laws“.³²⁴

If successful, the result would then be what Kant once, in an essay from 1784, called „a civil society universally administering right“³²⁵ and also primarily envisioned in his doctrine of right. One could certainly speak positively of the State’s „well-being“ here. However, in the sense of politics as doctrine of right put into practice, this would not necessarily constitute what one might call with Kant the „Heil“ of the State (*salus reipublicae*). However, at least the foundation would be laid for the development of a

³²⁰ Ibidem, 150.

³²¹ Ibidem, 153.

³²² ZeF 08.370 (m/it) .

³²³ Michael J. Sandel, *Public Philosophy*, (fn. 319), 151.

³²⁴ TP 08.298 (Kant’s italics). Freedom *is* for Kant the „Heil“ („salus“) (SF 07.30).

³²⁵ IaG 08.22.

State which „forms and *preserves itself* in accordance with laws of freedom“,³²⁶ – for „a society, which is to maintain itself *perpetually*“.³²⁷

Kant speaks of three predispositions of the human being: „to the *animality* of the human being, as a *living being*“; „to the *humanity* in him, as a living and at the same time *rational being*“; „to his *personality*, as a rational and at the same time *responsible being*.“ The first predisposition „may be brought under the general title of physical and³²⁸ merely *mechanical* self-love for self-preservation, for the propagation of the species and for community with other human beings, i.e. the social drive.“ „The predispositions to humanity can be brought under the general title of a self-love which is physical and yet *involves comparison* (for which reason is required); that is, only in comparison with others does one judge oneself happy or unhappy. Out of this self-love originates the inclination *to gain worth in the opinion of others*, originally, in fact, merely *equal worth*“. „The predisposition to personality is the susceptibility to respect for the moral law *as of itself a sufficient incentive to the power of choice*.“³²⁹

Well, all three predispositions require an adequate social environment to develop. The environment in the state of nature is, as Hobbes so eloquently described, extremely unsuitable for all three predispositions. This is precisely what drives humanity out of this state and toward the establishment of a civil state.

Yet, even the needs to be satisfied for the first predisposition are met very differently in the various States of our present world, being met most effectively in the constitutional States. The same applies to the second predisposition, albeit with reference to a different group of States. It is, however, the third predisposition whose development is needed if the civil State is to evolve beyond the mere constitutional State into a republic (*res publica*) in a comprehensive, all-embracing sense.

Even now, it is not simply the case, that in this new and novel stage of development the „politics of rights“ would be replaced by a „politics of the common good.“³³⁰ Rather, this politics, too, remains bound by right and must continue to

³²⁶ RL 06.318 (m/it).

³²⁷ RL 06.326 (m/it). „The supreme law of a society is the well-being [also here Kant says: „Heil!“] of the society. *Salus civitatis suprema lex est. Permanence* is the supreme law.“ (NRFeyer 27.1378; m/it). Recent history shows that the United States were all the years a rather well functioning constitutional State, but not a community of solidarity as the basis for permanence. This lack now poses a great danger to the US State.

³²⁸ The CE writes wrongly „or“, falsifying thereby what Kant says.

³²⁹ RGV 06.26 f. (pmt).

³³⁰ Sandel's juxtaposition of support for public education by liberals versus communitarians does not imply an either-or situation; both make together even more sense. Sandel writes, for example: „where liberals might support public education in hopes of equipping students to become autonomous individuals, capable of choosing their own ends and pursuing them effectively, communitarians might support public education in hopes of equipping students to become good citizens, capable of contributing meaningfully to public deliberations and pursuits.“ (*Michael J. Sandel, Public Philosophy*, (fn. 319), 154) These two objectives are certainly not mutually exclusive; rather, they complement each other.

However, I do not want to conceal the fact that, in my opinion, some of the measures discussed by Sandel violate the spirit of at least the *Kantian* republic. He once says: „Communitarians would be more likely than liberals to allow a town to ban pornographic bookstores, on the grounds that pornography offends its way of life and the values that sustain it.“ (*Michael J. Sandel, op. cit.*, 154) All one can say to that is: no citizen's universal lawful freedom is restricted by this, neither by the existence of such shops, nor by the fact that what they offer contradicts one's own way of life and its values. The same, of course, applies to „non-believers“ who would gladly see shops for devotional objects closed. No one is forced to enter such shops. – In a republic, an expression of opinion, such as blasphemy, cannot be prohibited simply because it disturbs others' beliefs, nor can „immoral“ behavior be prohibited just because it offends others. Juridically, there is a fundamental difference between the

establish right. But the aims now being pursued are new. They concern the „Heil“ („salus“) of the republic (*res publica*) and thus go beyond what is needed for the State's previously sought-after well-being. I am convinced that general (and of course voluntary) participation in the foundation of the republic's „Heil“ is the best thing that can be done for that „Heil“. However, this „salus“ must not be linked to value conceptions or even be connected with sanctions, that contradict a politics of rights.

In the spirit of Aristotle, one can certainly say that the republic exists in particular for the sake of the good life, because such a life is possible only within it. The reason for this is the highest degree of freedom that, again, only the republic makes possible. And a good life can only be a freely chosen and freely lived life.

Finally, what should be done nowadays for the good („Heil“) of the State, that is, for the ideal of a republic, will be outlined in the very apt words of Sandel: „We need to build a civic infrastructure for a shared life where people encounter one another, whether in health clinics or in public transportation or in public parks and recreation areas, municipal facilities, public libraries, sports stadia even. This inadvertent class mixing can create habits, attitudes, dispositions that remind us of our commonality. And so that's part of any project of creating a more equal society, even before we get to the tax rates.“³³¹

VIII. Outlook

The fact that the sense of responsibility toward the community is at present in great danger of gradual dissolution, is a consequence of the systematic destruction of the good State constitution of the USA by Trump and his political mafia.³³² So the

following facts: 1) Disturbance of the peace being the same on weekdays and Sundays, yet for which there may be good reasons to allow it on weekdays and prohibit it on Sundays; 2) the Sunday planting of trees in one's own garden, more or less silently, which certain churchgoers want to have prohibited because it allegedly desecrates Sunday and they feel offended in their religious feelings. It is obvious that there can be no universal principle of demarcation, and therefore no right, with regard to the *internal* conditions of the exercise of freedom. What is determined and protected by right, is merely this exercise itself.

It is also problematic that Sandel wants to give „free exercise of religion special constitutional protection“ on the grounds that „what makes a religious belief worthy of respect is [...] its place in good life, or the qualities of character it promotes, or (from a political point of view) its tendency to cultivate the habits and dispositions that make good citizens.“ (*Michael J. Sandel*, op. cit., 255 f.) A study conducted in eleven European countries reveals that people who consider themselves more or less religious, compared to those who do not, harbor more prejudices against ethnic minorities. These prejudices are more pronounced the more frequently they attend church and the more devout (orthodox) they are. There is a significant correlation between (self-perceived) „religiosity“ on the one hand and a propensity for prejudice and group-focused misanthropy on the other (see: Beate Küpper / Andreas Zick, *Riskanter Glaube: Religiosität und Abwertung*; in: Wilhelm Heitmeyer [Ed.], *Deutsche Zustände*, Folge 4, Frankfurt/Main 2006, 186 ff. [m/tr]). – It cannot be denied that followers of religions, including and especially those of religions represented in constitutional States, have been slaughtering one another for over a thousand years, right up to the present day (!!). And the notion that people who adhere to a (revealed) religion are „better“ or „more moral“ in their behavior compared to „others“ has not been evident to me in my long life. I have more frequently observed the conviction of what Kant's categorical imperative commands at work. – In 1969, when I gave a lecture at a Protestant community center by invitation, and, in keeping with its topic, spoke about the Christian persecution of Jews in the Middle Ages, concluding with a reference to the period in Germany after 1933, the audience, almost exclusively elderly men, confronted me furiously, declaring that the Jews had, after all, amassed the wealth in the Weimar Republic. When, after further remarks of this nature, I finally shouted into the hall that I now knew what those who crucified Jesus looked like, all hell broke loose. Three pastors, holding hands, formed a cordon sanitaire and protected me from the most devoutly Christian mob.

³³¹ *Michal J. Sandel*, *Equality*, (fn. 52), 78

³³² „Thus he [man] needs a *master*, who breaks his [this man's] will and necessitates him to obey a universally valid will with which everyone can be free. But where will he get this master? Nowhere else but from

first and foremost concern now is to preserve or restore the constitutional order. Of course, a sense of duty, as far as it exists, would be extremely helpful for this. But an enlightened sense of self-interest would also serve this purpose.

Unfortunately, what Branko Milanovic wrote on April 7, 2020 and on November 7, 2020 was not exactly encouraging at that time; and yet it seems almost harmless compared to what the USA and, with it, the world are currently experiencing: a very bad State constitution is to be expected from a ruling class distinguishing itself by a complete lack of moral education.

„Neo-liberalism justified and promoted the introduction of purely economic and hierarchical principles in the political life. While it maintained the pretense of equality (one-person, one-vote) it eroded it through the ability of the rich to select, fund, and make elect the politicians friendly to their interests. [...] The introduction of the rules of behavior taken from the corporate sector into politics means that politicians no longer see people whom they rule as co-citizens but as hired employees. [...] Until Trump³³³ came to power³³⁴ the invasion of the political space by economic rules of behavior was concealed. There was a pretense that politicians treated people as citizens. The bubble was burst by Trump who, unschooled in the subtleties of democratic dialectics, could not see how anything could be wrong with the application of business rules to politics. Coming from the private sector, and from its most piracy-oriented segment dealing with real estate, gambling, and Miss Universe, he rightly thought – supported by the neo-liberal ideology – that the political space is merely an extension of economics.³³⁵ [...] He may not be interested in the US constitution and complex rules that regulate politics in a democratic society because he, whether consciously or intuitively, thinks that they should not matter or even exist. The rules with which he is familiar are the rules of companies: »You are fired!«: a purely hierarchical decision, based on power consecrated by wealth, and unchecked by any other consideration. [...] People complain that Trump [...] is lacking the most elementary human compassion. But, while they are right in diagnosis, they are wrong in understanding the origin of the lack of compassion. Like any rich owner he does not see that his role is to show compassion to his hired hands, but to decide what they should do, and, even when the occasion presents itself, to squeeze them out of their pay, make them work harder, dismiss them without a benefit.“³³⁶

„He is being reviled for his callousness, racism, xenophobia, arrogance, inefficiency, ineffectiveness, ignorance. [...] He saw presidency as Bezos sees his own position at

the human species. But then this master is exactly as much an animal who has need of a master.“ (laG 08.23; pmt)

³³³ Piketty notes a „similarity between the tax reforms enacted by presidents Trump and Macron in 2017“ (all in favor of the prosperous, rich and very rich). Both presidents „adhere to an ideology according to which the competition of all against all requires offering ever greater tax cuts to the most mobile taxpayers while the masses are exhorted to honor their new benefactors, who bring innovations and prosperity (while omitting to mention that none of this would exist without public support for education and basic research and private appropriation of public knowledge).“ (*Thomas Piketty, Capital and Ideology*, [fn. 36], 889 f.)

³³⁴ See *Michael J. Sandel, Democracy's Discontent*, (fn. 151), 319 et seqq.

³³⁵ „The formation of a durable upper class is impossible unless that class exerts political control. Only politics, used for that purpose, can guarantee that the upper class stays on top. [...] To argue that rich people donate money to political campaigns without expecting any favors in return is not only totally antithetical to the normal behavior of the rich (most of whom have become rich by squeezing maximum surplus from employees, suppliers, and customers); it goes against common sense and our understanding of human nature. [...] What the rich purchase with their political contributions are economic policies that benefit them: lower taxes on high incomes, greater tax deductions, higher capital gains through tax cuts to the corporate sector, fewer regulations, and so on. These policies in turn increase the likelihood that the rich will stay on top. This is the ultimate link in the chain that runs from higher share of capital in net income to the creation of a permanent, or at least durable, upper class in liberal meritocratic capitalism. Without that last link in the chain, the upper class would still enjoy very strong tailwinds helping them maintain their position, but with the closing of the political link in the chain their position becomes all but unassailable. The circle is closed. Thus political control is an indispensable component for the existence of a durable upper class.“ (*Branko Milanovic, Capitalism, Alone*, [fn. 108], pp. 56 et seqq.).

³³⁶ *Branko Milanovic, The World Under Capitalism*, (fn. 202), 68 f.

Amazon: he can do anything, unconstrained by any rules or laws. [...] It was thus thanks to Trump that we could see the immense corruption lying at the heart of the political process. [...] Thus, from knowing more about Trump we know more about the means used to succeed in the rich business milieu of New York, and even of the world³³⁷ [...] Trump thus gave us another very valuable lesson: it showed the rot, corruption, and impunity that lie at the heart of many powerful businesses. His persona revealed the depth of corruption at the center of politics and at the center of business. These are unpardonable sins. Sins enjoyed in secret are acceptable or overlooked; sins flaunted are not.³³⁸

What Milanovic wrote here, is more than five years old. The danger that threatens Europe since then from Vladimir Putin, is the spread of his dictatorship. The far more serious, because more likely, danger is the destruction of the constitutional State in the USA, and then also in Europe and ultimately in the world, by Donald Trump. The super-rich are siding with him just as others like them sided with Hitler. But unfortunately, many underprivileged people will do the same, as long as they fail to realize that they are following a pied piper who lures them like rats.³³⁹

But this danger is the more serious one for an even more important reason, namely because at stake here is „the most sacred office that God has on earth, that of trustee of the right of human beings“³⁴⁰; – carelessly threatened by a businessman who seems to have no concept of right at all, but who, to the horror of all friends of the rule of right, is prepared to destroy precisely this worldwide.³⁴¹

That danger can only and must therefore be countered by the people in the still functioning constitutional States making ample use of the instruments needed for a community of solidarity, insofar as these already exist, whether rudimentary or abundant.

³³⁷ See chapter 4.4 „Worldwide Corruption“ in: *Branko Milanovic*, *Capitalism, Alone*, [fn. 108], pp. 159-175.

³³⁸ *Branko Milanovic*, *The World Under Capitalism*, (fn. 202), 70-72.

³³⁹ „As Americans went to the polls after eight years of the Obama administration, 75 percent said they were looking for a leader who would >take the country back from the rich and powerful<.“ (*Michael J. Sandel*, *Democracy's Discontent*, [fn. 151], 319) Well, they jumped out of the frying pan into the fire – already then. – With regard to the US-elections in 2016 Sandel writes: „Trump's plutocratic populism reflected his bifurcated base of support – upscale Republican voters who wanted less regulation and lower taxes, and white working-class voters, especially men without a college degree, who were drawn to his politics of grievance.“ (*Ibidem*, 321)

³⁴⁰ ZeF 08.353; RL 06.304: „what is most sacred of all among human beings (the right of human beings)“; see also: TP 08.307.18-19; VAZeF 23.166.

³⁴¹ This can undoubtedly be seen, for example, in the relationships he has established with various far-right parties in Europe, including the Prime Minister of Hungary.

