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**Closer than You Thought. Constitutional Grounding
of the Social Market Economy in Poland and Italy**

Keywords: cooperation, dialogue, solidarity, social market economy, common good, mixed economy

Słowa kluczowe: współpraca, solidarność, dialog, społeczna gospodarka rynkowa, dobro wspólne, ekonomia mieszana

Abstract

The article aims to investigate the system of the social market economy in Poland and Italy. It compares constitutional provisions, distinguishing national commonalities and discrepancies. They are the basis for the identification of the precepts common to all so-

cial market economies in Europe. The analysis concludes that combining economic rights with social interests is essential to establishing the social market economy.

Streszczenie

Blżej niż mógłbyś pomyśleć. Konstytucyjne podstawy społecznej gospodarki rynkowej w Polsce i we Włoszech

Niniejszy artykuł ma na celu zbadanie systemu społecznej gospodarki rynkowej w Polsce i we Włoszech. Porównuje przepisy konstytucyjne, wskazując podobieństwa i różnice pomiędzy tymi państwami. Są one podstawą do identyfikacji zasad wspólnych dla wszystkich społecznych gospodarek rynkowych w Europie. Analiza prowadzi do wniosku, że pogodzenie praw ekonomicznych z interesami społecznymi jest niezbędne do ustanowienia analizowanego systemu gospodarczego.

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I. Introduction

The economy and politics are inextricably intertwined. Most academics indicate that the 2007–2008 financial crisis led to numerous political and legal changes. In this context, the social market economy provides an invaluable opportunity to grasp the interplay between economic and political systems, as it operates between a socialist and a capitalist state. Combining elements of socialist thought with free-market principles requires reconciling capital and labour.

Against this backdrop, we compare the social market economy of Poland and Italy, analysing their relevant constitutional provisions. The research aims to uncover the central precepts of this economic system and identify its country-to-country variation. In this context, we assume that Poland and Italy share common foundations despite some national divergences. Our country selection allows us to consider the different understandings of the social market economy. Poland is a post-communist country whose democratic and economic transition in the 1990s was mainly grounded in the German legal tradition. Italy established its legal and economic system after World War II, combining the ideologies of the time, including communism and liberalism.

II. Between socialism and capitalism – what is the social market economy?

The social market economy integrates socialism and capitalism, constituting one of the subcategories of a mixed economy¹. The founders of this economic system, including Alfred Müller-Armack, Wilhelm Röpke and Ludwig Erhard, aimed to ensure that the economy did not degenerate into communism or laissez-faire capitalism². Both systems contribute to creating monopolies and interfering with personal freedoms. Consequently, the solution is to build a new ideal type – the social market economy – that provides economic efficiency and social justice.

It does not follow that the social market economy draws equally from capitalism and socialism. It borrows from either of these systems only as much as to ensure it reconciles the market forces and social justice. The social market economy does not encompass the most extreme elements of these two systems. It tasks the state with establishing a legal framework to guarantee individual freedom and market competition. The social protection system also balances the market through welfare benefits, subsidies or work incentives. Notably, the social market economy is dynamic. The state stimulates the economy in the event of a recession and dampens it during economic growth to avoid significant fluctuations in wealth.

The social market economy refers to two other categories of principles. On the one hand, they are related to human dignity, which is the basis of freedom and security. On the other hand, they relate to solidarity and subsidiarity. The former refers to state support for its lower units and individuals. The latter means that the state can only support them when they cannot cope³.

Germany pioneered the social market economy after World War II. Today, legal scholars emphasise that it is a quasi-constitutional imperative for the state to safeguard the welfare of the citizens and seek to mitigate the fundamental

¹ I.T. Berend, *An Economic History of Twentieth-Century Europe. Economic Regimes from Laissez-Faire to Globalization*, Cambridge 2006, pp. 190–262.

² See: A. Müller-Armack, *Wirtschaftslenkung und Marktwirtschaft*, Kastell 1990; L. Erhard, *Deutsche Wirtschaftspolitik*, London 1963; W. Röpke, *The German Question*, Leicester 1946.

³ H. Dessloch, *The social market economy in Germany and in Europe – Principles and perspectives*, “Religion in Communist Lands” 1991, pp. 112–118.

conflict between social rights and market values. In addition to Germany, other European social market economies include Italy, Poland, Portugal and Spain.

III. The social market economy of Poland

Unlike most European countries, Art. 20 of the Polish Constitution explicitly and deliberately refers to the social market economy as the main model⁴ of the country's economic system. The constitutional law of Poland bases its economic system on a theoretical concept, adopting elements⁵ from economic and social doctrines. The Constitution obliges the state to establish the social market economy through legal acts, providing institutional framework and market mechanisms. Notably, it imposes a responsibility on state institutions to put it into practice through law. Simultaneously, Art. 20 excludes economic systems other than the social market economy, e.g. socialist economy, market economy or other types of mixed economy⁶.

Other European legal systems, including Germany, the "homeland" of the social market economy, do not *expressis verbis* determine it as the model of the economic system. Most European constitutions implicitly refer to the theoretical model, anchoring it in other constitutional principles, enabling greater flexibility in shaping the economy.

Some legal scholars indicate that lawmakers should establish a legal system, underpinning the social market economy only based on the four pillars, enumerated in the Art. 20, that unconditionally frame Poland's economic system. They point out the difficulty for lawmakers in defining the sole expression of social market economy, as it has non-legal origins⁷. That is why it is necessary to follow the principles stemming from the pillars. They include the freedom of economic activity; private ownership; solidarity; and dialogue and cooperation between social partners. Most researchers do not see these

⁴ We use the words – theoretical concept, concept, theoretical model and model – interchangeably to refer to the social market economy as a theory.

⁵ Similarly, we use the words – elements and pillars – as synonyms.

⁶ D.A. Starrett, *Models of a mixed economy* [in:] *Foundations of Public Economics*, D.A. Starrett, Cambridge 2011, pp. 90–103.

⁷ J. Ciapała, *Konstytucyjna wolność działalności gospodarczej w Rzeczypospolitej Polskiej*, Szczecin 2009, p. 83.

elements as exclusive. The economic system is also auxiliarily defined by other constitutional provisions⁸.

The pillars of the social market economy must be treated equally. We divide them into two categories of principles: freedom and social-oriented. The former category includes the freedom of economic activity and private ownership. The latter corresponds to the solidarity, dialogue and cooperation between social partners⁹.

The freedom of economic activity is central in guiding the lawmakers on how to shape the economic system. Additionally, some authors consider it to be a source of individual economic freedoms¹⁰. It is regulated not only in the Art. 20 but also in Art. 22 of the Constitution. Notably, according to the Polish Constitutional Tribunal (PCT), Art. 20 is the basis for the individual's constitutional rights against the state¹¹.

The freedom of economic activity includes the possibility to independently undertake, run, choose the legal form and cease one's business¹². Furthermore, it corresponds to the principle of free competition¹³. The social market economy sets limits to this principle. However, its restriction must have grounds in other legally protected freedoms. These include problems of unfair competition¹⁴ or the protection of social groups¹⁵. In the social market economy, private ownership promotes economic initiatives. Private property

⁸ Some authors also refer to other values and principles constituting the economic system, see: P. Czarnek, *Wolność gospodarcza – pierwszy filar społecznej gospodarki rynkowej*, Lublin 2014, p. 83.

⁹ *Konstytucja RP*, t. I, *Komentarz do art. 1–86*, eds. M. Safjan, L. Bosek, Warszawa 2016, p. 29.

¹⁰ Judgement of the Polish Constitutional Tribunal (PCT) of May 7, 2014, file ref. no. K 43/12, OTK-A 2014, no. 5, item 50.

¹¹ Cf. Judgement of the PCT of October 11, 2011, file ref. no. P 18/09, OTK-A 2011, no. 8, item 81.

¹² Judgements of the PCC of: July 3, 2012, file ref. no. K 22/09, OTK-A 2012, no. 7, item 74; June 6, 2002, file ref. no. K 33/01, OTK-A 2002, no. 4, item 44; April 5, 2011, file ref. no. P 26/09, OTK-A 2011, no. 3, item 18.

¹³ Judgement of the PCT of January 9, 2007, file ref. no. P 5/05, OTK-A 2007, no. 1, item 1.

¹⁴ Combating Unfair Competition Act of 16 April 1993 (Dz.U. 2022 item 1233).

¹⁵ E.g. the concession system for alcohol, see: *Upbringing in Sobriety and Counteracting Alcoholism Act of 26 October 1982* (Dz.U. 2023 item 2151).

does not exclude the state-owned entities, provided that they respect market competition. The PCT considers that the private property is “all property belonging to actors autonomous from the State and its property”¹⁶. It, thus, requires balancing of public and private interests.

One may treat solidarity, dialogue and cooperation between social partners as restrictions to the free market¹⁷. Legal scholars, however, take the opposite standpoint, stating that these principles, together with economic freedoms, create a symbiotic economic system¹⁸. Solidarity means that the social life requires the interdependence and co-responsibility of all its participants, seeking to achieve the common good¹⁹. It also demands that all citizens bear common burdens. Additionally, it obliges the authorities to support weaker economic actors.

The inclusion of “dialogue” and “cooperation between social partners” in Art. 20 gives stakeholders the opportunity to actively participate in shaping economic processes. It is crucial to consider the interests of all engaged parties. In this context, the state is a special social actor²⁰. In addition, the Article 20 “invites” to the negotiations such social partners as trade unions and employers’ organisations. Since the social market economy assumes the balance of market participant’s interests, the dialogue and cooperation between them are the tools for reaching a social peace.

IV. The social market economy of Italy

Compared to Poland, the Italian Constitution does not explicitly state the country’s economic system. Most legal scholars call it a “mixed economy”,

¹⁶ Judgement of the PCT of January 30, 2001, file ref. no. K 17/00, OTK 2001, no. 1, item 4.

¹⁷ Cf. Judgement of the PCT of July 8, 2008, file ref. no. K 46/07, OTK-A 2008, no. 6, item 104.

¹⁸ K. Strzyczkowski, *Konstytucyjna zasada społecznej gospodarki rynkowej jako podstawa tworzenia i stosowania prawa* [in:] *Zasady ustroju społecznego i gospodarczego w procesie stosowania Konstytucji*, ed. C. Kosikowski, Warszawa 2005, p. 11.

¹⁹ A. Domańska, *Konstytucyjne podstawy ustroju gospodarczego Polski: na tle prawnoprównawczym*, Warszawa 2001.

²⁰ M. Wyrzykowski, *Konstytucja negacji i kompromisu* [in:] *Konstytucja – wybory – parlament. Studia ofiarowane Zdzisławowi Jaroszowi*, ed. L. Garlicki, Warszawa 2000, p. 226.

combining elements of market and socialist economy²¹. Title III of the Constitution of Italy contains the relevant provisions, especially Art. 41. It first specifies that private economic enterprise is free, establishing the basis of a market economy. Subsequently, Art. 41 (2) excludes a Thatcherite-like free market. Accordingly, the state's and individuals' economic activity shall not infringe on the common good, safety, liberty and human dignity. In addition to these state's negative duties, Art. 41 (3) obliges the state to adopt programmes and controls to orient and coordinate the economy towards social purposes.

The Art. 41 (1) establishes the freedom of economic activity. Placing it above the other principles and values, especially the state's duty to orient and coordinate the economy towards social purposes (Art. 41 (3)), the Constitution establishes it as the foundation of the economic system. Consequently, although free economic enterprise shall not disregard the common good, the society's interests shall not violate this freedom's core²². Similarly, the programmes and controls from Art. 41 (3) must not distort market activity, so entrepreneurs' choice is not significantly restricted²³.

The most widely discussed part of Art. 41 is its second paragraph, which establishes the common good (*l'utilità sociale*) as a limitation to the freedom of economic enterprise. On the one hand, the meaning of the common good is ambiguous. On the other hand, deciphering the relationship between economic freedom and the common good requires thoroughly analysing the extent to which the latter may constrain market activity²⁴.

Some authors trace the origins of the Italian *l'utilità sociale* to the Scottish Enlightenment, particularly to David Hume and Adam Smith²⁵. In this context, the Italian Constitution's definition of the *l'utilità sociale* should refer to its Art. 3 (2). It obliges the state to ensure the full development of the in-

²¹ F. Zatti, *Riflessioni sull'art. 41 Cost.: la libertà di iniziativa economica privata tra progetti di riforma costituzionale, utilità sociale, principio di concorrenza e delegificazione*, "Forum di quaderni costituzionali rassegna" 2012, pp. 1–18; R. Bifulco, A. Celotto, M. Olivetti et al., *Commentario alla Costituzione*, vol. 1, Milan 2006, pp. 846–863.

²² R. Bifulco, A. Celotto, M. Olivetti et al., *op.cit.*, pp. 851–860.

²³ Judgement of the Italian Constitutional Court of July 12, 2006, file ref. no. 279/2006; Decision of the Italian Constitutional Court of May 22, 2009, file ref. no. 162/2009.

²⁴ L. Massimo, *Unità nazionale e struttura economica. La prospettiva della Costituzione repubblicana*, "Diritto e società" 2011, pp. 636–719.

²⁵ A. Vaccari, *I fondamenti teorici dell'utilità sociale*, "Gruppo di Pisa" 2017.

dividuals and the participation of all workers in the country's political, economic and social organisation. The Constitution, however, does not indicate the state's actions to achieve these objectives. The Italian Constitutional Court generally attributes the task of unearthing the *l'utilità sociale*'s content to the lawmakers²⁶. Some legal scholars link it to achieving high employment levels and fair competition²⁷.

Simultaneously, the common good is a general clause that adapts to social and economic changes²⁸. Subsequently, moral rules should guide its interpretation and application. The *l'utilità sociale*, however, has a core that never changes. Utilitarianism explains it as “the greatest happiness of the greatest number”²⁹.

Concerning the relationship between the common good and free economic enterprise, the Constitution acknowledges that safeguarding individual rights and freedoms contributes to *l'utilità sociale*. For instance, by protecting fair competition, the state makes the economy more consumer-friendly³⁰. The common good and free economic activity are mutually reinforcing. The two instances when they are at a crossroads relate to the state constraining market activity inconsistent with *l'utilità sociale* and to the state correcting its infringements of the core of the free economic enterprise. The former refers to the nationalisation or licensing of the production of critical public goods.

Lastly, Art. 41 (3) of the Constitution is much less socialist than it appears. It determines that social purposes shall guide both public and private economic activities. The social purposes are not tantamount to the common good. They have a much narrower meaning, denoting the measures that orient and coordinate the economy³¹. Moreover, Art. 41 (3) does not allow the

²⁶ R. Bifulco, A. Celotto, M. Olivetti et al., *op.cit.*, pp. 851–860; S. Mazzamuto, *Libertà contrattuale e utilità sociale*, “Europa e diritto privato” 2011.

²⁷ C. Mortati, *Il diritto al lavoro secondo la Costituzione della Repubblica* (Natura giuridica, efficacia, garanzie) [in:] *Atti della Commissione parlamentare d'inchiesta sulla disoccupazione*, vol. IV, t. I, Roma 1953, p. 79.

²⁸ A. Vaccari, *op.cit.*; F. Pedrini, *Le “clausole generali”*. Profili teorici e aspetti costituzionali, Bologna 2013.

²⁹ J. Bentham, *A Fragment on Government*, Cambridge 2012.

³⁰ M. Libertini, *La tutela della concorrenza nella Costituzione italiana*, “Rivista Italiana degli Economisti. Il Mulino” 2005, Supplemento n. 1, pp. 105–118.

³¹ A. Vaccari, *op.cit.*; F. Modugno, *Scritti sull'interpretazione costituzionale*, Napoli 2010.

state to interfere significantly in the economy. The state must identify the market needs and failures and recommend how to address them, considering the social purposes.

V. Discussion

Poland and Italy fit well into the model of social market economy. Both countries regulate their economy, referring to socialist and capitalist economic systems and aiming to reconcile the free market with social justice. In this context, the state's obligation to guarantee equal rights and opportunities for the citizens justifies its limited interference in the market. As a result, both countries establish a mixed economy in which neither system dominates. Additionally, their constitutions implicitly exclude other economic systems.

Despite Poland's and Italy's identification as a social market economy, the legal framework determining the economic system of each of the two countries contains differences. The Polish Constitution explicitly refers to the theoretical concept of social market economy. Its Italian counterpart only implicitly indicates that Italy is a mixed economy.

In Poland, the social market economy is an ideal type that must be put into practice by legislation. Even though it is a general clause, it stems from specific fields of economics. Consequently, the primary objectives of such a system should guide its interpretation. Italy, on the other hand, does not refer to the theoretical basis of the economic system, containing one general clause in the form of the "common good". It does not imply, however, that the Polish Constitution does not include general clauses of a similar, social-oriented nature. On the contrary, the four pillars that unconditionally determine the economic system are general clauses requiring further specification. The significant difference between the general clauses in both constitutions is that no single idea spans the whole system in Italy.

The other significant factor distinguishing Poland from Italy is the number of core elements, constituting the economic system of each country. In Poland, there are four pillars, while Italy refers to two. At the same time, the Italian Constitution refers to three additional values that should shape the economy: safety, liberty and human dignity. The Polish Art. 20 does not entail a similar

solution. Parallel provisions are included in the other articles of the Constitution, but they determine broader phenomena than just the economic system³².

Despite the discrepancies, Poland and Italy mostly converge in regulating the economy. Firstly, the provisions concerning the social market economy are not only included in the articles in question but are also determined by other constitutional provisions. Some specify the concepts from the aforementioned articles, while others contain additional economic values, rights and obligations.

Another common feature is the central position of the freedom of economic activity, determining the “market” nature of both countries’ economies. It corresponds to the rule that the social market economy necessitates a free market with limited state intervention to protect vital social interests. Nonetheless, both constitutions place some limitations on the freedom of economic enterprise. Other elements of the social market economy may weaken its validity. These restrictions, however, do not mean that the social principles are superior to the economic ones. Every pillar of the social market economy has the same weight. Additionally, both Constitutions accept the coexistence of private and public-owned entities. They can operate together in the market if they do not interfere with the free competition. Hence, this rule is especially dedicated to state-owned enterprises, which tend to build monopolies. Introducing a specific legal framework prevents ownership concentration, negatively affecting market functioning.

It leads to whether the social market economy’s core elements in both countries have the same meaning despite including different general clauses. Although not referring to the common good, Art. 20 of the Polish Constitution provides for several general clauses. One of them is the concept of the “social market economy”, including a significant “hidden message” on the optimal economic structure. It refers to a model obliging the authorities to pursue society’s interests. Who is to identify the common good or the society’s interests? Constitutional courts in both countries generally refrain from specifying this matter. The judiciary instead leaves this task to the lawmakers, stating that the legislators must adapt the relevant general clauses to the changing social and market conditions.

³² See art. 30 and 31 of the Polish Constitution.

To conclude, comparing the constitutional underpinning of the Polish and Italian economies allows us to identify central tenets of social market economies in contemporary Europe. Both constitutions specify the economic system, emphasising the pivotal role of economic freedoms in the economy. It is a directive for the lawmakers on how to shape the economic affairs and the system's *sine qua non* principle, combining individual interests with social solidarity and the common good. In addition, the European social market economy embraces human dignity and liberty as its core elements.

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