

## HISTORICAL TRANSFORMATION OF PROPERTY RIGHTS IN THE CONTEXT OF NEW PARADIGM OF HUMAN DEVELOPMENT

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*ABSTRACT*

*The issue researched in this article is, whether the transformation of property relations, the process which has been taking place in the history even before the emergence of Roman law, can be achieved in modern times, by involving other factors of production (as for ex. work rather than capital) as a foundation for appropriation. Such a transformation would change the contemporary economic paradigm, based on capital as an exclusive foundation for appropriation substantially and would change the society as a whole.*

*The continuation of the historical process of transformation of property rights is therefore condicio sine qua non for reforms needed for the implementation of innovative, knowledge based modern society. There have been a number of adaptation of basic property right's principles so far in the history, but none of them succeeded to change dramatically the basic appropriation principle, based upon property (in modern times: capital) so far. Labor and innovations were never recognized as an independent factor of production but treated rather as an expense, needed to be paid in the course of production.*

*In this article we shall review the attempts in the history to transform the basic property (appropriation) principle from Roman law property right as an absolute right, to modern concepts of property as a social function (property with economic, social and ecological restrictions and limitations) rather than substitution of the basic appropriation principle, and predict if this process is going to continue in the future and if, generated by what driving forces and what legal tools.*

*Key words: Property rights, economic and legal definition of property, historical transformation of property rights, property as a social function, contemporary economic paradigm, profit sharing, social responsibility, social entrepreneurship*

## TRASFORMAZIONE STORICA DEI DIRITTI DI PROPRIETÀ NEL CONTESTO DELLA NUOVA PARADIGMA DI SVILUPPO UMANO

*SINTESI*

*Il problema studiato in questo articolo è se la trasformazione dei rapporti di proprietà, il processo che ha avuto luogo nella storia, anche prima della nascita del diritto ro-*

*mano, può essere raggiunto in tempi moderni, attraverso il coinvolgimento di altri fattori di produzione (come per esempio la forza lavoro, piuttosto che il capitale) come base per l'appropriazione. Tale trasformazione andrebbe a cambiare i paradigmi economici contemporanei basati sul capitale come fondamento esclusivo per l'appropriazione, e andrebbe sostanzialmente a modificare la società nel suo complesso.*

*La continuazione del processo storico di trasformazione del diritto di proprietà è condicio sine qua non per le riforme necessarie all'attuazione di una società moderna, innovativa, basata sulla conoscenza. Ci sono stati un certo numero di adattamenti dei principi del diritto di proprietà di base fino ad ora nella storia, ma nessuno di loro finora è riuscito a cambiare radicalmente il principio di appropriazione di base, basato sulla proprietà (in tempi moderni: capitale). Il lavoro e le innovazioni non sono mai stati riconosciuti come fattori indipendenti di produzione, ma piuttosto trattati come una spesa del processo produttivo.*

*In questo articolo passiamo in rassegna i vari tentativi nella storia di trasformare la struttura di base (appropriazione) del principio di pura proprietà per lo meno ad alcune restrizioni e limitazioni del diritto di proprietà e non di sostituzione e di prevedere se questo processo è destinato a continuare in futuro e, se così fosse, generato da quali forze motrici.*

*Parole chiave: diritti di proprietà, definizione economica e giuridica della proprietà, trasformazione storica dei diritti di proprietà, proprietà come una funzione sociale, paradigma economica contemporanea, partecipazione agli utili, la responsabilità sociale, l'imprenditoria sociale*

## INTRODUCTION

The new paradigm of human development (new concepts and new forms of economic coordination) engages scholars of the countries in transition as well. In search of new equilibrium between private, public and social sector, economies in transition face the challenge of post privatized ownership structure of the economy, significant for strong public, weak social and emerging, newly formed and consolidating private sector. In addition, there is an important historical and ideological burden with cultural patterns (and real experiences) derived from some similar concepts of the former socialistic state. But, talking about cultural environment in the countries in transition, it is necessary to say that private property and market economy enthusiasm from the early 90s still prevails over the concepts of public and social principles of economy. But paradoxically, the privatization of economy (better: transformation from social to private forms of enterprises) caused the strengthening of the public sector. Hereby the state as an owner took over total public services and in addition and became owner of substantial parts of other economy<sup>1</sup>.

1 State and parastatal institutions (funds, investment companies, public banks) own today in Slovenia own more than 50 % of economy.

Privatization thus led from social to state ownership and from social to state (political) controlled economy<sup>2</sup>.

## THEORETICAL BACKGROUND OF PROPERTY RIGHTS

### Property, appropriation, production

Generally speaking, **the property is the state** between people in relations to things. Therefore property is not a relationship between man and thing; the relationship between man and the thing is not a social relation and therefore the object of study of natural and technical sciences.

Property is the state and **not the process**; it is such a state of relations between the people that provides the owner with all the rights derived from the property, which are constituted as property rights. The process of acquiring property is **appropriation**. Appropriation is in the production unanticipated consumption. **Production** is primarily an objective process of manufacturing things. Theory defines appropriation as the realization of the economic value of a property by a person. Appropriation could also be identified, as the use of the economic benefits of a good by a particular person. Appropriation can be direct as for example consumption, destruction of goods, or indirect, as for example use, enjoyment. Production is unlike appropriation, creation of goods or services which are able to satisfy human needs (goods). Appropriation therefore is the use and production is the manufacture of goods.

The purpose of production is to create values to meet human needs, which are the subject of consumption. Therefore there is **no production without appropriation** and that on the other hand is **no appropriation without production**. Nothing is produced without the intention of appropriation and nothing is appropriated, without previously being manufactured. **Relations in production are therefore relations in appropriation.**

If the property is in the state of relations between people related to things, **the appropriation is the process** under which the holder of the property rights and the scope of property rights arising is defined.

Marx identified the property as a primary economic term, i.e. as the relationship of people in appropriation (manufacture); it is in the designing of such properties to parts of nature, to serve human needs (Marx, 1857). Marx further gave the property a deep **class content**; the production relations and property rights as legalistic term thereof, are described as fundamental, as the real foundation of society, which is being constructed on social consciousness as a superstructure of society. The primacy of property and its class nature is reflected in the fundamental nature of the relationship of production, the principles on which Marx built his definition of property rights<sup>3</sup>.

2 See more: Bohinc, Bainbridge (2001); see also: Buchen (2004).

3 Marx (1970) it is a critique of the draft programme of the United Workers' Party of Germany: "Labor is the source of all wealth and all culture."

### The economic definition of property

Property relations are the relations between people participating in production; property relations therefore explain in what proportion people appropriate products or services created in that production. The theory of property rights explains on what foundations among the participants involved in the production, appropriate the economic benefits achieved in the production of (surplus value); upon what the proportions in appropriation among the participants in production are based and justified?

Another words, what are the factors of production (capital, labor, innovations) that provide the foundation for appropriation and that determines relations (proportions) in appropriation of the added value achieved. In classical and contemporary capitalistic societies only capital presents the foundation for appropriation, rather than labor, innovations etc.

The definition of **property as the relationship between the people involved in the production**, which answers the question of how the resulting benefit is distributed among them, is the **economic definition of property**.

### The legal definition of property, property rights

Property in the legal sense defines its legal essence, determines what rights are derived from the property, and who, and to what extent is the holder of these rights (titular); further it explains the process of acquiring property rights

Property rights in positive law, is the right to have thing in possession, use and enjoy, and use it. Restrictions on the use, enjoyment and disposition can be determined only by law and within the limits of admissibility laid down by law or the owner himself.

At a certain stage of development of human society, with the emergence of private property and the state. the relationship between people in appropriation as a particular social relationship, becomes legal relationship; it gets legal character. The relationship in appropriation becomes legal relationship means, that the relationship is legally safeguarded; at that level of human development the **property right appears**.

The property in the legal sense can be defined in two ways:

- as an **attitude of willingness towards the thing as its own**, or shortly, as property right (the legal concept of property in the subjective sense),
- as **the property of an object** that belongs to someone (.the legal concept of property in the objective sense).

In contemporary legal and economic theory, property rights are a **controversial, theoretical construct** in economics for determining how a resource is used, and who owns that resource—government, collective bodies, or individuals (Alchian, 2008). Property rights can be viewed as an attribute of an economic good. This attribute has four broad components and is often referred to as a bundle of rights (Eggertsson, 1990; Lueck, 2008; Klein, Robinson, 2011):

- the right to use the good,
- the right to earn income from the good,

- the right to transfer the good to others,
- the right to enforcement of property rights.

In contemporary times economic analysis of law applies the tools of microeconomic theory to the analysis of legal rules and institutions; economic analysis of law derives from several different intellectual traditions in economics (Kornhauser, 2011).

## SOME HISTORICAL OBSERVATIONS ON PROPERTY

### **Tribal community property**

Tribal community property corresponds to the undeveloped stage of production, when people kept hunting and fishing, animal husbandry, or at least in agriculture. Furthermore, this form of property assumes a low level of division of labor and the level of patriarchal family.

Tribal community as natural community does not occur as a result, but as a precondition of community appropriation. Community ownership of land or common land (Roman *ager publicus*) is considered as the first form of property. During this period, the great earth laboratory arsenal, which gives the means of work as working material and lodging, base communities (Tičar et al., 2010).

Attitude of the shepherds, hunters, agriculturists to the community is an attitude to community property and community; it is reduced to opportunity to work and survive and it is not an individual property right.

In the case of the tribal community property, individuals are identified by a specific land they are entitled to work on. It is not an ownership relation, but rather the right to work on common land, an object to which an identified number of individual rights to work (not collective property rights) are attached. The common land is not the property of anyone but belong to identified number of individuals.

### **Municipal (community) property**

Municipal property as well as state property is a property right already. It is individualized to members of the community (private landlords); membership in the municipality is the assumption of land appropriation. There is thus an individual property on individual land community; members have the duty to provide *ager publicus* for community needs and purposes. In this form of property, the continued existence of the community, maintaining equality among its members and their own work is required as a condition for the existence of the property. Individuals work of the owners, is a precondition for the existence of this type of property; the relationship between labor and ownership, appears at this stage.

The municipal (state) community property is the first type of private property in different modifications in relation to municipal or. state property. Division of labor is already at more advanced stage.

### Feudal property

Feudal property is a type of community property, comparable with the tribal and municipal property. Significant for this type of community property is, that the work of serfs and small farmers is subordinated.

Feudal property is mainly organized in the countryside. In cities, it appears in the form of so-called corporate property (feudal organization of crafts).

In feudal times, the main form of property was therefore ownership of land on which peasant work was organized. On the other hand, individual's own work with a small capital, dominated.

### Social (socialistic) property

Social (socialistic) property was an expression of socialist socio-economic relations between people. It was the foundation for freedom of associated labor and the ruling position of the working class in socialism. The means of production were inalienable common base of social work and social reproduction<sup>4</sup>.

Legally social property entitled everybody to get right to work with the socially owned means of production under the same conditions (**the right to work with social means of production**). Social property was not ownership at all (**non-ownership concept**); no one could have acquired ownership rights over the social means of production; neither the state, nor other socio-political community (municipality etc.) nor an organization of associated labor (legal form of socially owned enterprise). Neither a group of citizens nor an individual could have had ownership rights over the social means of production. The only right attached to social property was the right to work with social means of production.

In no way, property rights could have been imposed on social property. The foundation for appropriation rights was labor (personal income), rather than property rights. Human labor was the sole basis for the appropriation of the product of social labor and the sole basis for the management of social resources (workers self management).

The most important impact of social property on socio-economic system was implementation of on-market tools of economic coordination. Non-market tools of economic coordination were different types of the self management models of regulation, dominating in the early 70s and 80s in Slovenia (former Yugoslavia). The implementation of this tools excluded market instruments related to goods, labor and capital and formed the fundamentals of so-called **agreement's, rather than market economy**.

### *Basic organization of associated labor*

The basic form of production (business form), rather than share company, was **basic organization of associated labor (BOAL)** as the primary labor association and business organization.

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4 The Constitution of the former Socialist Republic of Slovenia, 1974  
[https://sl.wikisource.org/wiki/Ustava\\_Socialisti%C4%8Dne\\_republike\\_Slovenije\\_\(1974\)](https://sl.wikisource.org/wiki/Ustava_Socialisti%C4%8Dne_republike_Slovenije_(1974))

In BOAL workers exercised their **right to work with social means of production** and self governed (managed) business activities. Self management included decisions related business conduct and organization, to distribution of added value (profit)s and appointment of managers.

Self management **corporate governance** structures were composed of the workers council in the capacity of the board of directors and the director in the role of executive manager responsible to workers' council.

### *Free exchange the work*

Free exchange of work was a special non market tool of coordination the relations between the **people working in the production and the people offering services** of general or common economic interest. Free exchange of labor was exercised, through the self-governing communities of interest.

As the constitution<sup>5</sup> stipulated: ...”working people, meet their personal and collective needs and interests in the field of education, science, culture, health care and other social activities by freely exchange their work with the work of employees in organizations of associated labor in these areas”.

Also in certain fields of material production of common interest (energy, communications, transportation, water, mining, etc.) self-interest communities were set up by the organizations providing services and organizations being the users of such services through which they freely change their work and directly regulate the relations of common interest.

Self-interest communities operated by combining the principles of reciprocity and solidarity.

### *Self management communities of interest*

**Self management community of interest** was a form of partnership between the entities that provide and the entities that use general public services and public services of economic interest (between providers and users); self management agreements on establishing self governing communities of interest had been concluded in both fields<sup>6</sup>:

- **public services of economic interest**, so called business infrastructure (public utilities, public energy, transportation, communications, etc.) and in the

5 The Constitution of the former Socialist Republic of Slovenia, 1974  
[https://sl.wikisource.org/wiki/Ustava\\_Socialisti%C4%8Dne\\_republike\\_Slovenije\\_\(1974\)](https://sl.wikisource.org/wiki/Ustava_Socialisti%C4%8Dne_republike_Slovenije_(1974))

6 The Constitution of the former Socialist Republic of Slovenia, 1974  
[https://sl.wikisource.org/wiki/Ustava\\_Socialisti%C4%8Dne\\_republike\\_Slovenije\\_\(1974\)](https://sl.wikisource.org/wiki/Ustava_Socialisti%C4%8Dne_republike_Slovenije_(1974)): Working people, meet their personal and collective needs and interests in the field of education, science, culture, health care and other social activities as part of a single process of social labor by freely exchange their work with the work of employees in organizations of associated labor in these areas. Free exchange of labor working people exercise, through the organizations of associated labor and the self-governing communities of interest or through them.

- **public services of general interest**, so-called **social infrastructure** (health, education, research, culture, etc.).

Both types of establishing self governing communities of interest were **contractual, not institutional cooperation** based upon common:

participation on risks and advantages, common governance of undertaking through common bodies,

planning, setting up standards, prices and other conditions, eliminating market regulation among them.

The role of the state on these fields was reduced to mere control of legality of these decision making process. The responsibility for satisfying the needs of citizens and business referring to rendering public services was taken by self management communities.

**Agreements on pooling of labor and assets (or just assets) together** aiming to regulate, govern and plan, business relationships within vertical chains of reproduction (trade, production, development, services), replaced classical contractual and institutional investment tools, like joint ventures issuing shares, bonds and other financial instruments and establishing, merging, taking over corporations.

### **Transformation of social property to state and private property**

These models were **abandoned in the reforms of early 90s**, as a measure of market and political reforms and transition.

The **state took over public services** through the process of nationalization. Former social enterprises (basic organization of associated labor) in the field of public energy, communications, transportations, water and mining, municipality services etc., were transformed to state or municipality owned enterprises. On the other hand, some of former social undertakings were fully or partly privatized and transformed to private share companies.

Former self management institutions (hospitals, universities, cultural, research, social self management institutions) were transformed to state and municipality owned and governed institutions.

Numerous forms of non-market cooperation and non-administrative forms of social coordination were abolished by market and political reforms, imposed by new market based legislation, all derived from the transformation of social to state/municipality ownership.

## CONTEMPORARY LEGAL OBSERVATIONS ON PROPERTY RIGHTS

### **Several types of property rights**

In the contemporary world only one type of property right is not sufficient to serve to a variety of social relations. Numerous limitations and restrictions of a sole, uniform property right reduce transparency and the effectiveness of law. That is why the existing uniform **private property should diversify to several types**.

Historically there were different types of property rights in **different political and socio-economic systems**, like feudalism, classical and modern (liberal) capitalism, socialism etc. But, in the modern times, when we are faced with the liberal version of capitalism being on power, there is again an opened question if only one type of property right satisfies the needs of very complex and diversified socio economic order like modern capitalism is.

Legal definitions in contemporary legislations are following uniform type of property right. In the case of distribution of uniform property right to private property right, public (state/municipal) property right, corporate property right, social (social undertakings) property right, individual regulation (limitations and restrictions) for each of them would be needed; it is obvious that such an approach would, to an important extent, facilitate interpretation and enforcement of law.

The answer to the question, does **new ways of adaptation** (limitations and restrictions) of “eternal” sole uniform property right satisfy the needs of the new human development paradigm is obviously no!; the emergence of **new types of property** is necessary as a way of transformation of socio economic foundations of capitalism. The classification of different property rights could be the following:

- **private** property right,
- **public** (state/municipal) property right,
- **corporate** property right,
- **social** (social undertakings) property right,

Introduction of new types of property rights would create opportunity for involvement of others (rather than exclusively capital) foundations for appropriation and management like labor and innovations.

Theory is arguing how this two thesis fit together?:

**“People and the knowledge they create are our company’s most important assets.”**

**“Our primary corporate goal is the maximization of shareholder value.”<sup>7</sup>**

The answer is in designing new types of property in order to create legal tools for combining diversity of foundations for appropriation and management and not stick with the capital only.

### **Private property rights**

The right to own private property is a human right generally defined as the right to acquire and enjoy the property<sup>8</sup>. Property right is the right to have thing in possession, to use and enjoy it in a most comprehensive manner and to dispose it. Restrictions on the use, enjoyment and disposition can be determined by law<sup>9</sup>.

7 Roberts, Van den Steen (2000): Corporations simultaneously claim that human capital is increasingly important to their success and that they seek to maximize shareholder value.

8 See Article 67 of the Constitution of Slovenia, Official Gazette of the RS, no. 33/9, 28.12.1991 (hereinafter, CS)

9 See: Article 38 of the Property Code of Slovenia, Official Gazette of the RS, no. 87/2002, 18/2007 (hereinafter PC)

A contemporary legal approach to property rights is, that the owner would not be given unlimited possibilities of use and disposes the property he owns (rather than absolute right according to Roman law concept); the property rights would be **restricted or limited** in various ways, providing **economic, ecologic and social function** of the property<sup>10</sup>.

The abuse of property prohibited; in exercising his rights, the owner is limited by the equal rights of others. Ownership rights have to be exercised in accordance with the fundamental principles of law, their purpose and the nature of things<sup>11</sup>.

Property rights can be **suspended or restricted** in the public interest for compensation in kind or monetary compensation under the conditions provided for by law<sup>12</sup>. Expropriation is applicable when the public interest outweighs the benefit of the owner (road construction and owners of the land).

There is a wide range of property restrictions and limitations; it is not possible to describe them generally. Normally the different pieces of legislation would provide for such a way of acquisition and enjoyment of property, as **to ensure the economic, social and environmental functions**.

The **economic function** of property is traditionally explained as the right to obtaining economic benefits as profit, and other capital gains. Free economic initiative is exercised in the conditions for establishing commercial organizations defined by law. Commercial activities may not be pursued in a manner contrary to the public interest. Unfair competition practices and practices which restrict competition in a manner contrary to the law are prohibited<sup>13</sup>.

The employee's rights for participation in management of commercial organizations and institutions in a manner and under conditions provided by law are an important limitation of private property rights.<sup>14</sup>

The limitation of the absolute property right is also the obligation of the shareholder (investor of capital) to consider the various public and other stakeholders' interests. In some legislations, such other stakeholders' interests are defined by law, like the provision of Austria Aktiengesetz, that obliges the management board of the public limited company to manage the company not only for the best interest of a company but also considering the interests of the shareholders and the employees as well as the interests of the public<sup>15</sup>.

For the **social function** of property is derived from the concept of the welfare state; the property should be exercised in a way that basic needs of citizens (health, education

10 In addition to the law, the owner himself may, for any purpose that is prohibited, limit their right, unless otherwise provided by law (Article 38th of the PC).

11 See: Article 12 of the PC

12 See: Article 69 of the CS

13 Article 74 of the CS (Free Enterprise)

14 Article 75 of the CS

15 § 70. Of the Law on Stock Corporations of Austria stipulates: «It shall be the responsibility of the Management Board to manage the company in the best interests of the company considering the interests of the shareholders and the employees as well as the interests of the public».

and culture) and overall development of social standards is taken into consideration (See: Nahtigal, 2013, 601-614).

As an example for mandatory social responsibility we can take Chinese company law, according to which the company has to act in good faith, accept the supervision of the government and the general public, and bear social responsibilities (Article 5 of the Chinese company law)<sup>16</sup>.

**Ecological function** presents the limits of property rights in order to protect nature and the environment. There are a number of limitations and restrictions that can be imposed by law on property rights in this field; let us just list them to get impression of how complex is the issue of contemporary property rights:

-Protection of national assets and natural resources; special rights to use national assets may be acquired, subject to conditions established by law and the conditions under which natural resources may be exploited have to be established by law<sup>17</sup>.

-Protection of land; the law shall establish special conditions for land utilization in order to ensure its proper use; special protection of agricultural land shall be provided by law.<sup>18</sup>

-Healthy living environment; everyone has the right in accordance with the law to a healthy living environment and the state shall promote a healthy living environment.<sup>19</sup>

-Protection of natural and cultural heritage; everyone is obliged in accordance with the law to protect natural sites of special interest, rarities and cultural monuments<sup>20</sup>.

## Corporate property

Corporation<sup>21</sup> (share company) is a private legal person who independently pursues an activity with a view to profit (any activity for the purposes of obtaining a profit) in the market as its exclusive activity. Share companies are, for profit legal entities, governed by private (company) law.

**Shareholders are investors** of the share capital to corporation. They are either founders of the company or buyers of its shares. As far as the corporate rights are concerned, they are in the equal position.

**Shareholders are not the owners of the corporation** as some theories argue. They are the holders of shares as securities that entitle them to corporate rights which they enjoy on the meetings of shareholders. Shareholders are therefore entitled to corporate rights attached to shares, rather than being the owner of the company.

16 Company Law of the People's Republic of China (revised in 2005)

17 Article 70 of the CS

18 Article 71 of the CS

19 Article 72 of the CS

20 Article 73 of the CS

21 Corporation is an American expression for company. The legal theory classifies legal entities as corporations versus foundations (*universitas personarum*, *universitas bonarum*), further on as public (administrative) law versus private (civil) law entity and finally as for profit versus non for profit entities.

A public limited company is a company which has subscribed capital divided into shares. It is liable to creditors for its obligations with all its assets. **Shareholders are not liable** to creditors for the obligations of the company.

Shareholder can dispose with the share; he or she can sell it or give it for free. But shareholder cannot dispose with the company unless he or she reaches  $\frac{3}{4}$  majority of all shareholders. The decision of the highest corporate body is needed to dispose with the company.

If shareholder dies or ceases to exist (legal entity), this does not affect the existence of corporation.

Shareholder is entitled to capital gain (dividend) only if the majority of the shareholders decide so.

Voting rights of the shareholders are exercised by applying the principle of ‘**one share, one vote**’ (proportionality) and the principle of **equal status of shareholders**: the bodies of the company must treat all shareholders equally under equal conditions. The principle of **proportionality** means, that the shareholders’ shares in the profit for appropriation and the number of voting rights, are determined with the proportion of their share in the subscribed capital.

Corporation is responsible not only to shareholders, but also to broader community, employees and other stakeholders. Corporation has its own **interest, separate and different from the shareholders** interest. Corporate interest is implemented by corporate bodies (board or directors) whose responsibility is to conduct business to the best interest of the company, although it differs from the interest of individual shareholder.

Shareholders unless treated in part of the theory as owners, do not make decision on business conduct of the company. Shareholders only have the right to participate in, and to be sufficiently informed on, decisions concerning **fundamental corporate changes**. Effective shareholder participation only in key corporate governance decisions, such as the nomination and election of board members, should be provided.

A corporation is an artificial person and therefore, it acts through its representatives in fact through the **members of the board of directors or management board**. The members (shareholders) are simply the holders of the shares of the company and need not be the managers of the company.

Corporate boards’ members are liable to the corporation and not to shareholders (except in the cases defined exceptionally by law).

Corporate boards exercise property rights respecting several limitations and restrictions, implementing the concept of economic, social and environmental function of property and corporate social responsibility. All this rules in order to provide transparency and effectiveness in legal interpretation and enforcement justify constitution of a **special type of property, called corporate property**.

In order to do so, **adaptation of classical tools of capitalism** is more than needed in the directions that are shaping the new concept of corporate property as a type of property based on principles of combining **capital and labor as foundation** for management and appropriation, implementing the principles of corporate social responsibility.

In addition legislative framework for **mandatory profit sharing** schemes in certain types of corporations (with high skilled labor structure) and/or for high skilled and inno-

vative individuals; together with capital, the labor principle of profit distribution should be followed.

Legislative framework for **mandatory employee ownership plans** in certain types of corporations following the labor principle of deferred profit distribution and other forms of distribution of shares out of a part of a profit also need to be improved as an element of newly designed corporate property. Part of the theory states, that It is arguable, that worker-investors should be regarded as equity holders and be granted control and income rights in the enterprise<sup>22</sup>.

Also legislative improvements are needed to strengthen **mandatory participation of employee representatives in corporate bodies** in one and two tier system of corporate governance in some countries. Theory explains success of West German, Scandinavian and Japanese economies, particularly when compared with lagging productivity and competitiveness of the US and the UK, have focused attention on comparative institutions in labour markets and corporate control<sup>23</sup>.

### Public (state, municipal) property

It is not always easy to find out whether a certain legal entity is public or private. Generally theory would differ between **public and private entities** by using the following principles:

- the **purpose of the entity**, declared by law (the law itself would define it as public purpose);
- the way, the entity is being **established** (the nature of founding act, article of incorporation) either by law or by private act;
- the **objectives** of the entity, defined by its articles of incorporation, as either public services or private profit or other interest;
- the relations between the **entity and the public authorities**; it has to do with the issue of possible interference of public authorities, with the entities corporate governance (nomination, supervision and recall of directors, etc.)<sup>24</sup>.

22 Furubotn, 1988: The article seeks to explain the property-rights structure that a “codetermined” firm must possess to be efficient.

23 Gurdon, Rai, 1990: The paper investigates the effect on company performance of the 1976 West German Codetermination Law, which expanded decision-sharing rights of the work force. **See also:** FitzRoy, Kraft, 1993; Gorton, Schmid, 2004 : A study of German codetermination Under the German corporate governance system of codetermination.

24 There are **several additional criteria** to be found in theory, to classify public law entities, as for example: founders are public entities, activities are public (services), financing is public, founding act is a public act. In addition, there are some more criteria as the entity has **public authorization and competencies**; the entity has a privileged **position on the market**. There could be special kinds of **monitoring and supervision** performed by executive as well as other branches of authorities; administrative regulation of **market conditions** would be the case (prices, tariffs, standards). In addition **public ownership** of the substantial part of the shared capital would be normal. Public entities would have the **duty of contracting** imposed by administrative law. Their **products and services would** generally be on **disposal to** everyone.

Public (administrative) law entities theory are further divides to **territorial** (state and its agencies, local authorities and self management communities) and **specialized** agencies and undertakings. Specialized public (administrative) law entities could be classified to **public enterprises** (undertakings), **public foundations**, **public independent agencies** and **other public entities**.

**Public enterprises** (undertakings) are for profit (profit is not ultimate purpose) public corporations, performing public services. **Public institutions** are non for profit public entities performing non commercial public services. **Public foundations** are non for profit noncorporate public entities (common law parallel would be a trust), acting as funding institutions. **Public agencies** (nongovernmental) are non for profit, non corporate public entities, involved in development and other activities and expertise. Different kinds of **other entities** are for example chambers of commerce (somewhere they are private, somewhere public entities), societies, variety of associations, etc.

Common characteristic of all public entities is, that they are **publicly owned**. But the type of property, significant for specific relationship between public (state or municipality) authorities and the public entity differs a lot from corporate property principles and even more from private property principles. That is why a special type (regime) of property, known as **public (state or municipal) property**, for public undertakings, should be designed.

These entities differ among themselves according to its **independency** (autonomy) to public authorities (state administration) on the basis of corporate governance concept. It has to do with the **involvement of a founder** (most usually the government or municipality) in the entities' governing bodies. If the governing body or majority of its members (the board of directors, trustees, etc.) is nominated by the government, this **cannot be considered as an independent public entity**.

And vice versa, if the **board is nominated bottom up**, by the representation of the relevant stakeholders it can be regarded as self managed, autonomous and thus independent institution. In addition it is important who nominates an executive manager, either the founders (government) directly or the bottom up elected body of representatives.

Public enterprise is the way of doing business on behalf of a state (or municipal) authorities as **owners and regulators** at the same time. Owing to the dual position (owner and regulator) of state or municipality, the corporate governance of state/municipality owned enterprise is different to the one of the private corporation (share company) (**Milward, 2005**).

A share company as a legal form based on private (corporate) property could in principle serve as an appropriate corporate structure for public enterprise. But, an important specificity makes difference to corporate governance structure of public enterprise; in the case of public undertaking, performing public services, rather than gaining the profit is a priority objective. This is the reason why private (corporate) ownership principles are not entirely suitable basis for public enterprises corporate structures. Instead of corporate property relationship, **public (state/municipal) property** as a special type of property should be legally stipulated..

In addition public enterprise is not subject of private (civil) law. It is subject to public,

administrative law, with the exception, that private (corporate) law structures could be used conditionally also for public undertakings. Such an amphibian position causes controversies in application and enforcement of law.

The application of private corporate principles for public undertakings would require that role of the state in public undertakings is purely the role of an owner (shareholder as anyone else's in private undertakings), rather than being a **hierarchal subordinated party, using its authority** and regulatory competences. This is possible to achieve with sharp separation between the regulatory and ownership powers of the state/municipality, what obviously doesn't work in real life; experiences with public agencies, public holdings, using the OECD principles for corporate governance in state owned companies are not encouraging. All this experiences strengthens the arguments for codification of a special type of ownership, different from corporate ownership, namely **state/municipal ownership**.

Share companies **corporate governance** principles can not entirely be applied to public undertakings. Nevertheless, public undertaking would normally be a legal **entity separated from its owner** as sui generis (special) legal form, rather than one of the types of share companies. But it is typical for legislations, that public enterprise would be **regarded as a share company** with an exception of additional **special rules**, imposed to by public (administrative) law, as follows:

- founder (state/municipality) rather than the management decides upon plans, programs, prices, tariffs and as a regulator sets up business and market conditions and quality and technical standards;
- founder (rather than the supervisory board in two-tier governance system) appoints and dismisses the management who is this responsible to the founders directly.

In the rest, the company law rules apply, which makes public enterprise a dual (mixed) entity in the terms of public (administrative) or private (civil) law jurisdiction. Better solution would be to consider the ownership of public enterprise as a state/municipal ownership, therefore as a **special type of ownership** and public enterprise as a **special type of business organization**.

### **Social (social undertakings) property**

Private property rights principles are **not appropriate legal tool for social undertakings** and entrepreneurship. A new concept of property rights for social entrepreneurship is necessary to be designed.

Social enterprise is the way of doing business different to the way, classical corporation (share company) does. The legal structure of the social enterprise is not well designed yet, but it is obvious, that it is more appropriate as a tool for labor based, rather than property (capital) based appropriation and management. On the other hand, a share company as a legal form based on private (corporate) property is not appropriate corporate structure for nonprofit and labor managed associations, what social enterprise is. In the case of share company, the principle of proportionality is relevant for distribution of profit and voting rights (one share one vote) which is absolutely not applicable to social enterprises.

Instead of corporate property relationship, **social property** as a special type of property should be legally stipulated (see more: M Nyssens, 2006).

This type of social property as property regime in social enterprises has nothing to do with social property in former socialist political system of Slovenia although it has elements of self management, but it is limited to social enterprises, rather than global society.

In theory and EU documents<sup>25</sup>, social enterprise' main objective is to achieve social impact rather than make a profit. It uses its profits primarily to achieve social objectives. It is managed involving employees, consumers and stakeholders affected by its activities.

Social entrepreneurship strengthens social solidarity and cohesion, encourages the participation of people and volunteering, strengthens the company's ability to deal with an innovative social, economic, environmental and other problems, Social entrepreneurship provides an additional offering of products and services that are in the public interest, developing new employment opportunities, providing additional jobs and social integration and vocational reintegration of the most vulnerable groups of people in the labor market (objectives of the social entrepreneurship)<sup>26</sup>.

There are several social enterprises' principles, not applicable to share companies. Specific principles of social entrepreneurship **governance** are equality of membership and stakeholder involvement in the management. Assets, **profits** and revenues in excess of expenses are used for the purpose of social entrepreneurship and other non-profit purposes. Distribution of profits to owners of the enterprise or surpluses of revenue is not permitted or is restricted. **Operations** of social enterprises aim for the benefit of its members, users and the wider community; like job creation for vulnerable groups of people, and the pursuit of socially useful activities.

**The members** of a social enterprise are not necessarily the same persons as the founders or the owners. The members are those people who have a social enterprise management rights; also those who joined the membership of a social enterprise become **stakeholders** (like **workers** who are employed in the social enterprise, **volunteers** in social enterprise engaged in volunteer work, and persons who are **users** of the products or services of social enterprise).

Founders or owners in deciding do not have a dominant influence on decisions made by all members on the principle of **one member - one vote**, irrespective of the share capital (equality of membership).

The above described differences in basic principles (objectives) between share company, and social enterprise, obviously show that social enterprises legal structure cannot

25 Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: Social Business Initiative - Creating a favorable climate for social enterprises, key stakeholders in the social economy and innovation; COM(2011) 682; Brussels, 25.10.2011

26 Law on social entrepreneurship, Official Gazette of Slovenia, no. 20/2011 article 3: Social entrepreneurship represents a permanent pursuit of social entrepreneurship under the special conditions of employment, with the production and sale of products or of services on the market, where profit is not the sole nor the main objective of the activity.

be based upon private property rights regime; the need for creation a separate legal form based upon a specific regime of property rights is more than obvious.

Social property right as a separate type of property right is needed to be installed into relevant pieces of legislation. The definitions of social property right should be enough concrete and operational, containing accurate regulation of the specific elements related to objectives of the social enterprise, appropriation and management, as for example:

- definition of goods or services that embodies social objective and of the way how positive social impact and social return are measurable, and what are the legal consequences, if such impact is not achieved to the foreseen extent;
- the rules on profit distribution (are they strict or just recommendation?); legal consequences in the case, profits are distributed to shareholders and owners should not just be left to articles of incorporation;
- the rules on corporate governance, based of membership principle (one man one vote) and legal definitions of the principle, that social enterprises are managed in an entrepreneurial, accountable and transparent way;

## SOME CONCLUSIONS

Understanding production as appropriation and relations in production as property relations, the definition of property right would be, that the property right is a legally regulated relationship between the people in relation to those things that are a prerequisite and a result of production. The legal essence of the property right as a special legal relationship is in the relation of the individual to a thing as his own.

Changing property rights means changing fundamentals of the society as relations in production are in fact relations in appropriation on which property right is constituted.

The present socio economic organization of the society is based upon the principle of capital rather than labor as the legal basis for appropriation of value added; distribution of profit is governed under the principle of proportionality (there are some exceptions in the profit sharing schemes that some regulations permit, but rarely stimulate). Capital is also the basis for the management rights in the corporations: decision making is based upon capital, according to principle: one share, one vote rather than one man one vote); labor based management is an exception, restricted to minority representation in rare legislations. In contemporary societies capital hires and fires labor, when/if needed and never vice versa.

The understanding of property rights as the owners' absolute right, disregarding social, economical and ecological responsibility is at least old fashioned, if not out of date, in the times of information and innovation society in which high qualified labor is the key value added factor.

The economic and related social organization of human society in the 21.st century, still follows the paradigm of classical capitalism of 19. and 20th century, where capital was considered to be the only production factor justifying it as an exclusive tool for determination of appropriation and voting rights.

This anachronism has been resulting to tensions and even distortions in the structure of the modern society, significant for predominant contribution of innovations and qualified human skills to added value, being completely disregarded, known today as world economic and financial crisis.

Changes are needed in diversification of property right to private, public, corporate and social property right.

## ZGODOVINSKE SPREMEMBE LASTNINSKIH PRAVIC V KONTEKSTU NOVE PARADIGME RAZVOJA ČLOVEŠTVA

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### *POVZETEK*

*Članek obravnava večplastnost lastnine in lastninskih razmerij ter skozi zgodovinski razvoj nakaže prednosti in slabosti transformacij pravne kategorije lastnine kot možnosti in nuje za novo paradigmo človeškega razvoja. Na določeni stopnji razvoja človeške družbe s pojavom zasebne lastnine in države dobi razmerje, ki obstaja med ljudmi pri prilaščanju predmetov narave kot posebno družbeno razmerje, pravni značaj. Postane torej s pravnimi predpisi varovano razmerje, torej pravno razmerje, pojavi se lastninska pravica.*

*Najbolj splošno je lastnina stanje v razmerjih med ljudmi glede stvari. Pri lastnini torej ne gre za razmerje med človekom in stvarjo; razmerje med človekom in stvarjo ni družbeno razmerje. Lastnina je takšno stanje v razmerjih med ljudmi, ki zagotavlja pridobitelju lastnine iz lastnine izvedene pravice, ki se v celokupnosti konstituirajo kot lastninska pravica (property rights). Lastnina je stanje in ne proces.*

*Sicer je lastnino v pravnem smislu mogoče opredeliti na dva načina:*

- kot voljni odnos subjekta do stvari, kot svoje ali kratko lastninska pravica (pravni pojem lastnine v subjektivnem smislu),
- kot objekt, ki nekomu pripada (pravni pojem lastnine v objektivnem smislu).

Prilaščanje je proces, v katerega vstopajo ljudje pri proizvodnji. Lastninska razmerja oz. razmerja pri prilaščanju, so torej razmerja med ljudmi pri proizvodnji. Prilaščanje bi namreč lahko definirali kot uporabljanje gospodarske koristi neke dobrine s strani določene osebe. Prilaščanje je lahko neposredno, to je npr. uporaba, potrošnja, uničenje ali pa posredno, npr. raba, uživanje, koriščenje.

Proizvodnja je izdelovanje, ustvarjanje proizvodov, ki so sposobni zadovoljiti človeške potrebe. Prilaščanje je torej uporaba, proizvodnja pa izdelovanje za zadovoljevanje človeških potreb koristnih proizvodov. Ustvarjanje uporabnih vrednosti, zaradi potrošnje, pomeni prilaščanje uporabnih vrednosti. Iz tega izhaja, da ni proizvodnje brez prilaščanja ter, da na drugi strani ni prilaščanja brez proizvodnje. Nič se ne proizvaja brez namena prilaščanja in nič se ne prilašča, ne da bi se prej proizvedlo.

Sodobna družbeno ekonomska organizacija družbe temelji na postulatu mladega kapitalizma, da je namreč kapital temelj prilaščanja dodane vrednosti in tudi temelj upravljanja podjetja v katerega je naložen. Delitev dobička in glasovalne pravice temeljijo na starem načelu proporcionalnosti udeležbe v osnovnem kapitalu (ena delnica en glas) gospodarske družbe.

Klub številnim korektivom, kot gotovo so orodja strukturne in finančne participacije ter različne oblike delavskih ter socialnih podjetij in kooperativ (kjer si pot utrjuje načelo en človek en glas), še naprej velja naslednje temeljno pravilo: delo, četudi vse bolj visoko kvalificirano, ne predstavlja temelja nikakršnim ekonomskim pravicam z izjemo participativnim, ki pa ne posegajo v temeljni kapitalsko zastavljeni družbeno ekonomski odnos.

V sodobni kapitalistični družbi še vedno velja klasično načelo tradicionalnega kapitalizma, namreč da kapital najema delo in ne obratno, da bi visoko kvalificirano delo najelo potrebne produkcijske tvorce (tudi kapital), da pa bi prilaščanje in upravljanje temeljilo na vrednosti vložka ideje in inovacije, torej visoko kvalificiranega dela.

Takšen ustroj sodobne družbe temelji na klasičnem (rimskopravnem) pojmovanju absolutnosti lastninske pravice, ki je zgrajena na trihotomiji upravičenje, rabe, uživanja in razpolaganja. Sodoben čas, značilen po tehnološkem napredku, posebej izrazito v komunikacijah in vse pomembnejši vlogi znanja in inovacij, in nasploh človeških virov, kot tudi po vse večji družbeni občutljivosti do človeka kot posameznika in njegovega dostojanstva ter sodobne družbe, ki temeljijo na vladavini prava in socialne države terjajo spremembe v temeljih prilaščanja in upravljanja. Izključnost kapitala kot temelja družbeno ekonomskemu sistemu 19. in 20. stoletja je povozil čas.

Anahronizem, ki povzroča krizo sodobnega kapitalizma je v tem, da civilizacijski (kulturni) razvoj ter intelektualne, tehnološke, demokratične in socialne razsežnosti prehitevajo razvoj ekonomske podstati družbene organizacije, ali drugače družbeno ekonomskih odnosov. Modernizacija prilastitvenih (proizvodnih) odnosov je *condicio sine qua non* premagovanja krize sodobnega kapitalizma. Zato je nujno zapustiti koncept eno-

*tne (uniformne) lastninske pravice in zakonodajno izpeljati diverzifikacijo sedaj enotne lastninske pravice na naslednje vrste lastnine:*

- zasebna lastnina,
- javna lastnina (državna in občinska),
- korporativna lastnina,
- socialna lastnina,

*Razčlenitev klasične zasebne lastnine na več vrst lastnine mora privedi do tega, se opustijo klasična kapitalistična orodja z uvedbo naslednjih temeljnih sprememb v zakonodaji, ki ureja temeljna lastninska (stvarnopravna), korporativna in socialna razmerja:*

- *obvezna udeležbe delavcev na dobičkih določenih vrst podjetij, posebej tistih z visoko kvalificirano in inovativno delavsko sestavo s ciljem vzpostavitve delitvenega modela dodane vrednosti tudi na temelju dela,*
- *obvezne sheme delavskega delničarstva, ki privedejo, do delavsko (čeprav še vedno tudi lastniško) upravljanih podjetij v določenih vrstah podjetij in panogah, s ciljem utrjevanja delavskega (notranjega) lastništva v prepletu z delavsko strukturno in finančno participacijo,*
- *obvezne sheme strukturne participacije, tako z utrjevanjem svetov delavcev, kot tudi s krepitvijo vloge delavskih predstavnikov v organih vodenja in nadzora gospodarskih družb,*
- *ureditev in vzpodbuditev socialnega podjetništva, kot načina opravljanja gospodarske dejavnosti, kjer je bolj kot profit v ospredju uresničevanje socialnih ciljev, na podlagi preglednega upravljanja, kjer sodelujejo vsi deležniki in ne zgolj predstavniki kapitala,*
- *ureditev in vzpodbuditev združništva in drugih pravno organizacijskih oblik, kjer upravljanje temelji na načelu en človek en glas,*
- *celovita in učinkovita ureditev družbene odgovornosti podjetij in odškodninske odgovornosti ter nasprotja interesov direktorjev ter neodvisnega nadzorništva.*

*Ključne besede: Lastninska pravica, ekonomska in pravna opredelitev lastnine, zgodovinske transformacije lastninskih pravic, lastnina kot družbena funkcija, sodobna ekonomska paradigma, udeležba pri dobičku, družbena odgovornost, socialno podjetništvo*

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