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THE NEW "SOCIAL CONTRACT" ON CAPITALISM WITH A HUMAN FACE

the political problem of mankind is to combine three things: economic efficiency, social justice and individual freedom.

John Maynard Keynes

Abstract: The global economic crisis has prompted particularly critical analysis of the reproductive power of capitalism, which is moving away from strengthening the production and exploitation of technological potential and grew into a consumer society, with all further implications of the inequitable distribution of resources and the increase of the difference between the extremely rich and the extremely poor, the regional disparities and the hunger in much of the world. Based on the analysis of the exploitation of available natural resources, the volume of food production, the birth control and the protection of the environment, neo – liberal capitalism is accused that in the race for profits it has become a hindrance to the development of human society, threatening the survival of life on Earth.

The central question is the relationship of capitalism and human, human dignity, freedoms and rights. A whole constellation of thinkers – founder (Voltaire, Rousseau, Montesquieu, Locke, Hume, and others) prepared a basic "social contract" of the new society, legalized by the French Declaration of the Rights of Man and of the Citizen of 1789. It still, also today, legitimizes capitalism, as a society, which is basically unfair, but which based on the contract, by raising the general level of well-being, the ideal situation for equal chances of achieving the common good have been determined, which are voluntarily accepted by all (Rowls). The contract, like any other, is valid if it is fulfilling its objectives: increasing well-being for all and equality of opportunity. The crises of capitalism in the first half of the twentieth century, that caused the most difficult wars in history of mankind, have been overcome with the "promise" that the new society will be based on the inherent and equal human dignity of the human freedom and inviolable rights (Article 1 of the Universal Declaration of Human Rights of 1948). After the childhood period of gaining awareness of human dignity, it has come to fulfill this promise by concluding a new "social contract" on capitalism with a human face, the society that will reconcile the race for profit and human dignity, freedoms

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and rights. Its guarantee is the social state based on the rule of law, essential democracy, legitimacy of the law and the independent position of the court as a protector of human rights and freedoms.

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1. CRISIS AND THE FUTURE OF CAPITALISM

1. In the last decade, especially after the culmination of the global economic crisis, the debate on the future of capitalism has fueled. The global economic crisis has prompted particularly critical analysis of the reproductive power of capitalism, which is moving away from strengthening the production and exploitation of technological potential (Kurz, Graeber et al.) and grew into a consumer society, with all further implications of the inequitable distribution of resources and the increase of the difference between the extremely rich and the extremely poor, the regional disparities and the hunger in much of the world. More and more accumulate the catastrophic economic forecasting of the world's leading scientists. Smithsonian in its recent issue states their prediction that the collapse of the global economic system with a high probability will occur as of 2015. Based on the analysis of the exploitation of available natural resources, the volume of food production, the birth control and the protection of the environment, neo – liberal capitalism is accused that in the race for profits it has become a hindrance to the development of human society, threatening the survival of life on Earth. The tendency to search for new solutions in the pregnant way expressed by Klaus Schwab, founder of the World Economic Forum, who at the Davos World Economic Forum in 2012 (in which the central topic was – "Is 20th century capitalism failing 21st century society?") stated that "capitalism in its present form does not correspond to the world around us", "that no lessons has been drawn from the financial crisis of 2009", and "that a global transformation is necessary, which should begin by establishing a global sense of social responsibility".

Obviously, in the center of these discussions, mainly lead by economists, statesmen and great financiers, is the central question of the relationship of capitalism and human, human dignity, freedoms and rights. It is the real subject of interest because the whole story about capitalism has just started with the creation of natural and legal concept of individual freedom and the innate human dignity, freedoms and rights, within the rationalist philosophy of the late sixteenth century (Grotius). A whole constellation of thinkers – founder (Voltaire, Rousseau, Montesquieu, Locke, Hume, and others) prepared a basic "social contract" of the new society, legalized by the French Declaration of the Rights of Man and of the Citizen of 1789. It still, also today, legitimizes capitalism, as a society, which is basically unfair, but which based on the contract, by raising the general level of well-being, the ideal situation for equal chances of achieving the common good have been determined, which are voluntarily accepted by all (Rowls). The contract, like any other, is valid if it is fulfilling its objectives: increasing well-being for all and equality of opportunity.

The crises of capitalism in the first half of the twentieth century, that caused the most difficult wars in history of mankind, have been overcome with the "promise" that the new society will be based on the inherent and equal human dignity of the human freedom and inviolable rights (Article 1 of the Universal Declaration of Human Rights of 1948). After the childhood period of gaining awareness of human dignity, it has come to fulfill this promise by concluding a new "social contract" on capitalism with a human face, the society that will reconcile the race for profit and human dignity, freedoms and rights. Its guarantee is the social state based on the rule of law, essential democracy, legitimacy of the law and the independent position of the court as a protector of human rights and freedoms.

2. CONFRONTATION OR COMMON HARSH ENVIRONMENT OF ECONOMIC AND LEGAL THINKING

2. According to an ideal projection of possible positive outcome of the crisis, the contemporary capitalism with a human face should be a system in which the economy is managed by the owners of knowledge and whose state and legal system is based on a social contract oriented towards the protection of the inherent human dignity and equal freedoms and rights of the natural unequal. Human dignity, freedom, rights, justice, legal equality – it is inherently a question of philosophy of law, jurisprudence and positive law. That is why the debate on such possible model of capitalism precisely the relation between the two tectonic plates – economy and law, whose movement causes the shifting of the social ground towards rough materialization of social relations based on pursuit for profit, or for human dignity, never reaching the end position of this movement. Because, if the essence of economics is the economic efficiency, the essence of law is justice and human rights and freedoms. The question is whether on ontological level it is possible to achieve a consistent blend between these spheres of human activity. If this is possible, then it makes sense to discuss capitalism with a human face and the ways of its conceptualization. Or, the traditional rule applies, which determines the bifurcation between the social systems: if the economic system is efficient – it can not be just; if the social system is fair, based on the idea of justice and equality of human rights – there is no economic efficiency! Thus, the economic efficiency and human dignity and justice cannot be combined into unambiguous ontological unity.

Given that the economy is dealing with the economic, and justice and human dignity with jurisprudence, it is interesting to consider one more and more influential theoretical direction that sheds new light on these questions, and in general on the relation between economy and law, known as *economism* or "economic analysis of law". This direction is an attempt to overcome the basic differences imposed by different viewing angles: economic science approaches the phenomena in terms of a model and drawing inferences about them through deduction, while the right focuses on the specific case and his pandering under a legal rule by *induction*. The difference is emphasizes particularly by the erroneous belief of the lawyers that they can improve the world (and economy) by paragraphs (*Mathis*, (2004) 16). The

consequence of such disparate development and direction of the economic and legal thinking is the common lag in front of the challenges of the new era: globalization, general value crisis, the growing gap between the "monetary" and "real" market economy (which are the main causes of today's economic crisis!).

The emergence of new learning, which aims at merging the basic premise of economy and law, is related to the publication in the United States in 1960, independently of one another, of the works by *Ronald Coase* ("The Problem of Social Cost") and by *Guido Calabresia* ("Some Thoughts on Risk Distribution and the Law of Torts"). In addition to the Nobel laureate *Coase*, the founder of the learning of economism in law is considered to be also the Nobel Prize winner *Gary Becker*, who in 1968 published the results of the researches on the economic factors of crime. Their views have been accepted by a number of prominent representatives of the modern economic thought (*Gordon Tullock*, *Friedrich Hayek* and others), and very soon *Richard Posner* in 1972 published the edition of "*Economic Analysis of Law*" and founded the world-renowned journal "*Journal of Legal Studies*". The economic analysis of law became a significant subject of numerous seminars and conferences, by organizing a number of associations of lawyers and economists in America, Canada and Europe (the protagonists of this learning are a number of leading professors of law and economics, as *Robert Cooter*, *Henry Manne*, *William Landes* and the judges of the high courts, such as *Frank Easterbrook*, *Richard Posner*, *Guido Calabresi*). According to *Anthony Kronmanu*, the former dean of the Faculty at Yale, "economism in law is the most influential intellectual movement of the American legal thought in the last quarter of the twentieth century".

The basic methodological approach of this scientific direction is highlighting the market economy and its effective capacity, and then shaping law which aims to ensure the function of the market and market expression of certain legal institutions (see *Mathis* (2004), 15; Horn (2004), 87). The method of economic analysis considered necessary only *legal constraints of the market* that concern the so-called "externalities" such as shifting the burden of development on the threat to the eco-system (meaning – development, not at any price!), or restrictions that are imposed by the need to protect consumers. Furthermore, according to the economy understanding of law, the right to private property and contracts are the efficient and any excessive legal intervention may worsen the economic results, so that basically, modern law should remain in positions of the *laissez – faire* policy. Finally, when transaction costs are positive, the rights should belong to those who have them and at zero transaction costs if it results in maximization of welfare. Just out of this elementary presentation one can conclude that the leading economic analysis of law is of neo-liberal provenance, which legitimizes the demand for restrictive regulatory function of the state and economic freedoms and freedom of entrepreneurship. The complex methodological approach of this learning involves the application of the public choice theory and the game theory, based on the assumption that man is a rational being who seeks to maximize individual satisfaction, and the normal way to do this is to increase the efficiency and the efficient allocation of resources. In light of these theoretical standpoints, law is a means to promote economic ef-

ficiency, and legal norms and institutes should encourage economic efficiency by removing market failures (legal prohibition of monopolies, taxes on environmental damage, etc.). It should be noted, in the review of this attempt at reconciliation between the conceptually different approaches to economy and law of social problems, that since the beginning of the crisis, the economic analysis of law has been directed toward the gradual abandonment of the market context and entering the field of analysis of consequence of legal regulation, which appears as an alternative to the spontaneous approach to rational choice (second generation, which is leaving the hard line of the first generation of the so-called "Chicago School").

3. From this summary presentation, one cannot conclude anything with respect to the scope and importance of economism in law right and its attempt to constitute itself as general legal concept, unless it is connected to latest development of the philosophical and legal teachings, which are strongly influenced by the legal positivism and especially postmodernism. Postmodernism is a direction of the philosophical and legal thought that is not a consistent theoretical concept, but more of a skeptical teaching which rejects all attempts to create comprehensive theories that aim to explain the legal and other social phenomena. He opposes the idea that there is an "objective" legal system, "from the other side" of the positive law, which is waiting to be discovered by the theory and applied in the positive law. In contrast to modernism, which summarizes as concept the leading philosophical and legal teachings of the twentieth century (natural law, positivism, etc.), based mainly on rationalist conception of rights, which is trying to restore order and stability of society with rational construction of the meta-theory, postmodernism rejects all "big theories" and apriority fundamental knowledge, opening new issues in the relations between law, politics, economy and culture. *Legal skeptical postmodernism* (*Derrida*, *Foucault*, *Rorti*, previously *Marcuse* and the "Frankfurt School") denies the doctrine of substance of law which is based on a belief in absolute truth or the acceptance of a single model of the type "legal state" and "rule of law". In the opinion of its main protagonists, modern society has gone down in the postmodern era of development, which is characterized by a completely changed social conditions (information society, globalization, the increasing gap between the developed and non-developed, etc.), and therefore requires new critical techniques of research. The confirmation of this is the existence of huge differences between the ideally imagined legal concepts, especially the concept of human dignity, freedom and rights, and the reality of the Western society and the normativism of the legal thought that is focused on the production of normative desirable effects, to the extent which becomes an end to itself.

It should be emphasized that postmodernism has not been developed in the integral philosophical and legal system, because it is, by its nature, an anti – theory, which tends toward denial of the regulatory obsession of the modern legal thought. Hence the criticism addressed to it as nihilistic academic direction that actually calls for reconciliation and passivity in the study of the nature, purpose and functions of law.

4. On similar positions are, and on similar remarks are exposed the *critical legal studies*, developed at Harvard and Stanford in the USA in the seventies of the last century (*Unger*, *Kennedy*, *Kelman* et al.). The basis of this intellectual movement is the critique of the radical legal realism, the major line of research-representation of the way in which the dominant tradition of legal realism helps to justify the abstract legal thinking, which ignores the facts of the policy of force, which is subordinated to the law. It is a neomarxistic approach to the study of the class structure of society and the law as a means of providing the domination of the rich layers. Law is nothing other than politics (according to the teaching of legal realism) and serves as an instrument for the legitimating of the rule and power of the economically dominant structure, by which they hold in obedience the economically weaker layers, creating a distorted ideology of human freedom and equal natural rights as a justification for inequality, injustice and exploitation. According to the critical legal studies, the economism in law is basically a *conservative*, *right-minded movement*. While the economic analysis of law promoted a return to *laissez-faire* of the legal theory, the critical legal studies see the social system as routinized system of the rationalized coercion. Still, while economism pleads for understanding of the law in light of the economy and its regularities, the critical legal studies explain law starting from its political determinants. Radicalism, unfortunately, does not offer any alternative legal concept, remaining only to the critique of the existing law and modern philosophical and legal learning. Therefore, the critical studies are reproached that they are "nihilistic" or "destructive" and that they do not offer constructive program of reform.

5. The prospects for overcoming differences and for better communication between economy and law are realized today by some *new economic directions*, whose methodological basis is the abandonment of empiricism and introducing normative, predictive elements, which has tempered the methodological gap between economy as a *positive* (about what is) and *normative science* (about what should be). This way economy is slowly relieved from naturalism (due to which it is nearly equal to the natural sciences, and economists are winning the Nobel Prize). The result is primarily distancing of the term "*value*" from the term of the notion (of economic) needs, which, according to *Abraham Maslow* are arranged according to a certain hierarchy: basic physiological needs, the needs for safety and security, etc. While meeting the lower ones implies exploitation of the natural resources, meeting the higher needs is achieved by using public goods (services etc.), so that according to *John Kenneth Galbraith* (the *Affluent Society*, *Boston* 1958) "we live in a society that had been plunged into private goods and is thirsty for the public goods"! The transition from industrial to post-industrial, information age is characterized by just transferring the focus of the economy from the "standards for life" to "quality of life". The relevance of the highest needs, such as justice, welfare, equality of rights, etc., to economy mean widely drawing into the economic concept of values that have ethical, legal and normative basis. The values that make the contents "quality of life" are not given by themselves or, imposed by someone, but they become established on the basis of the contract of the citizens themselves, with rights and poli-

tics. Modern man appears on the market not only as *homo oeconomicus*, but with his full complexity as a being with inherent dignity, freedoms and rights.

New horizons for rapprochement of the standpoints between normative economy and economized law also open the contemporary macroeconomic concepts: *Coase*'s theory of transaction costs, the game theory (*John von Neuman*), the theory of limited rationality of the Nobel laureate *Herbert Simon* and the information economics of the Nobel laureate *George Stigler* (see Fiti (2008), 35). The new microeconomics slows down: *methodological individualism* from the position of confrontation to the individual and common interests, so that individualism cannot explain the functioning of the state, companies and other institutions (*Keynes*, *Brochier*); *rationality of the individuals* as simplified abstract representations to the individual (*Allemand*); and the *excellence and efficiency of the market* – from the position of understanding the modern economies as mixed economies with coordinated action of the market mechanisms and state regulation and confrontation between the ideal model of perfect competition and the reality of the monopolistic competition (*Stiglitz*, see Fiti (2008), 53). This has shaken the foundations of economism viewed as a *positive* scientific direction, the acceptance of a broader normative approach to understanding the economy and economic systems.

3. BASES OF A NEW SOCIAL CONTRACT

6. The shift in the economic thinking, which is slowly leaving the position of economic empiricism and neo-liberalism and becomes acceptable to normative approach and in relation to the economic category ("quality of life"), is a good signal and an incentive to think about the reforms of the modern capitalism, which will mean its foundation on a new social contract. Their starting point is the idea that human dignity and freedoms and rights of the individual cannot be determined by the criteria of economy, but solely on the basis of absolute legal values. *Hegel's* definition of law as "empire of earned freedom" means freedom "*for*" (positive determination), but also freedom "*from*" (negative determination of freedom), so that it includes negation of the economic non-freedoms (forced labor, discrimination, exploitation, etc.). The concept of natural and inherent freedoms and rights, together with the model of a democratic legal and social state as the "end of history" (Fukuyama), have a strong effect on the abandonment of the neo-liberal economic model ("casino" – of the capitalism, the cowboy, *crony* etc. capitalism) and the acceptance of the new value orientation of the economic thought and economics, which has, after all, caused the emergence of an increasingly wide regulation of the so-called "externalities" (although that phrase is the last attempt to stay in the neo-liberal concept).

Modern economic and legal thought is on the best way, therefore, to bring the basic ideas of these areas to the human activity on the philosophical, ontological and axiological level. The philosophy of economy obviously can no longer bypass the basic questions of the general welfare, efficiency, dignity, freedom and justice, which are common also to the philosophy of law. It should here be reminded that even in

the time of the development of liberal capitalism (XIX century), *John Stuart Mill* challenged the foundation of the principles of economy in empiricism and everyday experience, stating that in this concept *homo oeconomicus* viewed as an atom, individual connected to others only through market transactions and contracts, so that in the social community there is no place for such higher and shared values such as justice. For a long time neglected, these critical viewpoints of *Mill* have experienced rehabilitation in the theories of *Milton Friedman*, *Karl Popper* and *Imre Lakatos*.

Today, no one from any echelon of economic thinkers, can negate the argument that the initial idea of law and its values cannot represent economic activities of man and the laws that govern their unfolding, but man as such, his inherent dignity and equal freedoms and rights. And that law is a special value system, whose autonomy stems from the complex anthropological nature of man: he is not only *homo oeconomicus*, but also *juridicus homo, homo politicus, homo faber,* etc. The essence, *objective or the leading idea* of law is justice (*Radbruh*, (2006), 38: law is the will for justice). The essence of the idea of justice is a measure of equal treatment of equals, and different treatment to different, equally giving and taking, winning and losing. In other words, the essence of justice is that the essentially equal should not be treated unequally, and the essentially unequal should not be treated equally. As *animal rationis capax*, man is the only creature who is endowed with sense and moral autonomy, placed under the control of the human mind (according to the diction of the Universal Declaration of Human Rights, Article 1: Human beings are endowed with sense and conscience and should act towards one another in a spirit of brotherhood). This anthropological feature of humans expresses the natural equality of men, which is acquired with the birth and remains constant during the whole human life. As dignity of every person by nature is equal, the natural hierarchy of the natural status and rights that derive from it is excluded, as requests to others and the society as a whole. Everyone is equal in dignity and in its derived rights, and equality implies a duty to general mutual respect for others, so that the natural order of dignity and rights as a law of society grows out of the necessity of the law of liberty and equality.

Each country, based on the social contract, is obliged to respect this natural law, to respect and protect human dignity and rights and their equality, by just laws, which are in compliance with these laws. The first and basic prohibition for the state, arising from the social demands for equal valuing and respecting of each person, is the prohibition of its use as a tool for achieving other goals that are not in touch with the basic human values. Contrary to the human dignity is the utilitarian concept of the state and law, which boils down the individual to the level of an ordinary subject, taxpayer, conscript, etc. In addition, the active commitment of the state is to prevent with all means the legal order of discrimination, violation or threat to human dignity, by punishing the misuse of power, violence and crime.

7. Taking into account this apriority standpoint, remains completely pointless the argument about the possibility of solving the problem of justice and equality in the capitalist society by guaranteeing the formal justice and equality before the law. On the other hand, it should be stressed that justice, as much as absolute and eternal category, and it must be viewed as "justice of a certain era", its ability to meet all

human needs. *Montesquieu* emphasized that the content and functions of law are determined by social relations (in "Spirit of the law"): there is multiple causality of law by natural, economic and cultural realities that represent the "nature of things". Respecting the law is even greater if its norms are in accordance with the natural, biological, economic, and similar needs of the individual (*Zippelius*, (2007), 37).

This suggests the need for finding an objectively assessed measure, from one capitalist society to another, balancing individualism and hierarchy of the (social) principles. A good attempt in this direction is *Rawls'* mixed conception that reconciles them according to the following principle: the concept of priority of human dignity, freedom and equal rights has an individual basis, but a fair distribution of goods and the role of the state and the rights and protection of freedoms and rights and distribution of goods has a hierarchical basis.

Recognizing and appreciating the *bias* – individualism and hierarchy, is only possible level of establishing a coherent relation between economy and law. Neither law cannot aspire towards the value aspect of homogeneity and one-sidedness, because the *bias* is inherent natural and typical for the human being (man as socialized *ego* and individualized *socius*). And the one-sided approach to the economy has always ended in extreme ideological concepts: the Marxist economics, with the theory of the labor value has cleared of the class and revolutionary understanding of law, which is in fact its negation; the Keynesianism, with its critique of the industrial capitalism as a system of the unstable, offered a scientific explanation for the need of state intervention; the neoclassical economics, based on the efficiency of the market, remained on the concept of *laissez-faire*. Law and economy, as opposed to the unilateral approach, should reflect the *complexity of the value aspect* of the individual on his world, which is heterogeneous, as it is complex the value and heterogeneous human nature.

A new social contract on capitalism with a human face should be based on the following postulate: better efficiency and greater respect for human dignity, freedoms, rights and justice. Particular, but not less important clause in this contract, should be the final recognition of the status "ownership of knowledge". Modern society, based on information, knowledge, research and technological development, develops a new relation between the individual as the owner of the idea, discovery, invention, and the individual as user of the fruits of his knowledge. It is a new capital-ratio, which should become the basic relationship of the new capitalist society and to make its revolutionary changes: capitalist is the one who has the knowledge, ideas, who explores, finds, and not the one who has in his hands property and means of production. The intellectual property as the dominant relation is the right, human source of the new society, and its dominance can accelerate the transformation of the modern society to a capitalism with a human, creative features, which rest its own dynamism precisely on the unstoppable race of knowledge, which does not allow the preservation of social classes; and the status of the capitalists lasts as much as the individual's ability to create new knowledge and ideas and to create new value. The new social contract should transfer the state as a first instance function, in addition to the protection of human dignity, freedoms and rights, the protection and exercise of intellectual property rights as a fundamental form of human capital.

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