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SOCIAL PURPOSE OF PRIVATE PROPERTY

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***Annotation.** Lithuania had a different experience in legal regulation of private property. There were periods when right to private ownership was denied and on the other hand – the periods when right to private ownership was respected and protected. Authors wanted to review today’s status of rights to private property in retrospective. The main purpose of the article is to reveal functions of private property in Lithuania. The article analyzes peculiarities of legal regulation of private property in Lithuania during different stages of the state’s development. The authors have analyzed the social significance of the right to private property, how it changed and how it has been reflected in Lithuanian legislation and the case law of the Constitutional Court of the Republic of Lithuania, paying a particular attention to entrenchment of the right to private property in the Constitution of Lithuania. The authors evaluate the compliance of the national legal regulation and Article 1 of the First Protocol with the European Convention on Human Rights, and the case law of the European Court of Justice.*

***Keywords:** private property, right to private property, constitutional protection of property, social functions of private property.*

Introduction

Philosophers, politicians and thinkers have been discussing the purpose of private property and its significance for many centuries. Plato in „The Republic“ claimed that it is vile to own a property and that the rulers should not acquire it; a view on ruled ones is different, based on claim that these residents may own property. Both property law and family law are precisely rationed: it is provided that land must belong to the state, and private persons may have only the right to use land. Nevertheless, Plato claims that property should belong to all people in general, while Aristotle opposes this thought, claiming that under the system of common property, people would have little interest to increase wealth. At the same time, Aristotle thought that in order to prevent rise of unduly rich persons, acquisition of private property must be restricted. Thomas More and his “Utopia” – the project of an ideal state must be mentioned in this regard. T. More depicted the existing society as a result of conspiracy of the rich, and saw the state their tool. According to More, the rich are using the state in order to exploit the people and to protect their material interests; while utopia is a state where private property is abolished. Social maladies are gone with the private property and thus, the country flourishes. Land is the property of the state, i. e. everybody owns the production, which is produced by families that specialise in some kind of crafts. In such a society, people of utopia do not know what a need is: everybody performs necessary works and people are not needy, they do not know excess (luxury). According to More, existence of public property, i. e. abolishment of private property will eliminate all crime, because greed, egoism and an aim to acquire capital thus disappear. According to P. Leonas, T. Campanella opposed this position, claiming at the same time that in the ideal city of the Sun, property must be joint and not private. Later on, T. Hobbes depersonalized the state and provided it with special powers, including the discretion to taken over of private property. Benjamin Constant de Rebecque claimed that one of the essential attributes of a free human being is his right to manage his property. In his opinion, people who do not own property or depend on others due to poverty should not be provided with civil rights either, because participation in state governance requires not only a certain age and citizenship, but also some spare time (i. e. wealth that allows to have enough time) in order to acquire sufficient education. Thus only owners may rule – private property becomes a precondition to participation in social life. Much later, creators of modern communism suggested abolishing private property and inheritance in order to avoid exploitation. G. de Mably names property as the source of many maladies (e.g. greed and pride). It was claimed that private property puts owners in a position of power, where they exploit the results of work of other people; it was demanded that the land and property be divided among the poor. K. Marx in his theoretic works and speeches suggested to abolish ownership of land and inheritance right, and to expropriate property of political opponents. J.S. Mill in his works on political economics theory claimed that right to property is a personal right to all things produced by work of a certain person (owner) or appearing due to inheritance of the producers. Land is not a product of human labour, thus land cannot be owned under the right to private property. The state may entrust management of the

land to any subject, while the property right to products of human labour is and must be unconditional.¹ It is interesting to observe that the Christian tradition never admitted and does not admit absoluteness and inviolability of right of property. On the contrary, under the Christian tradition this right has always been interpreted as a universal right to things that are created for the purposes of common use; the right to private property is subordinate to the right of common use.²

The status of private property is different in various countries to this date. In some states it is established that implementation of the owner's rights must be socially-oriented; the property has a certain social role and its owner must not only fulfil his personal interests but also to ensure that his private property serves a social interest. (e.g. in Germany).³ Analogous statements are underlined in rulings of the Constitutional Court of Lithuania.⁴

On the other hand, the opposite opinion is often expressed – the right to private property is absolute and must be protected as an exceptional priority. Classical liberalism pays particular attention to independence of a private individual, and the right to private property is inherent to an individual's freedom. P. Vileišis, an ideologist of Lithuanian liberal capitalism, claims that any restriction of property not only infringes a fundamental human right to property, but also discourages “energetic activity” which allows “a human being to always be a winner in the fight of life.” No legislator can do this by adopting relevant laws.⁵ However, one of the most prominent liberalists Adam Smith argued that in order to best serve human welfare, individuals should be left free to follow their own interests, which were to “sustain life and to acquire goods” and that a government should abstain “from interference in free enterprise, putting checks only on undue strife and competition.”⁶

Therefore, thinkers express different ideas and ideologies – on the one hand, there is a view on precedence or superiority of private property over public property, and on the other hand, there is a view that reflects a particular importance of public property. This

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- 1 Leonas, P. *Teisės filosofijos istorija*. [Leonas, P. History of Legal Philosophy]. Vilnius: Teisinės informacijos centras. 2005, p. 146–416.
 - 2 Spieker, M. The Universal Destination of Goods: The Ethics of Property in the Theory of a Christian Society. *Journal of Markets and Morality*. 2005, 8: 333–354.
 - 3 „Property entails obligations. Its use should also serve the public interest” - this provision is established in Article 14 of the Constitution of Germany.
 - 4 The Constitutional Court of Lithuania, Ruling on the compliance of Paragraph 1 of Article 16, Paragraphs 1 and 2 of Article 17, Article 19 of the Republic of Lithuania Law on the Associations of Apartment House Owners (wording of 21 February 1995) and Paragraphs 4 and 7 of Article 27 of this law (wording of 20 June 2000), as well as Sections 1, 3 and 4 of Item 8 and Section 1 of Item 10 of the Standard Regulations of Associations of Apartment House Owners approved by Government of the Republic of Lithuania Resolution No. 852 “On the Procedure of Enforcement of the Republic of Lithuania Law on the Associations of Apartment House Owners” of 15 June 1995 with the Constitution of the Republic of Lithuania. *Official Gazette*. 2000, No. 110-3536.
 - 5 Pruskus, V. Nuosavybės ir klasinių santykių aiškinimas XX a. pradžios Lietuvos katalikų intelektualų darbuose. [Pruskus, V. Lithuanian Catholic Intellectuals. Concept of Ownership and Class Relations at the Beginning of the 20th Century]. *Lithuanian* 2006, 46: 139–153.
 - 6 Smith, A. *Tautų turtas*. [Smith, A. The Wealth of Nations]. Vilnius: Margi raštai, 2004, p. 511.

article attempts to reveal the relation of private and public property in Lithuania. The main purpose of this article is to discuss the social functions of private property.

Deep and fundamental traditions on private property were created in the ancient Roman law, which entrenched that certain property may be owned only by the state and cannot be owned by individuals under the right to private property.⁷ The states that formed in the territory of West Rome of the former Rome Empire received the Roman law to a larger or smaller extent during the medieval ages. The changed Roman law has been further developed in different states but the principle of freedom of property remained one of its main principles.⁸

The state of Lithuania has had its own path of development of the right to private property. There have been periods of state existence when the right to private property was denied and property taken away from its owners. There have also been periods when, having regained the statehood, it had to be learnt anew how to implement and protect rights of owners and respect foreign property. Nowadays we hear much discussion on the right to private property and its place in life of the whole nation and separate individuals (owners). Lithuania has received Roman law and the Statutes of Lithuania are some of the first sources of law that reflect this. Besides other provisions, the Statutes establish and attempt to regulate the law on private property – issues of land ownership,⁹ inheritance,¹⁰ and legal regime of family property.¹¹ The First statute was replaced by the

7 According to Justinian, property was classified as follows: 1. *Res communes* - common property, i. e. air, flowing water, sea, seaside. An exceptional right to build houses on seaside was granted with a permission of a magistrate, but it did not involve ownership of the land in that area; 2. *Res publicae* state property, i. e. roads, rivers and ports; river banks had a special status as part of public property for the purposes of *quoad usum* navigation; 3. *Res universitatis* – common property or collective property, i. e. stadiums, theatres and other social buildings, in other words – public property; 4. *Res nullius* - property that does not belong to anyone at that moment, i. e. wild animals, abandoned things and etc. This category is divided into three classes: a) *Res sacrae* - temples, churches and their interior. These things could not be sold, except in cases when captives were redeemed; b) *Res religiosae* - land for burying corpses. Dead people were being buried in their lands, or with a permission of a land owner; c) *Res sancatae* – city gates and walls; this class is the least significant under private law.

8 Buckland, W. W. *A Manual of Roman Private Law*. Cambridge: Cambridge University Press, 1939, p. 107–109.

9 While codifying the right to property, all three Statutes clearly indicate types of land ownership – first, the domain of the grand duke, second, allodial property of esquires and noblemen, and the land acquired for service under fief rights, and third – personal land's ownership of free peasants. Under the First statute, noblemen could freely dispose of only one third of their estate, provided they acquired a permission of grand duke beforehand.

10 The statutes established inheritance under will and inheritance under law, and indicated persons who do not have a right to inherit. Wills could be signed only by sane persons. It was prohibited to leave property by will to a captive or a household member. Citizenry of unprivileged cities and common people had a limited right to conclude wills: they could leave only one third of their movable property to a chosen person and had to leave two thirds to their children. Sons and daughters of princelings, esquires, szlachta and citizenry inherited the property of their parents under law. Fathers' land was divided among sons. Sisters received for their dowry one fourth of the fathers' land or bought land. Only the property of deceased mothers was divided equally among brothers and sisters. After her husband's death, a wife used to get only a portion (*veno*), and all other property was divided equally among sons.

11 The peculiarities of family property relations under all three Statutes of Lithuania at the time of their enforce-

Second, and the Third statute was in force during 1588-1840. Later on, Napoleon attached the Lithuanian *Užnemunė* region (which was annexed by Prussia after the division of Polish-Lithuanian state) to Warsaw duchy. In the region, like in other countries under his reign, Napoleon established the Napoleonic Civil Code. Thus, Sudovia (Suvalkija) region was probably the only area where a Statue of Lithuania was abandoned only before 1840. The law digest of Russian empire that was in force in Lithuanian territory (the right bank of river *Nemunas*) also provided the right to private property under Article 420 of the first part of X volume.¹²

During the existence of the First independent Republic of Lithuania, both the constitutions and other laws established the free market principles, including the protection and defence of the inherent right to private property.

The situation essentially changed during the soviet occupation, when all Lithuanian law (especially its private law) was under influence of soviet ideology. Gradually, but in a short while, private property was abolished and negated, condemned as evil, and the socialist order based on public property was exalted. The first task of socialist ideology was to eliminate private property under civil law. Private persons could have only a limited statutory quantity of personal belongings, i. e. as much as needed to fulfil personal needs (e.g. one house or flat, one cow, and etc.).¹³

Under the Lithuanian legislation and the laws in force in the territory of Lithuania, private property was understood as a value and it gradually formed an adequate understanding and respect of this institute. It is illustrated, for instance, by decisions of provisional Lithuanian Government that was active in the territory of Lithuania occupied by Nazi Germany from 5 June 1941 to 5 August 1941¹⁴ and activity of which is to be evaluated controversially. As soon as the Government was formed, it announced that “the economics system of the liberated Lithuanian nation is based on private property as the necessary condition to create economic welfare, and public property that covers the main areas of economics.”¹⁵ At the same time, the Law on establishment of a board on denationalization of property was adopted.¹⁶ By these two legal acts and many others,

ment were determined by three main things: first, the caste dependency of a family – nobleman’s family, citizenry family, or peasant’s family; second, the wealth capacity; and third, the division of property among spouses. The statutes regulated possibilities of divorce, legal relations of parents and children (especially under inheritance law, i. e. when one of the parents died).

- 12 Civil laws established that the right to property featured exclusivity and independence from other persons; this meant that nobody could prevent an owner from using the thing that he owned under that right.
- 13 Pakalniškis V. Nuosavybės teisės doktrina ir Lietuvos Respublikos civilinis kodeksas. [Pakalniškis, V. Doctrine of Property Law and Civil Code of the Republic of Lithuania]. *Jurisprudencija*. 2002, 28 (20): 69–79.
- 14 Lithuania was occupied by the army of the Soviet Union on 15 July 1940 and an intensive nationalization process of private property (big and medium companies, bank accounts, flats, houses, cars and etc.) was launched. The land reform was launched, which included taking of land from private owners and assigning it to landless persons. In 1941 Lithuania was occupied by Germany. In 1945 Lithuania was occupied by the soviet army again and until 1990 the USSR legal system applied in the territory of the country.
- 15 Lietuvos laikinoji vyriausybė. Posėdžių protokolai 1941 m. birželio 24 d. – rugpjūčio 4 d. [Provisional Government of Lithuania. Minutes of Hearings, 24 June – 4 August 1941]. Vilnius: Lietuvos gyventojų genocido ir rezistencijos tyrimo centras, 2001, p. 23.
- 16 *Ibid.*

the provisional government of Lithuania clearly declared its view on private property and its priority protection.

The restitution of independence brought to light political and legal ideas on reinstatement of private property in Lithuania.¹⁷ One of the first few decisions of the Supreme Council – the Reconstituting Seimas was to establish the three main underlying principal provisions of expression of the nation's will: i. e. first, to declare unambiguously the continuity of the right to property of the state of Lithuania and its citizens, second, to establish that Lithuanian citizens have the right to recover in kind the existing real estate which they had owned according to the law, and provided that there is no possibility, to acquire compensation for the real estate, and third, to recognize the right of citizens of Lithuania to acquire a part of newly created (during the occupation period) state property that has been allocated for privatisation. At the same time, legal terms for functioning of a free market were re-created: i. e. the private property, its universal protection, and the freedom of contracts were established, the restrictions of the right to pursue economic and commercial activities were abolished, and the equality of participants of such activities was established.

Shortly before the restitution of Lithuania's independence, the Supreme council of the Lithuanian Soviet Socialist Republic (hereinafter – the LSSR) adopted the Law on the foundations of ownership,¹⁸ which was the first step to abandon the social doctrine on the right to property, its meaning, contents, and in particular the negative view on private property. Members of the LSSR Supreme council understood the development of political processes realistically, and just a month before the restitution of independence (12 February 1990) did not object to the initiatives of scientists and new political powers to establish the private property by law. Article 1 of this law clearly provided the main purpose for its adoption – to restore fully fledged institute of right to property, based on private property law. The main provisions of the law on the foundations of ownership provided that the property shall mean private property of citizens, property of citizens united into groups (collectives), and the state property (article 2). Any private person, or a collective of private persons under a legal person's title could be a subject of the right to property; it provided that „the owner has a right to use his property for any economic activity or any other activity that is not forbidden by laws“ (article 10); property owner had a right to hire other persons (article 11); private persons could legally own any property (article 13). II Chapter on Economic system of the Constitution of the Lithuanian Soviet Socialist Republic was adequately amended. Thus, when the Lithuanian independence was restored after a month, the foundations had already been laid for immediate amendment of legislation regulating property relations. Therefore on the same date – 11 March 1990, i. e. when the members of the Supreme Council of Lithuania adopted the

17 While evaluating the right of claim to nationalized property, the European Court of Human Rights has repeatedly stated that a state does not have a duty to reinstate the property nationalized by another state, but if it undertakes this duty, a person has all possibilities to protect his or her rights under the European Convention on Human Rights.

18 Law on the foundations of ownership. *Gazette of the Supreme Council and Government of the Republic of Lithuania*. 1990, No. 7-167.

Act of the Re-establishment of the Independent State of Lithuania, the Lithuanian provisional Basic Law was adopted, and its section 4 „Economic system“ was concluded on the basis of the said law. Later on, i. e. after the adoption of the Constitution of the Republic of Lithuania, these provisions were formulated more clearly. Therefore, this has not only laid the foundations for the private property law (which was formed within a couple of economic reform years) but also established realistic legal relations related to private property and the land economy based on such relations.¹⁹

Thus special legal protection applies to private property in Lithuania since 1990, and it is protected by the most important legal act of the state – the Constitution since 1992. The right to property, as one of the most significant rights, is established under the Convention for the Protection of Human Rights and Fundamental Freedoms.²⁰ The Convention was ratified by the Seimas in 1995. In its 24 January 1995 conclusion „On the compliance of Article 4, 5, 9, 14 as well as Article 2 of Protocol No 4 of the European Convention for the Protection of Human Rights and Fundamental Freedoms with the Constitution of the Republic of Lithuania“ the Constitutional Court analyzed the relation of the Convention and Lithuanian internal legal system. It stated is a peculiar source of international law, the purpose of which is different from that of many other acts of international law. This purpose is universal, i. e. to strive for universal and effective recognition of the rights declared in the Universal Declaration of Human Rights and to achieve that their observation while protecting and further implementing human rights and fundamental freedoms. With respect to its purpose, the Convention performs the same function as the constitutional guarantees for human rights, because the Constitution establishes the guarantees in a state and the Convention – on an international scale. The Constitutional Court also stated on the relation of the Constitution and the Convention that the ratified Convention is a part of the state legislation system. While ratifying the Convention, Lithuania undertook the obligation to ensure human rights established by the Convention to every person within its jurisdiction and national state authorities in charge of the legal defence of human rights and fundamental freedoms must directly apply the constitutional norms and realize the provisions of the Convention, which do not contradict the Constitution.²¹

In accordance to article 18 of the Lithuanian Constitution, human rights and freedoms are innate, including the right to private property (even though it is not explicitly stated in the text of the Constitution). The Constitutional Court has recognized the right

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- 19 Pakalniškis, V., Žilys, J. The problem of the Institute of Property and the resititution of property rights in constitutional jurisprudence of Lithuania. *Some issues of genesis*. Īpašums, tā aprģūtinaģumi: problģemas, risinģaji, iespģjas: rakstu krģjums. 2006, p. 43–52.
- 20 Safeguard guarantees of the right to property have been established in such legal documents like Magna Charta (1215), Human rights bill of the United States of America (1791), Universal Declaration of Human Rights (1948), Human rights convention of the United States of America (1969), and etc.
- 21 The Constitutional Court of the Republic of Lithuania, Ruling on the compliance of Part 4, Article 7 and Article 12 of the Law of the Republic of Lithuania, „On International Treaties of the Republic of Lithuania“ with the Constitution of the Republic of Lithuania. *Official Gazette*. 1995, No. 86-1949.

of property to allocated or paid pensions,²² the right to inherit or leave inheritance,²³ the right to claim an adequate pay for work,²⁴ and etc. Nevertheless, it must be admitted that there are still many situations, which are left out and an adequate balance between protection and defence of private property and its social purpose (i. e. private and public interest) has not been found. One of the most significant examples is granting of a possibility for former owners to reinstate ownership rights to a remaining real estate – land (not in the place where the property was situated, but in another place which belonged to the state and which is more acceptable for them). The purpose of granting of such possibility was to protect the right to private property and interests of private owners. It was a political decision, legalized by amending and supplementing the law on the order and conditions of restitution of citizen property rights to remaining real estate. This legal situation caused much confusion in the society because the public interest has been infringed.

The Convention does not create new human rights that would not be ensured under the Constitution but it ensures international legal remedies to these rights. The relation of the Convention and the national law – the fact that it is recognized as a part of our state's domestic legislation, is determined by the fact that the international remedies and the domestic legal remedies for infringement of human rights and freedoms cannot be considered separate.

However, the social purpose of private property is also determined by other inviolable provisions of the Constitution, establishing: the state's duty to regulate economic activity so it is useful to the society (article 46), state duty to support culture and science, take care of the protection of cultural heritage (article 42), protection of natural environ-

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- 22 The Constitutional Court of the Republic of Lithuania, Ruling on the compliance of the provisions of the Republic of Lithuania Law on state social insurance pensions and the Republic of Lithuania Law "On the amendment and supplement of the Republic of Lithuania Law on state social insurance pensions" with the Constitution of the Republic of Lithuania, as well as on the compliance of Item 84 of the Regulations of granting and payment of state social insurance pensions as approved by Government of the Republic of Lithuania Resolution No. 1156 of 18 November 1994 with the Constitution of the Republic of Lithuania and paragraph 4 (wording of 18 July 1994) of Article 45 of the Republic of Lithuania Law on state social insurance pensions. *Official Gazette*. 2003, No. 115-5221.
 - 23 The Constitutional Court of the Republic of Lithuania, Ruling on the compliance of Article 573 of the Civil Code of the Republic of Lithuania (wording of 17 May 1994) with the Constitution of the Republic of Lithuania. *Official Gazette*. 2002, No. 24-889.
 - 24 The Constitutional Court of the Republic of Lithuania, Ruling on the compliance of paragraph 2 of Article 11 (wording of 21 December 2000) and paragraph 2 of Article 12 of the Republic of Lithuania Law on the state pensions of officials and servicemen of the interior, the Special investigation service, state security, national defence, the prosecutor's office, the Department of prisons and of the establishments and state enterprises which are subordinate to the latter with the Constitution of the Republic of Lithuania, also on the compliance of section 2 of item 25 (wording of 25 May 2001) of the Regulations for granting and payment of state pensions of officials and servicemen of the interior, the Special investigation service, state security, national defence, the prosecutor's office, the Department of prisons and of the establishments and state enterprises which are subordinate to the latter as approved by Government of the Republic of Lithuania Resolution No. 83 of 20 January 1995 with the Constitution of the Republic of Lithuania and on the compliance of item 5 of the said regulations with paragraph 4 of article 16 of the Republic of Lithuania Law on the state pensions of officials and servicemen of the interior, the Special investigation service, state security, national defence, the prosecutor's office, the Department of prisons and of the establishments and state enterprises which are subordinate to the latter. *Official Gazette*. 2003, No. 68-3094.

ment, wildlife and plants (article 54), the human being's duty to respect the rights and freedoms of other people (article 28).²⁵ Similar provisions are established in the constitutions of Ireland, Denmark, Estonia, Greece, Italy²⁶ and other countries. Article 47 of the Lithuanian Constitution distinguishes individual objects by establishing exclusive state's ownership of the protected territories (parks), historical, archaeological and cultural objects of state importance. In this regard it is important to mention the conception of private property's purpose, its social significance and protection mechanisms under the Constitution and international legal acts. While talking about social significance of constitutions, professor J. Žilys claims that "Preconditions for the stability of constitutional order are not only adequate legal, political guarantees, but also – such a state of the society, when the basis of social life is social justice, harmony of social groups and their interests, and the legal regulation of property relations that is justifiable in all senses. Thus safety of constitutions is predetermined by such organising of the society and the state, which is aimed not only at ensuring liberal rights and freedoms, but also at providing guarantees of social dignity for human beings."²⁷ The same applies while analysing a social aspect of the right to private property. In Lithuania at the moment, the rights of private persons to implement owner's rights at own discretion may be limited only in specific cases determined by law, and the state is granted with the right for the purposes of the public (i. e. all nation's or part of the nation) interests to intervene into legal property relations of private and legal persons. Article 4.51 of the Civil Code of the Republic of Lithuania establishes: "things having a special import to the economy of the Republic of Lithuania, to the public or to national security, or for other reasons (weapons, heavily poisonous substances, etc.) may be acquired only upon special permission." State authorities may decide to apply such restrictions of private property right to private owners, as participants of civil legal relations. Analysis of these aspects inevitably leads to a conflict, which one is more important – the right to private property of an individual or the interest of the society that requires taking the thing from private ownership to satisfy public interest. The right to property remains subsidiary to the principle of universal distribution of wealth.²⁸ Function of private property is not only

25 The Constitution of the Republic of Lithuania. *Official Gazette*. 1992, No. 33-1014.

26 Article 43 (2.1) of the Constitution of Ireland establishes: "the State recognizes, however, that the exercise of the rights mentioned in the foregoing provisions of this article ought, in civil society, to be regulated by the principles of social justice." Article 74 of the Constitution of Denmark establishes: „Any restraint of the free and equal access to trade which is not based on the public weal, shall be abolished by Statute.“ Article 32 (2) of the Constitution of Estonia provides that restrictions of the right to property may be determined only by law, and property may not be used against the interests of third persons and against public interests. Articles 42 and 44 of the Constitution of Italy provide that laws establish limits of ownership to ensure its social function. For the purpose of ensuring rational utilization of land and establishing equitable social relations, the law imposes obligations on and limitations to private ownership of land.

27 Žilys, J. Konstitucijos socialinės prasmės. [Žilys, J. Social Meaning of the Constitution]. *Konstitucinė jurisprudencija*. 2006, Nr. 4, p. 310–324.

28 According to the Christian understanding of ownership, universal distribution of property is described as "absolute" or "initial" inherent right, while the right to private property – as "relative" or "secondary" inherent right. The first category is seen as "the God's creation" or "the main law," while the second – "a human creation" or "an order to implement."

to serve the public good; first of all, it is serving the purposes of personal development, which is also the purpose of universal wellness. Taking of property that belongs to a person under private property right for the needs of society is only permissible when it contributes to ensuring the universal wellness.

The state's discretion to establish limitations of private property rights or even to take over property (as necessary for the common good) is recognized both under the Convention and under the Lithuanian Constitution. The possibility to take over property under private legal title for the needs of society is also provided in the Convention, specifically – under article 1 of the First Protocol, which establishes: “Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.” Compulsory taking over of property is also provided under article 23 (3) of the Lithuanian Constitution: “Property may be taken over only for the needs of society according to the procedure established by law and shall be justly compensated for.” Analogous provisions exist in the constitutions of Denmark, Estonia, Spain, Norway, Germany²⁹ and other states.

The right to private property could be limited and such property may be taken over only when it is clearly and unambiguously provided under national legislation, the property is taken over for the needs of society, and a just compensation is provided. Besides these three requirements under the Constitution, taking over of private property must comply with the principle of proportionality of public and private interests.

The European Court of Human Rights (hereinafter – the ECtHR) is the most important institution that analyses whether the established restrictions are legitimately based on interests of society, whether restriction of possession and the use of property is compatible with the right to private property. The ECtHR rules on extreme cases, when decisions of national courts do not satisfy the interests of owners defending their rights. Analyzed cases reveal how inviolability of the right to property is understood at the international level and to what extent property rights of owners can be limited for the purposes of society.

29 Article 73 (1) of the Constitution of Denmark establishes: “The right of property shall be inviolable. No person shall be ordered to cede his property except where required by the public weal. It can be done only as provided by Statute and against full compensation”; Article 32 (1) of the Constitution of Estonia provides: “the property rights of everyone are inviolable and enjoy equal protection. No property shall be expropriated without the consent of the owner except in cases of public interest, in accordance with procedures determined by law, and in exchange for equitable and appropriate compensation. Anyone whose property has been expropriated without his or her consent shall have the right to appeal to a court and to contest the expropriation, and the nature and amount of compensation”; Article 33(3) of the Constitution of Spain states: “No one may be deprived of his property and rights except for justified cause of public utility or social interest after proper indemnification in accordance with the provisions of law”; Article 105 of the Constitution of Norway provides: „If the welfare of the State requires that any person shall surrender his movable or immovable property for the public use, he shall receive full compensation from the Treasury”; Article 14 of the Constitution of Germany establishes: „Expropriation is only permissible for the public good. It may be imposed only by or pursuant to a statute regulating the nature and extent of compensation. Such compensation has to be determined by establishing an equitable balance between the public interest and the interests of those affected. Regarding disputes about the amount of compensation, recourse to the courts of ordinary jurisdiction is available.”

The First Protocol of the Convention is probably the only legally obliging international document, which regulates state powers to limit the right to property and to establish safeguard standards for state-set restrictions.

The constitutional guarantee of the right to property under Article 23 of the Constitution does not include an explicit rule on restrictions, aimed at protection from unreasonable restrictions imposed by the state and it is derived from constitutional jurisprudence.

Article 1 of the First Protocol of the Convention establishes the principle of unhindered use of property and ensures protection from unilateral state interference. On the other hand, the same article establishes the state's discretion to restrict the right of private property on certain terms, thus entrenching the concept of an obliging ownership. The said article establishes the right to seek defence from unilateral taking over of property, and protection from unilateral control of the use of property. Provisions of the First Protocol and the Constitution are aimed at establishing that restrictions of the right to property must be legitimate, serve the needs of society and a just compensation must be provided. State interference to property legal relations may be qualified as hindrance of the use of private property, expropriation, control of the use of property, a measure to ensure payment of taxes, charges and other payments.

In the context of the rights guaranteed under the Convention, the concept of the right to property is changeable, because the Convention itself is not static but rather, a dynamic instrument, i. e. it establishes a dynamic concept of private property. The protection of the First Protocol is ensured to a wide circle of proprietary interests, which can be identified by applying the criteria of economic value and realistic existence. The ECtHR argues for the widest defence of property, including the defence of property rights and interests of an economic nature.

Provisions of the Convention apply not only when the state itself restricts the right to property of a private individual or entitles a third person to do it, but also when the state does not undertake positive actions, when it has an obligation to act in order to regulate relations among private persons adequately.³⁰

The possibility to apply restrictions of the right to private property and control of their application is under discretion of the states. The court evaluates whether the measures used by the state could be justified by using these criteria: first, the lawfulness, second, the aim at general interest, and third, the proportionality to objective aims, and keeping the fair balance between the interests of the society and the individual.

The Constitution also provides that while implementing his /her rights and freedoms, the human being must observe the Constitution and the laws of the Republic of Lithuania and must not restrict the rights and freedoms of other people (article 28). The term "ownership obligates" is used in scientific literature and jurisprudence of Germany, United States of America, and other countries for a long while; in Lithuania it was first used by the Constitutional Court in 2000. "The right of ownership is one of fundamental human rights. Its implementation presupposes certain obligations of the owner. Owners-

30 *Prodan v. Moldova*. 18 May 2004, No. 49806/99, ECHR.

hip obligates. By this provision the social function of ownership is expressed³¹ stated the Constitutional Court in its ruling.

Both the Constitutional Court and the ECtHR derive a general formula on the validity of the state's powers of interference to property relations, which involves these criteria: the lawfulness, fulfilling of public interests (the legal aim), and the fair balance of interests, based on the principle of proportionality.³² On the other hand, the content of criteria, especially application of the principle of adequate balance, depends on the form of the restriction of the right to property.³³ The measure restricting private property right must be lawful, aimed at public interest, be proportionate to its aim, keeping the fair balance between general interests of the community and the individual's interests,³⁴ and there must be a just compensation for taking over of property or restriction of the use of property.

The first rule relates to the requirement of lawfulness, which is ensured by the form and quality of a legal act, i. e. the restrictive provision must be established by law, must be accessible and clear, and its content must be predictable, foreseeable.³⁵ Accessibility of a legal act means that a person must have a possibility to identify the rights and duties under this act, and foreseeability means that a person must be able to foresee the consequences of non-compliance with the duties under the legal act. The criterion of foreseeability determines the state's duty to consistently qualify the requirements of same type, and to ensure stability of legal relations; it is needed to enable the individual to be certain about his evaluation of the legal consequences of his/her behaviour, and to have reasonable expectations of the regulation of legal relations.³⁶

The second rule on taking over of property or restriction of the right to private property determines that such steps must be inevitable to fulfil interests of community. There is no definitive list of interests that could qualify as general interests of society, considering the dynamics of social relations and the changing aims of needs. The ECtHR has recognized as general interests: environmental protection, implementation of social politics, restrictive measures on alcohol consumption, measures against international trafficking of drugs, living accommodation, measures for correction of court mistakes of fact or law, and etc.³⁷

31 The Constitutional Court of Lithuania, Ruling on the compliance of Paragraph 1 of Article 16, Paragraphs 1 and 2 of Article 17, Article 19 of the Republic of Lithuania Law on the Associations of Apartment House Owners (wording of 21 February 1995) and Paragraphs 4 and 7 of Article 27 of this law (wording of 20 June 2000), as well as Sections 1, 3 and 4 of Item 8 and Section 1 of Item 10 of the Standard Regulations of Associations of Apartment House Owners approved by Government of the Republic of Lithuania Resolution No. 852 "On the Procedure of Enforcement of the Republic of Lithuania Law on the Associations of Apartment House Owners" of 15 June 1995 with the Constitution of the Republic of Lithuania. *Official Gazette*. 2000, No. 110-3536.

32 *Jokela v. Finland*. 21 May 2002, No. 28856/95, ECHR.; *Broniowski v. Poland*. 22 June, 2004, No. 31443/96, ECHR ir kt.

33 *Gillow v. United Kingdom*, 24 November 1986, No. 9063/80, ECHR.

34 *Broniowski v. Poland*. 22 June 2004, No. 31443/96, ECHR.

35 *Spacek, s.r.o.v. v the Czech Republic*. 9 November 1999, No. 26449/95, ECHR.

36 Švilpaitė, E. Nuosavybės teisės apribojimai pagal 1950 m. žmogaus teisių ir pagrindinių apsaugos konvencijos Pirmojo protokolo 1 straipsnį. [Švilpaitė, E. Limitations of Property Right Under Article 1 of the First Protocol to 1950 European Convention on Human Rights]. *Daktaro disertacija*. 2004, p. 144.

37 *Pine Valley Developments Ltd and other v. Ireland*. 29 November 1991, No. 12742/87, ECHR.; *Fredin*

The third rule establishes that a measure restricting property must be proportionate. A proportionate measure: a. Must be adequate to its aim; b. Avoid negation of the essence of this right; c. Avoid overburdening the person whose property right is restricted, in comparison with existing alternative steps; d. Restrict individual rights not more than necessary for the aim reached, and a person whose individual rights are being restricted must be provided with legal remedies to protect his legal interests.³⁸ The court evaluates these circumstances analyzing whether the principle of proportionality has been fulfilled: the accessibility of compensation, the behaviour of parties, the nature of state chosen restrictive measures and the ways of their implementation, the accessibility of procedural defence remedies, and etc.

The fourth rule ensures adequate functioning of mechanism of compensation for taking over of property or restriction of property right. Compensation may take two forms: compensation *by paying a sum of money for the market value of the thing or property that is being taken over* to the private subject (owner) or *another thing or property may be transferred to private ownership* from state ownership. In any case an agreement between the private owner whose property is being taken over and the state which obliges to compensate for the property. In the contrary case, the state must ensure legal judicial remedy for the infringed rights and lawful interests. The compensation must comply with the principles of lawfulness, reasonableness and fairness.³⁹

Restrictions of property rights may be applied in separate fields of economic and other types of activity, where the possibility to apply restrictions is provided under specific constitutional norms.⁴⁰ Lithuania applies the direct applicability doctrine and under the applicable mechanism, the Convention is a constituent part of the legal system that has the effect of a law and is directly applicable.⁴¹ According to J. Jarašiūnas, the system

v. Sweden. 18 February 1991, No. 12033/86, ECHR.; *Denev v. Sweden*. 18 January 1989, No. 12570/86, ECHR.; *Air Canada v. United Kingdom*. 5 May 1995, No. 18465/91, ECHR.; *James v. United Kingdom*. 15 December 1988, No. 10622/83 ECHR.; *Handyside v. UK*. 7 December 1976, No. 5493/72, ECHR.; *Luciano Rossi v. Italy*. 15 November 2002, No. 30530/96, ECHR.; *Valova, Slezak and Slezak v. Slovakia*. 1 June 2004, No. 44925/98 ir kt.

38 Švilpaitė, E., p. 159.

39 Lithuanian laws provide cases when the state or a municipality can take over of land or a private company from owners, to satisfy a need of the society and after providing a legal and appropriate compensation. For instance, the Law on the nuclear power plant of the Republic of Lithuania establishes that “the land required for the implementation of the project may be taken for public needs from private land owners or contracts for the use”; the Natural gas law provides that the Government shall have the right to adopt a decision regarding assumption of the management or purchase of the assets of a licensed natural gas undertaking; the Law on banks provides: “Where according to the Law on Insurance of Deposits and Liabilities to Investors an insured event, in the event of its occurrence to a bank, may pose a threat to the liquidity of the State undertaking “Deposit and Investment Insurance” and proper payment of insurance compensations, the bank’s shares may be taken over from shareholders of the bank for public needs with a fair recompense. The shares taken over shall be managed, used and disposed of by the right of trust by the insurance undertaking.” Analogous provisions are established under the Law on drinking water supply and waste water management, the Law on Šventoji state sea port and other legal acts of the Republic of Lithuania.

40 For instance, Chapter IV of the Constitution of the Republic of Lithuania, establishing main provisions on national economy and labour.

41 Jočienė, D. *Europos žmogaus teisių konvencijos taikymas užsienio ir Lietuvos Respublikos teisėje*. [Jociene, D. Application of the European Convention on Human Rights Under Foreign and Lithuanian Republic Law]. Vilnius: Eugrimas, 2000, p. 132–134; Vadapalas, V. *Tarptautinė teisė. Bendroji dalis*. [Vadapalas, V. International Law. General part]. Vilnius: Eugrimas, 1998, p. 55–62 ir kt.

of guarantees under the Constitution of the Republic of Lithuania is not inferior to the one established under the Convention; a comparison of the guarantees of owner's rights under articles 23 and 46 of the Constitution and under the First Protocol of the Convention shows that although formulations are not the same, but at least indirect equivalents could be found under both legal acts.⁴²

Although there is no agreement of the Contracting states of the Convention on the application scope of property right protection, article 1 of the First Protocol ensures that the view of the community prevails in regulation of property relations. The Convention establishes flexible standard for safeguarding property rights, which recognizes wide freedom of discretion of states. The Convention is based on a dynamic and autonomic concept of property rights, which grants protection to any object of economic value. Thus the protection of property of economic value, and not safeguarding of the right of person's freedom and dignity, determines sufficiency of accessibility of procedural remedies and compensation in justifying the restrictions.⁴³ The ECtHR grants the states a margin of appreciation in establishing the general interest that shows an aim of restriction of property, and allows reasoning of proportionality of restrictions.

The content of safeguards and state powers to interfere with the right to private property change and the ECtHR evaluates them on *ad hoc* basis. Justification of restrictions is evaluated on the basis of a general formula, under which the proportionality principle has the most important role. Application of this principle depends on state activity, by which restrictions are set, the qualification form and the real nature of state actions and consequences thereof.

The Constitutional Court establishes a similar rule, noting that both human rights doctrine and law of democratic states that is based on it recognize a certain margin of appreciation in restricting property rights, as well as some other fundamental human rights. However, the main principle continues to apply that restrictions must not infringe the essence of contents of a fundamental human right.⁴⁴

Conclusions

1. Nowadays we have the reason to believe that both the Constitution of the Republic of Lithuania and other national legal acts, as well as international legal acts in force under the legal system of Lithuania, create adequate legal preconditions for thorough protection of the right to private property.

42 Jarašiūnas, E. Lietuvos Respublikos Konstitucijos II skirsnio „Žmogus ir valstybė“ komentaras. [Jarasiunas, E. Commentary to Chapter II “The Human Being and the State” of the Constitution]. *Teisės problemos*. 1999, 1–2: 23–24.

43 Švilpaitė, E., p. 243.

44 The Constitutional Court, Ruling on the compliance of item 7, Part 1 of Article 37, Article 39, Parts 1 and 2 of Article 40, Article 45 and Parts 2 and 3 of Article 46 of the Law of the Republic of Lithuania on Commercial Banks with the Constitution of the Republic of Lithuania. *Official Gazette*. 1996, No. 36-915.

2. At the same time all legal acts that ensure thorough protection of the private property right also ensure the possibility for the state to aim at social orientation of implementation of the private property right.

3. The right to private property may be restricted only when such a restriction is necessary to satisfy a public need. This fact also confirms the statement that the right to private property is socially oriented. The limitedness and non-absoluteness of the individual's right to implement his/her inherent right to private property is determined by contrary needs and legal interests of the state, society or community.

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PRIVAČIOS NUOSAVYBĖS SOCIALINĖ PASKIRTIS

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Santrauka. *Diskusijos apie privačios nuosavybės paskirtį ir jos reikšmę jau daugelį šimtmečių audrino ne vieno filosofo, politiko ar mąstytojo vaizduotė. Šiandien skirtingose valstybėse privačios nuosavybės statusas yra nevienodas. Vienose šalyse įtvirtinta, kad savininko teisių įgyvendinimas privalo būti socialiai orientuotas, kad nuosavybė atlieka tam tikrą socialinį vaidmenį, o savininkas turi tenkinti ne tik savo asmeninius interesus, bet rūpintis, kad jo privati nuosavybė tarnautų viešam interesui. Girdime ir priešingą nuomonę, jog teisė į privačią nuosavybę yra absoliuti, kad ji turi būti saugoma kaip išskirtinis prioritetas.*

Lietuvos valstybė nuėjo savo teisės į privačią nuosavybę apsaugos ir gynybos raidos kelią. Valstybės gyvavimo laikotarpiu buvo metų, kai teisė į privačią nuosavybę buvo neigiamą, o turtas atimamas iš jo savininkų. Taip pat buvo laikotarpis, kai susigrąžinus valstybingumą teko naujai mokytis įgyvendinti ir ginti savo, kaip savininko, teises bei gerbti svetimą nuosavybę. Šiandien mes girdime daug diskusijų apie teisę į privačią nuosavybę, jos vietą visos tautos ir atskirų individų (savininkų) gyvenime.

Šiame straipsnyje autorės pabandė atskleisti, koks privačiosios nuosavybės ir viešosios nuosavybės santykis Lietuvoje. Pagrindinis šios straipsnio tikslas – atskleisti privačios nuosavybės socialines funkcijas. Autorės siekia išanalizuoti ir apibendrinti, kokią funkciją privačiai nuosavybei priskiria Lietuvos Respublikos Konstitucija, kiti teisės aktai, taip pat konstitucinė jurisprudencija.

Straipsnio pabaigoje autorės pateikia išvadas, jog: 1) šiandien turime pagrindą manyti, kad Lietuvos Respublikos Konstitucija, kiti nacionaliniai teisės aktai, taip pat Lietuvos teisinėje sistemoje galiojantys tarptautiniai teisės aktai sukuria tinkamas teisinės prielaidas visapusiškai teisės į privačią nuosavybę apsaugai; 2) Savo ruožtu visi teisės aktai, garantuojantys visapusišką privačios nuosavybės teisės apsaugą, taip pat užtikrina galimybę

valstybei siekti, kad privačios nuosavybės teisės įgyvendinimas būtų socialiai orientuotas; 3) Faktas, kad privačios nuosavybės teisė gali būti apribota tik tuomet, kai toks apribojimas yra būtinas tenkinant viešąjį poreikį, taip pat patvirtina teiginį, kad privačios nuosavybės teisė yra socialiai orientuota. Individo laisvės įgyvendinti prigimtine teisę į privačią nuosavybę ribotumas „neabsolutumas“ yra nulemtas priešpriešinių valstybės, visuomenės ar bendruomenės poreikių bei teisėtų interesų.

Reikšminiai žodžiai: *privati nuosavybė, teisė į privačią nuosavybę, konstitucinė nuosavybės apsauga, privačios nuosavybės socialinės funkcijos.*

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