

THE LEGAL DIMENSION OF THE SOCIAL FUNCTION OF PROPERTY

“Ownership obliges” - Hugo Sinzheimer¹

ABSTRACT

The right to property is of special importance in a modern democratic society. In addition to its legal dimension, it has a political, social and, to some extent, moral dimension as well. That is why, when understanding the right to property, it is impossible to ignore its multifaceted nature. The social function of property especially well represents its role in shaping such important values for modern society, as social justice, general economic equality and fair social policy.

The article discusses the essence of the provision – “ownership obliges”, the historical development of the idea of the social function of the property right in the light of the philosophy of law, as well as the entry in the first Constitution of Georgia, which reflects the social understanding of property, i.e., its social chaining theory. The present article discusses the notion of the social function of property rights. In addition, the article in general terms, compares the practice and approaches of the Constitutional Court of Georgia and the Constitutional Court of the Federal Republic of Germany regarding the social chaining effect of ownership.

In conclusion, the article supports the idea that the social function of property determines the guarantees of individual property rights, although, at the same time its limitations, which considers the social function of property as an institution, as well as the entire social order in the state.

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¹ Hugo Sinzheimer, a famous German social democrat, thinker and lawyer, whose words were enshrined in Article 153 of the Weimar Constitution of 1919. Upon the initiative of his student, the social democrat Carl Schmitt, the wording “Eigentum verpflichtet” was written as the first sentence of the second paragraph of Article 14 of the German Basic Law of 1949.

I. INTRODUCTION - UNDERSTANDING THE NOTION

Private property is the main legal institution of modern society. Its rational definition for centuries has been the subject of consideration of social theory and philosophical deliberations and reasoning. Without the right to property existence of a democratic society is inconceivable. “The right to property is not only the basic foundation of human existence, but also ensures his freedom, adequate realization of his skills and abilities, and leading his life with his own responsibility. All this legitimately determines the individual’s private initiatives in the economic sphere, which contributes to the development of economic relations, free entrepreneurship, market economy, and normal, stable civil turnover.”²

Naturally, private property has its inherent social function. For an initial, simple understanding of the social function of property, it is sufficient to consider it against the backdrop of everyday life. Despite the considerable importance of the right to property, it is possible, that some types of property have a social bearing, that is contrary to the interests and/or will of its owner.

The Constitution of Georgia envisages, that it is permissible to restrict the right to property in the public interests, if it is provided for by the law. Its social function stems from the fact, that the owner has a connection with society, and his property has a certain influence on him. Certain types of private property have a special social function, for example, forest, land, real estate and other property of other designation, which may be vitally important for other members of the society.

Restriction of the right to private property may be considered constitutionally-legally justified due to its public and social importance, for example, dismantling of a specific building or structure in private ownership, or changing its appearance requires an appropriate permit, if it has a special cultural significance. The social function of property is to allow certain activities to be carried out through disposal of property, for the benefit of the society.

The provision “ownership obliges” is a powerful expression of its social function and this, alongside with the idea of social justice, has a pervasive effect on the entire legal system. For example, the financial standing of a person has a significant impact on the amount of a pecuniary penalty, imposed as punishment for criminal offence. If a certain amount of fine for one person may be a very heavy burden, the same amount of fine may not be a punishment at all for another person. Therefore, the property that a person possesses, obliges him to pay, to give more. For example, for the same reason, the tax law establishes differentiated taxes. A progressive tax system, in

² Judgment of the Constitutional Court of Georgia N1/2/384 “Citizens of Georgia - Davit Jimshelishvili, Taniel Gvetadze and Neli Dalalishvili v. the Parliament of Georgia”, 2 July 2007, II-5.

contrast to a proportional tax system, is more fair in the social context of taxation, and it promotes a fair distribution of public goods - private property. According to *Oliver Wendell Holmes-Jr.*³ - "Taxes are the price we pay to have a civilized society." The social function of property is mirrored in the system of progressive taxation. The following argument is also interesting: taxes are necessary for establishing and maintaining the rule of law, which also guarantees the right to private property, and in a narrow sense, defines what should be considered as private property. Based on this argument, it is justified to require from a person, who owns more property and income, to contribute more for the purpose of financing of all this, because he receives more benefits from the rule of law and the system of private ownership, than the person who owns less property and income. The mentioned theory belongs to the German Social-Democrats.⁴ In contrast to the above it should be noted, that equality before the law is recognized and safeguarded by the Constitution on social or any other basis. In the opposite case, it shall be considered as discrimination, which, in turn, contradicts the principle of non-discrimination guaranteed by fundamental rights. However, justification of progressive taxes is more solid and convincing not with the argument of preferential use of the benefits of the legal state, but with other arguments. Such argumentation is known in law by the term "positive discrimination" and it derives from the positive role of the state. This means, that the state has a system of privileges for the discriminated group of the society, which gives this group a chance to equalize. Therefore, the social function of property provides the basis for "positive action" of the state, which is an attempt of the state to achieve equality between social classes through targeted policies. It is important, that the state does not try to achieve total equality. In such a case, private property will lose its essence, the legal state will turn into a totalitarian regime, and instead of a welfare state, we will get a socialist regime. Accordingly, a balanced approach to property rights, and protection of the upper and lower thresholds of its impact by the state, determines the political regime established through property rights.

II. HISTORICAL DEVELOPMENT OF THE IDEA OF THE SOCIAL FUNCTION OF PROPERTY

The concept of the social function of property includes legal, social and philosophical foundations. In the constitutional-legal sense, the social chain, on the one hand, protects and, on the other hand, limits the sphere protected by property rights.

³ US Supreme Court Justice.

⁴ A Course in Social Democracy, The Welfare State and Social Democracy, Book 2 (Economics and Social Democracy 2009) Chapter 7, 19.

In legal and social philosophy, in addition to thematization, the foundations of social chain theory are clearly reflected in ancient philosophy.⁵ Traces of the theory of the social function of property can be found, for example, in the works of such figures of antiquity as, for example, *Marcus Tullius Cicero*. His works are based on the theory of property occupation.⁶ According to *Cicero*, “We must focus on the common and mutual benefits of property and material goods, and their giving and receiving promotes better relationships between people”.

Roman law made an indeterminate contribution not only to the ideological development of private property, but also to its legal formation. However, the recognition of private property in Rome was preceded by guarantees of common (state, community, family) property. In ancient Rome there were several types of property, and they differed from each other by the social status of the owner. Accordingly, the degree of protection of property and the scope of the legitimacy of the restriction were also different. For example, *Dominium Quiritium* owners (i.e., unlimited/dominant property) were almost not restricted, while some social classes, for example *res Mancipi*, were forbidden to own private property at all⁷. Roman private law shows how much influence state regulation can have on private property and how much inequality the unfair distribution of property between social classes can create.

As mentioned, the rational understanding of this institution is one of the main tasks of socio-philosophical thinking of the society since the early centuries. One of the most influential attempts at a modern, rational justification of the understanding of property can be found in the writings of *John Locke*, published in 1689.⁸

In the 19th century, the moral aspects of the social chain of property became very apparent. For example, *Friedrich Julius Stahl*'s states the following in the “Philosophy of Law”: “Property is the special and basic material for the moral performance of duties”.⁹

⁵ Anthony Arthur Long, *From Epicurus to Epictetus Studies in Hellenistic and Roman Philosophy* (Oxford University Press 2006) V-16.

⁶ Peter Lebrecht Schmidt, *interpretatorische und chronologische Grundfragen zu Ciceros Werk “De legibus”* (Diss. Freiburg 1959) 330 ff.; *Die Abfassungszeit von Ciceros Schrift über die Gesetze*, Rom 1969.

⁷ Marie Theres Fögen, *Römische Rechtsgeschichten. Über Ursprung und Evolution eines sozialen Systems* (Taschenbuch, Göttingen: Vandenhoeck & Ruprecht 2002) 18.

⁸ John Locke, *Zwei Abhandlungen über die Regierung* (7. Auflage, Frankfurt/M 1998); HU: *Versuch über den menschlichen Verstand*. You can see the basic theory, which is still acceptable and justified as the social origin, and at the same time, the main strategic legitimation of the social chain of the modern private property right. Bde., Hamburg 2006; E: „*Essays über das Naturrecht*” in John Locke, *Bürgerliche Gesellschaft und Staatsgewalt. Sozialphilosophische Schriften* (Leipzig 1980); AL: „*Plan zur Beseitigung der Arbeitslosigkeit*”.

⁹ Friedrich Julius Stahl, *Die Philosophie des Rechts nach geschichtlicher Ansicht. Band 1: Genesis der gegenwärtigen Rechtsphilosophie*. Heidelberg 1830, zit. n. 3. Aufl. v. 1854. Band I: *Geschichte der Rechtsphilosophie*. S. 587.

III. THE SUBSTANCE OF THE SOCIAL FUNCTION OF PROPERTY RIGHTS

Interestingly, in light of the recognition of the institution of private property and the corresponding freedom of disposal, it is necessary that the use of property does not conflict with the common good, and moreover, private property should serve the public interest. In this case, of course, it is of great importance what type of property we are talking about. Not all types of property can be considered in this context.

In the case of private property, it means that at the same time, the property obliges the owner: “Its use must, at the same time, serve the common welfare.” According to Art. 14 II. Of the German Basic Law, the type and size of the social obligation imposed on the owner, which the legislature must determine, essentially depends on how strong is the social burden of the respective property, and therefore, its social function. It should be noted, that this constitutional entry cannot be a social bond, and it does not justify such an excessive restriction of the right to property, which is not required by the broad interests of society.

A feature, that is particularly characteristic of this right, is the social obligation of ownership. The latter has a wide scope of legislative power. For example, in this regard, the Law on Residential Tenancy is worth mentioning. The Law imposes legal limitation on increase of the rent, and defines the terms of termination of the renting. In this case, the legal interests of the lessor, for example, in the case of personal use, are also constitutionally protected. The social function of the property, of course, does not justify an unsubstantiated restriction.

The right to property provided by the German constitution (Article 14, paragraph 2) is not only the right of the owner to own and dispose of the objects of the said property, but it also provides for the limitation of the right to freedom, because property of a person, in addition to bringing personal benefit, should also serve the general well-being. In this regard, legislation has a wide discretion to determine the scope of use of property in terms of private and public benefits.¹⁰

The social function of the property right does not imply only the material dimension. Just as the word “social” implies a multifaceted aspect of public relations, the social value of property rights also includes political, international legal, geostrategic, economic, state and ethical aspects as well. Taking into consideration these factors, private property is, on the one hand, a frequent object of restriction, but on the other hand, due to this restriction, it is worthy of protection. An example of expression of the moral aspect of the property right is a private law norm, which provides for the right of the grantor

¹⁰ Walter Leisner, *Sozialbindung des Eigentums* (1972); Felix Leinemann, *Die Sozialbindung des geistigen Eigentums* (1998); Lehmann, *Sachherrschaft und Sozialbindung?* (2004).

to claim the gifted asset back from the owner of the asset due to his/her ingratitude or immoral actions. This reflects the link of transfer property with human relations.

The state policy in the sphere of alienating private property to citizens of foreign countries indicates to the state, or even strategic or political function of the property. Restrictions may be imposed on property, that has a special social and political impact. Thus, in case of Georgia, it can be said that agricultural land has an important social function.

Law cannot be indifferent to the social implications of property, because this is where the task to be performed by property, its place, role and importance are revealed. Therefore, the social and legal state requires both, the freedom of private property and the need to restrict this right for public purposes. Article 19 of the Constitution of Georgia also provides for the possibility of interference into property rights for public purposes, in particular, restriction of property rights and confiscation of property.¹¹

Land is irreplaceable, non-renewable and “exhaustible” (limited) resource. Its price is a particularly relevant issue in the modern world. As the population grows and the demand for agricultural products increases, the uncultivated agricultural land decreases, and hence, the resource is depleted. That’s why alienation of an indefinite amount of land to foreigners is incompatible with the country’s vital tasks and public interest.

Alienation of agricultural land should always be a state-controlled process, because the land has not only an economic, but also a social and cultural value (Austrian Constitutional Court decision on the constitutionality of the law on the acquisition of real estate by a foreigner).¹²

The Federal Constitutional Court of Germany explained in one of its decisions: “Due to the fact that land is not subject to reproduction and is irreplaceable, it is forbidden to completely entrust its use and leave it to the indefinite play of free forces and the opinion of an individual. A fair legal and public system requires greater consideration and expression of the public interest in land, than in the case of other material goods.”¹³

Not only in relation to this specific issue, but also in regard to all other issues, it should be taken into consideration, that without the existence of certain legal, social and economic security criteria, Georgia will face the threat of losing its statehood.¹⁴

¹¹ Paata Koghuashvili, Ana Firtskhalashvili, Lack of land regulation is unacceptable, Internet Analytical Edition <<https://for.ge/view/33385/miwis-regulaciis-uqonloba-dauSvebelia.html>> (in Georgian) [last accessed on 8 July 2014].

¹² Landesgesetzblatt Nr. 88/1994.

¹³ VerfGEG21, 73.

¹⁴ Paata Koghuashvili, Ana Firtskhalashvili, ‘Lack of land regulation is unacceptable’ (Internet Analytical Edition “Liberal”, 2014) <<http://liberali.ge/blogs/view/5913/sasoflo--sameurneo-mitsa-utskhoelebzeisev-gashvisdeba>> (in Georgian) [last accessed on 1 November 2020].

Over-restriction and prohibition of property rights is just as harmful as lack of regulation. Both of them can lead to dire consequences for the state and society. If too much restriction leads to autocracy and then dictatorship, the absence of law and legal regulation of private property rights leads to anarchy and ultimately the collapse of the state.

IV. GEORGIAN AND GERMAN CONSTITUTIONAL LAW AND JUDICIAL PRACTICE, PROPERTY RIGHTS

For the first time in the history of Georgian constitutionalism, private property was elevated to the constitutional rank and included in the Constitution of February 21 of 1921, namely, Articles 114 and 116. Article 116 of the Constitution contains provision, which is a manifestation of the social function of property. According to the second sentence of this article, “cultivation and use of the land constitutes the duty of the land owner to the society”.

This provision of the first Georgian Constitution is a reflection of the social understanding of property, its social chain theory, which is also found in the Constitution of Weimar Republic of 1919¹⁵, and is later also found in the Basic Law of Germany, which uses the term: “ownership obliges¹⁶”, and which, in turn, as an ideological source, is based on the legal and social theory of property.¹⁷

The thirteenth chapter of the Constitution of February 21, of 1921, adopted by the Constituent Assembly of Georgia, is devoted to social and economic rights, and Article 114 states the following: “Forceful expropriation of property or restriction of private enterprise is admissible only for the state or cultural needs, in adherence with the rules defined in a separate law. In case of expropriation of property, corresponding compensation was to be paid, unless the law stipulates otherwise.”¹⁸

In the philosophy of modern law, there are two understandings of the right to property (if we do not count the socialist understanding of property). In the legal literature we mainly find:¹⁹ first - the concept of property based on liberal principles of natural law, and the second - the concept of property based on a positive and, at the same time,

¹⁵ § 153, Abs. 3 Verfassung des Deutschen Reichs vom 11 February 1919, Leipzig 1919.

¹⁶ Article 14, para 2, German Basic Law: <https://www.gesetze-im-internet.de/englisch_gg/englisch_gg.html> [last accessed on 2 November 2020].

¹⁷ Friedrich Julius Stahl, *Die Philosophie des Rechts*. 2.Bd., *Rechts- und Staatslehre auf der Grundlage christlicher Weltanschauung*, 2.Abth: *Die Lehre vom Staat und die Prinzipien des deutschen Staatsrechts* (Heidelberg, Mohr 1846).

¹⁸ The Constitution of the Democratic Republic of Georgia of 1921, and the Statute of the Senate of Georgia (GIZ 2014) 42 (in Georgian).

¹⁹ Otto Depenheuer (Herausgeber) *Eigentum, Ordnungsidee, Zustand, Entwicklungen* (Berlin/Heidelberg, 2005).

social vision. In case of liberal approach, the concept of property is defined as²⁰ a human right, which existed even before the “statehood”. Such rights exist independently of the state, because they were not created by the state (the natural theory of human rights). Right to property is one of the main components of personal freedom. According to this theory, if the state does not grant a person freedom, life or property, and these rights and freedoms are free, then their acquisition should not be dependent on the state, or regulated by it.

In contrast to this concept, the proponents of the theory of the positive social state define the right to property as follows: the right to property is the right of the owner to enjoy, possess and dispose of his/her property. Based on these functions of property rights, it is inherent to this process that one person’s property rights, in themselves, affect those around them, i.e., other members of the society. This is the basis of the legislator’s authority (or even his constitutional obligation) to regulate the legal side of ownership. The theory, developed by the Federal Constitutional Court of Germany throughout many years is based on this reasoning.²¹

The view of the Constitutional Court of Georgia on the social chain of property rights and the peculiarities of its social function is noteworthy. According to the Court “The legislator cannot ignore the social function of property as the task, position, role and significance of property can be identified through this function. The Constitution has achieved a balance between private and public interests so that in cases of conflict of interests the public interest will prevail, and owners must tolerate certain interference with their property”.²²

In addition, according to the decision of the Constitutional Court, the state is obliged to find the most correct and effective way of limiting ownership in the public interest, which will put a heavy burden on only one participant in the economic turnover. It is unacceptable to refuse the guarantee of the ownership of one such participant in favor of the ownership of another participant of the turnover. According to the court “The public need and therefore the social function of property cannot be determined by who the owning entity is. Property, as a value, obliges any subject - be it the state or a private person. This obligation derives directly from property, therefore, no matter who owns the objects defined by the disputed norm, they cannot be freed from the social burden”.²³

²⁰ Johann Eekhoff, „Soziale Sicherheit durch Eigentum, Abwägung zwischen Eigentumsschutz und Sozialpflichtigkeit” in supra note 19, 51, 56.

²¹ Hans-Jürgen Papier, „Der Stand des verfassungsrechtlichen Eigentumsschutzes” in supra note 19, 93.

²² Judgment of the Constitutional Court of Georgia N1/2/384 “Citizens of Georgia - Davit Jimshelishvili, Taniel Gvetadze and Neli Dalalishvili v. the Parliament of Georgia”, 2 July 2007.

²³ Judgment of the Constitutional Court of Georgia N1/14/184,228 “Joint-stock companies – “Sakgazi” and “Anagroup” (formerly “Tbilgazoaparat”) v. the Parliament of Georgia”, 28 July 2005.

In the Weimar Constitution of 1919 (Art. 153, Clause 3 WRV) the social chain was reflected as follows: “Ownership obliges. At the same time, its use should serve public welfare”.

According to paragraph 2 of Article 14 of the Basic Law: “Ownership obliges. At the same time, its use should serve the public good.”.

In Germany, the guarantor of the social market economy is Article 14 of the Basic Law. However, Article 14, paragraph 2 of the German Basic Law directly emphasizes the social obligation of ownership, since ownership obliges and its use serves the common good. Therefore, the priority of public interests over individual interests derives from the social function of property.

One of the criteria for determining the social function of ownership depends on the extent, in which the means of production are in the public/state ownership. The state, as a representative of the interests of the people, supervises property.

In the relevant case-law of the Federal Constitutional Court, in addition to guarantees of ownership as a basic right, its social function is specified in the wake of liberal order. At the same time, the Federal Constitutional Court of Germany has found, that it is important to impose ownership regulations, but according to Article 14 (2) of the Basic Law, such restrictions are inadmissible only on the basis of administrative acts and case law, and they require legislative regulations.²⁴

According to the practice of the Constitutional Court of Georgia, “the economic strength of a democratic, legal and social state is based on respect and protection of property rights.”²⁵

In spite of the above, the right to ownership is not absolute and unlimited right, which is due to its social function and meaning.²⁶ The owner is not isolated, he is an integral part of the community, which means that he can only satisfy his interests in confluence with the interests of others.²⁷

V. CONCLUSION

The social function of the property determines not only the guarantees and restrictions of individual property rights, but also the social function of ownership, as well as the

²⁴ BVerfG, Urteil vom 10. März 1981, Az. 1 BvR 92/71, BVerfGE 56, 249.

²⁵ Judgment of the Constitutional Court of Georgia N2/1/382,390,402,405 “Citizens of Georgia - Zaur Elashvili, Suliko Mashia, Rusudan Gogia and others and the Public Defender of Georgia v. the Parliament of Georgia”, 18 May 2007, para II-3.

²⁶ Judgment of the Constitutional Court of Georgia N1/2/384 “Citizens of Georgia - David Jimsheleishvili, Tariel Gvetadze and Neli Dalalishvili v. Parliament of Georgia”, 2 July 2007, para II-8.

²⁷ *ibid*, para II-18.

social order of the state. The Constitution makes the individual property right a state policy. It is on the one hand, the guarantor of the property rights of a person, and on the other hand, its social function determines the social order and the orientation of the economic system of the state.

The state interferes into the distribution of revenues. It is quite clear, which values are superseding. The right to ownership does not mean much without the supremacy of democratic law, which safeguards this right, and the rule of democratic law, in its turn, is a condition of a dignified and independent life of citizens.

Intervention in the distribution of revenues, which in turn are generated through taxes and contributions, is needed to ensure protection of the freedom, safety and property of all people. Therefore, collection of revenues according to its priorities, and their subsequent distribution indicates the welfare orientation of the state. Consequently, for social market economy, protection of ownership is a prerequisite for contributing to the public welfare, and thus fulfilling its social obligations. This does not mean disregard of the right of property - it is only a denial of the absolute priority of property rights.