ISSN 1392 – 0758 SOCIALINIAI MOKSLAI. 2006. Nr.1 (51)

CHANGES IN SOCIAL PHENOMENA AND THEIR CONCEPTUALISATION: INTERNATIONAL AND NATIONAL CONTEXTS

Public Interest: Problem of Conceptualisation

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Abstract

The article aims to disclose the problem of defining the concept of public interest in law. A brief review of public interest history is followed by a description of major scientific approaches and theoretical typology of public interest conception. Three subsequent structural parts focus on the legal approach and are based on written law and respective case law analysis; the concept of public interest is revealed within the legal systems of the European Convention on Human Rights, EU law and national law of Lithuania. Finally, the article provides generalized results of the analysis presented in the previous parts as well as a review of similarities and differences of public interest in all three mentioned systems of law and identifies the problem of the public interest conception established in law.

Keywords: **public interest, legal regulations.**

Introduction

In addition to individual, or internal, factors that determine human behaviour, e.g., will, consciousness and subconsciousness, the activities of an individual are also influenced by social, or external, factors, *i.e.* religion, tradition, norms of morality or law. Autonomy of an individual is inseparable from its restraint, although such restraint in a democratic society is tolerated only to the extent it is necessary to protect the autonomy of its other members and avoid social conflicts. Public interest is one of the universally accepted bases for restraint on an individual's autonomy. The idea of protecting this value exists in religion, customs and morality. Public interest is also protected by law, i.e. the most tangible system of social regulation which differs from other social regulators by being mandatory to all members of the society and enforceable by coercive measures of the state mechanism. Yet a democratic state serves the people, protects and defends their natural rights and freedoms – a legal form of an individual's autonomy. The need for legal certainty with respect to restraint of protection of the said values adds importance to the analysis of the concept of public interest.

The problem of public interest was interesting to Aristotle, Thomas Aquīnus, and later John Locke, David Hume, James Madison, Jean Jacques Rousseau and other theorists of the state and society in various historical epochs. A significant contribution to the development of the contemporary public interest theory and general conception of this category was made by Schubert (1960), Redford (1958), Powell (1998) and others. However, apart from individual authors, like Croley (2000), Crow (2001) and Lacey (1989), who analyse the aspects of conceptualising public interest within the specific context of legal institutes of the USA and some European countries, there are no fundamental works that would approach the public interest matter from the perspective of law. Regrettably, there are no works containing conceptual analysis of public interest conception in Lithuanian legal scientific resources at all.

This article attempts to clarify how the category of public interest is understood in the European Convention on Human Rights and Fundamental Freedoms, the EU law and the national system of law of Lithuania, to determine differences and similarities of public interest conceptions in the mentioned systems and to identify major problematic aspects relating to the definition of the concept discussed in this article.

The article begins with a brief history of the concept of public interest, review of the main theoretical approaches and typology of the concept of public interest formed in the theory. The following three parts focus on legal approach; drawing on the analysis of written law and case law, the concept of public interest is presented within legal frameworks of the European Convention on Human Rights and Fundamental Freedoms, the EU law and Lithuanian national law. The last part provides generalized results of the analysis, a review of differences and similarities of the concept of public interest in all three mentioned systems of law and identifies the problem of the public interest conception established in law.

The research presented in this article is based on the analysis of research literature and case law.

Public Interest in Theory

An understanding of what is currently often referred to as public interest goes back to the very rudiments of political philosophy. Aristotle mentioned 'common interest', Thomas Aquīnus – 'common good', John Locke – 'public good of the people', David Hume – 'public good', James Madison – 'public interest' or 'common interest/general interest' and Jean Jacques Rousseau – 'common good'. Irrespective of the variance in terms of different epochs, all the mentioned theorists of state and society inevitably related their 'common good', 'public good', 'public interest' or 'common interest' to moral, justice and the best outcome for the state or political society; they drew a line between what is related to the whole society in one way or another, on the one hand, and regional or individual interests relating to a certain sphere of public life, on the other. Even the theorists who cherished the idea of political freedom, such as John Stuart Mill, did not reject the idea of the existence of common good and common or public interests. Therefore, it would be difficult to deny that the category of public interest has been one of the fundamental instruments used in the polemics about the democratic state conception or analysis of practices in such democracies throughout political history of the world.

Nonetheless, irrespective of such apparently central role of public interest in the life of society, it is hardly possible to assert that the concept of public interest has been clearly defined in research. Even those who believe in the existence of public interest and the expedience of its realization are often forced to admit that there may be various interpretations of public interest and quite a number of different approaches. Even in the society with a rather low level of diversity of social, economic, cultural and ethnic context it would be difficult to project a personal position of an individual within the interest of 'all' members of that society. Meanwhile, in modern societies whose conspicuous diversity is almost their key feature, an identification of public interest is much more difficult. The questions that arise in the attempt to 'find' the public interest cast doubt on some researchers of that object as to whether or not public interest as a distinctive category exists at all (Schubert, 1960). Others, however, even if they adhere to the opinion on the absence of a uniform public interest conception and a method of its determination every time in the context of particular circumstances, still maintain that it is extremely important for the citizens to assume the existence of public interest in order to support the activities of the authorities, who based on democratic principles pass decisions in the name of the people, and the democratic procedures in adherence to which such authorities pass their decisions (Sorauf, 1957).

Apart from sceptics or representatives of temperate approach, there are many authors who support the idea of the benefit of said conception and the possibility of its realisation in public discourse, and who seek to develop the typology of public interest conception. The classification of public interest conception which reveals the key possible approaches of the theoretical conception of public interest is provided below.

Procedural approach. Procedural definition of public interest means an assumption that a concrete decision and its after-effects will be in line with public interest, provided the procedures based on constitutional principles are appropriately adhered to. Procedural definition of public interest does not cover the assessment of the after-effects of a concrete decision and does not require that such after-effects should be characterised by certain qualities or reflect certain values. In this particular case public interest is understood as a standard of legitimacy and an axiom that the decision to the benefit of public interest should be a result of an established process. When procedural approach is taken in the interpretation of public interest, due process principles of transparency and fairness are important, *i.e.* the criteria relating to certain voting procedures, adequate distribution of information to the public, equal representation of various interests, etc (Redford, 1958; Schubert, 1960; Powell and Elisabeth, 1998).

Majority opinion approach. The substance of public interest in the majority opinion approach is that a concrete decision will be considered complying with pubic interest if it is supported by a substantial majority of political society. An absolute application of the simple majority rule might turn into tyranny, therefore when a majority opinion approach is taken towards public interest, constitutional limits which guarantee protection of minority rights of the political society are usually emphasised. Constitutional guarantees of minority rights however are not a sufficient factor for the resolution of the problem: the so-called majority of a political society in fact may mean slightly more than 50 per cent of members of that political society. Consequently, the application of a mathematical majority rule in the context of a majority opinion is not suitable – support of a 'substantial' majority of political society is required (Downs, 1962; Mitnick, 1980; Powell and Elisabeth, 1998).

Beneficial approach. Under beneficial approach public interest is understood as an aspiration for balance of interests and a constant search for the ways to achieve a maximum satisfaction of needs of a heterogeneous society (this process is also referred to as identification of the least common denominator) after all availabilities of negotiations and consensuses are exhausted. The goal of this process is to avoid 'tyranny' of the majority by estimation of priorities of separate groups of the society. The public interest benefit or balance approach in decision-making is in particular important for the societies characterised by large diversity of conflicting interests of their members, *i.e.*, in an absolute majority of modern societies (Brinkley and Moos, 1950; Schubert, 1960; Marks, Leswing and Fortinsky, 1972).

Common interest approach. Conceptualising public interest as common interest signifies a substantive aspect of public interest. Common interest points to the content of public interest and is understood as the totality of interests common to all members of the society or which would be such if each member of the society were rational and impartial. Elements of the contents of common interest are also defined as interests impossible to be satisfied by an

individual if not valued and upheld by other members of the society (*e.g.*, pure air, clean water, safety, defence, *etc.*). When public interest is interpreted in the light of the given approach, a preconceived nature of the common interest contents is emphasised, which requires that in making a concrete decision in favour of public interest, even before the need for such decision arises, the formed contents of public interest, like a guideline or informant, should be applied in the assessment of competing requirements of particular parties, as well as in the determination of what exactly public interest is in that particular case in the context of concrete circumstances (Redford, 1958; Moore, 1995).

Shared values approach. This is one more substantive aspect of public interest and therefore slightly reminds common interest. However when common interest conception is based on the existence of common interests of the society members, to identify public interest in the light of shared values a focus should be made on the values that constitute the grounds for common interests of members of the society. Interests (even those common interests already discussed) are a more dynamic and variable element of social space than the static and firm values of the society placed above all. A chrestomatic example may be a deeply religious society whose key religious ideas due to a strong and sometimes fanatic support of its members would determine a single-sided life of public sphere even when interests of such society (*e.g.*, economic, foreign policy, etc.) would change depending on concrete circumstances (Diggs, 1973; Reddick, 2002).

Functional approach. Resources where the functions of public interest are analysed frequently indicate that public interest may manifest itself in both positive and negative aspects. In its positive aspect public interest performs the function of an ideal standard or goal and its most striking manifestation is in the case when a certain subject (civil servants, providers of public services) is expected to act to the benefit of the whole society. In its negative aspect public interest is expressed in restriction of an individual's freedom when an interest of a particular subject is denied to the benefit of public interest. This is almost the most contradictory aspect of applying the concept of public interest; it reveals the confrontation between two essential institutes of democracy: individual initiative which most often has clear reasons and concrete goals, and public interest the nature of which may be understood in a number of aspects and the contents of which is not clearly defined (Cassinelli, 1958).

The above public interest typology highlights the possible approaches to conceptualising the category of public interest; it reveals the complexity of the task to define the concept of public interest. Any of the mentioned approaches may be used to further analyse public interest in dimensions, such as social, political, philosophic, economic, *etc*. A further analysis will take a legal approach and the significance of theoretical conception typology of public interest to this particular conception category in law will be discussed in the last part of the article.

The Concept of Public Interest in the European Convention on Human Rights and Fundamental Freedoms

The European Convention on Human Rights and Fundamental Freedoms (the 'Convention') in the first paragraph of Article 1 of its Protocol 1 states that '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'. Paragraph 2 of the same Article goes on to say that 'The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties'.

It follows that the Convention, although entrenching of the fundamental rights of an individual, *i.e.*, the right to inviolability of property, concurrently points out that a democratic society and the state may have greater values for the sake of protection of which the natural right of an individual may be curtailed. Such values are public or general interests. The cited legal act neither provides a conception of public interest, nor specifies a test or criteria that would inform the subject who is making a decision to the benefit of public interest on how such values should be understood, what they protect, how they work and how they should be applied in the context of particular circumstances. Some of the answers to the mentioned questions may be derived from a long-standing practice of the European Court of Human Rights (the 'ECHR').

One of the first attempts to interpret the concept of public interest may be found in a separate opinion of Judge B. Walsh in *Sporrong and Lönnroth v. Sweden* (ECHR, 1982) where Judge B. Walsh declared that when ownership right is expropriated in public interest in the meaning of Article 1 of Protocol 1 of the Convention, the public interest must necessarily imply a just and legitimate public interest. If the public interest in question is a just and legitimate interest then the necessary diminution of the private interest required to sustain that public interest cannot in itself be unjust. Nonetheless, if the legitimacy requirement for the purpose of exemption under Article 1 of Protocol 1 of the Convention is more or less clear, the criterion of justice – even being an undisputed value of democracy – is even broader and not easier to apply than the public interest in question itself. Furthermore, the interpretation of public interest in question, as has already been mentioned, was delivered as a separate opinion of the ECHR judge, which, at least formally, should be considered an authoritative legal opinion but not the position of the ECHR.

The concept of 'public need' was disclosed in broader and more diverse aspects by the ECHR (1986) in its judgement in case *James and Others v. the United Kingdom*. The ECHR pointed out that it agreed with the applicants' position that compulsory transfer of private property from one individual to another for the latter's benefit alone may not be considered made in public

interest in the meaning of paragraph 1 of Article 1 of Protocol 1 of the Convention. The ECHR nevertheless emphasised that no common principle can be identified in the constitutions, legislation and case law of the Contracting States or any other democracies that would automatically outlaw transfer of property from one individual to another in public interest. The ECHR proceeded that taking of property from an individual may not be understood as a requirement to transfer it into the use of the general public so that its substantial portion would directly benefit from the taking. The ECHR explained that taking of property in pursuance of a policy calculated to enhance social justice within the community can properly be described as being in 'public interest' in the meaning of paragraph 1 of Article 1 of Protocol 1 of the Convention. The ECHR pointed out that the primary aim of paragraph 1 of Article 1 of Protocol 1 of the Convention, which embeds the principle of inviolability of property, is to provide a guarantee against arbitrary taking of property.

In the judgement in case *James and Others v. the United Kingdom* we can find hints about who in fact is the subject in the meaning of the Convention that decides about the public interests to the benefit of which private property may be restricted or even expropriated under the Convention. The ECHR stated that because of the direct knowledge of their society and its needs, national authorities are in principle better placed to appreciate what is 'in the public interest' in the meaning of paragraph 1 of Article 1 of Protocol 1 of the Convention. On the other hand, expanding on its explanations, the ECHR pointed out that national authorities should make only the initial assessment both of the existence of a problem of public concern warranting measures of deprivation of property and of the remedial action to be taken. By having established the doctrine of margin of appreciation by national authorities in the system of the Convention, the ECHR emphasised that the public interest conception must be understood in its broad sense, whereas a judgment on the expropriation of property may undoubtedly involve consideration of political, economic and social issues 'unless that judgment be manifestly without reasonable foundation.' In other words, although national authorities have only an initial and limited prerogative to make decisions on matters falling under the sphere of regulation of paragraph 1 of Article 1 of Protocol 1 of the Convention, such prerogative, according to the ECHR itself, is still wide, and its limits are determined first of all by national singularities of Contracting States but not by international principles.

As further analysis of case law of the ECHR shows, exemptions under the second sentence of paragraph 1 of Article 1 of Protocol 1 of the Convention cannot be interpreted without taking account of the first sentence of the same part of that Article: 'Every natural or legal person is entitled to the peaceful enjoyment of his possessions'. In the judgement in case *Fredin v. Sweden*, as well as many other cases, the ECHR (1991) emphasised that in controlling or taking of other person's property fair balance must be reached between the need to satisfy common interests of the public (as well as public interests (ECHR, 1995)) and major requirements of protection of an individual's rights. The ECHR explained that the fair balance means a reasonable relationship of proportionality between the means employed and the aim sought to be realised, as required not only by the structure of Protocol 1 of the Convention, but by the whole system of the Convention. In the above-mentioned case the ECHR stated that, *e.g.*, taking of property without payment of compensation the amount of which is related to the value of the property being expropriated is usually treated as a violation of the fair balance principle. On the other hand, the ECHR pointed out that, in exceptional circumstances, taking of property may be treated as justifiable in the meaning of Protocol 1 of the Convention even without payment of any compensation.

The ECHR also explains the fair balance principle linking it to the rule of law. In the context of interpretation of the rule of law the ECHR (2005) in *Frizen v. Russia* pointed out that the fair balance requirement is deemed satisfied when it is established that restriction or taking of private property in the meaning of paragraph 1 of Article 1 of Protocol 1 of the Convention is legitimate and not arbitrary.

One more important aspect should be mentioned on which the ECHR expressed its opinion in the above-mentioned case *James and Others v. the United Kingdom*: it is the relationship between the terms 'public interest' used in paragraph 1 of Article 1 of Protocol 1 of the Convention and 'general interest' used in paragraph 2 of the same Article (an official translation of the Convention into the Lithuanian language uses one term '*visuomenės interesai*' for both concept). Despite the applicants' efforts to explain that the very existence of common interests which under the Convention constitute the grounds for the state to control private property does not mean the existence in that particular situation of public interests in the meaning of paragraph 1 of Article 1 of Protocol 1 of the Convention, the ECHR did not engage in detailed argumentation although stated that under the circumstances of that particular case in terms of contents there was no need to look for a fundamental difference between public interests and common interests. By leaving a theoretical possibility for different interpretation of the conceptions in question, the ECHR quite clearly pointed (and confirmed in its subsequent practice (ECHR, 1995)) to the principles of interpretation of the Convention: in the interpretation of the categories of law directly embedded in that legal act a priority should be given to their contents but not their linguistic form.

With reference to the ECHR case law analysis, one may point out that the terms 'public interests' and 'common interests' embedded *expressis verbis* in the Convention are not detailed in that particular act of law, whereas their conceptualisation is entrusted to the ECHR. The long-lasting practice of the ECHR shows that the concepts in question cannot be understood in their quantitative aspect and do not forbid transfer of private property from one individual to another, but require from the Contracting States to apply such measure in the name

of social justice and prohibit the decision-making subject from arbitrary actions. The ECHR admits that 'public interests' and 'common interests' like the 'margin of appreciation' doctrine in respect of the Contracting States should be understood in their broad sense, including political, economic, and social aspects. Nonetheless, the ECHR points out that the prerogative of the Contracting States in identifying and solving problems that fall within the sphere of regulation of paragraph 1 of Article 1 of Protocol 1 of the Convention is initial, while in taking respective measures national authorities must seek fair balance between public interest and main requirements of protection of an individual's rights. Finally, it follows from the ECHR case law that the terms 'public interests' and 'common interests' most often are understood as synonyms and their linguistic differences do not automatically mean difference in the perception of the said categories either their different social purpose.

The Concept of Public Interest in the European Union Law

Free movement of goods, services, persons and capital are fundamental requirements of the internal market of the European Union and essential axes of the EU integration. None of the mentioned freedoms, however, is absolute: a public interest imperative delimits these freedoms. Although the term 'public interest' is not embedded either in the Treaty Establishing the European Community (the Treaty) or in any other piece of primary EU legislation, the effect of public interest is expressed by other conceptions of written law, such as, *e.g.*, 'public policy', 'public security' and 'public health'. Secondary EU legislation, *e.g.*, Articles 6(4) and 6(5) of Council Directive 79/409/EEC on the conservation of wild birds and Article 7(1) of Council Regulation (EC) No. 40/94 on the Community trademark, directly designate the criterion of public interest. Nonetheless, despite several insignificant exceptions, written EU legislation, like the text of the Convention, does not provide even guidelines or rules of application of the mentioned conception. Interpretation of public interest conception in *acquis communautaire* is entrusted to the European Court of Justice (the ECJ).

In its analysis of the limits of four European Community freedoms, the ECJ (2001) has more than once mentioned that Member States may restrict freedom of movement of goods, services, persons and capital by invoking public order as one of the public interest requirements only in the presence of a genuine and sufficiently serious threat to one of the major interests of the public. This is a frequent wording of the ECJ judgments indicating only a general rule the application of which requires further interpretation. To detail such axiom, the ECJ (2003a) points out that the uniform application of the Community law and the principle of equality require that the terms of Community law, the use of which in legal texts is not supplemented with direct references to national law of Member States which determine their meanings and limits, should be interpreted throughout the whole Community in a uniform way disconnected from a respective Member State, considering only the context of a particular Community act and its purpose. In other words, public interest, if the Community legal act in which this category is incorporated literally or by means of other conceptions identifying said element does not refer to the law of a particular Member State, shall be understood as the 'Community public interest' regardless of the singularities of Member States that are not in any way reflected in the Community law.

Such a position of the ECJ in the interpretation of public interest predetermines one more property of the analysed conception category in the Community law: strict understanding of the public interest imperative as grounds for restriction of Community freedoms, *i.e.*, their limits may not be set by Member States unilaterally without any control of Community authorities (ECJ, 2002). Moreover, no circumstances may be considered public interest unless they are of purely economic or administrative nature (2003b). *E.g.*, a national decision of a Member State on the choice of a strategic partner, strengthening of national market competitiveness, diversification of national production or increasing efficiency, may not be deemed a decision to the benefit of public interest in the context of Community freedoms.

On the other hand, the ECJ (2001) has admitted that Community law may not establish for Member States a uniform scale of values which might be used in the assessment of conformity of a concrete action with public order, *i.e.*, one of the public interest aspects in the Community law. The ECJ (1974) has also confirmed that specific circumstances, which justify the exceptions restricting Community freedoms to the benefit of public interest, may differ depending on the state and epoch, which means that competent national authorities of Member States use a margin of discretion. Although the ECJ recognised the discretionary power of national authorities, it pointed out that such discretion might be used only within the framework of the Treaty. Considering the ECJ case law, the public interest content in the Community law is specific and subject to interpretation independently of national legal frameworks of Member States. Limitation of discretionary power of national authorities by the Treaty means that the main principles of the Community substantive law – freedom of movement of goods, services, persons and capital – may not be limited by values which, apart from contradicting EU policies, simply fall outside the sphere of EU legal regulation whatever their importance to a separate Member State.

In addition to the limits set by the Treaty, the discretion of national authorities of Member States is limited by the principle of proportionality broadly accepted in the ECJ practice. In *Commission v. Belgium* the ECJ (2002) stated that the means of national legal regulation, beside being sufficient for attainment of the objective pursued, may not be more restrictive than necessary in the attainment of the objective, *i.e.*, non-proportional. In this context the necessity is understood objectively and the intentions of national decision-making authorities are not important (ECJ, 1997). The ECJ (1997) emphasised in more than one of its judgments that limitation of free

movement of goods, services, capital and persons to the benefit of public interest may be based only on such requirements which are equally applicable to all those subjects who trade, render services, travel, work or invest in a Member State (discrimination forbidden) and only if such the requirements are not satisfied, *i.e.*, public interest is not protected, in respect of such subjects by application of legal remedies available in another Member State.

It should be noted that in the interpretation of the provisions of the Convention, the ECJ, similar to the ECHR, indicated that linguistic differences between the conceptions 'public interest' and 'general interest' does not mean the difference between the conceptual categories, at least from viewpoint. The ECJ explained that both conceptions highlight a priority of collective interest against private interests of individual subjects and should be understood as similar. Thus, the ECJ in its interpretation of the conceptions of Community law, including various linguistic forms of 'public interest', likewise the ECHR within the framework of the Convention, adheres to the content over form principle.

In summarising the aspects of conceptualising public interest in written law of the Community and the ECJ case law, a focus should be made on the fact that 'public interest' is not the only linguistic form to express the content of this concept, *i.e.*, both in legal acts and in case law 'public interest', 'general interest', 'public order', 'public security' or 'public health' are used interchangeably. It is hardly possible to draw a line between the conceptions mentioned, since the ECJ adheres to the content over form principle and in most cases it leaves the linguistic problem intact. In analysing the aspects of the content, the ECJ points out that in the Community law 'public interest' reflects and protects 'overriding interests of the public', which however are understood narrowly and may not be of purely economic or administrative nature. Public interest, a specific Community category, is interpreted within that particular legal framework, without any estimation of legal framework singularities of separate Member States, unless such requirement is directly provided in a concrete legal act of the Community. Therefore, although national authorities of Member States to a certain degree use their discretionary power to the benefit of public interest, such their power is limited by the sphere of regulation of the Treaty and the principles of EU legislation, in particular by the requirements of proportionality and non-discrimination.

The Concept of Public Interest in the National System of Law of Lithuania

Lithuanian national legal act of the supreme power, the Constitution of the Republic of Lithuania (the 'Constitution'), does not use the conception 'public interest' (*viešasis interesas*) *expressis verbis*. Yet the Constitution protects 'society interests' (*visuomenės interesai*) and 'state interests' (*valstybės interesai*), while other legal acts also protect 'state needs' (*valstybiniai interesai*), 'interests of Lithuania' (*Lietuvos interesai*), 'interests of the state and society' (*valstybės ir visuomenės interesai*) as well as other public interests the linguistic form of which varies. Irrespective of the abundance of the existing different definitions, the Constitutional Court of the Republic of Lithuania (the 'Constitutional Court') (2003) has stressed that the interpretation of legal terminology is impossible without due attention to the historical context of a particular term the estimation of which in the analysis of legal terms leads to a conclusion that their differences rather reflect features of a certain stage of the society's development than express any type of state superiority over the society. The Constitutional Court pointed out that in carrying out its functions the state must act in the interests of society and therefore 'state needs' (*valstybės reikmės*) must coincide with 'society interests', and 'society needs' (*visuomenės poreikiai*) must be understood as 'state needs'. In other words, 'public needs', 'public interest', 'state needs', 'state interests' or 'interests of Lithuania' are legal conceptions differing by their emotional charge, which in no way means an automatically different their content and different legal conceptions. *E.g.*, the synonymous use of the conceptions 'public interest' and 'interests of the society' has been more than once approved by the Constitutional Court (1997) in its practice. Since the mentioned categories are almost absolutely indeterminate in the national, as well as international and written EU law, the guidelines to their understanding should be looked for in the national case law, and primarily in that of the Constitutional Court.

The Constitutional Court (1997) has stated that restrictions of rights and freedoms of a person or group of persons may vary and are usually imposed due to two reasons: objective differences (gender, age, *etc.*) or because so required in society interest. To determine how society interests, to the benefit of which restriction of individual or group values is permitted, should be understood in the national system of law of Lithuania, the Constitutional Court (2002a) pointed out that such interests first of all must be 'an objective of constitutional importance' ignoring of which would mean a violation of protection of the values entrenched in the Constitution. Not any rights and freedoms of a person or group of persons may be subject to restrictions, but only those protected by the Constitution – a national legal act of the supreme power – and those '*that under the Constitution must be guaranteed and met by the state in carrying out its functions*' (Constitutional Court, 2003).

In its interpretation of the nature of society needs in the meaning of part 3 of Article 23 of the Constitution, the Constitutional Court (2003) pointed out that such a phenomenon is not static. The needs which in one stage of the development of the society and state may be considered society needs, in another stage of such development may be treated as inconsistent with the constitutional conception of society needs, and vice versa. The Constitutional Court stressed that determination on whether or not needs to the benefit of which private property is taken are in fact needs of society in the meaning of part 3 of Article 23 of the Constitution should be done on a case by case basis, considering what exactly

socially important objectives are pursued by taking that particular property.

In the analysis of the limits of economic freedoms of an individual, the Constitutional Court points out that the enjoyment of such freedoms is in many respects related to society interests and therefore economic activity is regulated by the state. Part 3 of Article 46 of the Constitution states: '*The State shall regulate economic activity so that it serves the general welfare of the Nation*' In other words, 'the general welfare of the Nation' is one more linguistic variation of 'public interest' in its general sense. According to the Constitutional Court, although the welfare of the nation is usually reflected by the use of material goods, the constitutional conception 'the general welfare of the Nation' should not be interpreted purely from the viewpoint of satisfaction of an individual's material needs. The Constitutional Court explains that the general welfare of the nation may be measured by the social development of the nation and availabilities of self-expression of an individual. Consequently, in this respect public interest embodies not only material and economic but also ecological, cultural and spiritual needs of the society, *i.e.*, the public interest spectrum is rather wide and this is clearly recognised by the Constitutional Court (1997) in its support to the ECHR viewpoint.

The Constitutional Court (2001) has also delivered its opinion on the quantitative approach towards public interest. The definition of 'society needs' formed in jurisprudence in the context of expropriation stresses that society needs are first of all '*the interests of the whole or part of the society*'. It follows from the analysis of case law of the Constitutional Court that interests of one person, separate individuals or their groups, political parties or organisations may not be considered interests of the whole or part of the society (Constitutional Court, 1997). On the other hand, the Constitutional Court (2003) is of the opinion that public needs laid down in and protected by the Constitution – at least in the case of taking of private property – should be understood not in terms to whom the taken property is transferred, but in terms of the purpose for which the property is taken, *i.e.*, to be used in the interests of the society, with the aim of social importance that may be achieved only by the use of that particular property. Consequently, the Constitutional Court interpreted the public interest conception without rejecting the importance of quantitative approach to that category, but gave the priority to the objectives of restriction of certain person's rights and freedoms instead of the number of persons who will gain direct benefit from such restriction. The Constitutional Court clearly points out (in fact, the ECHR holds to the same position) that the conception 'society needs' may not be always interpreted as prohibiting from taking private property from one person and transferring it to the private ownership of another person. Whether or not property is taken for society needs does not depend on who (the state, municipality, legal or natural person) will become the owner of that property, but on whether the property taken from its owner was indeed taken because it was needed to attain an objective of social importance that may be attained in the only way, *i.e.*, by restricting rights of an individual and using the concrete property taken.

In pursuance of its guarantees to protect an individual's rights and freedoms, the Constitutional Court in its case law has also defined certain limits of the public interest conception. Restriction of ownership right is only allowable in compliance with laws and only when such restriction is indispensable in a democratic society for the purpose of protection of other people's rights and freedoms as well as the values and/or objectives of constitutional importance (Constitutional Court, 2002a). The Constitutional Court (2002b), like both the ECJ and ECHR, emphasises the adherence in every case to the principle of proportionality under which measures stipulated in laws must match the pursued constitutionally based objectives necessary for the public. Society needs to the benefit of which property is taken must also be concrete and clearly expressed – *i.e.*, by individualised but not fungible characteristics – in respect of a particular object of property (Constitutional Court. 2003). Society interests in the context of expropriation must be such, which cannot be objectively satisfied without expropriation of a particular object (Constitutional Court). Moreover, public interests as such must also be expressed in an objective way (Constitutional Court, 1994).

Finally, the Constitutional Court (1997) opines on the subject who has a prerogative to decide about the limits of public interest and its most appropriate satisfaction within separate spheres and, again in support of the ECJ and ECHR opinions, points out that such right is conferred on the legislator. On the other hand, the Constitutional Court goes on to say that in public service relations public interest in its most general sense is understood as defined in part 3 of Article 5 of the Constitution, which says that 'State institutions shall serve the people'. In other words, decisions to the benefit of public interest instead of private, group or a particular political party interests every day must be taken by executors of legislation, not only by legislators. Indeed, based on the interpretations of the Constitutional Court, executive authorities and their servants should not have broad discretionary powers of decision-making – they are expected to execute only what has already been decided by the representative of the people – the legislator.

Focusing on the approaches to the concept of public interest in the Constitutional Court case law of over 10 years, it should be once again mentioned that despite the abundance of the existing definitions that express public interest, the public interest conception and its content should not be analysed from the viewpoint of its linguistic forms: whether 'society needs', 'society interest', 'state needs', 'state interests', 'public interest', 'interests of Lithuania' or 'general welfare of the nation' – all of them are the definitions indicating in fact the same category, presupposing its content of the same nature and its social purpose. Public interest in its general sense is 'an objective of constitutional importance' ignoring of which would mean a denial of values entrenched in the legal act of the supreme power, protection and defence of which is delegated by the Constitution to the state. Public interest is

a dynamic category, the conception and content of which may change with the development of the state and society. Public interest may not be related to the satisfaction of material needs only; this category must have a broad meaning covering ecological, spiritual and cultural spheres of society's life. A quantitative approach to conceptualising public interest is not decisive: it is not the number of persons who will gain direct benefit from restriction of rights and freedoms of a particular person, but the very objective of the restriction of rights and freedoms of a person or group of persons which is more important. For the purpose of restricting rights and freedoms of an individual the public interest grounds may be invoked only when this is done according to law, is necessary in a democratic society, the principle of proportionality is followed and provided in that particular case public interest itself is concrete, objective and its application is objectively *ultima ratio*. The prerogative of defining the limits of public interest and the best ways of its satisfaction lies with the legislator, while the executor must act within the limits of legislator's will, but not its own.

Questions Unanswered

An overview of the theorists' notions and interpretations of the European Convention on Human Rights, EU law and national law of Lithuania leaves no doubt that the idea of public interest as something of value and therefore to be shared by the whole society at large does exist and has been existing for a long time. In written law, international and EU as well as national, there are many legal definitions meaning public interest, *e.g.*, 'public interests', 'interests of the society' 'state interests', 'general interests' and a number of others the linguistic differences of which seem to determine the differences between the categories and contents of this conception. Nonetheless, this is not a major problem of the public interest conception, since the tendencies of its settlement are clear: international courts, *i.e.* the ECHR and ECJ, as well as the Constitutional Court are not inclined to interpret the categories and content of the mentioned definitions in a different way and more than once mentioned that the understanding of 'public interest' and 'general interest' or 'interests of society' and 'public interests' cannot be fundamentally different.

The above-mentioned Courts when adjudicating on legal conflicts within their competence have also formed the public interest conception in its legal aspect. Within the framework of the Convention and national law public interest in terms of its content may be said to have a uniform understanding. The concept of this category points to social justice, priority of value over quantity, legitimacy, objectivity, proportionality and sharing of interests – all of which are integral and obligatory elements of the democratic society and state conception. Public interest is understood as a dynamic and broad category encompassing economic, political, social, cultural and spiritual spheres of public life.

In the EU law public interest is understood somewhat differently. In the system of law concerned the category in question is distinguished by a specific content and is interpreted in the context of that particular system without any estimation of legal framework singularities of separate Member States, unless such requirement is directly indicated in a concrete legal act of EU. Here public interest reflects and protects 'overriding interests of the public' which, however, are understood in a narrow sense and may not be of purely economic or administrative nature. Nonetheless, such features of public interest within the EU legal framework are not in conflict with the conception of this category in the meaning of the Convention or national law of Lithuania. Such specificity of public interest conception within the context of EU law is not difficult to explain in view of the integrational aspect of EU, a strictly limited competence of that organisation and EU law superiority over national legal provisions of Member States.

Striving for the largest possible integration of Member States and maximum functioning efficiency of the internal market, the EU law is primarily used as an instrument intended to guarantee free movement of goods, services, persons and capital within the EU and therefore the conception of public interest, which is the basis for restriction of the mentioned freedoms, is construed in a reserved manner. Moreover, the EU law has a strictly limited application in the sphere of social relations existing within the societies of Member States. Since many of such relations (*e.g.*, civil, public service, organisation of health care and services) fall outside this sphere, a public interest criterion in the meaning of EU law cannot be applied: respective national legal conception shall be used instead. Finally, the EU legislation stipulates (which is also recognised both by the Constitution and key laws of Member States) the priority of EU law and, consequently, of the public interest conception of that same system of law over national laws of Member States and respective public interest conceptions. Therefore, any conflicts between public interest conceptions of EU law and national law will be resolved to the benefit of that category as it is in the EU law.

The aspects of public interest conception in the Convention, EU law and national law of Lithuania covered above are fundamental, although there is one more substantive feature of public interest conception in law which raises fewer disputes as to its existence but causes most of the problems, *i.e.*, indeterminacy. The analysis of case law described in the previous parts of the article shows that in the interpretation of the concept of public interest and its content the courts provide only criteria of value which are not sufficient enough for the establishment of public interest in the context of new circumstances for each particular case, even though they indicate the tendencies in the interpretation of public interest. References to 'social justice', 'overriding interests of society' or 'an objective of constitutional importance' in respect of public interest application say no more than the very concept of public interest and call for their further interpretation and identification of new starting-points for their analysis. However, the question how to find such starting-points and how in a particular case to find among

the conflicting legal values the one or a group of those that would embody 'social justice', 'overriding interests of the public' or 'an objective of constitutional importance' remains open.

The indeterminacy of the concept of public interest in law is also caused by the fact that public interest may be understood in many aspects. Even if this category is looked upon within the limits of legal approach, the study of public interest may undoubtedly be classified further into many aspects within the approach dimension. In other words, a theoretical typology of public interest laid down in the second part of this article is relevant in the analysis of public interest conception exceptionally from legal point of view. Procedural, majority, benefit, general interest, shared values and functional approaches – all of them in one or another way are reflected in the analysed case law and, depending on a particular situation, are considered as more or less important in respect of each other. Case law has formed the principle of priority of the shared values approach to the public interest conception over the common interest or quantitative approach, but this seems to be all. None of the courts, the ECHR, ECJ or Constitutional Court, explain which of the approaches and in what exactly situation should be highlighted and how to make a synthesis of various approaches in the analysis of public interest.

Yet a national legislator, and within the EU legal system – national legislators of Member States and EU legislative authorities, – have a prerogative to determine within separate spheres the limits of public interest and the best way of satisfaction of the value concerned – this emerges from the Convention, EU law and Constitution. Since, as is evident, the public interest conception within legal frameworks analysed in this article is poorly determined, a question arises based on which criteria the subjects having a prerogative of delimiting public interest and ways of its satisfaction – primarily nothing else, but a definite groups of people – exercise such their right. One of the possible answers is discretion. In other words, members of legislative bodies, whether national or EU, *i.e.* people, in making a decision in a particular case about the limits of public interest and the best ways of its satisfaction are governed by 'their own understanding of what is the best' (Hart, 1997, p. 421). Such 'understanding' in the absence of objective rules or criteria means nothing else but a system of individual values and criteria of a particular individual. Such system, even if theoretically is able to indicate 'social justice', 'overriding interests of the society' or 'an objective of constitutional importance', may still have completely unique elements determined by social environment, education, legal consciousness of a particular individual and other subjective factors capable to cause a distorted understanding of public interest.

A more pragmatic view might be taken to answer this question too – the one offered by interest group theory. Croley (2000) points out that the state model substantiated by people's elected legislators who need economic resources to maintain their position, together with the executive bodies empowered by peremptory authority but depending on legislators for political and budgetary resources, may mean a state working to the benefit of influential but narrow-focused political interest groups. Such position is indeed deserves discussion, whereas its rejection altogether would mean naivety.

Human rights and freedoms are natural, and state authorities shall serve the people – these are the provisions of the Constitution and postulates of a democracy. Nonetheless, the way public interest is conceptualised in law calls for the contemplation of a declaratory nature of the said principles.

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Viešasis interesas: sampratos apibrėžtumo problema

Santrauka

Nors individo autonomija neatsiejama nuo jos ribojimo, tačiau demokratinėje visuomenėje toks ribojimas toleruojamas tik tol, kol tai būtina kitų visuomenės narių autonomijai apsaugoti ir išvengti socialinių konfliktų. Viešasis interesas yra vienas iš visuotinai pripažintų individo autonomijos ribojimo pagrindų. Viešąjį interesą saugo teisė, kurios, pirma, privalo laikytis kiekvienas visuomenės narys ir, antra, kurią užtikrina valstybės mechanizmo prievartos priemonės. Tačiau teisė taip pat saugo bei gina prigimtines žmogaus teises ir laisves – teisinę individo autonomijos formą. Teisinio tikrumo šių vertybių apsaugos ribojimo prasme poreikis viešojo intereso sampratos analizei suteikia ypatingos svarbos.

Šiame straipsnyje siekiama išanalizuoti, kaip viešojo intereso kategorija yra suprantama Europos žmogaus teisių ir pagrindinių laisvių apsaugos konvencijos (toliau – Konvencija), Europos Sąjungos (toliau – ES) teisės bei Lietuvos nacionalinės teisės sistemose. Jame taip pat siekiama nustatyti viešojo intereso sampratų minėtose teisės sistemose panašumus ir skirtumus bei įvardyti esminius probleminius aspektus, susijusius su šiame straipsnyje analizuojamos kategorijos sampratos teisėje apibrėžimu.

To, kas dabar apibendrintai dažnai įvardijama viešuoju interesu, ekvivalento supratimas egzistuoja nuo pat politinės filosofijos užuomazgų. Viešasis interesas domino daugelį didžiųjų valstybės ir visuomenės teoretikų. Nepaisant to, vis dar negalima tvirtinti, kad mokslas yra nustatęs aiškų viešojo intereso apibrėžimą. Net ir tie, kurie tiki viešojo intereso egzistavimu ir tokio intereso realizavimo tikslingumu, dažnai yra priversti pripažinti, kad galimos įvairiausios viešojo intereso interpretacijos ir daugybė skirtingų požiūrių. Klausimai, iškilę bandant „atrasti“ viešąjį interesą, kai kuriuos šio objekto tyrinėtojus privertė abejoti, ar viešasis interesas, kaip savita kategorija, apskritai egzistuoja. Tačiau tie, kurie pritaria šios koncepcijos naudos ir galimybės ją realizuoti viešame diskurse idėjai, siekia plėtoti viešojo intereso sampratos tipologiją, atskleisdami daugelį galimų viešojo intereso teorinės sampratos aspektų. Proceso, daugumos nuomonės, naudos, bendro intereso, bendrų vertybių ar funkcinis aspektai yra būtent tie, kurie gali atskleisti esminius minėtos analizės bruožus. Viešasis interesas minėtais aspektais gali būti analizuojamas nepriklausomai nuo pasirinkto požiūrio – socialinio, politinio, filosofinio, ekonominio ar kito. Šiame straipsnyje tyrimo objektas analizuojamas teisiniu požiūriu.

Apžvelgus Europos žmogaus teisių ir pagrindinių laisvių apsaugos konvencijos, Europos Sąjungos teisyno bei tam tikrų teismų pateiktus Lietuvos nacionalinės teisės aiškinimus, nekyla abejonių, kad viešojo intereso – kaip kažko, kas yra vertinga ir dėl to bendra visuomenei apskritai – idėja egzistuoja nuo senų laikų. Rašytinėje teisėje – tiek tarptautinėje, tiek ES, tiek ir nacionalinėje – galima rasti daugybę viešąjį interesą išreiškiančių sąvokų, pavyzdžiui, „viešieji interesai“, „valstybės interesai“, „bendri interesas“ ir kt., kurie ir lemia specifinius šių kategorijų sampratos bei turinio aiškinimus. Tačiau tai nėra pagrindinė viešojo intereso sampratos problema, kadangi yra aiškios jos sprendimo tendencijos – ir Europos žmogaus teisių teismas (EŽTT), ir Europos Bendrijų Teisingumo Teismas (ETT), ir Lietuvos Respublikos Konstitucinis Teismas nėra linkę minėtų kategorijų sampratos ir turinio prasme interpretuoti fundamentaliai skirtingai.

Konvencijos bei nacionalinės teisės sistemų ribose viešasis interesas turinio požiūriu suprantamas vieningai. Šios kategorijos samprata nukreipia į socialinį teisingumą, vertybės prioritetą kiekybės atžvilgiu, teisėtumą, objektyvumą, proporcingumą, interesų derinimą – visa tai neatsiejami ir būtini demokratinės visuomenės ir valstybės koncepcijos elementai. Viešasis interesas suprantamas kaip dinamiška ir plati kategorija, apimanti ekonominius, politinius, socialinius, kultūrinius, dvasinius visuomenės gyvenimo aspektus.

ES teisėje viešasis interesas atspindi ir saugo „pagrindinius visuomenės interesus“, kurie vis dėlto suprantami siaurai. Šioje teisės sistemoje grynai ekonominio ar administracinio pobūdžio interesai negali būti laikomi viešuoju interesu. Viešasis interesas čia yra charakterizuojamas savo konkrečiame kontekste ir jį būtina aiškinti išskirtinai pagal ES teisę, nebent ES teisės akte būtų nuorodos į konkrečios valstybės narės teisę. Tačiau šie viešojo intereso ES teisėje bruožai nesikerta su šios kategorijos samprata Konvencijos ir Lietuvos nacionalinės teisės prasme – tokią viešojo intereso sampratos specifiką ES teisės kontekste nesunku paaiškinti atsižvelgiant į ES integracinį aspektą, griežtai ribotą šios organizacijos kompetenciją bei ES teisės viršenybės nacionalinės valstybių narių teisės atžvilgiu.

Pagrindinis problemiškiausias viešojo intereso sampratos aspektas yra jo neapibrėžtumas. Aiškindami viešojo intereso sampratą, teismai pateikia tik vertybinius kriterijus, kurie nors ir žymi viešojo intereso aiškinimo tendencijas, bet aiškiai nėra pakankami nustatant viešąjį interesą kiekvienu atveju naujų aplinkybių kontekste. Nuorodos į „socialinį teisingumą“, „pagrindinius visuomenės interesus“ ar „konstituciškai svarbų tikslą“ pasako ne ką daugiau nei pati „viešojo intereso“ sąvoka jo praktinio panaudojimo prasme ir reikalauja tolesnio jų pačių aiškinimo.

Viešojo intereso sampratos teisėje neapibrėžtumą lemia ir tai, kad viešasis interesas gali būti suprantamas daugybe aspektų. Kaip rodo teismų praktikos analizė, net ir apribojus šios kategorijos sampratos analizę teisinio požiūrio aspektu, viešojo intereso tyrimą neabejotinai galima toliau skaidyti į daugybę aspektų požiūrio dimensijos viduje, pavyzdžiui, proceso, daugumos, naudos, bendro intereso, bendrų vertybių, funkcinį. Nei EŽTT, nei ETT, nei galiausiai Konstitucinis Teismas nepaaiškina, kokius viešojo intereso sampratos aspektus kokiose situacijose derėtų akcentuoti ir kaip atlikti viešojo intereso analizių įvairiais aspektais rezultatų sintezę.

Ir vis dėlto nacionalinis įstatymų leidėjas, o ES teisės sistemos ribose – valstybių narių nacionalinis įstatymų leidėjas bei ES teisėkūros institucijos, disponuoja prerogatyva atskirose srityse nustatyti viešojo intereso ribas bei geriausią šios vertybės tenkinimo būdą. Tuomet, kokiais kriterijais remdamiesi minėtieji viešojo intereso ribų ir patenkinimo būdų nustatymo prerogatyva disponuojantys subjektai – pirmiausiai tai ne kas kita, o apibrėžtos žmonių grupės – šią savo teisę įgyvendina? Vienas iš galimų atsakymų – diskrecija. Kitaip tariant, nesant objektyvių taisyklių, taikoma konkretaus asmens individualių vertybių bei kriterijų sistema. Akivaizdu, kad minėtos individualios vertybių sistemos taikymas, priklausantis nuo konkretaus asmens socialinės aplinkos, išsilavinimo, teisinės sąmonės ir kitų subjektyvių veiksnių, galėtų sąlygoti iškreiptą viešojo intereso supratimą.

Siekiant atsakyti į šį klausimą, galima žiūrėti ir pragmatiškiau, kaip siūlo interesų grupių teorija. Tautos išrinktų įstatymų leidėjų, kuriems būtini ekonominiai ištekliai, kad jie galėtų išlaikyti turimas pozicijas, ir vykdomosios valdžios institucijų, kurios disponuoja valdžios įgaliojimais, tačiau yra priklausomos nuo įstatymų leidėjų politiškai ir biudžeto prasme, derinys gali reikšti valstybę, kurioje tarnaujama įtakingų, tačiau angažuotų politinių interesų grupių labui. Nors tai diskusijos verta pozicija, tačiau visiškai ją atmesti būtų pernelyg naivu.

Žmogaus teisės ir laisvės yra prigimtinės, o valdžios įstaigos tarnauja žmonėms – tai Lietuvos Respublikos Konstitucijos nuostatos, demokratinės valstybės sampratos postulatai. Vis dėlto dabartinė viešojo intereso samprata teisėje verčia mąstyti apie tam tikrą šių principų deklaratyvumą.

Raktiniai žodžiai: viešasis interesas, teisinis reguliavimas.

First received: January, 2006
Accepted for publication: March, 2006