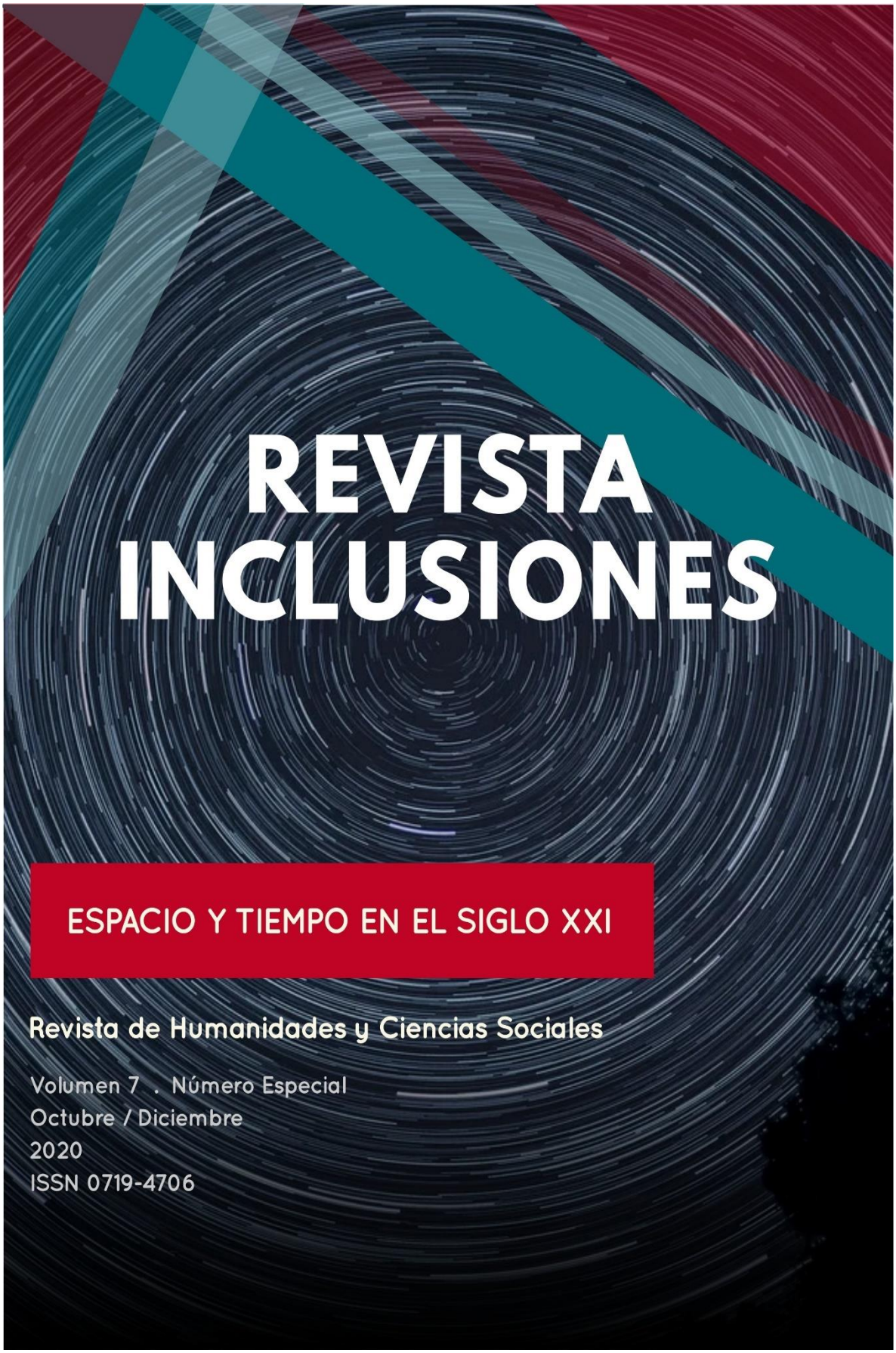
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CONSTITUTIONAL FOUNDATIONS OF PROPERTY RIGHTS IN A DEMOCRATIC STATE

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Abstract

The relevance of the research lies in the fact that there is still no universal constitutional definition of property in the foreign scientific literature. The understanding and constitutional and legal regulation of property as a universal institution resulted from the development of both the economic basis of property relations and the legal system in European countries, including that resulted from the democratic constitutions adopted in these countries.

Keywords

Property rights – Social state – Human rights – Democracy – Roman law – Law

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Introduction

Property is the subject matter in many social sciences, which is why a large number of diverse theories, ideas, viewpoints, etc. are focused on this concept. There is also no universally recognized constitutional theory of property in jurisprudence, and the possibility of its creation even in a globalizing world is called into question.

Constitutional regulation of property is one of the types of legal regulation of property that is fundamental to current legislation. Accordingly, the science of constitutional law has a specific set of ideas and concepts about the property that allow interpreting property as the most important constitutional and legal institution. A significant part of these concepts is the subject of research presented in this article.

The understanding and constitutional and legal regulation of property as a universal institution resulted from the development of both the economic basis of property relations and the legal system in European countries. For the earlier historical period of European civilization and non-European civilizations, it was more typical to divide the institution of ownership into special types of relations on the ownership and disposal of the property with respect to individual subjects of ownership of this property and separate objects. Besides, their defining feature was the domination of the collective ownership of community or other territorial or production collectives, combined with the restriction of turnover between territorial and production collectives. For example, within a community, a certain turnover of the property was taking place based on local traditions and customs, but the exchange between communities was quite rare, episodic, and mainly concerned rare items or products owned by the tribe. The lack of need for the constant exchange resulted from the lifestyle and its inherent limited needs.

In the modern sense, the property is a product of market relations development and property turnover. With certain conventionality, one can state that if the property was inalienable, it did not form property relations. For example, the accessory of land to the state in early societies did not create ownership on land. Since it could not be alienated, there was no one to protect it from; in economic and legal terms land acted as a universal given but not property[1].

The history of establishing the universal institution of property as a constitutional institution that extended to everything and everyone was by no means cloudless and was cyclical. During the period of increasing public demand for certain limited resources or military mobilization, the ideas of collective ownership, withdrawal of this resource from general circulation, etc., began to prevail. Other periods (for example, starting from the 18th century) were characterized by a predominance of liberal ideas of strengthening private property and collective property derived and based on private property[2]. Over time, the shortcomings of both extreme approaches were comprehended theoretically, and a search began for an optimal balance between them, which is typical for the contemporary period, including the constitutional level of property relations regulation.

[1] Der Duden: In 10 Banden. Duden Etymologie: Herkunftsworterbuch der deutschen Sprache (Mannheim: Dudenverlag, 1989)

[2] L. Yu. Grudtsina; S. A. Ivanova; M. V. Korotkova y L. I. Shevchenko, “The information in civil society”, International Journal of Civil Engineering and Technology Vol: 9 num 8 (2018): 1652-1663.

Methods

The methodological basis of the conducted research is based on the fact that there is no universal definition of property in the foreign scientific literature. For example, the French civil code states: "The right of ownership is absolute power over a thing within the limits established by law." This idea is repeated in the codes of other European countries. Here, according to the author of the article, it is important to emphasize two points.

First, the suggestions to reduce ownership to a "right to income", which are sometimes found in textbooks, are unjustified, since the authors mistake part of the property right for the whole. Second, property undoubtedly implies a right to income, but many rights to income have other grounds, while property rights include other rights besides the right to income. Civil law does not accidentally emphasize this. But whether the owner will be considered as such if the law restricts his power over property too much is not defined in civil law. If, for example, no one could bequeath land to their children, mortgage, or sell it, could anyone say, “I own”?[3].

The most important component of ius utendi et abutendi (the right to use and dispose of) is the unconditional right of disposal. Thus, property implies not only all the rights provided for by law but also the granting of the right of disposal to a person or institution. This conclusion casts doubt on the theories of the so-called "new property rights". The authors who claimed the emergence of "new property rights", as well as the "new class" theorists, correctly noted that in a socialist society where there was presumably no private ownership of the means of production, persons in key positions could exercise the same power as the owners of enterprises in the past, or had the same income and job security as capitalists. Similarly, members of trade unions in mixed economies may have the same job security as people who bought officers' or officials' patents in the 18th century[4]. They are mistaken in thinking that these are property rights because they do not pose a question of who in each case has the right to dispose of the property. Indeed, this power may be as important as property, and even give people rights similar to property rights. But considering it as property rights is incorrect. Until the 18th century, and perhaps even later, the property was a major topic for political scientists.

Results

Constitutional regulation acts as a basic one, creating the frame for the current itemized legislation. Therefore the constitutional rules on the property are inevitably lapidary in the form (except for only some constitutions, for example, in several Latin American countries, for which detailed regulation is characteristic in general, and not only in terms of this issue), and fragmentary with respect to the property as a regulated subject, i.e. their study does not give a complete picture of regulated relations since only a minimal part of economic property relations is regulated at the constitutional level. Thus, the study of the provisions of foreign constitutions related to property issues gives an idea of the only upper part of the legal "iceberg"[5].

[3] A. Alchian y H. Demsetz, “Production, information costs, and economic organization”, American Economic Review Vol: 62 num 5 (1972): 777-795.

[4] A. Ryan, Property. In: Eatwell, J., Milgate, M., and Newman, P. (Eds.). The invisible hand (London: Palgrave Macmillan, 2008)

[5] L. Yu. Grudtsina y A. A. Galushkin, “Questions of modern civil society development in the Russian Federation”, World Applied Sciences Journal Vol: 25 num 5 (2013): 790-793.

However, this feature of constitutional regulation allows studying the most socially significant features of the legal status of the property, which serve the key to understanding the approaches of the legislator to property and the regulation of property by the provisions of other branches of law. Besides, the increased abstraction and capacity of constitutional formulations make them the basis for application in a variety of legal situations and with regard to different subjects[6]. Thus, they create an extensive legal field that primarily resulted from judicial practice.

Discussion

Plato laid the foundation for a long-standing tradition by stating that the rulers of an ideal republic should not own property. Together, they should only own the common property of the republic, which will separate private interests from public ones. It should be noted that Plato, unlike the Apostle Paul, did not condemn greed and did not try to persuade people to direct their aspirations towards the benefits of a selfless world; rather, he wanted to avoid class struggle and protect the rulers from temptations.

The occupation of the lower classes in daily affairs was welcomed, no matter how many common goods it was possible to get. An equally long tradition is associated with Aristotle, who argued that common property is not the one that belongs to everyone, but the one that does not belong to anyone. Despite the recognition that private property is necessary for people to have a comfortable life, Aristotle did not approve of the market. He blamed the pursuit of profit for the fact that it led to the improper use of common goods, regarded consumption as proper, rather than trade; and even more than the pursuit of profit, he condemned interest-bearing loans for multiplying the despicable metal[7]. The right of ownership, especially of land, exists so that the best of men could have leisure and could develop their talents and rule wisely. The Greeks and Romans did not feel the need for the concept of individual rights, which became the main subject of discussions about property. However, it was the concept of property in Roman law that gave rise to modern theories of natural rights and natural property rights, just as Roman political thought gave rise to another tradition[8]. It's about the "art of management" and political insight described in the works by Machiavelli and Harrington, and to a lesser extent – by D. Hume and A. Smith. The main question that applies to any system of property rights is whether it contributes to political stability and political freedom[9]. Many different answers were given by J. Locke, and then by D. Hume, J.-J. Rousseau, I. Kant, G.V.F. Hegel, J. Mill and their followers, of which some contained support for the status quo, while others, like Rousseau's statement, on the one hand, and Mill's, on the other hand, suggested to reject it. In theories of natural rights, such as Locke's theory, it was argued that every person had the right to appropriate and use the goods of nature that no one else had; to make them his own, he only needed to use natural freedom. Does it follow that an employee who has nothing in contemporary society is deceived? Locke believed that this was not the case; as long as the worker could earn a living by his work, he was able to "appropriate" everything necessary. But it does not follow that the owners who refused to hire him were acting unfairly.

[6] V. A. Belova, Grazhdanskoe pravo: aktual'nye problemy teorii i praktiki. Moscow: Yurayt-Izdat. 2007.
[7] A. Buchanan, Ethics, efficiency, and the market (Oxford: Clarendon Press, 1986); R. H. Coase, Liberty, market, and state (Brighton: Wheatsheaf Books, 1960) y R. H. Coase, “The problem of social cost”, Journal of Law and Economics num 3 (1960): 1-44.
[8] D. A. Kolbasin y E. V. Lobatenko, Rimskoe chastnoe parvo: A course of lectures (Minsk: Academy of Interior Ministry, 2011).
[9] A. Ryan, Property…

Rousseau thought similarly but recognized that in practice owners found many ways to reduce the poor folks to servitude. Hume and Mill offered a utilitarian justification for the property. As long as there are no rules in the world that distinguish between "mine" and "someone else's", resources will not be used effectively; as for the rules of property management, they are determined by expediency. But while Hume believed that from the standpoint of expediency, custom and the law of limitation were preferable, even at the cost of loss in efficiency, Mill spoke in favor of state influence based on property laws to ensure efficiency, on the one hand, and create an economy of production cooperatives, on the other hand[10].

Kant and Hegel also saw property as a manifestation of human free will, but they explained it differently. Since only people have free will, they can give value to material objects that they make their property. Without property, the world of material objects becomes sluggish and useless. But if the property, in one form or another, is important in itself, then the state determines its specific forms for itself[11]. Kant and Hegel were enemies of the feudal remnants that disfigured the German principalities of that time. They were not supporters of the unlimited principle of *laissez-faire* (Laissez-faire means the principle of non-interference, an economic doctrine according to which state intervention in the economy should be minimal), but believed that since property expressed the power of man over nature, each person should be allowed to acquire property by his labor. This romantic justification of property rights was turned upside down by K. Marx who declared that the irrationality of capitalism and its obvious moral shortcomings showed that as long as property existed, things ruled over man, and people suffered from alienation[12]. Economic institutions could be evaluated from the standpoint of the representative of the social strata that were in the worst position[13].

The property rights system in developed capitalist countries emerged in an evolutionary way that led production to the greatest efficiency. Thus, a capitalist firm exists because it has developed a system of property rights that allowed entrepreneurs to act quickly and decisively.

One of the consequences of this theory is that a state that tries to forcibly implement a different system of property rights will face forces operating within the framework of the evolutionary process that will revive capitalism *de facto*, and only political repressions can preserve socialism. The significance of property rights lies in the distribution of resources they imply; what Marx called the bourgeois form of ownership creates the most effective management system[14].

Conclusion

Modern constitutional regulation of property directly or indirectly bears the imprint of the historical path passed, and in some countries includes the regulation of layers of property relations different by origin.

[10] A. Alchian, H. Demsetz, “Production, information costs, and economic organization...
[11] A. Ryan, Property…
[12] A. Alchian, H. Demsetz, “Production, information costs, and economic organization…; R. H. Coase, Liberty, market, and state… y R. H. Coase, “The problem of social cost…
[13] L. Yu. Grudtsina, “Civil society and private law”, American Journal of Applied Sciences Vol: 11 num 11 (2014): 1955-1958.
[14] A. Ryan, Property…

With the strengthening of constitutional control, the understanding of property rights in the constitution has evolved significantly. For example, the constitutional control bodies argue their decisions based not on one constitutional provision, but the diversity of its links with other constitutional provisions on property rights (in the systematic sense of this understanding), through the prism of constitutional principles and values, giving preference to one or the other principle and taking into account supranational provisions (international law). Thus, in contrast to the relatively recent past, the interpretation of national constitutional provisions on property rights can be considered multidimensional. Judicial argumentation has taken an important place in the contemporary scientific interpretation of constitutional provisions on property rights. It can be stated that both the contemporary legal state and the constitution are created through interpretation and argumentation, including the provisions of the property rights institution[15]. Part 1 of article 36 of the Constitution of the Russian Federation refers to the right of associations of citizens to own land, which can also be interpreted in different ways. On the one hand, the concept of "associations of citizens" is ambiguous. On the other hand, the Constitution of the Russian Federation contains provisions concerning different types of citizens' associations, such as religious associations (article 14), and public associations (articles 13, 46), which are established for different purposes, and the scope of the rights of a particular association cannot but depend on the goals of its creation. Taking into account the totality of the provisions of the Constitution of the Russian Federation, the Constitutional Court of the Russian Federation in its Decision stated that parts 2 and 3 of art. 35 of the Constitution of the Russian Federation applied to legal entities to the extent in which this right by its nature could be applied to them. This decision is in line with the decisions already taken by the constitutional courts of other countries in cases of this kind, and creating thereby the possibility of applying the protection of the rights of legal entities based on constitutional provisions on the property, leaves the "door open" for refusal in a specific case if it is considered that the nature of the legal entity is not compatible with this right. The emergence of rules on the ownership of political parties in the constitutions of foreign countries is associated with the processes of their institutionalization, which occurred relatively late. In terms of political pluralism, constitutions establish the free formation of political parties, the factual procedure for their establishment, i.e. without prior permission, which does not exclude the establishment in the constitutions of certain requirements that political parties must meet in a democratic society (compliance with the principles of national sovereignty, unity of the state and democracy, compliance of the internal organization of the party with democratic principles, etc.)[16].

Recommendations

The purpose of including provisions on property objects in the constitutions may be different. The most common are the constitutional provisions on guarantees and protection of property rights. The main purpose of including a reference to objects of property rights is then to specify the protection concerning this type of object in favor of the state or other public legal entities or individuals in the event of confiscation. From the standpoint of "presentation of material", the constitutions mention both individual objects of property rights and their lists. The mention of individual objects of property rights is a common, rather ordinary phenomenon in constitutional regulation[17].

[15] Der Duden: In 10 Banden…

[16] D. A. Kolbasin y E. V. Lobatenko, Rimskoe chastnoe parvo…

[17] P. P. Andreev, Sootnoshenie ponyatij: social'noe gosudarstvo, social'naya zashchita, social'nye riski, social'noe obespechenie (Vladimir, 2005).

Among individual objects, the most common are property and ownership, in the meaning of property. As for lists of objects, they are characterized by a certain cyclical appearance. Usually, they appear in constitutions to solve some specific historical problems, and as they are solved, the lists usually disappear from the constitutions. Such lists of objects were included in the first constitutions of monarchical states, in the provisions on the separation of the property of the king and the Crown (in countries where the monarchy remained), and on the disposal of the property of the former monarch (in republics). At that time, they served as a legislative and technical way to solve specific problems of the revolutionary and post-revolutionary period and later disappeared from constitutional regulation. Concerning state property, at first glance, the state has the widest possible opportunities to establish both objects of exclusive state property rights and the regime of state property in general. However, the exercise of state power in a state governed by the rule of law is not absolute either in this sphere. This means that the state cannot establish arbitrary relations of state property and arbitrary restrictions on the right of private property.

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