

Property in Some European Constitutions

The right of property is possibly one of oldest rights which has been created by human civilization – actually, even some animals are probably aware of the concept. However, the precise extent of property rights is not, and in fact, has never been very clear. There are many aspects and many opinions on each of them. Doubts include questions like: What is the *core* of the property right? Where does it come from? Why do we respect other's property rights? What are the restrictions? Since basic human rights in the modern world are guaranteed in constitutions, I decided to briefly show how the constitutions of European states regulate the issue of property rights.

1. Historical brief

The idea of property, as was said before, existed long before the first constitutions. In ancient Rome, it existed from the very beginning of the state. At the turn of the 3rd and 2nd century BC, the terms *dominium* and *proprietas* were developed¹. The Roman perception of property was not, though, common and indisputable. In the Middle Ages, property was divided into *dominium utile* and *dominium directum*. In all the ages, various scholars and philosophers launched their own definitions and disputed whether the source of property was nature or whether it was created through some kind of contract or agreement between people – like, of course, Jean-Jacques Rousseau. On the contrary, Richard Pipes claims that greed is not only an attribute of humans, but even of animals²

1 W. Dajczak, T. Giaro, F. Longchamps de Berier, *Prawo rzymskie u podstaw prawa prywatnego*, Warszawa 2009, p. 369.

2 R. Pipes, *Własność jako instytucja*, [in:] *Odkrywając wolność przeciw zniewoleniu umysłów*, L. Balcerowicz, Poznań 2012, p. 414.

and, of course, children³. Edward Adamson Hoebel, professor of anthropology, said that property is a universal attribute of human culture, which was a criticism of the ideas of some kind of *golden age*, a period of human history when everything was common and people lived in prosperity⁴. Opinions on property are very diverse: Adam Smith valued property so much, that in his opinion *civil government (...) is instituted for the security of property*⁵. On the other hand, Karl Marx and Friedrich Engels in *The Communist Manifesto* supported total abolition of private property, which was one of the most important goals of future communist and socialist generations.

The first constitutions were deeply influenced by the liberal, *natural* concept of property. The constitutions of Pennsylvania and Virginia described the right to property as natural and fundamental⁶. The French Declaration of Human and Civil Rights stated that *the right to Property is inviolable and sacred*⁷. This first, liberal concept of property changed in the 19th century under the strong pressure of socialist and more moderate ideas. In the 20th century, in the Soviet Union and other communist states, private property was extremely limited, but after collapse of the communist system those countries generally withdrew from that radical course. As a conclusion to this section, I can say that the current status of property and its constitutional position is the effect of long-lasting disputes and experiments with various ideas and now we have a kind of compromise between the most radical of them.

2. The right of property in the Constitution of the Republic of Poland

The right of property is mentioned in various articles of the constitution of the Republic of Poland⁸. According to the article 21, *The Republic of Poland shall protect ownership and the right of succession and expropriation may be allowed solely for public purposes and for just compensation*. Article 64 states that: *Everyone shall have the right to ownership, other property rights and the right of succession*. Under the next point of this article: *everyone, on an equal basis, shall receive legal protection regarding ownership, other property rights and the right of succession*. Article 46 concerns a forfeit, which is very limited: *Property may be forfeited only in cases specified by statute, and only by virtue of a final judgment of a court*.

Articles 20 and 21 of the Constitution of the Republic of Poland are part of chapter 1, describing the most important principles of the state. Article 20 states that *A social*

3 R. Pipes, *op. cit.*, p. 422.

4 *Ibidem*, p. 429.

5 A. Smith, *An Inquiry into the Nature and Causes of the Wealth of Nations*, Library of Economics and Liberty, <<http://www.econlib.org/library/Smith/smWN20.html>>.

6 W. Dajczak, T. Giaro, F. Longchamps de Berier, *op. cit.*, p. 348.

7 *Ibidem*.

8 Dz.U. 1997, No, 78, ilem 483.

market economy, based on the freedom of economic activity, private ownership, and solidarity, dialogue and cooperation between social partners, shall be the basis of the economic system of the Republic of Poland while according to article 21 the Republic of Poland shall protect ownership and the right of succession and, additionally, expropriation may be allowed solely for public purposes and for just compensation They both describe the right of property as a basic principle of the Polish economic system. Article 64, on the other hand, looks at it from the human rights perspective – therefore, property in the constitution of Poland has a dual character: it is first of all one of the state's principles and it is also one of the guaranteed human rights.

The term *property* is construed very widely, without categorisation of who the subject of that right is. However, judicial decisions made by the Constitutional Tribunal of the Republic of Poland are not straightforward and are sometimes inconsistent. Some problems concern the extent of the term *property* used in the aforementioned articles⁹, some others concern the *essence* of that term¹⁰, which has fundamental significance because of article 31, which comprises the following provision:

Any limitation upon the exercise of constitutional freedoms and rights may be imposed only by statute, and only when necessary in a democratic state for the protection of its security or public order, or to protect the natural environment, health or public morals, or the freedoms and rights of other persons. Such limitations shall not violate the essence of freedoms and rights

Enumeration of potential causes of limitation of rights is quite long, but at the same time it is limited by the requirement of non-violation of the *essence*. An example of such a violation is contained in the verdict of a Constitutional Tribunal from 12th January 2000: *if an object belonging to a proprietor causes losses, and the statute creates the obligation of keeping that object in a specific condition, it may be such a violation*¹¹.

9 D. Pokitko, Własność w Konstytucji III Rzeczypospolitej [online]. Repozytorium Uniwersytetu im. Adama Mickiewicza [access: 2013-10-28]. Available at: <https://repozytorium.amu.edu.pl/jspui/bitstream/10593/7030/1/13_Dawid_Pokitko_W_asno_%20w%20Konstytucji%20III%20Rzeczypospolitej_179-192.pdf>.

10 *Ibidem*, p. 187.

11 Verdict of a Constitutional Tribunal, P11/98.

3. The right of property in the Constitution of the Russian Federation

The first significant point is article 17 of the Constitution of the Russian Federation: *In the Russian Federation human and civil rights and freedoms shall be recognized and guaranteed according to the universally recognized principles and norms of international law and this Constitution.* This may be treated as a referral, for example, to the Universal Declaration of Human Rights. Article 17 also states that *everyone has the right to own property alone as well as in association with others and no one shall be arbitrarily deprived of his property.*

Article 34 of the Constitution of the Russian Federation states as follows: *Everyone shall have the right to use freely his (her) abilities and property for entrepreneurial and other economic activity not prohibited by law.* The next article, 35, states that *the right of private property shall be protected by law.*

We can see ostensibly insubstantial, but meaningful differences: in the Polish constitution the right to property is described generally, without specifying its purpose; The Russian article 34 provides for the right to use property *for entrepreneurial and other economic activity*, which may lead to the question – what about activities that may be not recognized as one of those listed? Additionally, article 35 speaks not about *property*, but *private property* – which may be a serious limitation. The phrase *shall be protected by law* creates other doubts, since *protection by law* may be construed in many different ways, including ones that define that protection in a very limited way, which would not provide the necessary preservation. However, the following provisions must be also noted. They state that: *Everyone shall have the right to have property and to possess, use and dispose of it both individually and jointly with other person*, and, what is extremely important, *Nobody may be deprived of property except under a court order. Forced alienation of property for State requirements may take place only subject to prior and fair compensation.* This last provision must definitely be lauded as proper and very positive.

4. The right of property in other European constitutions

The next constitution that I would like to present is the Basic Law for the Federal Republic of Germany. According to article 14 of this document, *Property and the right of inheritance shall be guaranteed. Their content and limits shall be defined by the laws.* It shows that some limits are unavoidable, but in any case they should be regulated by law. Additionally, according to article 19, *in no case may the essence of a basic right be affected.* However, exactly as in Poland, this *essence (Wesensgehalt)* has no commonly accepted definition¹². What is interesting about the German Basic Law, is the fact that property is

12 D. Pokitko, *op. cit.*, p. 186.

mentioned in the article which concerns armed force – namely, article 87a. Protection of civilian property is described as one of the goals of the Armed Forces – which is rather rare.

The Constitution of France is rather exceptional: it does not describe fundamental rights directly. Of course, this doesn't mean that they are not protected. This protection, after a landmark decision by the Constitutional Council¹³, is provided by a referral included in the preamble, which makes references to the Declaration of the Rights of Man and of the Citizen. This document, created in the 18th century, has the status of legally binding law. Therefore, property is one of the rights that should be preserved by political associations (article 2), and subsequently is covered by article 17:

Since the right to Property is inviolable and sacred, no one may be deprived thereof, unless public necessity, legally ascertained, obviously requires it, and just and prior indemnity has been paid.

However, practice shows, that this *sanctification* does not mean that it is totally absolute – limitations and taxes are present in France just as in all other states – as Gerard Depardieu's case reveals, they may be even more severe than in other countries.

Great Britain is a country that has no single constitutional document, however, it does not mean that there is no constitution in Britain at all. It is embodied in documents, statutes, court judgments and other sources of British constitutional law. However, there is still no singled out *declaration of rights* as in other states. Therefore, those rights are guaranteed in Great Britain mainly thanks to international treaties that are binding upon the British government, like the European Convention on Human Rights; the most important British statute is the Human Rights Act, introduced in 1998¹⁴.

Let us now move to slightly smaller states – firstly Belarus. According to article 44 of the constitution of Belarus *the State shall guarantee everyone the right of property and shall contribute to its acquisition*. That *contribution* is definitely a very original expression and leads to the question of why this is actually necessary in Belarus. The last part of this article states that: *the exercise of the right of property shall not be contrary to social benefit and security, or be harmful to the environment or historical and cultural treasures, or infringe upon the rights and legally protected interests of others* – which is a dangerous wicket, and may lead to uncontrolled expropriations.

Rather similar, but much better provisions are established in Armenia. According to article 31 of its Constitution:

13 E. Gdulewicz, *System konstytucyjny Francji*, Warszawa 2000, p. 23.

14 P. Sarnecki, *System konstytucyjny Zjednoczonego Królestwa Wielkiej Brytanii i Irlandii Północnej*, Warszawa 2009, p. 11.

Everyone shall have the right to freely own, use, dispose of and bequeath the property belonging to him/her. The right to property shall not be exercised to cause damage to the environment or infringe upon the rights and lawful interests of other persons, the society and the state. No one shall be deprived of property except for cases prescribed by law in conformity with the judicial procedure.

We can see that even if deprivation of property is theoretically possible, the necessity of lawful actions is much more highlighted; the voluntary actions of civil servants are excluded.

The last country that I would like to mention is the newest member of the European Union, Croatia. It's Constitution, in article 50, has an interesting determination:

In the interest of the Republic of Croatia, ownership may be restricted or rescinded by law, subject to indemnification equal to the market value of the pertinent property. Free enterprise and property rights may be exceptionally restricted by law for the purposes of protecting the interests and security of the Republic of Croatia, nature and the human environment and human health.

The Croatian Constitution does not have any other provisions directly connected to property; we can use the argument *a contrario* and thereupon find that ownership may not be restricted if this is not enforced by law, however, I believe that this is a weaker warranty than in the previously introduced constitutions.

5. The right of property in the European Convention on Human Rights

There is one more document that should be discussed in this paper: this is the Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms (commonly known as the *European Convention on Human Rights*). Of course, this protocol is not a constitution. However, since it comprises obligations undertaken by almost all countries in Europe, it could have an impact upon the status of property in those states. There are only 6 articles in the mentioned protocol, and property is encapsulated in the first one. It states as follows:

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 by law and by the general principles of international law.

However, the potential of those phrases is diminished by the next fragment:

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.

Since the question of what is *necessary* is left to the interested states, the general impact of this provision is rather weakened. However, some judgments of the European Court of Human Rights show that the Protocol's provisions are not without effect: for example, it criticised the practice of de facto expropriation in Turkey without any formal declaration of transfer of ownership. It also worked on post-conflict cases in Bosnia and Herzegovina, as well as in Georgia¹⁵.

6. Conclusions

The main goal of my paper was to describe briefly the ways of regulating property rights in selected constitutions of European states. As has been shown, the generally accepted provisions do not differ very much, however, some of them may be rated as worse than others: this refers to those which do not include precise enough warranties, while others contains dangerous wickets for forfeiture. Despite that fact, it must be said that property is generally still perceived as one of most important values and its protection is satisfactory. I strongly believe that this will be continued in the future. After the fall of communism, capitalism is widely accepted as the economic system in Europe and private property as the basis of that system, therefore, we can expect the continuation of the protection of property on a constitutional level.

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15 A. Buyse, Three Property Right Judgments [online]. ECHR BLOG [access: 2013-10-27]. Available at: <<http://echrblog.blogspot.com/2010/06/three-property-rights-judgments.html>>.

SUMMARY

Property in some European constitutions

The aim of the study is to analyse the notion of property in the selected European countries' constitutions. The author present the constitution of Poland, Russia, Germany and France and confront with the construction of the right to property in the European Convention on Human Rights.

KEYWORDS: property, European constitutions, European Convention on Human Rights