

Property Right in the 1982 Constitution As a Social Right

Fatih DEMİRÇİ

Dumlupınar University,

Kütahya, Turkey

fdemirci@hotmail.com

Abstract : Property right is often referred to for defining political regimes. Therefore to study property right in the 1982 Constitution is crucial for analyzing the Turkish political structure. Property right in the 1982 Constitution stands within the Article 35. This article consists of three clauses. The first two clauses may often exist in any democratic constitution but the third clause has a very interesting and peculiar feature. Because the first two clauses say that everyone has right to own and inherit property and this right may be limited by law only in view of public interest. But the third clause says that exercise of the right to own property shall not be in contravention of the public interest.

This third clause is objectionable in two reasons. First; this clause ordains the citizens an impossible thing. Because it is impossible for people to use their properties always in favor of public interest. If this article said that property right could not be used against the public interest, it could be acceptable and reasonable. But this clause as written in the constitution puts an impossible obligation but the law cannot order any obligation on the citizens.

Secondly; the limit of property in liberal democracies may be in line with the public interest and this limit can be defined only by law. Using the property right in favor of public interest is merely a matter of people's choice. However this article literally obliges people to use their property in favor of public interest. This is not appropriate for liberal democracies.

Introduction

Property has always been a critical issue in political philosophy. Every political philosopher has something to say about it. However, the theme of property has become particularly central in modern political thought: at times the whole science of politics has seemed to be subordinate to, or even identical with, the science of economics. While Rousseau defines property as the source of all kinds of evil, Aristotle and John Locke place the right of property in the basis of state. Especially in his *Two Treatises of Government*, John Locke attaches to property as the motive for establishing and maintaining political society (Zvesper, 1996, p.91). To Locke, property is a natural right for an individual and each individual has a natural right of property before state. For Locke, what makes a government legitimate is its preservation of property. To him, the aim of government is preservation of property (Tully, 1993, p.120). Thus Locke favors any form of government that supports an individual's natural right of property, its acquisition and its preservation in the hands of its rightful owner (Tannenbaum-Schultz, 2004, p. 184).

Actually, the right of property is listed among the personal rights and the basic rights of the individual in the constitutions of the American States where they declared their independency, in "the American Declaration of Independency" and the French Revolution's "The Declaration of the Rights of Men and of the Citizen" (Soysal, 1987, p. 229). For example, in 1789 *the Declaration of the Rights of Man and of the Citizen*, which has been announced after the French Revolution it is declared that "*since property is an inviolable and sacred right, no one shall be deprived thereof except where public necessity, legally determined, shall clearly demand it, and then only on condition that the owner shall have been previously and equitably indemnified.*" (<http://www.hrcr.org/docs/frenchdec.html>). Thus property is still one of the most prominent issues in politics.

Property right so important in some certain ways that some suggest that what reveals the difference between Eastern and Western political regimes is property³. In this context, many constitutions in the West oblige the state to protect property.

³ For details about this issue see "Feodalite ve Osmanlı Toplumunu" by Murat Özyüksel, Derin Yayınları, 2007, İstanbul.

Property Right in Turkey

Private possession of land has been limited, as feudalism as a political regime flourished after the fall of the Roman Empire through right of property, in order to prevent the advance of such a fragmented government structure like feudalism. The most detailed regulation concerning property is the Noble Edict of the Rose Chamber. This edict reads:

“If there is an absence of security for property, everyone remains indifferent to his state and his community; no one interests himself in the prosperity of the country, absorbed as he is in his own troubles and worries. If, on the contrary, the individual feels complete security about his possessions then he will become preoccupied with his own affairs, which he will seek to expand, and his devotion and love for his state and his community will steadily grow and will undoubtedly spur him into becoming a useful member of society”(<http://www.yursil.com/blog/2010/01/hatt-i-sherif-of-gulhane-noble-edict-of-the-rose-chamber-beginning-of-tanzimat-reforms>)

But the given importance to property that took place in this edict is for protection of the state exclusively. In the Republican Era, Ziya Gökalp’s solidarist thoughts prevail as against the liberal economic and political thoughts. While 1924 Constitution declares that property is an inviolable right, 1961 and 1982 Constitutions declare that property is used for only public benefit.

Property Right in the Constitution of 1982

The text of the article concerning property right in 1982 Constitution is exactly the same with the one included in 1961 Constitution (Soysal, 1987, p. 229). However, property right was listed under the heading “Social and Economic Rights and Liabilities” in the 1961 Constitution while it takes place in the “Rights of the Individual” section of the 1982 Constitution (Tanör-Yüzbaşıoğlu, 2009, p.174). Moreover, considering the content of the article, it is clear that property right was regulated as a “social” right rather than an “individual” right in the constitution. In the Constitution, the right of property was regulated in the Article 35 (the Article 36 of 1961 Constitution) as follows:

*“Everyone has the right to own and inherit property.
These rights may be limited by law only in view of public interest.
The exercise of the right to own property shall not be in contravention of the public interest”*

Although property right was placed in the section of “**Rights and Duties of the Individual**” instead of “**Social And Economic Rights And Duties**” section in the 1982 Constitution, it was stated that this right can be limited by law for the sake of public interest and its exercise cannot be in contravention with public interest. Clearly, a big and fundamental change took place in terms of property; this sacred, inviolable right was limited for the sake of the society for the first time (Polatcan, 1989, p. 140). However, inclusion of property right in the section of personal rights has got two results in terms of application: the Article 91 that gives the authority to issue Decree Law (KHK) states that during normal periods, the subjects concerning personal rights cannot be regulated with KHKs and such regulations can only be performed during the period of martial law and state of emergency. But it is always possible to issue KHK about social and economic rights and to regulate the subjects concerning these rights with KHKs (Bulut, 2006, p. 23). On one hand this replacement can be considered as a kind of weakening in the social state principle, on the other hand, maybe as a more appropriate comment, because of being listed with individual’s rights the property right has been strengthened and protected better by the 1982 Constitution. Nonetheless, it would be beneficial to consider as a whole the way the property right was regulated in the constitution.

Although the first two clauses of the Article 35 in the Constitution include some provisions, which are normally included in any other modern constitution, the last clause of the Article is one of the interesting regulations concerning property right. The interesting part of the last clause of the article concerning property right in the Constitution is that its projection saying property rights shall not be exercised against “the public interest”. This provision is interesting because the condition not to use property against public interest is independent from the provision of limiting property right merely for the sake of public interest and only by law. This provision reveals the content in which property right is recognized; that is, this right is recognized within limitation by “public interest” from the beginning. There is also a disadvantage of this provision because it leaves room for arbitrary intervention in exercise of this right, even if it is not a legitimate limitation based on law, by claiming that the property was not used in line with public interest, thus giving the courts the right to decide on the way property owners should use their property right (Erdoğan, 2006, p. 77).

Justifications in the Constitutions of 1961 and 1982 of the Article text are vitally important for a better understanding of the subject. In the article justification in 1961 Constitution, especially about the last clause of the article, it was stated that property right has the quality of unlimited freedom that can be exercised however the individual wants to, inconsiderate of public interests with the same interpretation of this right in Roman Law and that even in our old law, property had also a social characteristic and inclusion of this right in the constitution would guide the legislator and would have a disciplinary influence on the individuals (Özer, 1996, p. 175). In the justification of 1982 Constitution, it is stated that together with the guaranty provided to property right, the economic systems that ignore private property would be unable to remove private property (Özer, 1996, p.170). The 1982 Constitution considers property right basically as private property. This understanding of property includes free enterprise, private property of production tools. Therefore, choice of a fascist or communist system or a system based on religious principles is not possible because of the provisions of the Constitution concerning property as well as its other provisions (Polatcan, 1989, p.140). Moreover, although the right of property is a basic right, its exercise was determined not to be against the public interest. Public interest may necessitate total abolition of property right in some cases. Therefore, expropriation and nationalization were regulated within the Constitution (Polatcan, 1987, p.139). Because of its definition this regulation is based on the privilege of private enterprise and private property, as stated by Taha Parla in his study on Ziya Gökalp's model of state, and it has some features of capitalism while it also reminds corporatism, which bears "anti-Marxist" and "anti-Socialist" characteristics (Parla, 1999, p.90).

As observed above, in essence the 1982 constitution considers property right within the framework of "property right as a social function" idea. Property right is not an absolute right in the constitution as the owner of something is adorned by a set of responsibilities, yet a relative right that can be limited on social grounds (Bulut, 2006, p.25). The judgment of the Supreme Court concerning property right is in a similar vein:

"Property right has already lost its former connotation as a right which the individual might use at his will and a boundless liberty, the understanding of property has developed labeling it as a social right and the principle that this right also could be limited for public interests as many others was adopted.

Property right, which initially meant the absolute sovereignty of an individual over a thing and was deemed sacred lost these implications and this absolute and subjective right has transformed into a conditional situation and bounded by its social functions (Akad-Dinçkol, 2007, p.230).

In another judgment the Supreme Court accounts for the fact that property right could not be used against public interest as follows:

"It is quoted that property right cannot be used against public interests. In our constitution property right is not recognized as an absolute right and it is foreseen that public interests would be privileged in case individual interests conflict with public interests and the social function of property is identified with using in line with public interests. The constitution does not permit using property right against this (Akad-Dinçkol, 2007, p.232).

The motivation behind this and similar regulations concerning property right has traces of the public property understanding before the Republic and the solidarist corporatist state model in the Republican period developed by Ziya Gökalp. Yet, according to Parla, the corporatist thought of Gökalp might be considered as a model of "corporatist capitalism" which deeply influenced the Turkish thought and provided the governing classes (including those who prepared the constitution) with a paradigmatic worldview. Unlike the individual-based liberal social model, corporatism considers individualism and individual property as a force that atomizes and disintegrates society. Hence it is asserted that this has an annihilating effect on the balance of social organism and its possibility to survive. So to speak, as he believes the liberal society has anarchist tendencies, the self-interested efforts of individuals, their private properties and enterprises are considered legal in this model as far as they serve social solidarity and unless they damage the public interest which is a supreme value per se (Parla, 1999, p.93).

In his study which examines modern constitutions Wheare states that constitutions are primarily prepared in two types. He notes that, the first approach considers the constitution as a legal document in principle and thus only includes laws in praxis and excludes others while the second approach considers constitutions as a kind of manifesto, an acknowledgement of belief, an expression of ideals (Wheare, 1984, p.43). While denoting which one to choose he says that it would be wise to exclude anything that would not be considered as a law from the constitution (Wheare, 1984, p. 67) and the ideal constitution would include the least number of laws (Wheare, 1984, p. 45).

In this context, the article of the constitution on property is more a petition that clarifies the desired ends than a law expressing the recognition and exercise of rights. However, according to Wheare, a constitution which is considered as a political manifesto or creed by some should limit not ideas, desires or plans but itself as far as possible with laws (Wheare, 1984, p. 62-67).

The judgment expressed in the third clause of the property rights article of the 1982 constitution which is the expression of the yearning for property in a solidarist and corporatist society more than a law clause, especially the provision "property rights cannot be used against public interests", is problematic in its insistence as a law.

In the first place, laws do not demand impossible things. That is to say, laws include applicable commandments. However, the provision “property rights cannot be against public interests”, is not applicable. An applicable provision would exist if the provision in the constitution were “property cannot be used to damage the public”. Nevertheless, the provision in the constitution, considering the critics of the concept, necessitates each and every use of property by the individuals should contribute to public interests, which is impossible.

However, the important discrepancy between these two concepts is neglected and comments interpret that the constitution only commands not to impair. For instance, while the Supreme Court pointed out in a judgment that property right is limited by “not violating others’ rights” (Akad-Dinçkol, 2007, p. 237) a scientific study on this provision asserts that the provision that asserts property rights cannot be against public interests is unnecessary since it was accepted by law that property should not be used in contravention of public interests (Şahin, 2009, p.96). However, it must be kept in mind that what the constitution commands is “property should not be against public interests” and not that “property should not impair public interests”.

In the second place, it should be discussed whether the constitutions aimed at guaranteeing rights and limiting the governments in this respect limit the individuals with the liability of being in favor of the public whenever they exercise their property right or not. While the primary task of the state is preserving the rights through law, the introduction of the moral principle of appealing to public interest as a legal obligation for individuals is not fully consistent with the universal principles of law.

Conclusion

Considering the comments of K. C. Wheare, who studied modern constitutions, about the Article 43 of the Irish Constitution⁴ where it is declared that the State guarantees to pass no law attempting to abolish property right, and then states that the exercise of the rights mentioned in the provisions of this Article ought, in civil society, to be regulated by the principles of social justice, thus may, as occasion requires, delimit by law the exercise of the said rights with a view to reconciling their exercise with the exigencies of the common good; in other words, although property right is recognized, it is limited by social considerations, which Wheare considers as “a classical example of giving a right by one hand and taking it back with the other” (Wheare, 1984, p.57) it can be concluded that some rulings in constitutions that conflict with legal techniques are not only unable to maintain the desired aims but also fall short in protecting rights and liberties, which is the main reason of their existence, and might leave them without guarantee.

References

Akad, M. & Dinçkol, A. (2007). 1982 Anayasası ve Anayasa Mahkemesi Kararları, İstanbul, Der Yayınları.

Bulut, N. (2006). Mülkiyet Konusundaki Temel Yaklaşımlar ve Türk Anayasasında Mülkiyet Hakkı, Erzincan Üniversitesi Hukuk Fakültesi Dergisi, Atatürk’ün 125. Doğum Yılına Armağan, Cilt : X, Sayı: 3-4, Aralık 2006 (pp. 15- 26).

Erdoğan, M. (2006). İnsan Hakları, Ankara, Başbakanlık İnsan Hakları Başkanlığı Yayını.

<http://www.constitution.ie/reports/ConstitutionofIreland.pdf>

<http://www.hrcr.org/docs/frenchdec.html>

⁴ Full text of this article :

Private Property

Article 43

1. 1° The State acknowledges that man, in virtue of his rational being, has the natural right, antecedent to positive law, to the private ownership of external goods.

2° The State accordingly guarantees to pass no law attempting to abolish the right of private ownership or the general right to transfer, bequeath, and inherit property.

2. 1° The State recognises, however, that the exercise of the rights mentioned in the foregoing provisions of this Article ought, in civil society, to be regulated by the principles of social justice.

2° The State, accordingly, may as occasion requires delimit by law the exercise of the said rights with a view to reconciling their exercise with the exigencies of the common good.

<http://www.constitution.ie/reports/ConstitutionofIreland.pdf>

<http://www.yursil.com/blog/2010/01/hatt-i-sherif-of-gulhane-noble-edict-of-the-rose-chamber-beginning-of-tanzimat-reforms>

Özer, A. (1996). Gerekçeli ve 1961 Anayasası ile Mukayeseli 1982 Anayasası, Ankara, Lazer Ofset.

Parla, T. (1999). Ziya Gökalp, Kemalizm ve Türkiye’de Korporatizm, İstanbul, İletişim Yayınları.

Polatcan, İ. (1989). Türkiye Cumhuriyeti Anayasası, Gerekçeler, Anayasa Mahkemesi Kararları, Bilimsel Görüşler, İstanbul, Bayrak Yayımcılık.

Şahin, A. (2009). Ulusalüstü İnsan Hakları Hukukunda ve Türk Anayasa Hukukunda Mülkiyet Hakkının Sınırlandırılması Sorunu, Liberal Düşünce, Kış-Bahar 2009, Sayı: 53-54, (pp.65-83).

Soysal, M. (1987). 100 Soruda Anayasanın Anlamı, İstanbul, Gerçek Yayınevi.

Tannenbaum D.G. & Schultz, D. (2004). Inventors of Ideas, An Introduction to Western Political Philosophy, Toronto, Thomson Wadsworth.

Tanör, B. & Yüzbaşıoğlu N. (2009). 1982 Anayasası’na Göre Türk Anayasa Hukuku, İstanbul, Beta Yayınları.

Tully, J. (1993). An Approach to Political Philosophy: Locke in Contexts, Cambridge, Cambridge University Press.

Wheare, K.C. (1984), Modern Anayasalar, Çev. Mehmet Turhan, İstanbul, Değişim Yayınları.

Zvesper, J. (1996). Locke and Aristotle on Property, In Richard Bellamy & Angus Ross (Editors) A Textual Introduction to Social and Political Theory, (pp. 91-121), Manchester and New York, Manchester University Press.