

**Sapienza Università di Roma**

**Law and Economics II**

**Analysis on the Right to Property and the Limitation of this Right According to  
the Constitution of the Republic of Turkey**

**Dogukan Caglayan**

**19.12.2022**

## **Abstract**

In this study, the right to property within the scope of the 1982 Constitution of the Republic of Turkey and the conditions for limiting this right are examined. The perspective of the 1982 Constitution on the right to property shows great similarities with the European Convention on Human Rights. The reason for the differences is the historical development of the property right in Turkish and European law. Even though the case law of the European Court of Human Rights is seen as directly applicable in Turkish law pursuant to Article 90 of the 1982 Constitution, Turkish law has often abstained from this practice.

**Key Words:** Property, European Convention on Human Rights (ECHR), protection of right of property, restricting right of property.

## **Introduction**

The right to property has a special importance among fundamental rights and freedoms, since it is accepted that all other rights are derived from it. The right to property was accepted as an absolute and unlimited right, especially until the 18th and 19th centuries. However, in the 19th century, this absolute and limitless feature gradually decreased. In the past, property was seen as one of the inviolable, sacred and natural rights, but today this view has changed and the right to property has begun to be seen as a social right.

### **The nature of the property right according to the 1982 Constitution**

Article 35 of the 1982 Constitution regulating the right to property is the same as the text of Article 36 of the 1961 Constitution regulating the right to property. However, the 1982 Constitution's view of the right to property is quite different from the 1961 Constitution.<sup>1</sup>

The 1982 Constitution gave weight to the state in the individual/state balance due to the influence of the conditions that created it, namely, the military coup government. For this reason, the legislator has been given important powers in terms of limiting the right to property. Unlike the 1961 Constitution, the right to property is not regulated between "social and economic rights and duties", but among "the rights and duties of the individual".<sup>2</sup> The Constitution adopts private property on the one hand and the limitation of this right on the other hand, with a mixed approach. Article 35 of the Constitution states that everyone has the right to property and inheritance, and private property is accepted as the basis. If the

---

<sup>1</sup> (Kursat Akca, *Anayasa Mahkemesi Kararlarında Mülkiyet Hakkı* 2015, P.55)

<sup>2</sup> (H.Burak Gemalmaz, *Mülkiyet Hakkı* 2018, P. 4)

regulation of the property right among the rights and duties of the individual is added to this, it is clear that this approach is seen as a choice in terms of the state system. However, the Constitution stipulated that the right to property can be limited for the public benefit and cannot be used contrary to the public interest, and for this reason, it has given great importance to the social aspect of the right to property.

The 1982 Constitution sees the understanding of property as an absolute and unlimited right, as in the classical understanding of property, but accepts that property imposes duties on individuals as well as rights. However, it is not possible to say that an unlimited right to property was adopted in the 1982 Constitution. The understanding of the social state adopted by the Constitution adopts that the benefit of the society, not the individual, should be prioritized in situations where individual benefit and community benefit meet. The Constitutional Court also gave importance to the social function of the property right, even though this right was regulated in the classical rights section in the 1982 Constitution and stated that the property right could be restricted in cases where the public interest required it. Therefore, the only result of the regulation of the property right among the rights and duties of the individual in the Constitution was that the property right could not be regulated by decrees having the force of law in ordinary periods.

### **Rights**

The Constitutional Court, adopting the approach accepted by Roman law regarding the rights granted by the property right to the person, states that the property right allows individuals to use, benefit from and dispose of their property. Although the Court gives the impression that the concept of property is evaluated in terms of property law with this approach, it is an important determination in terms of determining the scope of this right.

<sup>3</sup>However, considering that the elements to be considered as property are not limited to objects with tangible assets, and that non-material elements such as intellectual property rights are also considered as property, evaluating the scope of property right in terms of property law may also mean restricting the quality of the right.<sup>4</sup> In this context, the classification coming from Roman law and adopted by the Constitutional Court regarding the powers granted to individuals by the right of property is not very meaningful. In addition, since the property right is a dynamic element, it is affected by the conditions of the society in which it is located.

---

<sup>3</sup> (H.Burak Gemalmaz, *Mülkiyet Hakkı* 2018, P. 5)

<sup>4</sup> Anayasa Mahkemesi'nin 17.06.1992 tarihli ve E:1992/22, K:1992/40 sayılı kararı, Resmi Gazete T/S: 09.01.1995/22518.

## **Duties**

Contrary to the classical understanding of property, in the understanding of social property, there are the duties that the right of property provides to individuals as well as the duties that it imposes on individuals. In particular, this issue can be seen as a reflection of the social rule of law principle mentioned in Article 2 of the Constitution. Although the right to property is regulated in the section of the rights and duties of the individual in the Constitution, the social aspect of the right to property has not been neglected. In Article 35 of the Constitution, it is emphasized that the use of the right to property cannot be contrary to the public interest. Therefore, individuals are obliged not to use their possessions contrary to the public and community benefit, and especially to comply with the restrictions imposed by the laws. The Constitutional Court also includes the right to property; It is defined as the right of a person to use something as he/she wishes, to benefit from its products, to decide on this property, provided that it does not harm the rights of others and comply with the limitations imposed by the law. This definition also imposes not only rights but also some duties on individuals.

In addition, Article 12 of the Constitution covers fundamental rights and freedoms; It shows that it imposes responsibilities and duties on the person as well as rights. Looking at the justification for the article, it is seen that individuals have to take into account the duties and responsibilities in Article 12 while using their rights and freedoms. The abuse of fundamental rights and freedoms is also captured in Article 14 of the Constitution. According to the article, fundamental rights and freedoms cannot be used in the form of activities aimed at disrupting the indivisible integrity of the state with its territory and nation and abolishing the democratic and secular republic based on human rights. Due to these limitations, people have to use their property within the limits determined by the legal order and within the duties assigned to them.

## **Limitation of Property Rights**

Article 35, which is the general provision for the limitation of the property right in ordinary periods, stipulates that the property right may be limited for the purpose of public interest. Article 13 of the Constitution, which regulates the restriction of fundamental rights and freedoms, is also applicable to the right to property.<sup>5</sup>

---

<sup>5</sup> (H.Burak Gemalmaz, *Mülkiyet Hakkı* 2018, P. 100)

In addition, there are many provisions in the 1982 Constitution that result in the restriction of the right to property. As an example of these provisions, Article 46, which regulates the expropriation of privately owned immovables in cases where the public interest necessitates, can be given. Therefore, in ordinary periods, in terms of the purposes of limitation of the property right and the conditions that must be included in the limitation, Articles 13 and 35 and the articles that indirectly restrict the right to property should be applied. Article 35 of the Constitution stipulates that the right to property can be restricted for the purpose of public interest. The right to property until the 2001 amendment to Article 13 of the Constitution; It could be restricted for the reasons listed in both Article 35 and Article 13. However, with the amendment made in 2001, the basic provision in terms of limitation of property right was Article 35.

According to the Constitutional Court; The social state of law mentioned in Article 2 of the Constitution; State should ensuring that people live in peace, prosperity and happiness, taking social, economic and financial measures for the stable development of working life, protecting employees and enabling them to live humanely, takes the necessary measures for the fair distribution of the national income, and establishes social justice and social balance by protecting the weak against the strong.<sup>6</sup> In this context, it may be necessary to implement different economic and social policies from time to time in order to realize the social state of law. In order to implement these economic and social policies, it is possible to impose restrictions on the right to property from time to time.<sup>7</sup> Because in the social state, when the general interest of the society and the individual interest conflict about the right to property, the state gives weight to the interest of the society. In other words, in the social state understanding, in areas where the benefit of the individual and the benefit of the society conflict, the state has always prioritized the benefit of the society as a principle.

### **The Concept of Benefit of the Society**

The rule that property can only be limited for the purpose of public interest, on the one hand, constitutes a limitation purpose by allowing the law keeper to limit the property right in cases where the public interest requires it. On the other hand, it establishes a limitation limit by stipulating that the property right cannot be limited except for the purpose of public interest. However, the concept of public interest is a very broad and subjective

---

<sup>6</sup> Anayasa Mahkemesi'nin 21.11.2000 tarihli ve E:2000/77, K:2000/49 sayılı kararı, Resmi Gazete T/S: 15.03.2002/24696.

<sup>7</sup> Anayasa Mahkemesi'nin 21.11.2000 tarihli ve E:2000/77, K:2000/49 sayılı kararı, Resmi Gazete T/S: 15.03.2002/24696.

concept, and for this reason, there is no agreed concept of public interest. Moreover, it is known that the concept of public interest does not have a static meaning, it may differ from state to state, and different meanings can be attributed to it in different periods of society. Although there is the concept of public interest in the expropriation law in Turkey, the definition of this concept has not been made by the legislature. Therefore, governments do not hesitate to use this uncertain environment for their own interests. The Constitutional Court, without defining the concept of public interest, is content with determining whether the legal norm in question is in accordance with the public interest. According to the Constitutional Court, determining the situations required by the public interest is at the discretion of the legislator.<sup>8</sup> However, this authority of the legislator is limited with the constitutional norms, therefore the legislator has to make arrangements in accordance with the constitutional principle in the evaluations that fall within the discretion of the legislator.<sup>9</sup>

### **Limiting the Right to Property in the Light of Constitutional Court Decisions**

Article 35 of the Constitution, which regulates the right to property, states that the right to property can only be limited by law. In Article 13 of the Constitution, it is stated that fundamental rights and freedoms can be limited only by law, without prejudice to their essence, depending on the reasons specified in the relevant articles of the Constitution, and that these restrictions cannot be contrary to the Constitution, the requirements of the democratic social order and the secular Republic, and the principle of proportionality.<sup>10</sup> These conditions listed in Articles 13 and 35 are as follows:

#### **Limitation by Law**

Restrictions on the right to property must be made by law in the formal sense. A restriction imposed by any legal norm other than the law will constitute a violation of Articles 13 and 35 of the Constitution, even if the restriction is in the public interest.

#### **Compliance with the Word and Spirit of the Constitution**

The concept of the word and spirit of the Constitution refers to the entire Constitution as a whole. In this context, the restrictions to be imposed on the right to property should be in accordance with the general philosophy of the Constitution and the basic meaning derived from it.

---

<sup>8</sup> Anayasa Mahkemesi'nin 17.06.1992 tarihli ve E:1992/22, K:1992/40 sayılı kararı, Resmi Gazete T/S: 09.01.1995/22518.

<sup>9</sup> Anayasa Mahkemesi'nin 17.06.1992 tarihli ve E:1992/22, K:1992/40 sayılı kararı, Resmi Gazete T/S: 09.01.1995/22518.

<sup>10</sup> Anayasa Mahkemesi'nin 21.06.1989 tarihli ve E:1988/ 34, K:1989/26 sayılı kararı, Resmi Gazete T/S: 05.12.1989/20363.

### **Not Contrary to the Requirements of the Democratic Social Order**

Limitations on the right to property must not be contrary to the requirements of a democratic society. Instead of the "principle of touching the essence of the right" in the 1961 Constitution regarding the limitation of fundamental rights and freedoms, the principle of "not being contrary to the requirements of a democratic society" was adopted in the first form of the 13th article of the 1982 Constitution. There are several important reasons for this change: The first of these is the requirement that the measures restricting fundamental rights and freedoms be in accordance with the democratic system want to be guaranteed by the constitution. The second reason is that the concept of "requirements of a democratic social order" is more specific than the concept of "essence of right". According to this justification, it is easier to know what the concept of "requirements of a democratic social order" is than to define the concept of "essence of right".

### **Not Contrary to the Requirements of the Secular Republic**

Although it was not included in the 1961 Constitution and the first version of the 13th article of the 1982 Constitution, according to this principle, which was included in the text of the article with the 2001 amendment to the 13th article of the Constitution, restrictions cannot be contrary to the requirements of the secular Republic. The reason for this article may be that some of the communities that make up the Republic of Turkey are anti-secular.

The Constitutional Court emphasizes that the term "secular" used here is different from the concept of secularism in western countries for religious and social reasons.<sup>11</sup>

### **Compliance with the Principle of Proportionality**

The principle of proportionality can be defined as the means used for the limitation of a right to be suitable in terms of reaching the goal desired to be achieved with the limitation. The principle of proportionality is a concept that describes the relationship between the means used for restraint and the consequences of restraint. The main purpose of the principle of proportionality is to prevent the excessive restriction of fundamental rights and freedoms. In fact, in the justification of Article 13, it was stated that there should be a balance between the restriction and the purpose, and it was stated that it was not possible to make more restrictions than the purpose required.

---

<sup>11</sup> Fendoğlu, H. T., (2002) "2001 Anayasa Değişikliği Bağlamında Temel Hak ve Özgürlüklerin Sınırlanması AY. M. 13" Anayasa Yargısı Dergisi, Yıl: 2002, sayı: 19, s. 134.

## **Conclusion**

The right to property is regulated under the title of Rights and Duties of the Person in the 1961 and 1982 Constitutions in 3 paragraphs in Article 35. In the first paragraph, where the right to property is recognized, it is emphasized that everyone has the right to property, and in the second paragraph, it is stated that the right to property can be limited for the purpose of public interest. In the third paragraph, it is stipulated that the property right cannot be used by the owner against the public interest. The right to property is not an absolute right. According to our Constitution, the right to property can be limited for the purpose of society and public interest. However, both the concept of public benefit and the concept of community benefit are very flexible, broad and arbitrary concepts. Therefore, these concepts should be interpreted as narrowly as possible. There is no consensus in the doctrine about what these concepts mean. As a matter of fact, the Constitutional Court considers these two concepts to be equivalent in the majority of its decisions.

As a result, the right to property is under constitutional guarantee in Turkey. It should not be forgotten that this constitution was prepared by a government that came to power through a military coup. Although the right to property is under constitutional guarantee, the law in Turkey has become highly politicized and this constitutional guarantee has lost its credibility.



## References

Anayasa Mahkemesi'nin 17.06.1992 tarihli ve E:1992/22, K:1992/40 sayılı kararı, Resmi Gazete T/S: 09.01.1995/22518.

Anayasa Mahkemesi'nin 21.11.2000 tarihli ve E:2000/77, K:2000/49 sayılı kararı, Resmi Gazete T/S: 15.03.2002/24696.

Anayasa Mahkemesi'nin 17.06.1992 tarihli ve E:1992/22, K:1992/40 sayılı kararı, Resmi Gazete T/S: 09.01.1995/22518.

Anayasa Mahkemesi'nin 21.06.1989 tarihli ve E:1988/ 34, K:1989/26 sayılı kararı, Resmi Gazete T/S: 05.12.1989/20363.

Fendoğlu, H. T., (2002) "2001 Anayasa Değişikliği Bağlamında Temel Hak ve Özgürlüklerin Sınırlanması AY. M. 13" Anayasa Yargısı Magazine, Year: 2002, No: 19.

H.Burak Gemalmaz, *Mülkiyet Hakkı* 2018.

Kursat Akca, *Anayasa Mahkemesi Kararlarında Mülkiyet Hakkı* 2015.