

## **The right to property is a constitutional restriction on the work of the tax legislator**

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### **Abstract**

The study aims to reach a common point that achieves a balance between two interests, which are generally in conflict with the public interest and the interest of the individual owner of private property, by extrapolating the provisions of the constitutional judiciary that include the protection of private property, and this protection extends to every right of financial value and is not limited to a specific type, but It included everything that can be estimated with money, as ownership is no longer an advantage for the owner, but rather has become a right for him and a social function. The tax is imposed on what is derived from it, but if there is a need to prejudice it, the conditions, limits and restrictions expressly stipulated in the constitution.

**Keywords:** private property, tax, social function, constitutional restriction

### **Introduction to research**

Proceeding from the constitutional legislator's view of the right of ownership, that it is no longer a privilege for the owner only, but has become a right for him and a social function, as these restrictions have been numerous and expanded, and in fact there is nothing to prevent the legislator from interfering by imposing restrictions that limit the owner's powers to draw the limits that the owner must observe For his exercise of the right of ownership, as well as the restrictions imposed by the constitutional legislator on the legislative authority when regulating this right in general and imposing taxes in particular, in order to achieve a balance between the interest of society and the right of the owner.

Several questions were raised: What is the scope of protection for this right? What is the authority of the legislature to impose a tax on the origin and essence of the right? Does it achieve what the modern positive systems seek of imposing a tax on the right of property achieve the common good of the individual and the group?

The problem is that the property tax law has exposed the right of private property to impose a tax on a periodic and renewable basis, and specified its container, which leads to the demise of the capital imposed on it in whole or in part, which led to its confiscation.

Since the right to property is a constitutional officer that the constitutional legislator has set as a restriction on the work of the ordinary legislator when legislating laws whose subjects directly or implicitly affect property, including tax laws, we aim to reach a common point that achieves a balance between two interests that are in most general conflicting, namely, the public interest and the interest of the individual. In order to achieve the social function of

private property.

Therefore, our approach in the research is the descriptive analytical method in light of the analysis of the constitutional and legal texts, and half of those texts are based on what jurisprudence and constitutional judiciary went to.

### ***First, the concept of property right***

#### ***1- Defining the right of ownership***

The right of ownership is the right to monopolize a thing by using it, exploiting it and disposing of it on a permanent basis, all within the limits of the law. Thus, it becomes clear that ownership consists of several elements, and these elements, if they meet, are in front of ownership, which are: legal authority (use, exploitation and disposal), owned money, creditor money as, debtor society (), and the right of ownership has characteristics, the most important of which are: it is a comprehensive right characterized by comprehensiveness in the sense It is a right that entitles its owner to all the advantages that can be obtained from the thing in accordance with its requirements, as it is a right that is invoked against all, and everyone is obligated to respect it and not to attack it or hinder its owner from using it( ).

#### ***2- The nature of private property***

The conflict of adapting the nature of ownership is the two directions of the individual trend and the collective trend, as well as the modern trend, for private ownership according to the individual trend is an absolute right of the individual and the meaning of the absolute right is the right that is not bounded by borders or restrictions (), but according to the collective trend, ownership is not an absolute right as he sees Supporters of the individual tendency, but rather it is a social function that is practiced to achieve the public interest, and this function is determined by the legislator and the competent authority in the state. He must use the thing in his possession for the benefit of the community and meet its needs, as well as contribute to the progress of society (Knapp & Jongerden, 2020; Romano, 2020; Yesiltas, 2021).

As for the modern trend, private property is a right that has a social function (), it sees that private property combines two elements, the first is that it is an absolute right, and the second is that it is an absolute right, but it may be exceptionally restricted. On the other hand, this trend emerged which sees that private property is a right that has a social function in order to balance the right of the owner with the rights of the community. The social development of the right to property has now become a modern social trend that made it necessary to understand the right to private property in the light of the wisdom and considerations that made it possible to recognize this right as one of the as for the basis of the social role of private property, it is based on two considerations. The first is the observance of the principle of social solidarity and considerations of justice and equality, and what this imposes on the necessity of cooperation and participation of all members of society. As for the consideration the second must be taken into account that the right to private property is not the result of the work done by the owner, but rather it is also the result of society's contribution to the establishment, preservation and protection of this property. O, therefore, this property must have a role towards this society, which is expressed by the social role

### ***Second: Constitutional and legal protection of the right to private property***

The right to private property is one of the rights guaranteed to protect it under the constitutions of countries, including the text of Article (23/first) of the Iraqi constitution in force for the year 2005, which stipulates "Private property is protected and the owner has the right to benefit from it, exploit it and dispose of it within the limits of the law" as well as the

Egyptian Constitution of 1971 Article (34) of it stipulates: “Private property is safeguarded and it may not be imposing guard on it except in the cases specified in the law and by a court ruling”

The right of property stipulated in its constitutional maintenance is a constitutional officer of tax legislation and a framework for it.

### **1. *Protection of all types of property rights***

The court gave a scope for private property that accommodates all ideas, as the Egyptian Supreme Constitutional Court indicated in one of the reasons for the decision: In kind, or was it an artistic, literary or industrial property right, which means its expansion of funds in general, which means its expansion of funds in general.... The contested law had a negative impact on the positive elements of the taxpayer's financial disclosure, detracting from it without justification. It includes - by this - an aggression against private property in violation of Articles 32 and 34 of the Constitution (") thus referring to what the court has settled on the definition of property: it is every right of financial value. Thus, it is not restricted to a specific and specific type of rights, but rather extends that property. To every right of financial value, and here the court begins by defining the scope of ownership by saying whether it is a personal or real right, or an artistic, literary, or industrial right.

The question that arises is whether the census by the court of property rights (artistic, literary, or industrial) was exclusively or for example?

- 1) It seems that the court intended this plurality to mention images of property as an example but not limited to because it generally includes all funds, and thus it included everything that can be estimated in money with the protection stipulated in the constitution for private property.
- 2) Accordingly, the court shows that a law that does not adhere to the constitutional rules and regulations is subject to appeal and is not considered immunized, and thus has likened the infringed property from the law to aggression without justification by saying - detracting from it without (imperative) - that is, without justification.
- 3) Protection of the right of ownership in terms of the origin of the right and its branches

The court confirms that the right to property is absolutely protected and protected by the constitution by stating its sanctity and not being violated. On what the constitutional legislator wanted to convey to us of an understanding of ownership, which is also what indicates the court's reference to those articles of the constitution. And since the Constitution, in Article (34), was keen to stipulate the preservation of private property, which is represented - in accordance with Article (32) - in unused capital, it ensured that it would not be touched except by way of exception and within the limits and restrictions it mentioned, considering that it - in The origin is a fruit that results from the special effort made by the individual, and as an incentive for him to move forward and advance, so he is singled out for the money he owns and to prepare it for the beneficial use of what brings its fruits back to him. It may be restricted without a necessity dictated by a legitimate interest. Therefore, it results in a clear aggression against their private ownership and its sources, and a violation of their freedom to choose the best way according to their estimation to invest their money.

Apparently, the court's mention of untapped capital means that the funds, whatever their type is real estate (arsa) or untapped funds, are the untapped capital (private property), which ensured that it is not affected as we indicated above with the meaning of Article (32) ( )

The legislator, when drawing up the tax policy, must not touch it, as it is the fruit of an individual's effort, and secondly, violating it represents a violation of the individual's freedom to choose the most appropriate way to invest his money.

I would like to ask what is the intent of the court from the essence of the right to private property? Does the right of ownership branch from it? Is each of the origin of the right or its essence protected without its branches? Or with branches that includes protection?

Most modern constitutions stipulate not prejudice to the origin of the right. Either ownership has an original right, which is (the eye), and what is subdivided from it is (the right to use, the right to exploit, and the right to dispose), and that private ownership includes you the origin of the thing and the right branched from it, but the following question arises whether Is the tax and public savings imposed on the origin of the property, or on its offspring?

All of these constitutional texts () confirm that private property is protected in principle and may not be violated, and that the right to property has importance and a role in the political, economic and social system in the various constitutional systems, and some countries' constitutions embrace the individual doctrine that the right to property according to this concept is an absolute right It is sacred and is not bound by limits or restrictions, and it was considered that ownership is an absolute right of the owner and he has all the powers over what he owns even if he abuses his use of it, and this leads to harming the interests of others.

And that private property gives the owner complete sovereignty and control that allows him to misuse what he owns or let it vanish or be destroyed if he so desires (). This is the meaning that was brought by the French civil group issued in 1841, which defined the right of ownership as "the right to use something and dispose of it in an absolute manner to the fullest extent." The restrictions began to gradually intervene to degrade this right and limit its release until it gradually increased and expanded with the introduction of socialist systems and what required restricting absolute rights and subjecting them to the public interest to a degree that resulted in a change in the nature of the private property right as an absolute individual right to a right of a social nature (). And it seems that the thought that dominates the framers of the 1971 Egyptian constitution is the socialist thought, which will be reflected in man-made laws (ordinary legislation), which does not give to private property with the sanctification given by constitutions with capitalist thought (individual) as it is in the French constitution. ()

Referring to the court's decision (he ensured that it would not be violated except by way of exception and within the limits and restrictions he mentioned) (). When the court mentions the word exception, it comes to mind that the "original" is that the original may not be violated, and it is protected and protected in the constitution, and "the exception" can be infringed on private property, and that the exception cannot be expanded upon and cannot be compared to it, as it must be understood in the narrowest extent.

And it appears that this exception constitutes limits and protection for not being subjected to private property, and this protection comes from the Constitution (), and the constitutional judiciary also stipulated it by saying "he mentioned it" indicating that the constitutional legislator approved its protection that the exception must be explicitly stipulated in the constitution and not an assumption because The original does not need to be stipulated, and the exception is the one that must be stipulated, and for this protection to be granted, it should be mentioned in the constitution.

1) It is for the purpose of achieving the public benefit

- 2) There should be compensation
- 3) Compensation must be fair
- 4) Compensation must be paid in advance, which is a condition established by jurisprudence and mentioned in the Egyptian Constitution of 2014 in Article (35).

Thus, the court referred to the scope of protection, as the exception is restricted by conditions, restrictions and limits that were mentioned and determined by the constitutional legislator() and it seems that the court sets a road map for us to understand those limits and restrictions imposed on the exception and to set a scope for them in case they are vague and unclear, which is the criterion of the budget that it establishes Ordinary legislator perfectly professional between the private interest - the private property of the owner - and the public interest of society.

This means that when we put private property in two scales, it must be in an equal and equal balance with the public interest, so we must not weigh any of the two interests, and we must understand those restrictions within the limits of balancing the two interests.()

It seems that the legislator set these conditions to secure the immunity of private property and not to deprive the owner of his property without his consent () because - the origin - and the public interest usually prevails over the private interest, except in private property because it is the fruit of individual efforts made by the owner as an incentive to the Starting and progressing, two characteristics that confirm that the meaning of the right of ownership is an absolute right. It is a feature that is not distinguished by ownership only, but for all rights in kind to distinguish them from personal rights. - A fruit that results from the individual's own effort, and as an incentive for him to move forward and advance, so he is exclusively concerned with the funds he owns and preparing them for the beneficial use of what will return to them, in addition to the fact that the funds to which the right of ownership is returned are among the sources of national wealth that should not be neglected. And since, within the framework of modern man-made systems, ownership is no longer an absolute right that is intractable to legislative regulation, it has become justified to place it under the restrictions required by its social function, whose scope and goal are determined by observing the budget that is imposed on it. The legislator conducted it - in light of the provisions of the constitution - between the private interest of the owner and the public interest of society.

It was also confirmed by the Constitutional Court in another ruling (and since all successive Egyptian constitutions, since the 1923 constitution, have been keen on the principle of preserving private property and not infringing on it, the highest way of exception, and the restrictions stipulated in the constitution, because it is originally considered the fruit of individual activity and its incentive to launch and progress.

It seems that private property is the fruit of absolute individual activity has begun to decline and there has become a state intervention in that fruit by providing an environment (constitutional, legislative, economic and security) to protect that fruit (private property) and because it is part of the national wealth, hence the idea of "social function" that It allowed exposure to private property as an exception and with the restrictions and limits mentioned by the constitution.

This is the meaning that was brought by the French civil group issued in 1841, which defined the right of ownership as "the right to use something and dispose of it in an absolute manner to the greatest extent." The restrictions began to gradually intervene to degrade this right and limit its release until it gradually increased and expanded with the introduction of

socialist systems and what required restricting absolute rights and subjecting them to the public interest to a degree that resulted in a change in the nature of the private property right as an absolute individual right to a right of a social nature.()

The French jurisprudence has gone to the idea of the social function of the right of private property that would introduce a fundamental change to the power of use of the owner. This authority is no longer absolute and unrestricted, so that the owner, when exercising his authority to use his right of ownership, must take into account the public interest. The right is absolute but has become restricted and conditional. This social right and that the use by which the owner deviates from this goal is illegal use.

The Egyptian legislator referred to the social function in the 1971 constitution in Article 32, but we note that the court stated: It is no longer permissible for the legislator to affect its elements, nor change its nature, or strip it of its supplies, nor separate it from some of its parts, or destroy its origin, or restrict the exercise of rights that branch from it. Unnecessarily required by its social function. Without that, ownership loses its essential guarantees, and aggression against it is forced, it is subject to its confiscation.” ) without prejudice to the origin, which is private property, and thus the court gives the scope decreed for the constitutional protection of private property revolves around the origin of ownership, and the need for a careful balance between the rights arising from this property, which is represented by (use, exploitation and disposal) and between the restrictions that can be The legislator imposes it on the rights that are derived from this property, meaning that private property is the original outside the equation, and it is a new standard that differs from what was mentioned in Case No. (5) of the judicial year 10, saying: which I have mentioned). When the court mentions the word exception, it comes to mind that the “origin” is that the original is not to be violated and is protected and protected in the constitution, and “the exception” can be infringed upon private property, but with conditions and restrictions set by the constitutional legislator () and we establish a balance when applying the restrictions and limits that stipulated The constitutional legislator must, in the event of a lack of understanding between private property and the public interest, which in turn has become for private property a social function and a role in the national wealth.

The court pointed out that there is another dimension to private property, that it has a social function, saying: “This deprives it of its role as a base for the national wealth, which may not be drained by imposing restrictions that are not required by its social function, which means that property should provide it with protection that helps it to perform Its role, and guarantees the harvesting of its fruits, products and accessories, and in a manner that protects them from being exposed to it by others, whether by reversing it or by detracting from its parties.()”

It is clear from the foregoing opinion of the judiciary that the legislator restricts and regulates all the branches of ownership and it is possible to impose a tax on the branches, but it does not reach the depletion of the asset and this depletion or confiscation makes the property worthless and cannot fulfill its role as having a social function and when leaving this framework will be achieved Damage not only to the owner, but also to the social function of ownership as a part of the national income. The failure of this part of the income to interact with the rest of the elements of the national income leads as a result to be an obstacle to increasing this income and gradually will lead to the depletion of the national wealth, so this ownership must carry restrictions Which achieves its objective, which is the social function, as well as achieves its scope and goal, taking into account the balance between the restrictions and limits mentioned by the constitutional legislator and the public interest (society) on the grounds that these restrictions are not intended for its own pleasure, but rather to achieve the common good of the

individual and the group.

The court indicated that it is not permissible for the legislator under the pretext of regulation to exceed the limit of the depletion of its elements (use, exploitation and disposal) and arrive at the original protected by the constitution and a number of matters that the legislator must take into account when regulating that right on the elements, namely:

- 1) That it does not change its nature or strip it of its supplies.
- 2) Not to separate it from some of its parts.
- 3) That it does not destroy its origin or restrict the exercise of the rights that branch from it without the necessity of its social function.

Anything contrary to this is considered aggression and confiscation of a right protected in the constitution.

### ***3- Extent of the constitutional and legal protection of the right of ownership in terms of time***

We start by asking, is it possible to imagine the existence of a future, right? What is the extent or scope of protection for those future rights? We have previously indicated that the court gave a scope for private ownership that accommodates all ideas, as the Egyptian Supreme Constitutional Court indicated that “(every right of financial value)” () is a definition of ownership. Thus, it is not restricted to a specific and specific type of rights, but rather extends that ownership to everything that is estimated with money. This indicates that it generally includes all funds, and thus it has included everything that can be estimated in money with the protection stipulated in the constitution for private property.

And she stated by saying, "(And since the protection imposed by the constitution for private property and what was done by the judiciary of this court extends to all its forms) () and we see that the court says that the protection imposed by the constitution for that property, as well as what the judiciary of this court has settled on - and we know that the decisions of the court Supreme Constitutionalism is final and binding for itself and for everyone - that it extends to all its forms because the idea of right or property is a flexible idea that accommodates current or future private property.

Likewise, Article (23/first) of the Iraqi constitution in force for the year 2005, which stipulates that “private property is inviolable, and the owner has the right to benefit from it, exploit it and dispose of it within the limits of the law” that property is safeguarded, i.e. protected, and that this protection is absolute and that the absolute applies to absolute, as it is not specified. If this protection is future, current or potential, after we have concluded that ownership extends to everything that can be estimated with money, and this is called flexible formulation by developing a general idea to accommodate future developments and changes.

It seems that it is possible to imagine the existence of future rights that arise within the owner's right to use, exploit and dispose of, such as a person depositing a sum of money in the bank to obtain interests in the future, but the idea is not to imagine the existence of the future right or not to imagine it, but rather the problem is that The constitution protects this future right or does it not protect?

Apparently, the idea of protection for current and future ownership revolves around the constitution. If the constitution includes protection for a type of future or potential property right, there is no objection to that, and this is what it stipulates in most constitutions by using

flexible wording that can accommodate and organize everything that is possible. It may occur in the future, but if the constitution does not include such a type of protection, it is not possible to imagine a scope for protection for it.

## **Results**

The right to private property has a protection guaranteed by the constitution to extend to every right of financial value and was not limited to a specific type, but rather included everything that could be valued with money. The lack of a specific definition of private property due to the multiple points of view that it is in the socialist system is a right that is not absolute and in the individual system absolute right.

The private property is the unexploited capital and does not generate income. The “arsa” is protected by the provisions of the constitution, and that exposure to it that leads to its confiscation is aggression and contravenes the constitution that guarantees its protection.

The exposure to private property is possible as an exception expressly provided for in the constitution and with restrictions and conditions also specified by the constitution. We must establish a balance between the public interest and the private interest of the individual, which is also the scope or extent of protection even in the event of an exception.

The principle of the right cannot be violated, and that the tax is imposed on what is derived from it, but if there is a need to infringe upon it, it is possible, but as we mentioned with conditions, limits and restrictions expressly stipulated in the constitution.

Private property has a social function that makes property subject to restrictions that play an important social role.

The principle of the constitutionality of laws is the most important guarantee of the right to private property, and this is by ensuring that laws are not issued that contradict the constitutional texts related to the protection of the right to property. Considering the constitutional text as a guarantee of the right to private property or not depends on the extent to which all provisions of the constitution are ensured, i.e. respect for The constitution itself.

The extent of future protection of private property must be stipulated in the constitution so that the constitutional text accommodates that protection whether there are future or potential rights that it can accommodate.

## **Recommendations**

Cancellation of the Law No. (26) for the year 1962 for violating the constitutional provisions on the protection of the right to property.

Amending the legislation that regulates private property for individuals, the most important of which is the constitution, to include that private property is a right that has a social function.

We call on the constitutional legislator to enable individuals and bodies to challenge before the Federal Court the constitutionality of laws and decisions that have the force of law in a manner that ensures respect for the constitution. Including a guarantee of respect for private property.

Amending Article 23 of the Iraqi constitution to include granting compensation in



advance before the seizure, as the Egyptian legislator did in the 2014 constitution in Article 35 when he set the conditions for exposure to the origin of private property as an exception to the original.

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## Constitutions and laws

- 1) The Egyptian Constitution of 1971
- 2) The Egyptian Constitution of 2014
- 3) The Iraqi Constitution of 2005
- 4) Egyptian Civil Law No. 131 of 1948

- 5) Iraqi Civil Code No. 40 of 1951
- 6) Property Claims Authority Law No. 13 of 2010
- 7) French Civil Code of 1841

### **Constitutional Court decisions**

- 1) Case No. 8 of Judicial Year 5 of the Egyptian Supreme Constitutional Court.
- 2) Case No. (5) of the 10 judicial years of the Egyptian Constitutional Court.
- 3) Case No. 43 of Judicial Year 17, the Egyptian Supreme Constitutional Court.
- 4) Case No. 105 of Judicial Year 24, the Egyptian Supreme Constitutional Court.
- 5) Judicial Case No. (308) of 2006, the Egyptian Supreme Constitutional Court.
- 6)