

## Legal Confiscation as a Property Right Issue in Turkey\*

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### Abstract.

Zoning plans are drawn and written texts prepared as a result of planning activities according to the characteristics of the region in order to meet the social, cultural, human and economic needs of a settlement and to show a safer and more regular development of the place. The property rights of individuals can be restricted by means of the plans prepared by the administration to create livable, orderly and modern living spaces. While the zoning plans are being prepared, the immovables allocated for public services should first be selected from public lands and if these immovables are not sufficient for the places to be allocated to the public service areas, the immovables subject to private property should be allocated to the public service and these areas should be expropriated by the administrations to be allocated on their behalf. The Zoning Law No. 3194 in Turkey is the basic regulation of the zoning law. In the Zoning Law, there is a regulation that the parcels allocated to public services in the zoning plans will be expropriated within five years. However, if the expropriation of the immovables is not completed within the time specified in the legal regulation, the owner who is deprived of his right to dispose of the immovable, is unfairly burdened with a heavy burden. The concept of "legal confiscation" emerges when the property right of the owner of the immovable is restricted for many years only by allocating privately owned immovables to public space in the zoning plans without any actual intervention by the administration. Since the administrations responsible for expropriation mostly avoid this obligation, the procedures established by the administration for planning constitute a disproportionate and unfair intervention in the property rights of the immovable owners. In this study, the definition of the concept of legal confiscation in Turkey, its elements, the remedies for ending the interference with the right to property will be explained, the procedures and principles to be considered during the judgement will be explained by giving examples from the judicial case-law and the decisions of the European Court of Human Rights, and solution proposals will be presented.

**Keywords:** Legal Confiscation; Construction Plan; Property; Contravention

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## Tuntutan Hukum sebagai Permasalahan Hak Properti di Turki

### Abstrak.

Undang-undang Zonasi No. 3194 di Turki adalah peraturan dasar dari undang-undang zonasi. Dalam UU Zonasi, ada aturan bahwa persil yang dialokasikan untuk layanan publik dalam rencana zonasi akan diambil alih dalam waktu lima tahun. Akan tetapi, jika pengambilalihan barang-barang tidak bergerak itu tidak selesai dalam waktu yang ditentukan dalam peraturan perundang-undangan, maka pemilik yang dirampas haknya untuk membuang barang-barang tidak bergerak itu, dibebani secara tidak adil dengan beban yang berat. Konsep "sita hukum" muncul ketika hak milik pemilik barang tidak bergerak dibatasi selama bertahun-tahun hanya dengan mengalokasikan barang-barang milik pribadi ke ruang publik dalam rencana zonasi tanpa intervensi nyata dari pemerintah. Karena sebagian besar administrasi yang bertanggung jawab atas pengambilalihan menghindari kewajiban ini, prosedur yang ditetapkan oleh administrasi untuk perencanaan merupakan intervensi yang tidak proporsional dan tidak adil dalam hak milik pemilik tak bergerak. Dalam penelitian ini akan dijelaskan pengertian dari konsep sita hukum di Turki, unsur-unsurnya, upaya penyelesaian untuk mengakhiri campur tangan terhadap hak milik akan dijelaskan, prosedur dan prinsip-prinsip yang harus dipertimbangkan selama penilaian akan dijelaskan dengan memberikan contoh-contoh dari kasus hukum peradilan dan keputusan Pengadilan Hak Asasi Manusia Eropa, dan proposal solusi akan disajikan.

**Kata Kunci:** Penyitaan Hukum; Rencana Pembangunan; Properti; Kontravensi

## Юридическая конфискация как проблема права собственности в Турции

### Абстрактный.

Закон о зонировании № 3194 в Турции является основным постановлением закона о зонировании. В Законе о зонировании есть положение, согласно которому участки, выделенные для общественных услуг в планах зонирования, будут экспропрированы в течение пяти лет. Однако, если отчуждение недвижимой вещи не завершено в сроки, указанные в правовом регулировании, на собственника, лишённого права распоряжаться недвижимой вещью, несправедливо возлагается тяжёлое бремя. Понятие «юридическая конфискация» возникает, когда право собственности владельца недвижимой вещи ограничивается в течение многих лет только путем отнесения частной недвижимой собственности к общественным местам в планах зонирования без какого-либо фактического вмешательства со стороны администрации. Поскольку администрации, ответственные за экспроприацию, в большинстве случаев избегают этого обязательства, процедуры, установленные администрацией для планирования, представляют собой несоразмерное и несправедливое вмешательство в имущественные права владельцев недвижимого имущества. В этом исследовании будет объяснено определение концепции правовой конфискации в Турции, ее элементы, средства правовой защиты для прекращения вмешательства в право собственности, а также будут объяснены процедуры и принципы, которые должны быть рассмотрены в ходе судебного решения, с помощью примеров из судебной практики и решения Европейского суда по правам человека, а также предложения по их решениям.

**Ключевые слова:** Конфискация; План Строительства; Собственность; Правонарушение

## A. INTRODUCTION

Property right, which is evaluated among the negative status rights concerning the classification about fundamental rights and freedoms (Gözler, 2018) and which was included among the inviolable rights for the first time with the Declaration of 1789 (Gülan, 1989), is an absolute right that gives the right to use, benefit and dispose of property (Gözübüyük, 2002).

The restriction on the right to property, which is guaranteed by Article 35 of the Turkish Constitution, should be made for the purpose of public interest, and the immovable owner should not be burdened with an unbearable burden (Sancakdar, 2014).

Article 618 of the Turkish Civil Code grants the owner the right to demand the return of his property and the prevention of interference from the person who unlawfully confiscated his property (İlgezdi, 2015).

Construction Law makes an important contribution to the development of urbanism (Gülan, 2011). The administration incorporates the immovables it needs by expropriating it and making an agreement with the owner on the price. However, although the administration sometimes starts to benefit from the immovables, it does not take the necessary actions to take the immovables into its own ownership. In confiscation without expropriation, which can be described as an intervention by the administration in the nature of an intervention to the property right, the intervention can be in the form of actual use (Karaca, 2018), or it can be in the form of the separation of private property into public service in the development plans of administrative action, that is, in the form of confiscation of the property, and this situation restricts the right of disposal of the property in the property of the owner.

## B. METHODS

In this study, implement a development plan, which is a new concept in the Turkish legal system and accepted by the public administrations; and legal confiscation, which is a state of restriction of ownership by taking the real estate into the public service function, have been examined. Since legal confiscation is a property right restriction due to construction plans, the subject has been examined within the framework of the Construction Law No. 3194, and the elements of legal confiscation have been explained. In addition, judiciary case-laws about the practices related to legal confiscation, a newly introduced concept

into the Turkish Legal system, and sample decisions regarding the point of view of the European Court of Human Rights are mentioned.

## C. RESULT AND DISCUSSION

### 1. Legal Confiscation

In Turkey, the first decisions regarding the immovables that are confiscated to be allocated to public services without expropriation process in the judicial decisions are related to the actual confiscation (Kaplan, 2012). Since 1956, the person whose immovable property has been interfered with without expropriation has the right to file a lawsuit against the intervention or demand the cost of the immovable in Turkey. However, for many years, the legal status of the immovables allocated to the public service with the zoning plans, on the grounds that there was no actual confiscation, were not accepted as confiscation without expropriation, and the lawsuits brought before the judiciary were rejected. In this process, individuals whose property rights have been restricted by the planning process of the administration, have applied to the European Court of Human Rights by exhausting the domestic legal remedies, Turkey was sentenced to pay compensation several times concluding that the property rights of the applicants against Turkey were violated (Çevik/Türkiye, 2011).

The Supreme Court Assembly of Civil Chambers mentioned for the first time in its decision dated 15.12.2010, numbered E:2010/5-662 and K:2010/651, that the administration did not fulfill its responsibilities regarding the legal confiscation. In the decision, it was decided that “the owner could not use the immovable allocated as a school area for more than twenty years and the property right of the immovable owner was limited as the administration had not taken any action for a long time regarding the immovable reserved for the school area in the zoning plan, had not prepared a zoning program to implement the zoning plans, had not expropriated or exchanged the immovables included in the zoning plan, and there was no legal regulation on when the zoning plans would be implemented” (Yargıtay, 2010). In the decision, referring to the Sporrang and Lonnroth decision of the European Court of Human Rights dated 23.09.1981, it was stated that the owners' inability to benefit from their immovables due to the construction ban imposed for years on the grounds of expropriation, and the restriction of the right of disposition on their immovables were a limitation that touched the essence of the right to property. With this decision, the Court of Cassation accepted that for the first time, confiscation without expropriation could also be realized with legal confiscation (Akyılmaz, Sezginer&Kaya, 2019).

After the decision of the Court of Cassation, amendments were made in the Expropriation Law to allow lawsuits due to legal confiscation, and legal assignment became the subject of legal regulation for the first time, and it was regulated that immovable owners whose ownership rights were restricted due to implementation zoning plans could file a lawsuit in the administrative judiciary after the administrative application and proceedings were completed (Yıldırım, Yasin, Kaman & Özdemir, 2009).

The Constitutional Court decided in the annulment lawsuit filed for the annulment of the legal regulation on legal confiscation that “in case the expropriation process of the immovables included in the zoning plans is not completed within five years, the owner is burdened with excessive burden due to the failure to compensate the damage of the owner, it imposes an excessive burden on the owner of the immovable and in this case the fair balance is disturbed against the immovable owner (AYM, 2018). In the decision, it is foreseen that the owner of the immovable property whose property is restricted can file a full remedy action for the compensation of the damage without even the need for a reconciliation application to the administration.

### **1.1. Definition of Legal Confiscation**

Legal confiscation is the intervention of the administration to the property right by preventing or restricting the use of the property right of the owner for a long time. (Akyılmaz, Sezginer & Kaya, 2018). In order to perform public services, the administration may restrict the right of disposition of the immovable owner by actual interventions to a privately owned immovable property without complying with the procedure in the Expropriation Law No. 2942 or sometimes by being passive, silent or not taking action for which it is responsible for (Aydın, 2018). However, legal confiscation should not be confused with the “regulation partnership share”, which is taken up to a value not exceeding 45% of the immovables in the zoning application as compensation for public service, without expropriation decision, without the consent of the immovable owners, without paying and for public benefit, according to Article 18 of the Construction Law (Kalabalık, 2017). Within the scope of the authority given to the administration by law, that is, within the scope of the authority to make a zoning plan, the restriction on the privately-owned immovable is called legal confiscation, but if this restriction lasts more than 5 years, then the unlawful process begins.

According to the Zoning Law, municipalities are required to prepare 5-year zoning programs for the implementation of the zoning plan within a period of at least 3 months from the effective date of the zoning plan. This period is the maximum period foreseen for the completion of the expropriation of the immovables allocated to public services by the zoning plan by the administration. Therefore, the expropriation process should be started as soon as the real estate is allocated to public services.

Since the immovables that are privately owned for purposes such as parks, mosques, roads, squares, schools, municipal service areas reserved for public services in the zoning plans are not be expropriated or bartered for a long time in the zoning programs in which they are included, or the immovables allocated in this way in the zoning plan are not included in the zoning program for a long time, and most importantly, since there is no law compelling the administration to take these actions, the administration remains inactive by not taking any action, the owner's right of ownership is restricted, the right of disposal on the immovables is prevented, it is also unclear how long the ownership right of the lands where construction is not allowed and the buildings where substantial changes and additions are not allowed will be restricted (Çolak, 2014); therefore, the essence of the property right is touched by the administration. (Yasin & Şahin, 2015). After the zoning plans are finalized, the most important responsibility of the administration is to prepare and implement the zoning programs within the periods specified in the law (Semin, 2018).

After the implementation development plan is finalized, in the event that no plan change or zoning application or expropriation is made by the administration within the legal period of 5 years, the problem of legal confiscation arises for the privately-owned immovable. In fact, if a lawsuit is filed before the end of the 5-year period due to limitation and even if the time passes during the trial, it is concluded that the administration has neglected its duty and a violation of the right to property and fair trial is determined (Firdevs Serim vd, 2019).

If the zoning plan for the immovable whose property rights are restricted by the zoning plan is cancelled and the immovable is divided into public service areas with the new zoning plan and the property right of the owner continues to be restricted, the effective date of the cancelled previous zoning plan is taken into account within the 5-year period specified in the law.

## **1.2. Conditions of Legal Confiscation**

Five-year zoning programs for the implementation of the zoning plan become final after they are approved by the municipal council, within 3 months at the latest after the zoning plans come into force. In the zoning program, the areas allocated to public institutions for public services should be expropriated.

### **1.2.1. Inclusion of the Immovable in the Area Remaining in the Implementation Zoning Plan**

In the zoning planning, the social and economic characteristics of the settlements are evaluated and a plan is made by aiming at the services that should be provided for the future needs of the area (Yaşar, 2008). The zoning plans are the tools that enable urban planning to be embodied on the land. The use of the immovable property is restricted for the purpose of public interest, with zoning plans, which are in the nature of a general regulatory act. Master zoning plan and implementation zoning plan constitute the two main parts of the zoning plan (Danıştay, 1998).

Master zoning plans can be defined as a plan prepared as a whole, with plan notes on maps and a detailed report, at a scale of 1/5,000 drawn to in order to show the general use of the land plots, the main types of regions, the future population density of the regions, the development directions and sizes of various urban and rural settlements, their principles, urban, social and technical infrastructure areas, transportation systems, and to be the basis for the preparation of the implementation development plans. The report showing the preparation and implementation of the plan is an integral part of the plan.

Master zoning plans are an idea, estimation project that does not specify definite borders and shapes reveals the lines of the city in general terms, and cannot be used for practice (Orta, 2005).

And the implementation zoning plan is a plan that shows the building blocks of various regions on maps, their density and arrangement, roads and application stages and other information that will be the basis for the necessary development application programs for implementation. In order for a privately owned immovable to be subject to legal confiscation, it must be included in the remaining area in the implementation zoning plan. In the application plans, which are usually drawn at a scale of 1/1000, floor heights, building layout-numbers of floors, parcel sizes and infrastructure facilities and other application details are specified (Kalabalık, 2017).

### **1.2.2. Being Subject to Private Ownership of the Immovable**

Legal confiscation due to the inaction of the administration is possible only on an immovable subject to private ownership. If public administrations need real estate belonging to another public administration, they should apply for the procedure of transfer of goods between administrations (Gülan, 2000). In the case of confiscation of an immovable subject to private property without a duly expropriation process in accordance with the Expropriation Law, confiscation without expropriation will occur.

### **1.2.3. Permanent Intervention in Property**

In legal confiscation, the administration must have taken possession of the immovable permanently. Otherwise, the temporary restriction of the property right of the immovable owner is not accepted as a legal confiscation. The Council of State decided that the immovable that is the subject of the lawsuit in the private property of the owner has been in the "Olympic park area" in the zoning plans for many years, but the administration did not implement the plan, and did not expropriate the immovable that was included in the zoning plan or exchange it for another property in its possession, or legally confiscated by not taking any action instead of removing the restriction by making changes in Zoning Plan after the implementation zoning plan came into force and the time for filing a lawsuit would not expire since the damage of the immovable owner has not been compensated by the administration and the state of restriction continues (Danıştay, 2016).

### **1.2.4. Absence of Actual Confiscation of the Real Estate, Even Partially**

For the actual confiscation, the administration must take possession of an immovable that is subject to private ownership permanently and must have intervened against the right of disposal of the owner of that immovable property. Actual situation called *de facto* road is a different concept from legal seizure and in this case called *de facto* road, the administration starts to use the privately owned immovable in public services without expropriation and the lawsuits to be filed for the compensation of the damage must be resolved in the judicial court according to the provisions of private law (Danıştay, 2017).

According to the plans put into practice by the administration in order to carry out the public service, the lawsuits to be filed for the purpose of eliminating the damages caused by the establishment, operation and maintenance of facilities such as roads, dams, waterways, and water networks are full jurisdiction lawsuits and these lawsuits are heard in administrative jurisdiction.



If a part of a private law person's property is de facto called road, and if there is a limitation situation in another part of it by legally confiscating, the lawsuit to be filed must be filed in the judicial jurisdiction and this situation is not considered as legal confiscation. (Uyuşmazlık Mahkemesi, 2019).

### **1.2.5. Not Included in the Zoning Program**

According to Article 10 of the Zoning Law No. 3194, 5-year programs are prepared for the implementation of the zoning plan within 3 months at the latest after the zoning plans come into effect, and these programs become final after they are approved by the municipal council.

Although the administration is obliged to prepare the zoning programs in accordance with the laws within 3 months for the implementation of the plans, the sanction it will face if it does not prepare the zoning program within this period is not regulated in the law. In fact, the administration undertakes to expropriate the privately-owned immovables allocated to public services in the zoning plans, until the end of the fifth year at the latest.

The areas reserved for public services in the zoning plans are continued to be used by the owner of the immovable until the time it is included in the implementation zoning program; however, construction in these areas or substantial changes or additions to the buildings are not allowed. Due to the fact that the immovables allocated to the public area in the zoning plans are not included in the zoning program, the uncertainty about how long the use of the owner will continue limits the right of disposal of the immovable owners and an indefinite limitation occurs on the property rights. The balance between the public interest and the private benefit restricts the property right of the owner allocated to the public service with the zoning plan and this balance is disturbed (Anayasa Mahkemesi, 1999). If a change is made in the zoning plan with the application of the owner five years after the approval of the zoning plan, or if the administration abandons the allocation to the public service in the zoning plan, the restriction on the immovable is lifted (Kalabalık, 2017).

### **1.2.6. Restriction of the Immovable by a Legal Intervention**

Pursuant to Article 2 of the Regulation on Restricted Buildings, Estate and Land, the property rights of immovables located in areas reserved for public services in the zoning plans are restricted. Owners cannot use their authority arising from the right of ownership, since construction is not allowed until the land and land arrangement is made in the immovables that are reserved for public services in the zoning plans and have not been expropriated for years. Even if the public interest has given the authority to restrict the property right of

a privately owned immovable, the violation of the essence of the constitutionally guaranteed property right causes the fair balance between the rights and freedoms of individuals and the public interest to deteriorate.

Pursuant to Article 10 of the Zoning Law, the immovable allocated to the public area in the zoning plan must be included in the zoning program by the defendant municipality, and the immovables to be allocated to the public should be determined according to criteria such as appropriation, urgency, and urgency of the service to be provided by the administrations. Despite the fact that more than five years have passed within the scope of the zoning program, the defendant administration should not expropriate, and the fair balance between the public interest and the right of property should not be disturbed by pushing the utilization of the property right of the restricted immovable into uncertainty (Danıştay, 2013).

In order for the immovable to be considered as limited, the parcelling process must not have been carried out in the area and the immovable must not have been expropriated within the five-year period specified in the law.

#### **1.2.6.1. Condition Regarding Parceling**

The application of the zoning plans finalized under the concept of estate and land arrangement parcellation to the land, the separation and merger processes to create public services within the main parcel or parcels to create a zoning parcel is defined as the distribution of the zoning parcels to be constituted (Karaca, 2018).

Estate and land arrangement is a zoning planning application that aims to transform unsuitable cadastral parcels into suitable zoning parcels and areas suitable for construction (Ergen, 2006). The parcels combined with this application are arranged in accordance with the zoning plan and given to the owners of the immovable, and it is aimed to present the parts reserved for public areas to the public service (Kalabalık, 2017).

In legal confiscation, the right of disposition of the owners on the immovables is limited since there will be no construction until the estate and land arrangement, that is, the parcellation process, of the immovables that have been allocated to the public area in the zoning plans and have not been expropriated for a long time. After the areas reserved for public services are removed with the parceling process, the remaining part is divided into islands and parcels and distributed to the right holders, so confiscation does not occur in the parceled immovables (Danıştay, 2016). However, those who are not allocated immovables as a result of the land estate arrangement can file a lawsuit for legal confiscation.

If the administration does not take action by not expropriating the immovables allocated to public areas for more than 5 years, although the subdivision (implementation) process is not carried out, a lawsuit may be filed against the administration.

#### **1.2.6.2. Condition that the Immovable in the Public Area is not Expropriated**

One of the conditions of legal confiscation is that the immovables reserved for public use with zoning plans are not expropriated. If the administration files a lawsuit for the expropriation of a part of the immovable, then it is necessary to examine whether there is a restriction in terms of the part of the immovable that has not been sued. Since the immovables reserved for public services in the zoning plans due to legal confiscation are not implemented in the zoning plan for a very long time or they are not expropriated within 5 years, the immovable owners cannot carry out any construction due to the restriction, cannot obtain a license for the immovables built, or are forced to sell their immovables at very low prices compared to the value before they were allocated to the public domain (Danıştay, 2014).

## **2. Remedies Against Legal Confiscation**

There is no requirement to apply to the administration in order to solve the legal confiscation problem. If the immovables that have become restricted by the zoning plan by the administration are not expropriated within the five-year zoning program period, the owner of the immovable may request with a petition to expropriate the immovable or to remove the restriction by removing the immovable from its function reserved for "public services" in the implementation zoning plan, that is to make it suitable for private use such as housing, trade, etc., and to make changes in the zoning plan that will enable it to be made suitable for private use, such as the allocation to the zoning function (Erol, 2013). Upon application, administrations can conduct an examination of the immovable within the framework of environmental, urban planning principles and planning principles, and a plan change can be made to ensure that the property right is used without restriction and that the immovable is disposed of without restriction (Danıştay, 2005).

An application for a change in the zoning plan can be made at any time from the moment the zoning plan is accepted. In order to make a change in the zoning plan, it is necessary to ask the opinion of this institution in order to abandon the allocation made to the institution that carries out the public service with the zoning plan.

If the zoning plan amendment made by the owner of the immovable to the zoning program or expropriation request is rejected by the applied administration, the owner of the immovable can file an action for annulment, as well as file a full remedy action against the administration for the compensation of the damage caused by the restriction.

There is a distinction between judicial and administrative jurisdiction in Turkey. The Court of Disputes resolves the conflicts of duty between the two judicial branches. It has been decided that the administrative judiciary is in charge of legal confiscation cases (Uyuşmazlık Mahkemesi, 2020). Lawsuits arising from the processes and actions of the administration are brought before the administrative judiciary. Since the reason for filing lawsuits for legal confiscation is the action of the administration to restrict the disposal of immovables with zoning plans, the lawsuits to be filed should also be heard in administrative jurisdictions. In addition, geographically, the case must be filed in the administrative court in the place where the immovable property is located.

If a lawsuit is filed about the limitation of ownership in the immovable with the zoning plans, the immovable property and the property bond of the owner must continue until the case is concluded in order to be able to decide on the compensation. If the owner transfers the immovable property to someone else during the lawsuit, the lawsuit is rejected in terms of competence and the right to pursue the lawsuit does not pass to the new owner (Danıştay, 2019). However, if the person who has sold the immovable, that is, the former owner, proves that the value of the immovable has decreased due to the separation of the immovable into public services within the scope of the zoning plan, and therefore he has to sell the property of the immovable at a price that is much lower than its actual value, the case is continued in order to identify the difference between the sale price of the immovable and its real value and compensation for the loss.

The new owner, who bought the immovable after the zoning plan is finalized, may also request the zoning plan change request. Waiting for a period of 5 years after the purchase so that the new owner can file a lawsuit due to legal confiscation would be contrary to both the law and the principle of proportionality. In the decision of the Constitutional Court on the individual application, requesting that the 5-year restriction period, which expired in the previous owner's period, be repeated for the applicants who bought the immovable, is a disproportionate intervention in the right to property and a violation of the right to property (Anayasa Mahkemesi, 2018).

Since the administration responsible for expropriation has to expropriate within a five-year period after the zoning plan comes into force, the lawsuits filed

before this period is rejected in terms of time (Danıştay 2016). The lawsuit can only be filed at the end of the 5-year period, and after 5 years, as long as the restriction continues, a lawsuit can always be filed (Danıştay, 2016). Otherwise, it will constitute an infringement of the right to a fair trial and property rights specified in the ECHR (Mesutoğlu/Türkiye, 2017)).

In lawsuits to be filed for the compensation of the damage caused by the rejection of the expropriation application or the legal confiscation, it is necessary to file a lawsuit against the administrations authorized and in charge of expropriation. The task of expropriating the places allocated to the public service is given to the administrations that provide this service.

For example, the Ministry of National Education should be shown as the adversary in the lawsuits to be filed against the zoning parcels allocated as education area in the zoning plan while the mayorship should be shown as the opponent about the parcels remaining in the parking area. Considering the lawsuits filed in Turkey, it is seen that municipalities are shown as defendants as well as administrations authorized and in charge of expropriation. In the lawsuit to be filed, it is necessary to write the date and numbered zoning plan of the damage and the amount of the damage.

## **2.1. Action for Annulment**

The restriction on the property rights of immovables restricted by zoning plans can only be removed by the administration with a plan change. If there is damage caused by the restriction of ownership until the zoning plan change is made, a lawsuit can be filed for compensation for this damage. However, claims for compensation are rejected for immovables whose restrictions are removed after the plan is changed by the administration (Danıştay, 2020).

Although the Council of State decided that the administration could not be compelled to expropriate in the cases regarding the refusal of the real estate owners to expropriate the real estate by the administration, it clearly emphasized that the administration should expropriate in its subsequent decisions. In other words, the administration has to fulfill the requests to make expropriation or zoning plan changes in accordance with the principle of reverse process (Danıştay, 2012). Although 5 years have passed since the approval of the zoning plans, it has been decided that the fact that the immovables are not expropriated causes an uncertainty in the use of the property right, therefore, the administrations responsible for preparing the zoning plans should determine the immovables to be allocated for the public space. However, the administration

may take decisions to maintain the restriction of the immovable, provided that it does not try to neutralize the judicial decisions according to the new needs (AYM, 2014).

## **2.2. Full Judgment Case**

Legal confiscation cases arise due to the indefinite blocking of the right to property due to the failure of the administration to expropriate the immovables in private ownership, which are allocated for public services with zoning plans and which need to be expropriated.

The state of limitation on the immovables allocated to the public service area in the zoning plan begins as of the implementation of the zoning plan, and if the immovable has not been expropriated despite the lapse of 5 years, the owner's right of disposition is considered to be blocked and a loss occurs for the owner of the immovable. The right of compensation should be calculated according to the plan that causes the restriction of the real estate so that the administrations do not delay their obligations by delaying the implementation of the development plan and do not push the owners into an uncertain situation (Danıştay, 2016).

### **2.2.1. Principles of Determination of Damage Occurred in Legal Confiscation**

The loss of the owner of the immovable will be compensated by determining the expropriation base value of the immovable by the courts and ruling on compensation for the damage. In the case-law of the Council of State, the value of the immovable should be determined according to the actual value of the immovable to be expropriated on the date of the lawsuit (Danıştay, 2020, AYM, 2016). The real value is the amount that will replace the expropriation value calculated by taking into account the most recent qualification to the expropriation, by adding the damage suffered during the period when the property right of the immovable was restricted.

First of all, the court determines from which plan the restriction of the real estate originates and for how long the restriction has existed. Lawsuits filed against immovables that are restricted for less than 5 years or that are not obliged to be expropriated by the administration are rejected. For example, there is no obligation for the administrations to expropriate the immovables remaining in the "site". In order for the immovables in this status to be exchanged with the treasury immovables, there must be a conservation plan. In order to prepare a

conservation plan, a certain legal period is given to the administrations from the announcement of the site in order to prepare a conservation plan. Since the limitation in the natural protected areas is caused by the conservation decision, not the zoning plans, it is not possible to talk about any damage caused by confiscation without expropriation (Danıştay, 2019). The Constitutional Court rejects the individual applications made on this issue, stating that the interference with the right to property is continent and proportionate (AYM, 2020). However, if the building is restricted based on the conservation decisions taken after the buildings constructed in accordance with the law in accordance with the zoning legislation, the damage must be compensated.

While determining the actual value of the immovable, the value at the date of the lawsuit should be taken as reference for the immovables with similar characteristics, which are not subject to zoning restrictions (Danıştay, 2020). Otherwise, the right to a fair trial is violated. This situation has been pointed out in many decisions of the ECHR (Stan Greek Rafinerileri Dökmeci / Türkiye, 1994). The owner of the immovable suffers a loss of material value or income due to the fact that he cannot actually benefit from the immovable allocated to the public service area. In the decisions given by the ECtHR, it is seen that compensation is awarded due to the loss of income due to the fact that the immovables allocated to public services in the zoning plan were not expropriated for many years (Metin Sezer/Türkiye, 2014). The pecuniary damage may be the value of the immovable, as well as the loss of value due to the zoning plan, the damages caused by the inability to use the immovable, or the values related to the structures on the immovable.

Legal confiscation is the absence of compulsory expropriation of an area reserved for public use in the implementation development plan. In other words, legal confiscation is an administrative action arising from the failure of the administration to carry out the implementation procedures required to implement the zoning plans by inaction (Demirkol, 2001). Lawsuits arising from legal confiscation are compensation cases arising from administrative action. The expropriation value to be calculated as of the date of the lawsuit and also the interest from the date of the lawsuit must be calculated (Danıştay, 2020). According to the established jurisprudence of the Council of State, the interest to be applied in legal confiscation cases without expropriation is legal interest (Danıştay, 2020).

## D. CONCLUSION

Legal confiscation arises from the limitation of the zoning plans made by the administration within the framework of the Zoning Law No. 3194. Due to the fact that there is no de facto visible intervention in Turkey, it has not been accepted for many years that legal confiscation is confiscation without expropriation. In the applications made to the European Court of Human Rights, after decisions were made that Turkey violated the right to property and that the administration should pay compensation in order to maintain a fair balance, the Court of Cassation started to accept the existence of legal interference by making a change in case law. Following this process, the legislature made legal regulations that generally protect the administration and do not fully resolve the violations of property rights, and these regulations were annulled by the Constitutional Court.

Since the legal confiscation cases are cases for the determination of the expropriation value of the immovables that are restricted by the zoning plans, the administration can get rid of this financial burden by increasing the deduction of the arrangement partnership share with the subdivision plans it will make in accordance with the zoning plans.

In cases of legal confiscation, which is a new type of lawsuit in administrative jurisdictions, it is stated that the real value of the immovable should be paid in order to minimize the loss of the owner whose property right is restricted while calculating the real estate value according to the case law of the Council of State, and it is stated that the real value of the immovable should be taken as a criterion in the determination of the real value. Determining the price of the immovable on the date of discovery made closest to the decision date, instead of the value of the qualities and qualifications of the comparable immovables at the date of the lawsuit, will be in accordance with the principle of full compensation and fair trial.

Since the previous legal regulations regarding legal confiscation were annulled by the Constitutional Court, making a new legal regulation in accordance with the justification of the annulment decision will contribute to the prevention of resource waste and a quick and fair solution to the interference with the right to property. In addition, "establishment of a legal confiscation commission" and determination of real estate precedent values by this commission and concluding the expropriation procedures by this commission will contribute to the faster solution of the problems.



The administration should either expropriate the immovables by making the zoning programs or zoning applications within five years, or make a zoning plan change that will remove the restriction that prevents the use of the property right of the immovable.

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