

The Balance between the Public Interest and the Protection of Property Rights: A Judgment by the European Court of Human Rights about Expropriation

Contributed by Dr. Murat Volkan Dülger

The protection of property, historically and practically is crucial in many aspects. The laws of democratic countries, as well as the international agreements put importance on such regulations. One of the common types of restriction to the right of a peaceful enjoyment of property comes from the State, as expropriation with a legitimate aim to protect public interest. It is significant to maintain a balance between the public interest and the protection of property; but in some ways it can be disrupt against equity.

About unlawful expropriation or any other kind of confiscation; the national courts may be more distant about imposing sanction to the State; but the International Law and Courts are more restrictive and strict about State's unjust actions. The most significant International Agreement the Turkish Government sticks to is The European Convention on Human Rights. The Court's judgments are binding; so the government has efforts to adapt itself to the Convention and tries to avoid being sentenced to judicial fine. One of the Decisions that may lead to a change in Turkish legislation, is the Court's decision on the "*Case of Devecioğlu v. Turkey*" (*Application no. 17203/03*) given on 13 November 2008, about the protection of property.

1. Background and Relevant Domestic and International Law

According to the Turkish Administrative law, when the State is taking over a private property, this can happen in two ways: 1-Expropriation 2-Confiscation without expropriation. In the first situation, if the expropriation decision does not rely on public interest, or if the decision is void with the wrong choice of territory for that specific interest, the persons have legal right for a case to nullify the decision of expropriation. There is also the right for a lawsuit to increase the amount the State pays for that immovable property, due to the State's obligation to pay the "real" amount of the property taken (Expropriation Act no.465). In the second situation where the State chooses to confiscate without expropriation in some urgent or exceptional situations, it has the right to do it in return of compensation. However, this is an exceptional way to take over a private property; in ordinary circumstances the State has to follow the expropriation procedures.

The forests, shores, and other "unclaimed property" are not subject to these procedures. They are under the property of State by nature and can never be sold to or restricted in favor of a natural or a legal person. If the land is already under the property of the State, but somehow occupied unlawfully (i.e. owned or used without any permission) there is no need for expropriation or compensation, since the property already belongs and always belonged to the State. However, there are some cases where the State has *sold* these kinds of lands as if they are private property. Here, there is obviously a mistake by the State itself; but what will happen if they want to take the lands away arguing the land cannot be a private property by nature?

About these situations, there is a loophole in the Turkish law. The rights to bring an action as the ones mentioned in unlawful expropriation are not given to the persons in this case. They only can sue the Administration to change the land to become a private property, arguing that

the cadastral examinations are wrong. However, this is against the protected public interest, and also probably not the argument land owners want to defend. It is just the only way.

While the Turkish Constitution strictly forbids the transfer of forests, shores and other public property that can never be sold, the Civil Code protects the property rights of persons who gained them lawfully. This means that they bought it, relying on the “land registry logs” which does not indicate any restriction on the property as “forest land” or anything else which will prevent its transfer. It is absurd that the title deed which is obtained lawfully is invalid in this case. Therefore, there is apparently a legal problem here: how do we protect the property rights of persons who bought the State’s land relying on the records, while trying to protect the public interest? We may say that “compensation” for the loss of property is the best solution here; but on what legal grounds do we want this fee and with which legal procedure since the Administrative law does not mention one?

As we discussed before, according to the Turkish legislation there is only one type of case to bring to courts which is to annul the cadastral examination of the land as a “forest.” However, if the courts reject the case, and then after the appeal the Court of Cassation also rejects, the land owners won’t have any other legal option. When there is exhaustion of domestic remedies, the persons may apply to The European Court of Human Rights. In this case, if there is an application on these circumstances, the applicants will be judged from the violation of the Article 1 of Protocol No.1 to the Convention. The Article 1 of Protocol No.1 says, “Every natural or legal person is entitled to the peaceful enjoyment of his possessions” and then it regulates State intervention’s domain by stating that the deprivation is possible only for the public interest in accordance with the domestic and the international law. These mentioned circumstances are also against Article 13 of the Convention, which is as follows: “Everyone whose rights and freedoms as set forth in the Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.”

2. “Case of Devecioğlu v. Turkey”

The mentioned case is brought to the Court by Feriha and Serhat Devecioğlu against the Turkish government. The disputed land (“the Yana Farm”) is situated in the Marmara Island, in Balıkesir, Turkey. The land, although it is a “forest land”; is sold to a natural person in 1926, in which they then sold the area to others. The last ones to buy the land were the applicants. Before the applicants bought the land, on September 12, in 1986, the Forest Cadastral Commission conducted a “boundary marking exercise” to detect the forest areas that are not detected before. They then found out that the Yana Farm involves “forest land.” within its boundaries. The forest land then had to be transferred to the State. The applicants brought an action to annul this decision; but it was rejected. Then, the decision was appealed; but the Court of Cassation rejected the case too. Then, since the domestic remedies were exhausted, the land owners applied to the European Court of Human Rights.

One of the government’s arguments in response to the case in ECHR was that the owners knew the land was disputed when they bought the land, and so they cannot deny they had undisputable right of property. As an example, the Government mentions the *Case of Lami Daim Namlı and Others v. Turkey* but the Court finds the case irrelevant since the applicants of the *Case of Lami Daim Namlı and Others v. Turkey* did not have any lawful title on the property in contrast to the *Case of Devecioğlu v. Turkey*. So the title deed itself is accepted as evidence that suggests the applicants’ right to claim property rights. The Government’s

another argument is that the domestic remedies are not exhausted; the case can be based on “unjust enrichment.” However, unjust enrichment regulated in the Code of Obligations is applicable only when there is no legal reason of enrichment, and in this case, the “enrichment” is based on a *valid* transfer of property.

As the European Court of Human Rights finds the governments’ arguments irrelevant, furthermore it argues that there is a violation of the Protocol 1, Article 1, with the justification explained below.

3. European Court of Human Rights’ Final Judgment:

Firstly the Court examines whether the applicants owned the land in accordance with the law and so, whether if they can benefit from the protection of Article 1. Then the Court argues whether if there is a deprivation of property and if there is a legitimate aim for it. In the last step, the Court examines if there is a balance between the State’s interference and the land owners’ interest, to understand the scope of violation on the peaceful enjoyment of property. The Court argues:

1- The applicants bought the land from the previous owner, relying on the Land Registry Office’s official records. As written in the Turkish Civil Code, these records are reliable, the log book is open to public and any damage should be compensated by the State. Here the law foresees an absolute responsibility and liability even if the officials don’t have any fault. As the code says, the State is responsible from the damages caused by the mistakes in record-taking (Civil Code Art. 1007); also when one gains a right relying on the record in the log book, that right is under protection (Civil Code Art.1023).

Since the official records don’t contain any limitation on the disputed land, it means that the transfer of the land is possible this way. The Court mentions that the applicants have legal rights on the land, and legal proceedings before the court, because they have the title deed in which they took in good faith.

2- It is accepted that the disputed area is “public forest” after the examination of cadastral maps and expert reports prepared according to domestic law. According to the Turkish Constitution Article 169, the forests are in the property of the State and they can never be subject to private property; which means that forests cannot be sold to or restricted in favor of a natural or a legal person. There is obviously a legitimate aim in this regulation to protect the environment, and so to protect the general interest. The Court also gives importance to the protection of environment in such situations as seen in cases like: *Fredin v. Sweden*, *Taşkın and Others v. Turkey*, *Fadeyeva v. Russia*, *Lazaridi v. Greece*.

3-There is a legitimate aim to protect the forests, and so to protect the public interest, but the Court examines whether if there is a fair balance between the “public interest” and the interest of the individuals who are deprived of their possessions. In other words: Does it put a “disproportionate burden” on the applicants, the Court asks. They note that to take a land without any reasonable payment cannot be accepted as a proportionate interference, if the case is not exceptional. This “exceptionality” is not clearly explained in the Court decisions; but analyzing the few exemplary cases, when there is a huge change in political, economical or legal order, the Court accepts that there is exceptionality which legitimizes State’s intervention without any compensation. In this case, the State doesn’t mention any exceptional circumstances; and take the land from the applicants without *any* payment. Therefore this cannot be accepted as a “fair balance” between rights.

The Court accepts that proportionality does not exist when there is no compensation about the real value, for the expropriated land. The *Case of the Former King of Greece and Others V. Greece* (Application no.25701/94) is an example for this. The judgment states: "...the Court has already found that the taking of property without payment of an amount reasonably related to its value will normally constitute a disproportionate interference..."

Similarly, ECHR's judgment of *Doğrusöz and Aslan v. Turkey* finds the State responsible in circumstances that are alike the *Case of Devecioğlu v. Turkey*. In the *Case of Doğrusöz and Aslan*, a land on the shore has been sold to the applicants by the State (The Treasury) but then it was taken away by the State, arguing that it already belonged to them, which as we mentioned is true. However, this kind of confiscation without any payment was said to be unjust, even though the government had a legitimate aim "in the public interest." As a result the Court discussed that "The requisite balance will not be found if the person concerned has had to bear 'an individual and excessive burden'" and decided that there was a violation of the Protocol 1, Article 1. It states this as follows: "In this connection, the Court recalls that not only must a measure depriving a person of his or her property pursue, on the facts as well as principle, a legitimate aim 'in the public interest', but there must also be a reasonable relationship of proportionality between the means employed and the aim sought to be realized."

4- As a result, since there is no domestic solution to applicants' need for compensation, the Court accepts that there is violation of the owners' peaceful enjoyment of possession, which means that the State behaved against the Article 1 of Protocol 1.

4. Impact in Turkey:

Now, the case is pending in the Grand Chamber for the determination of pecuniary and the non-pecuniary damage, demanded as an application of the Article 41 of the Convention. Since the government did not offer any agreements about the amount of compensation, the Grand Chamber will be giving its final decision in these days. However, The European Court of Human Rights, with this decision, declared that the State's "unbalanced" intervention to the land of Devecioğlu is against the Article 1 of Protocol 1. Considering that Turkey has many similar cases about such problem, the Court's decision is exemplary. The Turkish government may try to prepare legislation about it, since the Convention is binding and it has the obligation to behave accordingly.

For further information on this topic please contact Dr. Murat Volkan Dulger at Dulger Law Firm by telephone (+90 212 217 82 98) or by fax (+90 212 217 79 34) or by e-mail (volkan.dulger@dulger.av.tr)