THE LEGAL REGIME OF PUBLIC PROPERTIES IN TURKEY

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Abstract

Public properties constitute one of the main parts of the administrative law. For, the administration needs certain movable and immovable properties to carry out its activities, including public services. These properties are naturally and necessarily subject to a legal regime that is different from the regime which the properties of real and corporate entities and the private properties of the administration are subject to. Through the use of public properties, the administration delivers public services and hence works for the public benefit. By their nature, public services are offered uninterruptedly with a view to meeting public needs. Therefore, the legal regime of properties allocated for public services, which should be delivered uninterruptedly, should be consistent with the nature of these properties.

Keywords

Public Properties, Administrative Law, Private Properties of the Administration, Public Service, Public Authority.

TÜRKİYE'DE KAMU MALLARININ HUKUKÎ REJİMİ

Özet

Kamu malları, idare hukukunun temel konularından birisini teşkil eder. Çünkü idare kamu hizmeti gibi çeşitli faaliyetlerini gerçekleştirebilmek için birtakım taşınır ve taşınmaz mallara ihtiyaç duyar. Bu malların da özel hukuk gerçek ve tüzel kişilerin sahip olduğu mallar ile idarenin özel mallarının tâbi olduğu hukukî rejimden farklı bir hukukî rejime tâbi olması hem zorunlu hem de işin niteliğine uygundur. Çünkü idare, kamu malları vasıtasıyla kamu hizmeti gibi kamu yararına yönelik faaliyetleri gerçekleştirmektedir. Kamu hizmetleri de özelliği gereği kesintisiz ve sürekli olarak toplumsal gereksinimleri karşılamak üzere kamu yararı amacıyla sunulan faaliyetlerdir. Dolayısıyla kesintisiz ve sürekli olarak sunulması zorunluluğu olan kamu hizmeti niteliğindeki faaliyetlere özgülenen malların hukukî rejiminin de, bu malların özelliğine uygun nitelikte olması gerekmektedir.

Anahtar Kelimeler

Kamu Malları, İdare Hukuku, İdarenin Özel Malları, Kamu Hizmeti, Kamu Kurumu.

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1. INTRODUCTION AND DEFINITION OF PUBLIC PROPERTY

The administration needs movable and immovable properties, tools and devices when carrying out its duties. These are generally called public properties although other concepts are sometimes used[1].

There is no consistency related to the concepts used to refer to public properties. The constitution and laws use different expressions to signify public properties and provide different regulations. Among these expressions are state property, property fully-owned by the state, public estate, public sphere and treasure property. On the other hand, in one of its decisions, the Court of Conflicts states that administrative properties established in accordance with Laws no. 221 and 2942 are deemed public property provided that they are subject to public law and are under the control and disposition of the public administration[2].

Legal regulations do not provide a definition of public property. According to the Constitutional Court, "the unowned properties that are open for public use due to their nature, common properties that are opened for full or partial public use by public entities, and properties that constitute subjects and means of activities in the form of public services may be defined as public properties"[3].

The Council of State provides a similar definition, suggesting that "according to the principles of administrative law, goods and properties that are allocated for public use and public interest and properties that are a component and inseparable part of a public service are deemed public properties"[4].

Properties of the administration are divided into two, i.e. public properties and private properties, according to the legal regime with which they are affiliated. Public properties are subject to the regime of public law and administrative law. On the other hand, private properties of the administration may be defined, in general terms, as the properties that are not of public nature. Although being in the possession of a public entity, private properties of the administration are not open for public use and not allocated for the delivery of a public service. Not public law but private law provisions apply to these properties[5].

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1 A. Şeref, GÖZÜBÜYÜK-Turgut, TAN. **İdare Hukuku Genel Esaslar (General Principles of the Administrative Law).** Vol. I. Turhan Kitapevi. Ankara. 1998. p. 669.

2 Court of Conflicts. File no: 1989/16. Decision no: 1989/17. Official Gazette: 09.10.1989. For different expressions referring to public properties in judicial decisions, see Aydın, GÜLAN. "Kamu Malları (Public Properties)". İlhan, ÖZAY. **Günışığında Yönetim.** Alfa Yayıncılık. Istanbul. 2002. p. 584.

3 Constitutional Court. File no: 1996/66. Decision no: 1997/7. Official Gazette Date and No: 28.10.1997-23154. See A. Şeref. GÖZÜBÜYÜK-Turgut TAN. **ibid.** Footnote on p. 671.

4 Council of State 3rd Chamber. File no: 1980/157. Decision no: 1980/181. Date of Decision: 13.10.1980. Danıştay Dergisi (Journal of the Council of State). Issue: 44-45. p. 54.

5 Kemal, GÖZLER. **İdare Hukukuna Giriş (Introduction to Administrative Law).** Ekin Kitapevi. Bursa. 2003. p. 253.

Two conditions should exist in order to define a property as a public property. First one is the organic requirement that a property should be owned by a public entity, i.e. the State, local governments or public institutions, to be recognized as a public property. However, in some cases, a property may be used for public service although it is owned by a private person. These properties are defined as "virtual public properties" with a view to highlighting that a regulation for public properties should apply to these properties[6]. The second requirement is the material one, which suggests that, in order for a property to be defined as public property, it should be allocated for public use or public service by a specific regulation.

2. TYPES OF PUBLIC PROPERTIES

Public properties have been categorized in different ways in doctrinal terms[7]. They are divided into two categories in terms of use and allocation: the properties allocated for public use and the properties allocated for public service. In terms of quality, they are classified as naval, air and land public properties[8]. They are also classified as movable and immovable public properties in terms of movability. Furthermore, they are divided into two categories by type of formation, as natural and artificial public properties.

The most widely accepted classification in the doctrine is classification by the purpose of allocation. Properties are categorized into three in terms of allocation: unowned properties, common properties and service properties.

The legislation provides various definitions and categorizations of public properties. For instance, the Turkish Civil Code prescribes that unowned properties and the properties whose benefits belong to the public are under the control and disposition of the State[9] while the Cadastral Law involves three types of public

6 Aydın, GÜLAN. **ibid.** p. 588.

7 See A. Şeref, GÖZÜBÜYÜK-Turgut, TAN. **ibid.** p. 672vd.; Akın, DÜREN. **İdare Malları (Administrative Properties).** Ankara Üniversitesi Hukuk Fakültesi Yayınları. Ankara. 1975. p. 95; Feyyaz, YALÇINKAYA-Turhan, KARTAL. **Devlet Malları (Kamu İdareleri-Kamu Kurumları) [State Properties (Public Administrations-Public Institutions)]** Yeni Desen Matbaası. Ankara. 1971. p. 7; Sadık, KIRBAŞ. **Devlet Malları (State Properties).** Adım Yayıncılık. Ankara. 1988. p. 16; Aydın, GÜLAN. "Kamu Malları (State Properties)". **ibid.** p. 589; Kemal, GÖZLER. **ibid.** p. 255; İsmet, GİRİTLİ-Pertev, BİLGEN-Tayfun, AKGÜNER. **İdare Hukuku (Administrative Law).** Der Yayınları. Istanbul. 2001. p. 647; Sıddık Sami, ONAR. **İdare Hukukunun Umumi Esasları (General Principles of the Administrative Law).** Istanbul. 1966. p. 1311.

8 Pertev, BİLGEN. "İdare Hukuku Ders Notları-İdare Malları (Lecture Notes on Administrative Law-Administrative Properties)". İstanbul Üniversitesi Siyasal Bilgiler Fakültesi Yayınları (Istanbul University Faculty of Political Sciences Publications). Istanbul. 1995. p. 32.

9 New Civil Code
Article 715: Places not in anyone's possession and properties whose benefits belong to the public shall be under the control and disposition of the State. Unless prescribed otherwise, waters at the service of the public and places unsuited for agriculture, such as rocks, hills, and mountains, and the resources there from, are not owned by anyone in any way and cannot be subject to

properties, i.e. unowned lands, properties open for common public use, and lands used actually for the delivery of a public service[10]. In some cases, there are conflicting arrangements regarding the type of a specific property. For instance, the Village Law defines properties such as mosque and school, normally considered properties used in a public service, as common properties[11] while the Cadastral Law qualifies cemeteries, fountains, roads and squares as properties in a public service[12].

2.1. Types of Public Properties by Purpose of Allocation

Public properties are categorized, by purpose of allocation, as unowned properties, common properties and properties used in public service.

2.1.1. Unowned Properties

Properties not in anyone's possession are open for direct and common public use due to their natural characteristics. These properties are defined as public properties because of the importance attached to their natural functions, quality and social role. Rocks, hills, mountains and the resources there from are among unowned public properties. The Constitution stipulates that coastal areas and

private ownership. The acquisition, maintenance, protection, operation and use of places not in anyone's possession and properties whose benefits belong to the public are subject to specific legal provisions. See Lütfü, BAŞÖZ-Ramazan, ÇAKMAKÇI. **Yeni Türk Medeni Kanunu (The New Turkish Civil Code).** Legal Yayıncılık. Istanbul. 2002. p. 329.

10 Cadastral Law no. 3402
Public Properties
Article 16: Among properties allocated for common public use or delivery of public services and unclaimed properties under the control and disposition of the State:
A) Official buildings and facilities at the service of public, built by funds and donations allocated in the budget (government, municipality, police station and school buildings, village offices, hospitals or other health facilities, mosques, cemeteries, fountains, wells and closed roads, squares, marketplaces, parks and gardens and empty areas) are registered on behalf of the Treasury, public institutions, provincial, municipal, village and local governments (public entities) in accordance with registries, documents and specific laws.
B) Common immovable properties proved, by documents and expert or witness statements, to have been allocated for public use for long years, i.e. pastures, summer pastures, winter pastures, meadows and fairgrounds are bordered and given parcel numbers, their surface area is calculated, and they are recorded in the private registry.
The bordering of these immovable properties is not in the form of registration, and these properties are not subject to the private law, without prejudice to the provisions of specific laws.
Common properties such as roads, squares and bridges are only shown on the map.
C) Places unsuited for agriculture, such as rocks, hills, and mountains (and the resources there from), which are under the control and disposition of the State, and water areas such as seas, lakes and rivers are not subject to registration and bordering, without prejudice to the exceptions.
D) Forests under the control and disposition of the State are subject to provisions in specific laws, provided that there is no related provision in the present law. See www.tbmm.gov.tr 2006.

11 Village Law no. 442
Article 2: People commonly using public properties such as mosques, schools, pasturelands or summer pastures and residing in clustered or scattered houses constitute a village with their gardens and agricultural lands.
See www.tbmm.gov.tr 2006.

12 Pertev, BİLGEN. **ibid.** p. 17.

natural resources are under the control and disposition of the State[13]. Underground waters, mines, oil reserves, lakes, rocks, coasts, and saltwater in the form of running water, spring or well are also under the control and disposition of the State.

Unowned properties are regulated by the public law and not subject to private ownership[14]. It is nevertheless argued that being under the control and disposition of the State does not necessarily designate the status of public property and exclude the right of ownership. As a matter of fact, being under the control and disposition of the State is defined, specifically in the Turkish law, as a principle of measure adopted to protect public properties against individuals and communities and against the State and owner public entities and to protect them from the drawbacks of private ownership[15]. However, the Agricultural Reform Law for Land Consolidation in Irrigated Areas suggests that since the immovable properties under the control and disposition of the State may be distributed to farmers, these properties are potentially eligible for the right of ownership by persons or the State[16].

2.1.2. Common Properties

Common properties are allocated for direct use either by the whole public or by some part of the society. For instance, roads, squares and market places are used by everyone whereas pasturelands, threshing fields and cemeteries are used by some parts of the public.

Common properties are available for public use either by allocation or tradition. As mentioned in one of the decisions of the Council of State, "threshing fields – one of the common properties in a village – are allocated by the authorities to village people for the purpose of threshing or allocated for this purpose because they have traditionally been used as threshing fields"[17].

2.1.3. Properties Used in Public Service

These are the properties allocated for public use as part of the delivery of a public service. For instance, university buildings, courthouses, museums and hospitals are properties used for the delivery of public services[18].

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13 Constitution of 1982. Article 43. See Süleyman, ARSLAN-Bahtiyar, AKYILMAZ-Murat, SEZGİNER-Cemil, KAYA. **İdare Hukuku Mevzuatı (Administrative Law Legislation).** Sayram Yayınları. Konya. 2006. p. 18.

14 Sadık, KIRBAŞ. **ibid.** p. 6.

15 Lütfü, DURAN. "Kamusal Malların Ölçütü (Criteria of Public Properties)". Amme İdaresi Dergisi. Vol: 19. No: 3. p. 43.

16 Pertev, BİLGEN. **ibid.** p. 10.

17 Supreme Court 1st Civil Chamber. File no: 1987/11356. Decision no: 1987/10167. Date of Decision: 10.11.1987. Yargıtay Kararlar Dergisi (Journal of Supreme Court Decisions). Vol: 14. No: 11. p. 1490.

18 Supreme Court 4th Civil Chamber. File no: 1985/398. Decision no: 1985/5074. Date of Decision: 20.05.1985. Yargıtay Kararlar Dergisi (Journal of Supreme Court Decisions). Vol: XI. No: 10. p. 1454.

According to the Council of State, school buildings are complementary to the delivery of the educational service; and it is inevitable that the service is hindered unless provided in appropriately and specifically designed buildings. Thus, the buildings constructed as schools are typically public properties. It is also argued that, in order for an immovable property to be deemed a property used in public service, it should necessarily be allocated for the delivery of a public service and used actually for this purpose[19].

The Constitutional Court, after mentioning that some immovable public properties are leased out to generate an income without being allocated for the delivery of public services, stated that public administrations should comply with the legal rules to lease out and sell immovable properties and allocate the income obtained for public services and that expending the relevant income on public services means that these immovable properties are indirectly allocated for public services[20].

3. MAKING USE OF PUBLIC PROPERTIES[21]

The purpose of use of any public property should fit for or at least be compatible with the purpose of allocation of the given property. The use of property should never compromise or be against the protection of allocation of the given property. The administration should be vested with absolute and indispensable authority with regard to the use of any public property.

The right to use any public property cannot limit the administration's authority to designate and where required change the allocation of any public property. The quality, scope and future of using any public property are dependent on the relevant allocation and changes on the allocation related to the given property. The allocation of any public property determines the regime of using the property, authorities of the administration and rights of users.

Besides protecting a public property, it is the duty of the administration to seek to make best use of a public property. It is also important to give, extend and terminate permission of use, to determine the cost demanded and to set out the conditions of use. The administration plays a guiding role particularly in determining the ways, period and conditions of use. Thus, public entities are required to enable the best use of public properties. It should be particularly mentioned that these conditions apply to full range of procedures of use.

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19 Pertev, BİLGEN. **ibid.** p. 28.

20 Constitutional Court. File no: 1996/1. Decision no: 1996/18. Official Gazette Date and No: 18.10.1997/23144. www.anayasa.gov.tr/ Anayasa Mahkemesi Kararları (Constitutional Court Decisions). 2006.

21 See A. Şeref, GÖZÜBÜYÜK-Turgut, TAN. **ibid.** p. 700-703; İsmet, GİRİTLİ-Pertev, BİLGEN-Tayfun, AKGÜNER. **ibid.** p. 654-659; Aydın, GÜLAN. "Kamu Malları (Public Properties)". İlhan, ÖZAY. **ibid.** p. 620.

3.1. Procedures for Making Use of Public Properties

It is also impossible to combine public properties under a single roof to offer them for public benefit. While some public properties are open for the use of whole public, some others are used only by people resident in a specific area. While some are open for personal and direct use, some others are used indirectly when people are benefiting from a public service.

The use of public properties that are allocated for the use of people is subject to certain rules. These rules are divided into two as general and specific use of public properties.

3.1.1. General Use of Public Properties

The general use of public properties means offering the properties for the use of the whole public in accordance with the purpose of allocation. In such cases, there is no need to obtain permission to use the properties. The use of properties falling under the scope of these rules is directly related to fundamental rights and freedoms. It is against the law that the administration decides whether a person can use such properties or not. The use of roads, squares, sea coasts or rivers constitutes examples to the general use of public properties.

The general use of public properties is gratuitous since it is directly related to enjoying public freedom and an outcome of enjoying this freedom. The costs claimed by the administration in some cases cannot be the full return of service provided, and thus should not be considered the price of service. They are only in the form of levy and tax. For instance, in the case of tolls collected in highways and bridges. People may make use of these public properties in line with the rules without any discrimination. Whether the property be a public property or not, the administration holds a general enforcement power on the property. The authority of the administration in a highway in the form of a public property or a private road open for public use is indisputable due to traffic enforcement power. In addition to this general enforcement power, the administration is likely to carry out some extra enforcement procedures in order to protect the given nature of such public properties. When making use of properties, persons are required to comply with the rules brought by the administration. One of the examples of rules set by the administration is that vehicles with iron wheels are prohibited from using asphalt motorways[22].

Since the general use of public properties is a result of enjoying public freedom, people have equal rights in using these properties. That is why users of public properties should refrain from attitudes and behaviors that interfere with

[22] See A. Şeref, GÖZÜBÜYÜK-Turgut, TAN. **ibid.** p. 700-703; İsmet, GİRİTLİ-Pertev, BİLGEN-Tayfun, AKGÜNER. **ibid.** p. 654-659; Aydın, GÜLAN. "Kamu Malları (Public Properties)". İlhan, ÖZAY. **ibid.** p. 620.

others' rights to use these properties. In the same vein, the administration should ensure that people under same conditions make equal use of these properties without hindering others' rights to use the properties. The administration cannot allow some enterprises to put tables and chairs on a large pavement and prohibit some others from putting them on the pavement. It would also be illegal when the administration claims levies in a way and to the extent that it makes discrimination between enterprises[23].

3.1.2. Specific Use of Public Properties

The specific use of public properties is subject to certain limitations and interferes with others' rights to use the given properties. That is why the use of these properties is subject to prior permission from the administration and payment of certain charges. The administration is vested with broad authorities against the persons holding specific rights to use a public property. The administration is always superior to these people. To make specific use of public properties, there is a need to establish a relationship with the administration through license, contract or privilege.

Through license (permission), which is a one-way and executive action of the administration, persons may make use of a public property for a purpose other than its purpose of allocation and with a method of use against its nature. Shops displaying goods in front of the shop, stands placed on the pavement or coffee shops having tables and chairs on the pavement constitute examples of such uses of public properties. It is at the discretion of the administration to permit such uses of public properties. When asked to issue a license for the use of a public property for specific purposes, the administration is required to investigate whether the use will prevent the public from making use of the given public property and reject the request for license provided that the specific use interferes with others' right to use the property. It should not be disregarded that, in such cases, the administration is free to decide whether to grant permission or not and can revoke the license at any time.

The results of license granted by the administration may be as follows: The license holder, in other words the person granted the right to specific use of a public property cannot claim any rights on the property. They solely have the right to make use of the property. The license holder may demand the removal of any confiscation provided that their right to use is confiscated by a third party or may use the right to sue for damages arising from a wrongful act. Given that the license granted by the administration is one-way and that there is no contract between the administration and private person, the administration can revoke the license at any time.

[23] See A. Şeref, GÖZÜBÜYÜK-Turgut, TAN. **ibid.** p. 700-703; İsmet, GİRİTLİ-Pertev, BİLGEN-Tayfun, AKGÜNER. **ibid.** p. 654-659; Aydın, GÜLAN. "Kamu Malları (Public Properties)". İlhan, ÖZAY. **ibid.** p. 620.

Given that the administration may revoke the license at any time and that the license holder is likely to incur losses in such a case, it is normal that the holder desires to protect their rights and take their rights under protection by a license. For instance, Law no. 80 prescribes that wholesale markets, excluding those selling fresh vegetables and fruits, are public properties and the sales areas in these markets can only be allocated to producer cooperatives, producers and commission merchants. Thus, the contracts concluded between the administration and persons to whom a sales area is allocated is an administrative contract. Since an administrative contract is signed between the two parties, the administration is no longer supposed to grant a one-way license. In such a case, it is easier to deal with mutual rights and debts provided that the administration revokes the right to specific use of the public property before the date of termination. In other words, the administration may terminate the right to use based on one hand on the public power and on the other hand on its authority and position superior to the beneficiary, as required in the contract. However, before terminating the contract, the administration should consider the type of allocation and requirements of public interest and examine whether the activity terminated constitutes an obstacle to the delivery of public services.

In such cases of termination of rights to use, any contractual provision stipulating that the right to specific use granted by the administration has no validity, on the condition that the administrative procedure is not otherwise illegal. For, the administration is vested with authorities that go beyond the scope of private law and the administration is always superior to individuals.

In some cases, it may be required to allow public properties occupied by beneficiaries and to permit the construction of permanent and large facilities on the property. For instance, there may be a need to lay pipes or construct permanent facilities due to the right to use granted for natural gas provision. An administrative contract should be signed between the administration and the beneficiary in order for the beneficiary to have a specific right to use the given public property.

4. CHARACTERISTICS OF PUBLIC PROPERTIES[24]

Public properties have different legal regulations and characteristics than the properties subject to the private law. Specific rules apply to these properties, and making use of the properties are subject to different rules. There are some principles that characterize the fundamentals of this legal regime.

[24] See A. Şeref, GÖZÜBÜYÜK-Turgut, TAN. **ibid.** p. 683-699; İsmet, GİRİTLİ-Pertev, BİLGEN-Tayfun, AKGÜNER. **ibid.** p. 651-654; Aydın, GÜLAN. "Kamu Malları (Public Properties)". İlhan, ÖZAY. **ibid.** p. 607; Kemal, GÖZLER. **ibid.** p. 259.

4.1. Public Properties Cannot Be Transferred

Due to their nature, public properties cannot be purchased or sold, or cannot be acquired as a result of prescription. The procedures regarding the transfer and alienation of public properties are legally invalid as long as the public makes use of these properties or the administration allocates the properties for public services. The transfer and alienation of these properties are possible only when their nature of being public is revoked in line with certain rules. In the case of a natural public property, the transfer and alienation of this property are subject to the condition that this characteristic of property disappears. The artificial public properties may be transferred or alienated by transforming them into a private property by a legal procedure on the condition that the procedure is not against public benefits.

In one of its decisions, the Constitutional Court mentions that natural wealth and resources are not in the scope of the private property order, subject to the provisions of the Civil Code, but in the scope of the properties that the State owns due to the sole nature of being the state; and thus, the alienation of a property that is not subject to the property order is not possible[25]. In its decision regarding the privatization law, the Constitutional Court ruled that it would be against the Constitution to privatize natural wealth and resources, from which state economic enterprises benefit, by selling or transferring the operational rights without time limitation[26].

The prohibition of transferring or alienating public properties constitutes an obstacle to the execution of some other legal procedures that may result in transfer or alienation. For instance, a public property cannot be placed under a mortgage. In other words, a right holder cannot be conferred a limited real right that gives the authority to collect debts based on the value of a public property. For, a property under a mortgage may be put up for forced sale by auction when the debt is not paid in due time. However, it is not possible to sell public properties.

4.2. Public Properties Cannot Be Seized

According to the Enforcement and Bankruptcy Law, private or public properties owned by the State cannot be seized. Public properties owned by public entities other than the State cannot be seized. The ground for this prohibition is explained as follows by the Constitutional Court: The main aim is to ensure the regular and uninterrupted delivery of public services. Seizing any properties allocated for the delivery of public services may cause undesirable results such as the removal of means required for the services that the State is required to offer.

25 Constitutional Court. File no: 1963/126. Decision no: 1965/7. Date of Decision: 16.02.1965. Anayasa Mahkemesi Kararlar Dergisi (Journal of Constitutional Court Decisions). No: 3. p. 23.

26 Constitutional Court. File no: 1994/49. Decision no: 1994/45-2. Date of Decision: 7.7.1994. www.anayasa.gov.tr/ Anayasa Mahkemesi Kararları (Constitutional Court Decisions). 2006.

Since public service and hence public interests are crucial in activities of the State, it is out of question seizing state properties for the sake of personal interests of a claimant, in order words preferring private interests to public interests[27].

The principle that public properties are non-seizable applies only when it is clear that the assets of a public entity cannot be seized based on the specific law regulating the entity or that the given property can take full advantage of the privileges conferred to public properties. It is accepted that the properties of public entities, which are subject to private law provisions, can be seized even if they are treated as state properties in the penal law because they are not under the scope of state properties in the General Accounting Law and the Enforcement and Bankruptcy Law.

4.3. Public Properties Cannot Be Expropriated

Expropriation applies to properties owned by private persons or private properties of the administration. Public properties cannot be expropriated for the sake of public interest. It is not possible that a public entity expropriates a public property it owns to deliver public services for a public service to be delivered by another public entity. Nevertheless, another public entity can expropriate the property when the allocation regarding the property is removed. There is a need for an allocation in order for a property to gain the nature of public property. Allocation is subject to a law, statute, bylaw, or an administrative procedure only when it is authorized clearly by the law. Provided that the allocation procedure is cancelled in line with the theory of inverse action and hence the public acquires the nature of private property, it may then be given to another public entity gratuitously or ungratuitously. If public entities fail to reach an agreement or compromise, the central administration is authorized to settle the conflict. If the public entity transferring the public property suffers losses due to the transfer, then it should recover damages.

4.4. Public Properties Are Not Subject to Land Registration

It is accepted that the immovable properties that do not have the nature of private property and are allocated directly or indirectly for common public use are not subject to land registration. It is also accepted by judicial bodies that registration of these properties do not produce any legal outcomes[28]. The validity, accuracy and appropriateness of the principle that immovable public properties are not subject to land registration have been questioned[29]. It is also noted that,

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27 Constitutional Court. File no: 1992/13. Decision no: 1992/50. Date of Decision: 20.10.1992. www.anayasa.gov.tr/ Anayasa Mahkemesi Kararları (Constitutional Court Decisions). 2006.

28 Supreme Court 7th Civil Chamber. File no: 1976/11573. Decision no: 1977/12272. Date of Decision: 29.11.1977. Yargıtay Kararlar Dergisi (Journal of Supreme Court Decisions). Vol: 4. No: 8. p. 1300.

29 Aydın, GÜLAN. **ibid.** p. 588.

although public properties do not have to be recorded in the land registration system, the property should still be registered in the presence of any real right related to the property, which is subject to registration[30].

4.5. Public Properties Are Exempt from Taxes and Levies

Public properties do not have a value that is subject to taxation because they are open for common public use. The administration does not have any monetary interests that is subject to taxation. However, the administration can claim taxes in return for the use of public properties.

4.6. Public Properties Are Under Special Protection

Compared to private properties, public properties are subject to a tighter and more privileged regime of protection. Any crimes against public property have more severe punishments. Some specific legal regulations involve specific provisions concerning the protection of public properties (e.g. Law on the Protection of Cultural and Natural Properties, Coastal Law).

Public properties are also specifically protected against unlawful occupation. Law no. 3091, adopted to eliminate any infringement of immovable property ownership, prescribes that infringements and interventions in immovable properties open for public use should be prevented without regard to the essence of actual possession.

4.7. Public Properties Cannot Be Acquired through Prescription

It is also a widely accepted principle that individuals cannot gain possession or real rights of any public property through prescription. This premise is an outcome of the principle that public properties are unalienable. The rule related to the prohibition of transfer and alienation prevents the administration from transforming a public property into private property at its own discretion while the rule that the ownership of a public property cannot be acquired through prescription prevents the shift of ownership of public properties without the consent and permission of the administration.

Even in the event that a public property is used by a private person due to neglect of the administration and not being used for a long time and that the conditions for acquisition by prescription are fulfilled, it is not possible that the said public property is acquired by a private person. Some public properties are protected by the Constitution. For instance, Article 169 of the Constitution stipulates that the ownership of state forests cannot be transferred. Ownership of these forests cannot be acquired through prescription, nor can servitude other than that in the public interest be imposed in respect of such forests. Furthermore, the ownership of unowned properties and common properties cannot be acquired

30 Akın, DÜREN. **ibid.** p. 78.

through acquisitive prescription. Some decisions of the Constitutional Court and the Supreme Court also support that the transfer of ownership is not possible in the case of public properties because there is no ownership rights of these properties. In a decision about privatization, the Constitutional Court highlights that, pursuant to Article 168 of the Constitution, the right to explore and exploit natural wealth and resources belongs to the state and The state may delegate this right to individuals or public corporations for specific periods[31].

5. ACQUIRING AND LOSING THE STATUS OF PUBLIC PROPERTY[32]

5.1. Acquiring the Status of Public Property

Natural and artificial public properties acquire the status of 'public' in different ways. Natural public properties such as rivers, lakes, seas and coasts are deemed public properties just because of their natural characteristics. They become public properties inherently and automatically. There is no need for further allocation procedure or decision.

On the other hand, artificial public properties acquire this status by means of two stages: 'acquisition' and 'allocation'. Acquisition is a legal action (e.g. purchase or expropriation) or a material action which incorporates a property into the wealth of a public entity. Allocation is a legal or material action that results in setting apart a property for public use. Artificial public properties are allocated for public benefit by means of traditions or an administrative decision. Some common properties such as roads, squares, marketplaces, pasturelands, threshing fields or cemeteries have been offered for direct public use through conventions and traditions. These lands are considered public properties because they have traditionally and uninterruptedly been used by the public. The majority of other artificial public properties are allocated for public use by an administrative decision (decision of allocation).

5.2. Losing the Status of Public Property

Losing the status of public property does not mean that a property is no longer in the possession of public entities and is owned by private persons. It means that a property in the possession of public entities loses its status of "public property" and gains the status of "private property". Any property that is no longer a public property and becomes a private property still remains in the possession of a public entity; however, not public law but private law provisions apply to this property.

Natural public properties such as rivers, lakes, seas and coasts lose their "public property" status and acquire "private property" status when they lose their natural status since they become a public property only because of this

31 İsmet, GİRİTLİ-Pertev, BİLGEN-Tayfun, AKGÜER. **ibid.** p. 653.

32 Kemal, GOZLER. **ibid.** p. 257.

characteristic. For example, if a lake dries up due to drought or earthquake, the land on the ground of lake becomes a private property of the state.

In order for artificial public properties in the possession of the administration to lose their public status, there is need for a clear decision regarding the removal of allocation. To exemplify, in the event that a highway is damaged by flood and thus not used by vehicles for long years, the public nature of that property does not terminate. In the similar vein, a public property cannot lose its status through conventions or traditions[33].

6. AUTHORITIES OF THE ADMINISTRATION REGARDING PUBLIC PROPERTIES

Authorities of the administration regarding public properties may vary according to the type of property. For instance, although natural wealth and resources are under the control and disposition of the state, the legal regimes and hence rights and authorities of the state are set forth in specific laws. These authorities, i.e. exploiting natural resources, granting permission, monitoring and auditing private businesses, collecting levies and imposing penalties, derive from the administrative law[34].

The same applies to common properties. The legal regime of these properties are also subject to the laws regulating the public service for which the property is allocated, as well as related specific laws. For example, according to the Law on the Protection of Cemeteries, municipalities and villages should allocate a part of their budget for the maintenance of cemeteries every year.

When the administration manages, uses and takes advantage from properties used in the delivery of public services, it has to comply with certain administrative procedures and hence provisions of the administrative law. When the administration has others use these immovable properties, its relationship with private persons is also subject to the administrative law and any damages on third parties deriving from these immovable properties are also subject to the provisions of the administrative law[35].

7. PRIVATE PROPERTIES OF THE ADMINISTRATION[36]

Private properties are the properties that are eligible for private ownership and not allocated for any public service by the administration or do not have a direct effect on the delivery of public services. The ownership of these

33 Kemal, GOZLER. **ibid.** p. 257.

34 Pertev, BİLGEN. **ibid.** p. 15.

35 Fikret, EREN. **Borçlar Hukuku (Law of Obligations).** Vol: 2. Ankara. 1986. p. 328.

36 See A. Şeref, GÖZÜBÜYÜK-Turgut, TAN. **ibid.** p. 708; İsmet, GİRİTLİ-Pertev, BİLGEN-Tayfun, AKGÜNER. **ibid.** p. 673; Aydın, GÜLAN. "Kamu Malları (Public Properties)". İlhan, ÖZAY. **ibid.** p. 589; Kemal, GÖZLER. **ibid.** p. 264.

properties belong to the administration. The properties provide income for the administration and are thus included in administrative properties that provide public benefits.

The private properties owned by the administration are subject to the rules of private law because the administration holds an ownership right to these properties, deriving from the civil code. However, this is not always the case. Since the administration is the owner of private properties, the administrative law provisions sometimes apply to these properties. The provisions of civil code do not apply when it is clearly mentioned in laws that the administrative law applies to the property.

The administration gains the ownership right of private properties in line with the ways defined in the civil code, e.g. purchase and sale contract, donation or legacy. However, in some cases, a public property may be owned through ways and methods specific to the administrative law.

According to the civil code, unowned places belong to the state.

It is possible, in some cases, to acquire private properties through expropriation or etatization. In expropriation, it is not always necessary to give public property status to the property expropriated. It is not against the law that an expropriated property remains as a private property if it is for the sake of public benefit. In etatization, private enterprises functioning in the form of public service may be taken under the control of state when required by public interest. In this procedure, since all immovable and movable properties of an enterprise enter the state control, it is possible that some of these properties are in the status of public property and some others are in the status of private property.

A public property becomes a private property provided that the allocation procedure regarding a public property is revoked by the same administration and by means of the same procedure.

There are some other outcomes of state ownership of private properties, which may be summarized as follows: In the Turkish legislation, the provisions of private law apply to state-owned private properties in certain cases. For instance, the state-owned private properties cannot be seized.

The procedures related to the administration of private properties are also subject to the rules that apply to the administrative and executive procedures of the administration. In other words, the procedures that the administration uses for the management of private properties can be examined with regard to five components of the administrative action: authority, form, cause, topic and purpose. Public entities cannot sell or rent out private properties arbitrarily. The administration has to comply with certain methods and principles set by the laws.

The administrative organs that decide on the sale of private properties are not the ones responsible for the daily administration of these properties, but mostly the ones that are at higher levels of the hierarchy[37].

CONCLUSION

Public properties constitute one of the main parts of the administrative law. For, the administration needs certain movable and immovable properties to carry out its activities, including public services. These properties are naturally and necessarily subject to a legal regime that is different from the regime which the properties of real and corporate entities and the private properties of the administration are subject to. Through the use of public properties, the administration delivers public services and hence works for the public benefit. By their nature, public services are offered uninterruptedly with a view to meeting public needs. Therefore, the legal regime of properties allocated for public services, which should be delivered uninterruptedly, should be consistent with the nature of these properties.

[37] See A. Şeref, GÖZÜBÜYÜK-Turgut, TAN. **ibid.** p. 708; İsmet, GİRİTLİ-Pertev, BİLGEN-Tayfun, AKGÜNER. **ibid.** p. 673; Aydın, GÜLAN. "Kamu Malları (Public Properties)". İlhan, ÖZAY. **ibid.** p. 589; Kemal, GÖZLER. **ibid.** p. 264.

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