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Evaluation of the annulment decision of the constitutional court on the expropriation law

Anayasa Mahkemesi'nin kamulaştırma kanununa ilişkin iptal kararının değerlendirilmesi

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ABSTRACT

Expropriation is a system used by the state and public legal entities to transfer immovable property owned by individuals to their ownership in cases of public interest. Although expropriation is a procedure that interferes with the right to property, it is based on the Constitution itself and must be implemented according to the measures specified in the Constitution. The Expropriation Law, which was enacted for this purpose in our legislation, shows the procedures to be carried out by public administrations in expropriation transactions and specifies the obligations of the state and public legal entities. One of the obligations imposed on the administration under the Expropriation Law is the payment of the price of the immovable property. Since the correct determination of the value of the immovable property is important in expropriation transactions, the variables to be taken into account when calculating the value of the immovable property are also important. The most important of these variables are the facilities built and the trees planted on the expropriated property by the real estate owner. These two elements affecting the price have always been a subject of debate. A new one has been added to these discussions with the decision made by the Constitutional Court (dated 16/7/2020 and Case Number 2018/104, 2020/39 Decision Number). In this study, it will be investigated whether the value of the facilities and trees planted on the expropriated immovables after the expropriation decision will be taken into consideration. The current situation regarding the period of time regarding the cost of the facilities and trees planted will be discussed in the study. Finally, an evaluation will be made regarding this issue.

Key Words: Expropriation, Constitutional Court, Principle of Proportionality, Right to Property

ÖZET

Kamulaştırma, kamu yararı bulunan hallerde, kişilerin mülkiyetinde bulunan taşınmaz malların, devlet ve kamu tüzel kişileri tarafından mülkiyetine geçirilmesi için kullanılan bir sistemdir. Kamulaştırma, mülkiyet hakkına müdahale eden bir işlem olmakla birlikte, bizzat Anayasa'ya dayanmakta olup, Anayasa'da belirtilen tedbirlere göre uygulanması gerekmektedir. Mevzuatımızda bu amaçla çıkarılan Kamulaştırma Kanunu, kamu idarelerinin kamulaştırma işlemlerinde yapacakları işlemleri göstermekte ve devletin ve kamu tüzel kişilerinin yükümlülüklerini belirlemektedir. Kamulaştırma Kanunu kapsamında idareye yüklenen yükümlülüklerden biri de taşınmaz mal bedelinin ödenmesidir. Kamulaştırma işlemlerinde taşınmaz mal bedelinin doğru bir şekilde belirlenmesi önemli olduğundan, taşınmaz mal bedelinin hesaplanmasında dikkate alınacak değişkenler de önemlidir. Bu değişkenlerin en önemlisi, taşınmaz mal sahibinin kamulaştırılan taşınmaz üzerine yaptırdığı tesisler ve diktiği ağaçlardır. Fiyatı etkileyen bu iki unsur her zaman tartışma konusu olmuştur. Anayasa Mahkemesi'nin 16/7/2020 tarihli ve 2018/104 Esas, 2020/39 Karar sayılı kararıyla bu tartışmalara bir yenisi daha eklendi. Bu çalışmada, kamulaştırma kararı sonrası kamulaştırılan taşınmazlar üzerine dikilen tesis ve ağaçların değerinin dikkate alınıp alınmayacağı araştırılacaktır. Dikilen tesis ve ağaçların maliyetine ilişkin zaman dilimine ilişkin mevcut durum çalışmada ele alınacaktır. Son olarak bu konu hakkında bir değerlendirme yapılacaktır.

Anahtar Kelimeler: Kamulaştırma, Anayasa Mahkemesi, orantılılık ilkesi, mülkiyet hakkı

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1. INTRODUCTION

The right to property is one of the rights guaranteed by the Constitution. Since this right is recognized as one of the fundamental rights and freedoms, any interference with this right must also be in accordance with the measures set out in the Constitution. The point to be considered when interfering with fundamental rights and freedoms is that the interference must first be in accordance with the procedures and principles set out in the Constitution. Article 13 of the Constitution states that any restriction can only be made by law and for the reasons specified in the relevant article of the Constitution. The restriction cannot be contrary to the letter and spirit of the Constitution, the requirements of the democratic social order and the secular Republic, and the principle of proportionality.

According to Article 46/1 of the Constitution, expropriation can be defined as "the taking of the ownership of all or part of the immovable properties in private ownership by the state and/or public legal entities according to the principles and procedures specified by law, or the establishment of administrative easements on them, provided that they pay their real value in advance, in cases where public interest requires it". Since the subject of expropriation is the immovable property owned by real persons, there is an interference with the right to property in this process. The right to property is also regulated in Article 35 of the Constitution and it is stated that the right to property can only be restricted for public interest. When the constitutional regulations are taken into consideration, it is concluded that it is essential that there must be public interest in the expropriation process and the limitation to be made on the right to property due to the expropriation process must comply with the principle of proportionality. When the principle of proportionality is not observed, the owner of the immovable is victimized if the price is underestimated, and the public suffers damage if the price is overestimated (Kılıç, 2021).

As is known, constitutions are at the top of the hierarchy of norms. The laws and other legal legislation enacted by the legislative body based on the Constitution and the transactions and decisions taken by the executive body must comply with the Constitution. This is called the supremacy and binding force of the Constitution and is a consequence of the binding force and supremacy of the Constitution (Özkul, 2015). In our country, the Constitutional Court (a.k.a. AYM, Anayasa Mahkemesi) fulfills this supervisory function. Although the principle of "supremacy of the Constitution" was regulated in the 1924 Constitution, it can be said that this principle was secured with the establishment of the Constitutional Court in the 1961 Constitution (Kanadoğlu & Şahin, 2022). In doing so, in cases where it finds a violation of the Constitution, it issues a decision of annulment in order to eliminate the violation. However, although the issuance of an annulment decision solves the problem of unconstitutionality, the disputes in which the annulled legal provisions are applied are not always concluded. Following annulment decisions, there is sometimes a gap in the legislation due to the annulled provision, and the application of the annulled provision brings along debates.

One of these discussions is the annulment decision of the Constitutional Court regarding the last sentence of Article 25/3 of the Expropriation Law. As we will see in the remainder of our study, the unconstitutionality has been eliminated with the annulment decision, but it is not clear in the legislation and doctrine how to proceed with the regulation that is the subject of the annulment decision. In this study, firstly, the effect of the annulment decisions of the Constitutional Court, the power granted to the President in the Expropriation Law and the way this power is used will be mentioned, and then the annulment decision, which is the main subject of the study, will be mentioned. In the last part of the study, the legal situation arising from this annulment decision and the right of the property right holders whose immovables are expropriated to demand the compensation for the planted trees and structures will be discussed. Then, our opinion will be expressed on how the five-year period on immovables should be applied.

2. THE EFFECT OF THE CONSTITUTIONAL COURT'S ANNULMENT DECISIONS

According to Article 148/1 of the 1982 Constitution, the Constitutional Court reviews the conformity of laws, presidential decrees and the Rules of Procedure of the Grand National Assembly of Turkey with the Constitution in terms of form and substance and decides on individual applications. It examines and reviews constitutional amendments only in terms of form. Furthermore, according to Article 150/1, the Court reviews the conformity of laws, presidential decrees and the Rules of Procedure of the Grand National Assembly of Turkey with the Constitution in terms of form and substance through annulment proceedings. This procedure is called abstract norm review in the doctrine. Another way of asserting unconstitutionality is called concrete norm review according to Article 152/1 (Edoğan, 2011). In this procedure, if the court hearing a case deems the provisions of a law or presidential decree to be contrary to the Constitution, or if one of the parties asserts this, and the court hearing the case considers that the allegation of contradiction is serious, it shall apply to the Constitutional Court and suspend the case. It is stated that persons whose has right to apply to the Constitutional Court with the claim that a law or other regulations that may be subject to concrete norm review violate their rights and interests should also benefit from the consequences of the annulment provision (Küçük, 2013).

If the Constitutional Court finds a violation of the Constitution as a result of its review, it shall issue an annulment decision. The law, presidential decree or the Rules of Procedure of the Grand National Assembly of Turkey or their provisions shall cease to be in force on the date the annulment decision is published in the Official Gazette (Resmi Gazete). According to Article 150 of the Constitution, the Constitutional Court may also determine the date on which the annulment decision will enter into force. This date may not exceed one year starting from the day the decision is published in the Official Gazette. In cases where the entry into force of an annulment decision is postponed, the Grand National Assembly of Turkey shall first discuss and decide on the proposed law that will fill the legal gap created by the annulment decision. The annulment decisions shall not be retroactive and the decisions of the Constitutional Court shall be published immediately in the Official Gazette and shall be binding on the legislative, executive and judicial organs, administrative authorities, law natural persons and legal entities. The matters regulated in the Constitution are also regulated in the Law No. 6216 on the Establishment and Trial Procedures of the Constitutional Court (Law No. 6216, Date Accepted: 30/03/2011).

While the principle of retroactivity of annulment decisions is fundamental in the administrative judicial system in our law, the situation is different in the constitutional judiciary (Tanör & Yüzbaşıoğlu, 2016). Pursuant to the explicit provision in the Constitution, the decisions of the Constitutional Court do not have retroactive effect, but future effect. This is called "the principle of non-retroactivity of judgments" (Gözler, 2018). In Turkish constitutional law, the decisions of the Constitutional Court are constitutive, not declaratory, since the norm subject to annulment ceases to be in force as of the date of publication of the annulment decision in the Official Gazette. In administrative jurisdiction, in the event of an annulment decision, the administrative act becomes invalid from the date of its execution (Teziç, 2014). The adoption of this principle is also important in terms of the stability of the legal order and legal security. Because in the event that the decisions are retroactive, security of law and legal stability cannot be mentioned, since they will affect all transactions established from the date of adoption of the law until the date of annulment (Özbudun, 2017).

Although the principle of non-retroactivity of the decisions of the Constitutional Court is fundamental, this principle should not be understood as absolute. If the Constitutional Court annuls a law through concrete norm review, the party claiming unconstitutionality may also benefit from the annulment decision (Özbudun, 2017). In the objection procedure, the annulled norm is automatically retroactive. In this case, the parties claiming unconstitutionality will naturally benefit from the annulment decision. The annulment decision to be given in criminal laws will also affect the conviction decisions based on the law in the same way in accordance with the "principle of legality in crime and punishment" (Tanör & Yüzbaşıoğlu, 2016).

The principle of non-retroactivity of decisions is clearly stated in the decisions of the Constitutional Court. According to the Constitutional Court, annulment decisions affect the past in some cases, but the future in all cases. In this case, what should be the meaning of the rule of "annulment decisions are not retroactive" in Article 153 of the Constitution? The answer to this question also emerges from the system itself. In the Constitution, annulment decisions are not considered as in administrative cases and the principle that the annulled rule becomes invalid from the beginning is not adopted. In the Turkish Constitutional system, the rule of non-retroactivity of annulment decisions has been adopted in order not to undermine the principle of "trust in the State" and not to cause confusion in state life. Thus, it has been ensured that the situations that have shown their effects in the legal and objective field and have produced their results are considered valid for the period until the day the annulment decisions enter into force. In the event that a status established by a legal act is abolished by the annulment decision of the Constitutional Court or by another legal act, it is natural that the subjective transactions connected to this status also become invalid. Therefore, these subjective transactions cannot be used to obtain prospective rights based on the abolished status. The binding nature of the Constitution, the obligation of all state organs to abide by the decisions of the Constitutional Court and the principle of the supremacy of the Constitution strictly prevent the application of a rule contrary to the Constitution after the determination of its contradiction (1989/12/12).

In the decision of the Council of State (Danıştay) on the interpretation of the time period for filing a lawsuit in administrative jurisdiction regarding the per diem, an interpretation was made as an exception to the principle of non-retroactivity of decisions. According to the decision of the 2nd Chamber of the Council of State dated 23/12/2005 and Case No: 2004/7942, Decision No: 2005/4297 (2005/12/23), after 01/01/2020, an environment of legal uncertainty has been created with the annulment decisions given by the Constitutional Court on per diem. This is because the principle of the rule of law has been distanced from the legal regulations enacted on per diem. In order to ensure this principle, a re-evaluation should be made by the administrative authorities (limited to the period of legal uncertainty) for public officials who apply. The Council of State has stated that the applications of those who could not receive their allowance in a legal environment that occurred after the aforementioned date and which contains uncertainties for public personnel, should be considered within the scope of Article 10 of the Administrative Procedure Law No. 2577, once this uncertainty is clarified after the judicial process. According to the Council of State, the acceptance of the applications to be made after the elimination of legal uncertainty as being in compliance with the time limit for filing a lawsuit will be considered as the starting point of an equitable judicial process for administrative jurisdictions. In addition, according to another decision (2020/12/08), the pending cases should take into account the annulment decision in the proceedings, as stipulated in Article 153 of the Constitution, which states that the decisions of the Constitutional Court are binding, and the established case law of the Council of State. What is meant by the binding nature of the judgments is that both the reasoning of the judgment and the "closely related parts in the formation of the judgment" are binding (Şahbaz, 2020). In the event that a decision has been rendered by the courts of first instance but the appellate review is still pending, it is necessary to make an assessment in line with the annulment decision, as there is no legal basis left (1998/10/07).

3. NATURE AND CHARACTERISTICS OF PRESIDENTIAL DECREES

In our country, the government system was changed as a result of the constitutional amendment made by Law No. 6771 (Law No. 6771, Date Accepted: 21/01/2017) in 2017. With the constitutional amendment, the government system has become similar to the presidential system, and the dual structure in the executive, which we encounter in the parliamentary system, has been ended. While the Presidency remained in place, the Council of Ministers was abolished and its powers were largely vested in the President. In the new system of government, the President is authorized to take three types of actions. These are the power to issue presidential orders (referred as “karar”), the power to issue presidential regulations (referred as “yönetmelik”) and the power to

issue presidential decrees (referred as “kararname”). The determination of the nature and characteristics of these powers is important in determining which authority will exercise judicial review against these acts (Ardıçoğlu, 2017).

The decree power granted to the President by the Constitutional amendment and the limits of this power are set out in the Constitution. According to Article 104 of the Constitution, the President of the Republic may issue presidential decrees on matters relating to executive power, the appointment and dismissal of senior public administrators and the procedures and principles governing their appointment. The fundamental rights, personal rights and duties under the first and second sections of the second part of the Constitution, and political rights and duties under the fourth section cannot be regulated by presidential decree. Presidential decrees shall not be issued on matters that the Constitution stipulates shall be regulated exclusively by law. Presidential decree shall not be issued on matters expressly regulated by law. In case there are different provisions in the Presidential decree and the law, the provisions of the law shall apply. If the Grand National Assembly of Turkey enacts a law on the same subject, the Presidential decree shall become null and void. Decrees are published in the Official Gazette. Decrees may also be issued for the establishment, abolition, duties and powers, organizational structure and central and provincial organizations of ministries according to Article 106, the functioning of the State Supervisory Board, the term of office of its members and other personnel matters according to Article 108, the organization and duties of the Secretariat General of the National Security Council according to Article 118, the administration of the State of Emergency according to Article 119, and the establishment of public legal entities according to Article 123. According to Article 148, the Constitutional Court examines presidential decrees (except those issued in times of emergency and war) in terms of form and substance. Presidential decrees are regulatory administrative acts (İba & Söyler, 2019).

Although the Constitution contains the above-mentioned provisions on presidential decrees, there is no clear statement in the Constitution on presidential orders/decisions. In the articles of the Constitution that enumerate the powers of the President, the manner in which the President shall exercise these powers is not clearly written. As generally accepted in the doctrine, the individual and regulatory acts listed in the Constitution, which are not foreseen to be carried out by presidential decree, shall be carried out by Presidential orders. These shall include the acts of appointment, election and termination of office listed in the Constitution, as well as the acts specified in laws and presidential decrees. While presidential decrees can be considered as primary acts, presidential orders can be considered as derivative acts (Ülgen, 2018/2). Moreover, while the Constitutional Court can review presidential decrees, the Council of State is the court of first instance competent and authorized to review presidential orders in accordance with Article 24 of the Council of State Law No. 2575. According to Article 24 of the Council of State Law, lawsuits filed in relation to "regulatory acts other than presidential decrees issued by the President of the Republic" shall be heard by the Council of State as the court of first instance.

3.1. Authorization Granted to the President by Law No. 2942

Article 25 of Law No. 2942 regulates the limitation of the rights of the owners on the expropriated immovables in case of expropriation. The current regulation in the Law is as follows: "As of the date of the registration decision issued by the court, the rights of the owner of the immovable property to use the immovable property decided to be expropriated, such as new construction or planting or making substantial changes in the existing construction, shall cease. The value of what is done after that is not taken into account. In large projects such as dams, irrigation networks and pipelines, highways, railways, ports and airports, the public interest decision shall be announced by hanging in the neighborhood and/or village headman's office where the immovable to be expropriated is located for fifteen days. As of the end of the announcement period of the public interest decision, the cost of facilities and trees planted on the immovables to be expropriated shall not be taken into account in determining the expropriation price. This limitation on immovables shall be five years from the end of the announcement date...".

With Article 28 of the Law No. 7139 "Law Amending the Law on the Organization and Duties of the General Directorate of State Hydraulic Works and Certain Laws and the Decree Law on the Organization and Duties of the Ministry of Food, Agriculture and Livestock" (Law No.7139 General İnformation, Article justification), the regulation in the third paragraph of Article 25 of the Expropriation Law No. 2942 was amended as "This limitation on immovables is five years from the end of the announcement date, and this period can be extended by the Council of Ministers for a period of five years for one time only." Prior to the amendment, the regulation in the third paragraph of Article 25 of the Law No. 2942 was "this limitation on immovable properties cannot exceed five years from the end of the announcement date" and this phrase was added by Article 27 of the Law No. 6495 on the Amendment of Certain Laws and Decree Laws (Law No.6495, Date Accepted: 12/07/2013).

Article 25/3 of the Expropriation Law No. 2942 limits the power of disposition of the immovable property owner for a period of five years. Prior to the Constitutional Court's annulment decision, this limitation could be extended for another five years, making a total limitation of 10 years. Before the annulment decision, the authority granted to the President in the text of the article was an authority exercised through a Presidential order. It is stated in the justification that the purpose of this authority is to prevent malicious construction on the expropriated immovables as a one-off measure in cases where it is not possible to complete the expropriation works within a five-year period due to lack of funds or infrastructure deficiencies (Law No.7139 General İnformation, Article justification).

3.2. Evaluation of the Annulment Decision on Law No. 2942

The third paragraph of Article 25 of the Expropriation Law titled "limitation of rights and transfer of ownership to the administration" reads as follows "In large projects for the next years such as dams, irrigation networks and pipelines, highways, railways, ports and airports, the public interest decision shall be announced by hanging in the neighborhood and/or village headman's office where the immovables to be expropriated are located for fifteen days. From the end of the announcement period of the public interest decision, the cost of fixed facilities and trees planted on the immovables to be expropriated shall not be taken into account in determining the expropriation price. (Amended third sentence: 19/4/2018-7139/28 Art.) This limitation on immovables shall be five years from the end of the announcement date..." The phrase in the third sentence of the third paragraph of the Law, which reads "this period may be extended by the Council of Ministers (the phrase "Council of Ministers" was later changed to the President) for a period of five years for one time only", was canceled by the Constitutional Court's Decision on 16/7/2020 Case No: 2018/104 and Decision No: 2020/39 (2020/07/16). The previous objection application regarding the said phrase was rejected on the grounds that it was not reasoned (2019/03/14).

In the application made in relation to the annulled phrase, it was stated that "even if there is no expropriation due to expropriation, the authority of the owners to dispose of the immovable is significantly restricted for five years, and the restriction of up to ten years is disproportionate, and with the significant restriction of the authority of the owners to use their immovable for ten years, only the bare value of the immovable will be taken as the basis when the expropriation decision is made at the end of ten years, and in this respect, excessive burden is imposed on the owners". For this reason, it was argued that the aforementioned regulation is contrary to Articles 13 and 15 of the Constitution. In the assessment made by the Constitutional Court, it was stated that the state was allowed to extend the restriction on owner’s immovable properties for up to ten years. In the justification of the additional five-year rule, it was stated that it was aimed to prevent malicious constructions in a second five-year period due to the lack of funds and infrastructure and the impossibility of completing large projects in a five-year period. However, according to the Constitutional Court, the restriction is already imposed on the owners during the first five-year period, and a second five-year period restricts the disposition of the owner for a total period of 10 years. It is stated that this imposes an excessive burden on the owner and that this situation disrupts

the fair balance between the public interest and the owner's right to property in favor of the owner. For this reason, the Court stated that the restriction stipulated by the rule was not proportionate and found the regulation contrary to Articles 13 and 35 of the Constitution (2020/07/16).

Although a limiting provision has been added to the Expropriation Law, in practice, the courts have been evaluating the costs of trees planted and structures built according to the actual situation and the rules of good faith. In many decisions of the Court of Cassation (Yargıtay) on the subject, planting trees and building structures on the immovable property despite the fact that it was known that it would be expropriated, demolished after a few years or flooded by dam waters was not deemed to be in good faith and it was deemed correct not to pay for them. In one of the decisions of the General Assembly of Civil Chambers of the Court of Cassation (2020/11/24) "Considering the nature of the structures, the defendant's action is in the nature of a disposition aimed at increasing the expropriation price of the immovable, moreover, in many decisions of the local court, during the discoveries made during the courts views, it was observed that some new houses did not have stairs to go upstairs, some houses did not have water installations although they had taps, the interior facade of the houses were not painted, It is clearly stated that very large structures without walls and columns were built in the middle of the fields, that there were saplings planted in the fields without even removing the bag, that there was no irrigation system even if the bag of these saplings was removed, that some saplings were not integrated with the soil, therefore, there is an aim to obtain unfair gain by acting against the rule of honesty and the action constitutes a violation of Article 2 of the Code of Civil Law. Article and it is understood that it is not possible to give compensation for the structures built on the immovable in this respect". In another decision (2019/11/26) it was stated that "it would not be correct to take into account the values of the structures and saplings planted in recent years in the determination of the expropriation price, and in the cases of determination and registration of the expropriation price, the condition and value of the immovable at the date of the lawsuit should be taken into account, Considering that the lifespan of a building is at least 50-60 years, the owner of the immovable may have resorted to such a method in order to get a high price for a place that he knew would be flooded in two or three years" and it was stated that the actual situation and the purpose of the owner should be considered in the payment of the expropriation price. Both of the aforementioned decisions were rendered in the cases decided by the Court of Cassation on the cases filed before the annulment decision. In summary, in expropriation proceedings, the courts already take into account whether the owners are in good faith, whether the trees planted and the structures built are real disposals in practice. As a general period, the addition of a five-year period to the Expropriation Law should be considered reasonable. However, the calculation of a second five-year period is contrary to the principle of proportionality, as stated in the Constitutional Court decision. Moreover, it has been stated that even the five-year limitation in the current version of the Law is a regulation in favor of the administration, making the right to property unusable and violating the right to property. (Tezcan, 2013)

As explained above, the annulment decision of the Constitutional Court is justified. This is because the rights of immovable property owners are already limited for a period of five years from the date of the announcement. Moreover, it is doubtful that the expropriation will be completed during this period. The administration may not carry out the works and procedures despite the expropriation decision. In this case, the owner of the immovable will not be able to make any changes to his immovable for a period of five years. Determining this period as five years for a second time will have extremely disproportionate consequences against the immovable owner. As stated in the Court's decision, although malicious construction is intended to be prevented, this situation may give the administration a tendency to act arbitrarily, reduce the obligation to complete the expropriation procedures expeditiously, and give the administration freedom in this regard. Therefore, it can be stated that the intervention made by the Law is not proportionate and unlawful.

As mentioned above, the first five-year period was added to Law No. 2942 in 2013 and the second five-year period was added in 2018. In the current situation, when an expropriation decision is taken by the administrative authorities, the rule that the cost of the fixed facilities and trees planted on the immovables to be expropriated will not be taken into account in the determination of the

expropriation price, as of the end of the announcement period of the public interest decision, starts from the date of the announcement. However, it is seen that the legal amendment was made in 2018 and the Constitutional Court decided to annul it in 2020. Considering the time that has passed, it is necessary to determine whether a second five-year period has been set by the President during this time, and if so, what will be the fate of the decision on the announcement of a second five-year period in the face of the annulment decision of the Constitutional Court.

4. THE EFFECT OF THE ANNULMENT DECISION ON EXISTING PRESIDENTIAL DECISIONS/COUNCIL OF MINISTERS DECISIONS

As it is clearly understood from the provisions of the Constitution, the annulment decision of the Constitutional Court shall abrogate the norm subject to the lawsuit. However, pursuant to Article 153/3 of the Constitution, the Constitutional Court has the authority to decide on the entry into force of the annulment decision later, and this period cannot exceed one year. As we have explained, the principle that the decisions of the Constitutional Court do not apply retroactively in constitutional jurisdiction is seen as a requirement of vested rights, the principle of trust in the State (1989/12/12).

As stated above, the principle that annulment decisions shall not be retroactive is a general rule, although there are some exceptions. Therefore, decisions made and finalized on the basis of annulled provisions and completed transactions should not be affected by the annulment decision (Çağlar, 2017).

The Constitution does not specify an effective date for the annulment decision on Article 25/3 of the Expropriation Law within the scope of Article 153/3. In this case, it can be said that on the date of publication of the annulment decision in the Official Gazette, the last part of Article 25/3 of the Expropriation Law, the phrase "this period may be extended by the Council of Ministers (President) for a period of five years for one time only" immediately ceases to be in force. In this case, it should be stated that the Presidential decisions taken based on the annulled provision as of 27/11/2020 no longer have a legal basis. However, this situation does not mean that the decisions are invalid as of the date of their adoption, but that the decisions taken based on the annulled phrase until 27/11/2020 and the situations arising from their implementation will remain valid. It is clear that the principle of retroactivity of the annulment decisions of the Constitutional Court is accepted in order not to harm the legal transactions and relations that have been finalized (Kaplan, 2013). In this case, with the annulment decision, the Presidential orders or decisions become invalid after the annulment decision since they no longer have legal grounds. It is necessary to protect the legal transactions made and completed based on these decisions in accordance with the principle of legal security and certainty (Güneş, Kaya, & Bingöl, 2018), and to act according to the current situation in terms of incomplete transactions. This is because the situation of legal uncertainty in the decision of the Council of State, which we have already mentioned, has not occurred in terms of the decision that is the subject of our study.

In the current situation, the costs of the trees planted and the structures built on the expropriated immovables as of the date of the announcement of the expropriation decision will no longer be taken into account, limited to a period of five years. In the event that the expropriation procedures have not been completed, the disposals made by the owner of the immovable must be taken into account in the calculation of the value of the immovable. In terms of the value of trees planted and structures built between the date of the decision on the announcement of the second five-year period and the date of the publication of the annulment decision, the courts cannot make an assessment according to the rules of good faith. This is because the justification relied upon by the Constitutional Court for the annulment is that, considering the length of the period, this has imposed an excessive burden on the owner. A separate evaluation by the courts in terms of good faith after the five-year period in terms of the expropriation price will harm the implementation effect of the Constitutional Court's decision.

5. CONCLUSION

It is clear that expropriation is an interference with the right to property. Considering that interferences with fundamental rights and freedoms must be within the limits specified in the Constitution and laws and in accordance with the principle of proportionality, it is necessary to make a narrow interpretation in the limitations to be made. Any interpretation that exceeds the limitations set forth in the Constitution and the Expropriation Law in the transactions to be carried out regarding the immovable property that is the subject of expropriation will violate the right to property and the principle of proportionality.

In its decision Case No: 2018/104 Decision No: 2020/39, the Constitutional Court correctly annulled the regulation in the Expropriation Law by finding it contrary to the principle of proportionality of the Constitution. Thus, a situation that already limits the owner's authority to dispose of the immovable property and imposes an excessive burden on him/his has been alleviated. However, the annulled phrase of the Law remained in force for more than two years and some transactions were carried out based on this phrase. The fate of the five-year extension decision, which was announced for a second time by the President's decision, and the actions taken on the basis of this decision after the annulment decision has been a matter of debate. No regulation has been made by the legislature on this issue.

It is undoubtedly the case that after the annulment decision, Presidential orders are no longer enforceable and have no legal basis in the legislation. This is because the article of the Law relied upon by the President is no longer in force. Therefore, the Presidential orders issued on the basis of Article 25/3 of the Expropriation Law are no longer valid and no longer have the possibility to be implemented after the annulment decision. However, no decision has been taken on how to implement the transactions based on the decisions announced between 2018 and 2020. In this regard, the implementation of the Constitutional Court decisions should be considered.

As clearly stated in the Constitution, annulment decisions are not retroactive. In addition, the annulment decision on Case No: 2018/104 is not one of the exceptions in the doctrine that affects the past and completed transactions. The decision of the Council of State regarding the legal uncertainty does not find the possibility of application in the concrete case. This is because there is no previous determination decision on the annulled legal provision that would qualify it as a legal uncertainty. In this case, there is no action to be taken in terms of the expropriation transactions completed in accordance with the principles of legal certainty and security in the expropriation transactions established based on the extension of time after the annulment decision. In the event that the contrary is accepted, it will be concluded that the decision of the Constitutional Court will affect the transactions that have been completed in the past, which will be contrary to the Constitution and established judicial decisions. However, since there is no legal basis for the disproportionate restriction imposed on the right to property, in the ongoing transactions in this regard, it is necessary to apply according to the current legal situation. In the expropriation transactions that continue after the annulment decision and in the compensation cases pending in the judiciary, the costs of trees planted and structures built for the expropriation transactions that were not completed within the five-year period should also be taken into account in the expropriation price. Although it is stated by the Court of Cassation that in practice, the costs of planting trees and building structures in bad faith in order to increase the price of immovable property will not be taken into account, bad faith cannot be mentioned in the event that the five-year period has passed. Because in this case, there will be a disproportionate interference with the property right of the immovable owner.

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