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Judicial Review of Mining Exploration-Exploitation Licenses-Permits and Revocations in Forest Areas

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Abstract

Aim of study: The aim of this study is to identify issues pertaining to the justifications of the annulment decisions of the administrative judiciary in the cases of actions for annulment brought against the revocations of mining licenses and permits for mining activities granted by the administration due to reasons specified by the legislation.

Area of study: This study addresses licenses and permits granted for mining activities in Turkey and judicial review of the revocations of these licenses and permits.

Material and Method: The main material of the study is the current legislation on mining activities and the judicial decisions for the cancellation of mining licenses / permits. The method of study is to evaluate the materials together and to determine the reasons for the cancellation and rejection decisions of the judiciary.

Main results: Sanctions in the Mining Law should take into account future generations, stop improper practices and ensure that mining activities are compatible with the environment and human rights.

Research highlights: Revocation of mining exploration-exploitation licenses in forest areas is an issue that warrants further research and careful evaluation. Judicial decisions play key role in filling the legal gaps in mining exploration and exploitation.

Keywords: Mining, License, Revocation, Administrative Justice

Orman Alanlarında Maden Arama-İşletme Ruhsatları-İzinleri ve İptallerinin Yargısal Denetimi

Öz

Çalışmanın Amacı: Bu çalışma ile madencilik faaliyetleriyle ilgili olarak idare tarafından verilen ruhsat ve izinlerin, mevzuatta öngörülen sebeplere binaen iptaline ilişkin idarenin işlemleri hakkında açılan iptal davalarında, idari yargının vermiş olduğu iptal ve red kararlarının gerekçelerinde öne çıkan hususların tespiti amaçlanmaktadır.

Çalışmanın Alanı: Bu çalışma Türkiye'de gerçekleştirilen madencilik faaliyetlerine yönelik ruhsat ve izinler ile bu işlemlerin iptallerinin yargısal denetimini kapsamaktadır.

Materyal ve Yöntem: Çalışmanın ana materyali madencilik faaliyetlerine ilişkin güncel mevzuat, ve maden ruhsat/izinlerinin iptaline yönelik yargı kararlarıdır. Çalışmanın yöntemi ise materyallerin birlikte değerlendirilerek yargının vermiş olduğu iptal ve red kararlarının önde gelen gerekçelerinin tespit edilmesidir.

Sonuçlar: Maden hukukunda öngörülen yaptırımlar ile gelecek nesillerin yaşam standartlarının da göz önünde bulundurulması, günümüzde uygulanan hatalı uygulamaların ortadan kaldırılması ve çevre ve insan haklarıyla uyumlu şekilde faaliyetlerin yürütülmesi amaçlanmalıdır.

Araştırma Vurguları: Orman alanlarında maden arama-işletme ruhsatının iptali konusu doktrinde eksik görülen ve detaylı çalışmalara ihtiyaç duyulan bir konudur. Yargı kararları, maden arama ve işletmeye ilişkin hukuki boşlukların doldurulması adına önem taşımaktadır.

Anahtar Kelimeler: Madencilik, Ruhsat, İptal, İdari Yargı

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Introduction

Article 168 of the Turkish Constitution titled "Exploration and Exploitation of Natural Resources" stipulates that "natural wealth and resources shall be under the authority and at the disposal of the State. The right to explore and exploit these belongs to the State. The State may delegate this right to persons or corporate bodies for a certain period. Of the natural wealth and resources, those to be explored and exploited by the state in partnership with persons or corporate bodies, and those to be directly explored and exploited by persons or corporate bodies shall be subject to the explicit permission of the law. The conditions to be observed in such cases by persons and corporate bodies, the procedure and principles governing supervision and control by the State, and the penalties to be applied shall be prescribed by law."

The object of interest in Article 168 is natural wealth and resources. Mines and mineral resources are also regarded by the Turkish Constitution as natural wealth and resources. Therefore, Article 168 forms the basis of the Mining Law. Since the right to explore and exploit mines belongs to the state, it may delegate this right to persons or corporate bodies for a certain period.

The state exercises this right by authorizing persons or corporate bodies to that end. This authorization is regulated under the names of licensing, certification and concession in the Mining Law. A license is an authorization document issued by the administration. According to the Mining Law, a certificate is a document issued by the Ministry in accordance with the procedures and principles specified in the regulation for mining exploration and exploitation activities.

An exploration license is an authorization document granting the right to explore on a determined land.

An exploitation license is an authorization certificate granting the right to mining activities. These definitions show that there is no legal difference between license and certificate.

A license provides a person with a legal status. It is, however, a conditional transaction that is subject to revocations in the event that conditions specified in a mining exploration and exploitation project are not fulfilled (Çal, 2012).

Article 5 of the Mining Law defines the term "license revocation," which is the subject matter of this study, as "license abolishment" while Articles 10, 13, 17, 24 and 33 define it as "decertification." Article 3 defines "license termination" as "automatic termination of rights without any requirement for notification."

Material and method

This study first addressed the legal dimension of the issue of the revocation of permits and licenses for mining exploration and exploitation in forest areas.

The Forest law No 6831, the Mining Law No 3213, the Mining Regulation, the Regulation on the Permits to be granted in Forest/Nature Areas and the Application Regulations of Article 16 of the Forest law were used. Regulations and penalties regarding license revocations within the said legislation were identified and evaluated. Afterwards, judicial decisions on sanctions regarding permit and license revocations were obtained from the UYAP and Kazancı Hukuk data banks and included in the study. We believe that this study will pave the way for further research on permit and license revocations, which is a disputable issue.

Findings

A penalty is defined as a punishment prescribed and regulated by the law and imposed by the authority (Gözler, 1998) in response to non-compliance with laws and regulations (Özay, 1985). In Turkish Law, the terms "sanction" and "penalty" are often used interchangeably (Çağlayan, 2006).

The term "penalty" is a higher concept than the term "sanction." The former is often associated with criminal law while the latter is mostly used for cases of violation of administrative law (Özay, 1985; Gülan, 2006; Oğurlu, 2001).

Sanctions determined according to rules, principles and procedures of the Administrative Law are the means by which the administration can fulfill its duties effectively and immediately (Günday, 2003). As stated in the Constitutional Court[1] and

Council of State[2] decisions, administrative sanctions are penalties imposed by the administration directly in the manner specific to the Administrative Law (Özay, 1985).

License revocation or suspension is an administrative sanction without any requirement for notification. License revocation, as an administrative sanction, is a one-sided operation executed by a license-issuing authority. Firstly, we addressed the concepts of license or permit for mining activities and their place in the legislation. We then examined the place of license revocations in the legislation and gave examples of judiciary. We analyzed judicial decisions for license revocation sanctions and the attitude of the judiciary towards the subject matter of interest.

License or permit for mining activities

Mining activities in the Mining Law consist of two stages; exploration and exploitation, both of which are carried out depending on the license granted. Licenses must be obtained provided that they comply with conditions specified by the laws (Günay, 2017).

The Mining Regulation issued for the execution of mining activities and enforcement of the Mining Law regulates the terms and conditions for obtaining licenses for mining exploration and exploitation activities. Real persons or legal entities requesting licenses must document their financial qualifications in order to ensure that mining activities can be carried out without interruption.

Article 7 of the Mining Law No. 3213 contains regulations and conditions regarding licenses granted for mining activities in private protection zones, national parks, nature protection zones, preservation forests, zones protected in accordance with the Coastal Law No. 3621 Date. 4/4/1990, grade 1 forbidden military zones, 1/5000 construction planning zones and grade 1 protected zones. Licenses for constructing facilities for mining exploration and exploitation activities in state forests are subject to the Forest law No. 6831.

Permits and licenses for exploration activities

Permits required for mining exploration activities are subject to the provisions of Article 7 of the Mining Law. Permits granted for mining activities are valid during the validity of the license law. Permits are deemed expired in the event of termination, expiry or withdrawal. Mining exploration activities are subject to the regulation to be issued by the Ministry in accordance with the Mining Law.

Permits and licenses for operation/exploitation activities

Operation license right should be acquired by applying until the end of the exploration license term. Section 5 entitled "Operation Permits and Exploitation Licenses" of the Mining Regulation No. 30187 Date 09/21/2017 regulates the permit applications and permits for mining exploitation activities. The requested documents and permit conditions for exploitation permit applications are arranged separately for each mining group.

Legal basis in the Forest Law for permit approvals and license revocations for mining activities

Article 7 of the Mining Law stipulates that mining exploration activities at locations that fall in State Forests require permits in accordance with the Forest law No 6831. The procedures and principles regarding these permits are regulated by "the Regulation on the Permits to be Granted in Forest/Nature Areas" that defines the legal framework for implementation of Articles 16, 17, 18 and 115 of the Forest Law and by the regulation for implementation of the Forest law No 16. These regulations regulate the necessary mining exploration permits under two titles: exploration activities requiring excavation and those that do not.

Mining activities at locations that fall in State Forests that are reserved for public service or public interest are subject to the permission of the Ministry, which is, in exchange for the permit, entitled to demand forestation and area permit fees from the license holder. Article 9 stipulates that areas that have no roads to access mine sites and

those with no application for roads for access shall not be granted permits.

According to some of the judicial decisions regarding offences committed during mining activities, "the license holder has committed the crime of occupation and illegal utilization by pouring waste into the forest areas outside the borders of the mine for which the permit has been granted,"[3] "the license holder has committed the crime of occupation and illegal utilization by building a barrack in the mine research area for the mine workers without receiving a permit for its construction from the forest administration,"[4] "the license holder has committed the crime of occupation and illegal utilization, for activities for providing access to the mine site within the state forest cannot be considered within the scope of the forest permit granted," [5] "mining activities without permission in the state forest is an offense punishable by fine,"[6] and "tools and machines used during the committal of the crime shall also be confiscated."[7]

License revocation sanction in mining law

Article 15 of the Regulation on the Permits to be Granted in Forest/Nature Areas stipulates that exploration and exploitation permits shall be revoked by the Ministry in the following conditions: if the license holder waives its requests regarding the permit, if the license holder does not comply with the provisions of this Regulation, and if the license holder does not make an official request for the renewal of the permit or consent by submitting the relevant documents (renewed permit or a document indicating that the permit law is in force) to the relevant regional directorate.

Permits granted in accordance with the Regulation for Implementation of Article 16 of the Forest Law or mining exploration, exploitation, facility and infrastructure facility permits shall be revoked in the following conditions: if the license holder waives its requests regarding the permit, if the environmental impact assessment (EIA) report is revoked, if the license holder does not make an official request for the renewal or extension of the permit, if the license holder uses the permit for purposes other than those for which the permit was issued, if the license holder violates the conditions in the written contract or if the forest administration determines that mining activities are not carried out in accordance with the rehabilitation project and if deficiencies in the project are not completed within the specified term.

Article 5 of the Mining Law stipulates that rights and obligations over mines can be passed on by way of inheritance and that licenses whose assignment transactions are not completed within 6 months shall be abolished.

License revocation sanctions are generally imposed against repetitive violations which could not be done away with the imposition of other sanctions in the Mining Law. For example, Article 7 of the Mining Law stipulates that in the event that mining activities at licensed fields are not in conformity with this Article, administrative fine shall be imposed on the license holder and the mining activities shall be terminated, and in the event that this Article is breached at least three times within three years, the permit shall be revoked. The license holder who interferes with the implementation of the provisions of the law under false pretenses and makes unlawful profit by mine production or delivery shall first be punished by an administrative fine and in the event that the license holder violates the provisions in Article 10 three times within three years, the permit shall be revoked.

According to Article 13 of the Mining Law, in the event that the license holder does not pay the annual license fee or does not pay the full amount, the license holder shall be subject to an administrative fine. In the event the full amount is not paid within three months, the permit shall be revoked.

According to Article 17 on exploration activities, in the event the exploration activity report related to mineral resources and investment expenditures are not submitted to the General Directorate, the license holder shall be subject to an administrative fine. In the event the required corrections are not made within this period, the license shall be revoked. In addition, the failure of the license holder to obtain the permits required to be obtained under the

provisions of the relevant legislation shall result in license revocation.

It is observed that the license revocation sanctions in the relevant articles of the Mining Law have been imposed against violations repeated within the periods specified in the Law. However, the provision of article 17 of the Mining Law should be further discussed. According to the said Article, an exploration license is revoked in the event the license holder does not make an official request for an exploitation license at the end of the exploration license term. What this actually means is that expired exploration licenses are not processed. Therefore, here, we are talking about expired, not revoked, exploration licenses. The provision of article 17 includes the term "the guarantee deposit shall be returned to the license holder," which shows that this transaction is not actually a sanction. It only indicates that in the event an exploitation license is not obtained at the end of the exploration license term, then no mining activities can be carried out (Gülan, 2008).

According to Article 24 of the Mining Law, an exploitation license is granted upon the acquirement of the required permits under Article 7 of the Law. If the environmental impact assessment (EIA) decision, property permit, business license, work permits and other required permissions under Article 7 of the Law are not completed within three years from the date the exploitation license is granted, the license holder shall be subject to an administrative fine each year. In the event the exploitation license is not acquired due to the permits under the Article 7 until the exploitation permit term, then the permit term shall not be extended, corresponding to an indirect imposition of license revocation sanctions.

Another reason for revocation specified in Article 24 of the Mining Law is as follows: In the event that the total amount of minimum production made in any of the three years within five years of production is less than 30% of the production quantity specified in the project, the license holder shall be subject to an administrative fine. In the event the license holder is subject to an administrative fine twice within five years, the license shall be revoked.

According to Article 29 of the Mining Law, adjacent or nearby mining zones are deemed to be mining areas due to the environmental impacts of production activities, urbanization, exploitation security, efficiency in the operation of the reserve. In order to combine mining permits within a mining region into a legal entity, the requests of license holders corresponding to at least half of the mine reserve in the designated area are required. In the event of insufficient number of requests, all permits in the designated area shall be revoked.

Permit and License Revocations in State Council Decisions

The decisions of the court of appeal regarding the judicial review of revocation of mining permits and licenses focus on three main issues; 1) decisions regarding special legal conditions according to the nature of an area on which a permit is requested, if the area should be protected, 2) decisions on monitoring the impact of mining activities on the environment, and 3) decisions for the fulfillment of criteria set forth in the legislation for the execution of mining activities.

Judicial review of mining activities in protected areas

Mines are spread all over the world. Mining activities are carried out at locations remaining outside a horizontal distance of 500 meters and a vertical distance of 150 meters from roads under the responsibility of the General Directorate of Highways, 1/5000 scale fields with a construction plan, organized agriculture and animal husbandry zones, seas, lakes and cultural assets uncovered in grade 1 natural site areas. Additional conditions are required for licensing mining activities in forests, pastures, olive groves and areas located in close proximity to settlements.

Permit and License Revocations in Forest Areas

Mining exploration and exploitation in state forests, and construction of facilities for mining activities are subject to the permission of the relevant Ministry, which has the discretionary power regarding the

granting of permission. However, discretionary power is not absolute and should be used in accordance with the law and legislation. Possible negative impacts of mining activities on an area should be investigated and this investigation should be conducted by a panel of experts.[8] Although decisions of the administrative court are subject to judicial review, they should not be contrary to the provisions of the Constitution pertaining to the protection of forests (Güloğlu, Belkayalı & Bulut, 2017).

The application for permission to operate on forest/nature areas has been rejected on the following grounds: The area has fertile state forests, no mining exploration and exploitation permit has been issued for this area before, if issued, the permit would set a precedent resulting in the deterioration of the area, and the area is located in the long-range protection area of the Ömerli Dam and in the partially protected area of the large streams under protection. As a result of the investigation carried out by the court, it has been decided that the possible effects of mining activities on the forest, water resources and environment should be determined. For forest permit, the EIA report should also be submitted to the forest administration. It is certain that forest permit will not be granted based on "the EIA not required" document. It has, therefore, been concluded that the necessary examinations should be completed to arrive at a decision again.[9] All over the world; mining activities are permitted and supported on condition that the land damage due to mining activities is rehabilitated according to legal regulations. Mining activities in forest/nature areas would cause damage on a wider scale and it is, therefore, clear that the "EIA is not required" decision does not apply to forest lands.

Before the mining exploitation permit was revoked, all permits required for mining activities were acquired by the plaintiff. However, the plaintiff's forest permit application process was protracted by administrative procedures. After all, the plaintiff acquired all the necessary permits. Given that the license holder is not at fault regarding the failure of the permits to be concluded within the period stipulated in the law, it has been concluded that the refusal of the plaintiff's application, which has resulted in license revocation, is unlawful.[10]

Permit and license revocations in olive groves

For mining activities in olive groves, the construction and operation of facilities (except for olive oil factories and small-scale agricultural enterprises) releasing chemical waste, generating dust and smoke, or leading to these negative consequences in and within three kilometers of these areas should be prevented. The revocation of the permits is, therefore, lawful.[11]

Mining activities in pastures

For mining activities in pasture lands, environmental and economic factors should be taken into account together before degrading the pasture. The public interest of the pasture, as it is, should be compared with the public interest of mining activities there. For this comparison, possible negative effects on the environment and measures to be taken should be determined. The economic loss of the pasture and the economic benefits to be derived from mining activities should be calculated. In conclusion, a pasture land should be degraded based only on technical procedures.[12]

It should be determined whether a pasture land on which mining activities are to be carried out has been degraded. If it has been degraded by the Provincial Commission of Pasture, it should be determined whether permits set forth by Article 7 of the Mining Law has been obtained.[13]

Mining activities in natural protected areas

The area for which permit application for mining activities has been made has been declared as grade 1 natural protected area by the Regional Board for the Preservation of Cultural and Natural Heritage, Bursa. Therefore, the EIA permit request has been denied by the relevant administration. It has been emphasized that the area has been declared as grade 1 natural protected area, and therefore, no mining activities can be carried out there. It has been concluded that the revocation of the mining exploitation license is lawful.[14]

A portion of the area for which a request for an exploration license has been made is under the protection of the Regulation on Control of Drinking Water Basins of Istanbul Water and Sewerage Administration (ISKI). It has, therefore, been concluded that a permit should be requested from the General Directorate of ISKI for the exploitation license to be granted.[15]

In addition, whether or not the areas in which mining activities take place are included in the zoning plan, they are subject to non-sanitary establishment licenses. Therefore, no mining activities can be carried out in zones with any non-sanitary establishment licenses.[16]

An EIA report is required for mining activities.

According to the Mining Law, an EIA report is required to be prepared for a mining exploitation license to be granted. In the event mining activities are carried out without an EIA report, the guarantee deposit shall be accounted as revenue and the mining activities shall be terminated. In the event the violation is of a continuing nature, the exploitation license shall be revoked. An EIA report has been obtained and the "EIA Positive" decision has been revoked by the Fourteenth Division of the Council of State. It has, therefore, been concluded that no mining activities can be carried out without an EIA license and that the exploitation license shall definitely be revoked.[17] Forests are most adversely affected by global climate change (Güloğlu & Bulut, 2016). It has, therefore, been emphasized that mining exploration activities should be subject to environmental impact assessment, not based on any limit value.[18]

Decisions on the fulfillment of the administrative procedure stipulated in the legislation

The required corrections were not made, within the period specified to the financial deficiencies detected in the operation project and reported thereafter, and the guarantee deposit was not paid up within the period specified. It has, therefore, been concluded that the decision to revoke the exploration license, to deny the exploration license request and to account the guarantee deposit as revenue is lawful.[19]

Despite receiving the EIA certificate, which is one of the permits to be received from and submitted to relevant institutions within six months following the date of the received license in accordance with the provisions of the legislation, the license holder had not started performing mining operation activities within six months period. It has, therefore, been concluded that the license revocation by the administrative court is lawful.[20]

The reason for the failure to obtain the forest license was the revocation of the decision (dated: 19.12.2011, no: 02-20) of the Istanbul Cultural and Natural Heritage Preservation Board No 2. Therefore, the permits could not be submitted to the General Directorate within the deadline, and the necessary permits could not be submitted to the General Directorate of Mining Affairs within the period prescribed by law due to reasons arising from the administration. It has, therefore, been concluded that the revocation of the exploitation license is unlawful.[21]

The license holder had the will to start mining exploitation activities. The license holder had made the applications within the period specified in the law by obtaining the necessary permits. The permit granting institutions did not report a negative evaluation. Therefore, the license holder had the will to start mine exploitation as soon as possible. The condition requiring the revocation of the license was due to the reasons that were not in the hands of the license holder. The case of the applicant should, therefore, be considered an unexpected situation.[22]

In addition, granting a license for mining exploration and exploitation activities and for the construction of compulsory and temporary facilities for those activities within state forest borders will be determined by the inspection and supervision that will be carried out in accordance with the legislation by a commission formed by the Ministry. The discretionary power of the competent authority that grants mining rights should be in accordance with the law and legislation.[23]

The right of exploitation license shall arise if the exploration license holder applies, until the end of the exploration license term, with the exploitation project and the document showing that the application fee has been paid, and the license holder shall be entitled to the exploitation license if there is no deficiency in the project. It has, therefore, been concluded that no additional permission from the Prime Ministry with a circular of the Ministry shall be imposed on the license holder to acquire the exploitation license, that is, no limitation unforeseen by the law shall be brought by an administrative regulation.[24]

Conclusion and Recommendations

The decisions of the Council of State on the inspection of license revocation sanctions in the Mining Law show that the Council of State regards the implementation of license revocation by the administration as lawful in the event of failure to obtain permits required under the legislation and to submit them to relevant authorities and institutions within the period stipulated in the Law. The decisions also show that the Council of State regards the implementation of license revocation as lawful in the event of failure to complete technical and financial issues within the given period. The Council of State also upholds the decision of the administration to implement license revocation in the event of failure to start mining activities. However, the Council of State regards the implementation of license revocation as unlawful in the event of license delays due to administration.

The decisions of the Council of State emphasize that the non-sanitary establishments license should be obtained whether or not an area in which mining activities take place are included in the zoning plan. The decisions also show that mining exploration activities can be carried out only if mining exploration license is obtained while mining exploitation activities can be carried out only if mining exploitation license is obtained. Another result is that if the site in which mining exploration and/or exploitation activities are to be carried out is subject to special provisions, then firstly, the provisions of that law should be taken into consideration.

The Council of State attaches importance to reports of expert commissions as to whether or not a mining license should be granted. It emphasizes that the process of granting mining licenses should be based on expert opinions and on-site examinations.

Mining rights, which are considered qualified rights, should be shaped according to absolute rights and necessary arrangements for mining should be carried out in accordance with this principle. Human and environmental rights are more important today than they used to be, and they will be much more important in the future. Therefore, the idea that "mines should be extracted at all costs for national prosperity" should not be accepted as the absolute truth. Topography, geological structure, relief, water regime and climate change in areas where mining activities are carried out change drastically (Külekci & Belkayalı, 2009). In the event mining activities are to be carried out in forest/nature lands, it should be taken into account that forests are high carbon reservoirs and play an effective role in reducing the negative effects of climate change (Ünal and Küçük, 2007)

The clause of “public interest” in Article 169 of the Constitution titled “Protection and Development of Forests” should be interpreted as “overriding public interest.” The administrative court should use its discretionary power based on overriding public interest assessment and in accordance with the provisions of the Constitution pertaining to the protection of forests.

The changing demands of society should be taken into account and policies in the field of mining should have a modern management approach. The sanctions in the Mining Law should take into account future generations, stop improper practices and ensure that mining activities are compatible with the environment and human rights. The common goal of the judiciary, administrators, non-governmental organizations, scientists and politicians should be to ensure that mining activities do not impinge on the right of all living things to live in a clean and balanced environment.

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