

Deprive of the Property and Just Satisfaction in the Context of the Protection of the Cultural Heritage

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Key words: access to land, legislation, security of tenure, valuation, deprive of the property, just satisfaction, expropriation compensation, ECHR decisions

SUMMARY

In Turkey, in accordance with the Cultural and Natural Heritage Protection Act (Law no. 2863) and provisions in the national legislation regarding expropriation, when calculating the expropriation compensation for a listed property, it is impossible under Turkish law to take into account that part of a property's value that results from its rarity and its architectural and historical features. The Turkish legislature has deliberately set limits on such valuations by excluding the taking into account of such features. Thus, even where the latter seem to imply an increase in the price of the listed property, the domestic courts cannot take them into consideration. In contrast, however, it appears from the Court of Cassation's case-law that where the value of an expropriated property has decreased on account of its registration as a listed building, the courts take such depreciation into account in determining the compensation to be awarded. The European Court of Human Rights (ECHR) decisions emphasize that this valuation system is unfair, in that it places the State at a distinct advantage. It enables the depreciation resulting from a property's listed status to be taken into account during expropriation, while any eventual appreciation is considered irrelevant in determining the compensation for expropriation. Thus, not only is such a system likely to penalise those owners of listed buildings who assume burdensome maintenance costs, it deprives them of any value that might arise from the specific features of their property. In this system, because of the taking of property without payment of an amount reasonably related to its value normally constitutes a disproportionate interference under Article 1 of Protocol No. 1, applicants who apply to the Court for increased compensation, have received huge amount of additional compensation. In this situation it is clear that interested parties of the Convention have sustained pecuniary damages. In this study, firstly the valuation method in the process of expropriation of buildings classified as cultural heritage will be analyzed and the unfairness problem which is formed by the process of expropriation will be introduced. And then, solution offers based on legal process will be introduced in order to prevent pecuniary damage of the State and provide using of the people's right to the peaceful enjoyment of their properties in line with the international Conventions and ECHR decisions.

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1. INTRODUCTION

Turkey has a compulsory cadastral system and there is an emphasis on the importance of land and human-related activities. Based on the country's constitution, every citizen has property rights. These private rights can only be restricted when a public interest is concerned. To regulate these public land requirements, Turkey ratified Expropriation Law No. 2942 in 1983. Since then, many expropriation cases have been brought to the courts by landowners dissatisfied with the compensation payment. The origin of this problem lies in the determination of the land price in order to obtain the real value. A significant number of expropriation implementations cause disagreement between the state and owners.

Under Turkish law, the state is entitled to acquire private lands for a public purpose in return for payment to the affected owners and users of the land within the framework of the Expropriation Law. Article 46 of the Turkish Constitution allows for the confiscation of property with compensation by a public agency for the public benefit. The seizure of movable and land property belonging to private persons by public corporations and bodies to be used for public purposes without the consent of the owner in accordance with the decisions made by authorized bodies and with the cost prepaid is termed "expropriation". Real estate subject to private ownership may be expropriated by the competent administrative authorities where required by the public interest. Expropriation can be realized only for the purpose of providing public services or conducting public initiatives. Compensation for expropriated real estate shall be paid in cash and in advance or, in specific situations foreseen by the law, in equal instalments (Yomralioglu et al., 2008).

On the other hand, in Turkey, in accordance with the Cultural and Natural Heritage Protection Act (Law no. 2863) and provisions in the national legislation regarding expropriation, when calculating the expropriation compensation for a listed property, it is impossible under Turkish law to take into account that part of a property's value that results from its rarity and its architectural and historical features. The Turkish legislature has deliberately set limits on such valuations by excluding the taking into account of such features. Thus, even where the latter seem to imply an increase in the price of the listed property, the domestic courts cannot take them into consideration. In contrast, however, it appears from the Court of Cassation's case-law that where the value of an expropriated property has decreased on account of its registration as a listed building, the courts take such depreciation into account in determining the compensation to be awarded. The European Court of Human Rights (ECHR) decisions emphasize that this valuation system is unfair, in that it places the State at a distinct advantage.

In this study, firstly the valuation method in the process of expropriation of buildings classified as cultural heritage will be analyzed and the unfairness problem which is formed by the process of expropriation will be introduced. And then, this study will also examine a special case related to Turkish expropriation appearing before the ECHR. Finally, solution offers based on legal process will be introduced in order to prevent pecuniary damage of the State and provide using of the people's right to the peaceful enjoyment of their properties in line with the international Conventions and ECHR decisions.

2. THE VALUATION PROCEDURES IN EXPROPRIATION

In Turkey, expropriation procedures begin following a decision by the state or the municipal authorities that the implementation of a project will necessitate the acquisition of land for public use. Feasibility studies that have been conducted for each subproject provide information on the need to carry out an expropriation process. Figure 1 describes the main steps in the expropriation process (Uzun, 2000).

A valuation commission assesses the value of the land or building to be expropriated. According to Article 8 of the Turkish Expropriation Law, expert opinion on the value of the land must be sought. This can be provided by local and central agencies, real estate agents and chambers of commerce. The standard applied in assessing the value of the land and property assets is that of full replacement cost. Valuation procedures, as specified by law, allow for a fair and transparent process of compensation to all owners.

The valuation commission calculates, on a plot-by-plot basis, the capitalized income loss from assets, and this is applied to both temporary and permanent expropriations within the confines of the law. According to Article 11 of the Expropriation Law, the valuation commission, in the following, take into account:

- type and quality of the property or resource;
- surface area;
- all the qualities and properties that can affect the value of it and the values of every quality and property;
- tax statements, if any;
- amount estimation made by the official authorities on the date of expropriation;
- in Urban land, the sales amount of the similar land sold before the date of expropriation;
- sales amount of the similar lands sold before the date of the expropriation without any special purpose;
- official unit prices, construction cost estimates and depreciation of buildings on the date of expropriation;
- other objective measurements that may influence the determination of valuation.

Turkish legislation does not take into account of any other criteria except this legal procedure concerning with valuation method.

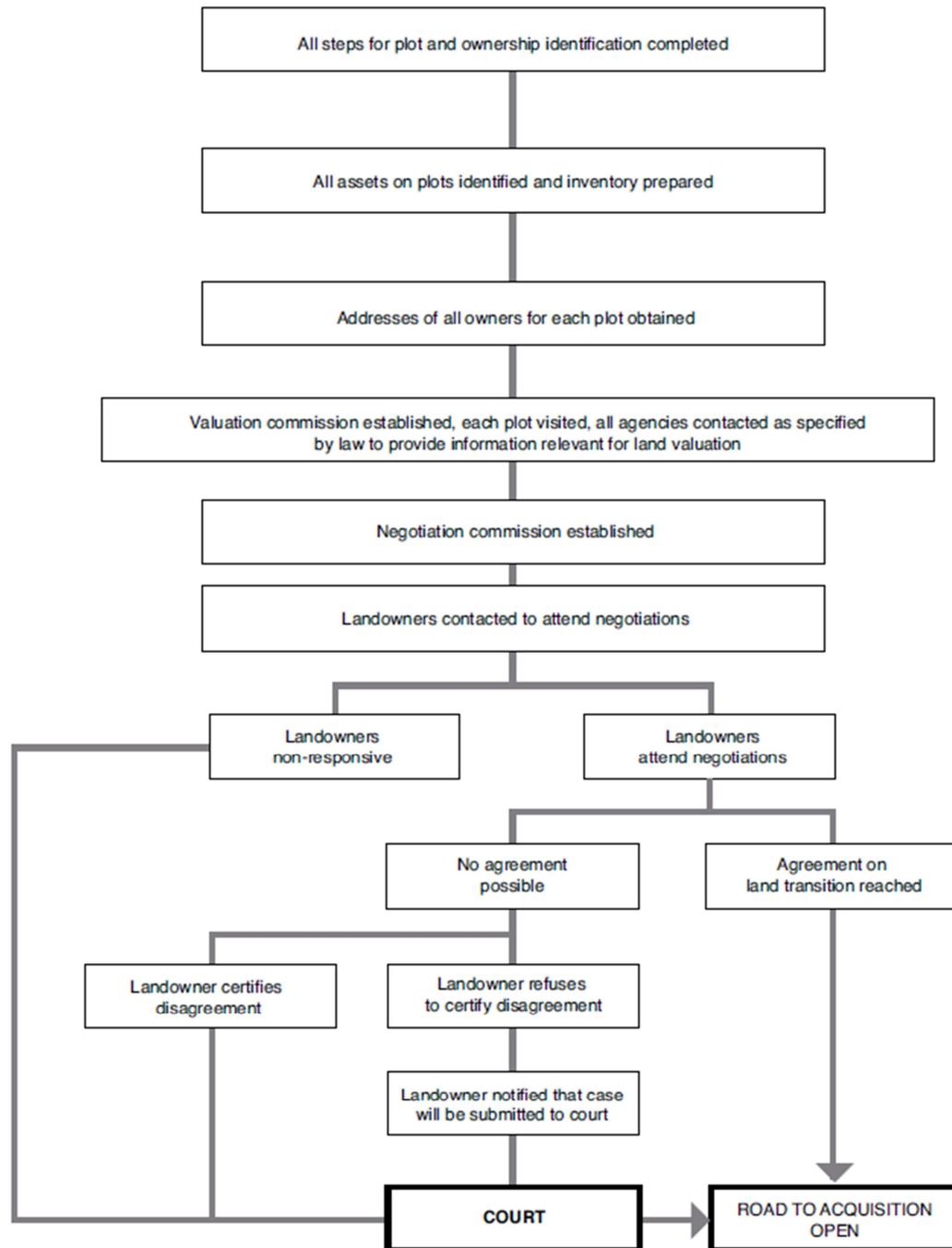


Figure 1. Main steps in the expropriation process, Turkey (Source: IFC, 2002).

3. ANALYZING A SAMPLE CASE REGARDING EXPROPRIATION OF BUILDINGS CLASSIFIED AS CULTURAL HERITAGE

3.1 Cultural Asset at Issue and the Fact

The property owner, a Turkish national who was born in 1903 and died in 2005, was resident in Adana at the relevant time. During the 1930s he acquired for value a two-floor freestone building, constructed in 1906, in the sub-prefecture of Tarsus, İçel province. It is recorded in the land register as a solid structure house with a courtyard. The building is composed of two floors, each with a living floor space of 258.17 m², its total living floor space being therefore 516.34 m². The building was of architectural interest in its own right.

On 1 November 1990 the Committee for the Protection of Adana's Cultural and Natural Heritage decided to classify the property as a “cultural asset” within the meaning of the Cultural and Natural Heritage (Protection) Act (Law no. 2863 of 21 July 1983). It was included in the project for protection of the urban environment on 23 November 1998. It was also included on the Council of Europe's inventory for the protection of the cultural and natural heritage.

On 4 April 2000 the executive council of İçel province issued an expropriation order in respect of the property in the context of the “Project for the environmental rehabilitation and regeneration of the streets around St Paul's Well”. After the expropriation process the landowner complained that amount of expropriation compensation awarded by the domestic courts did not correspond, in his opinion, to the real value of the expropriated property. After the exhausting of domestic remedies the applicant brought his case to the ECHR.

3.2 Expropriation Process in Turkey

The executive council of İçel province issued an expropriation order in respect of the property in the context of the “Project for the environmental rehabilitation and regeneration of the streets around St Paul's Well” on 4 April 2000. On the basis of a valuation report submitted on 21 March 2000 by a panel of experts” made up of three representatives of the authorities and two representatives of property owners, and in line with the “high-grade building” category in the construction price index published by the Ministry of Urban Planning, the council determined the building's value at 36,856,865,000 Turkish liras (TRL) (about 65,326 euros (EUR)). This amount was paid to the applicant on the date of transfer of ownership.

The applicant lodged an application for increased compensation for the expropriated building with the Tarsus District Court on 12 October 2000. He requested that a new panel of experts, to include a qualified art historian, re-assess the property, taking into account its historical and architectural value. He claimed TRL 1,000,000,000,000 (about EUR 1,728,750) in additional compensation.

On 26 February 2001 the court held a hearing and dismissed the applicant's request for re-valuation of the building on the ground of its historical value. The court held that under section 11 (1) of the Expropriation Act (Law no. 2942), the panel of experts responsible for

the building's valuation could only determine its value on the basis of clearly defined objective data. At the same time, it agreed to the appointment of a new panel of experts, to be made up of a civil engineer, an architect and a representative of property owners (panel no. 2).

On 10 May 2000, in determining the value of the building, panel no. 2 based its findings primarily on the construction price index published by the Ministry of Urban Planning, specifically the category "buildings requiring restoration". It stated its findings as follows:

...
The disputed property has the features of buildings... constructed in line with the Mediterranean tradition, known as 'Tarsus houses' (Tarsus evleri). It has also been included in the Council of Europe's inventory for the protection of the cultural and natural heritage...As the building comes within class V, group D (buildings requiring restoration) under the Ministry of Urban Planning's circular of 2000..., the approximate cost of construction per square metre ... has been set at TRL 351,413,000."

Panel no. 2 concluded that panel no. 1 had valued the disputed building as an ordinary dressed-stone building, without taking account of its architectural features. It decided not to adopt those valuation criteria and assessed the building's value at an initial TRL 181,448,588,000. It then reduced this amount to TRL 90,724,294,000, noting that the building's depreciation justified a reduction of 50%. However, it then increased this sum to TRL 181,448,588,000, holding that, in view of the building's architectural, historical and cultural features, its value should be increased by 100 %. After deduction of the expropriation compensation already paid to the applicant, the panel decided that the additional compensation should be TRL 144,591,723,000.

A third panel of experts submitted a report on 12 June 2001, confirming all of the conclusions in the second expert report.

On 14 June 2001 the applicant requested a further expert report, on the ground that the two previous reports had failed to take sufficient account of the building's architectural and historical features in assessing its value.

On 15 June 2001 the court, after dismissing the request for an additional expert report, allowed part of the applicant's claim and instructed the authorities to pay him TRL 144,591,723,000 (about EUR 139,728) in additional compensation, with interest at the statutory rate, to be calculated from 3 October 2000.

On 19 November 2001 the Court of Cassation set aside that judgment. It held that under section 15 (d) of the Cultural and Natural Heritage (Protection) Act (Law no. 2863), neither a building's architectural or historical features nor those resulting from its rarity could enter into play in the assessment of its value. Consequently, a 100 % increase in the amount of additional compensation could not be considered justified.

On 4 December 2001 the applicant petitioned for rectification of the Court of Cassation's judgment. He contested the amount of expropriation compensation and emphasised, the absence of a legal criterion that would enable the value of buildings making up the country's cultural and historical heritage to be calculated. He relied on Article 6 of the Convention and

Article 1 of Protocol No. 1. On 21 January 2002 the Court of Cassation dismissed the applicant's request for rectification.

On 15 February 2002 the District Court complied with the Court of Cassation's judgment and fixed the amount of additional compensation at TRL 53,867,429,000 (about EUR 45,980), with interest, to be calculated from 3 October 2000. On 27 May 2002 the Court of Cassation upheld the judgment of the first-instance court.

On 23 December 2002 the Ministry of Finance issued a payment order for TRL 124,807,810,000 (about EUR 91,905), broken down as TRL 53,867,429,000 in respect of additional compensation and TRL 70,940,390,000 in respect of interest.

The case file shows that, following judicial proceedings which ended in 2005, the applicant received separate compensation for the land on which the building was constructed. According to information submitted by the Government and uncontested by the applicant's representatives, the compensation received following the expropriation of the land was 145,460 new Turkish liras (TRY) (about EUR 87,101).

3.3 The ECHR's Assessment

The ECHR's assessment as follows:

In particular, there must be a reasonable relationship of proportionality between the means employed and the aim sought to be realised by any measures applied by the State, including measures depriving a person of his or her possessions.

In this connection, the Court has previously held that the taking of property without payment of an amount reasonably related to its value will normally constitute a disproportionate interference. Article 1 of Protocol No. 1 does not, however, guarantee a right to full compensation in all circumstances. Legitimate objectives of "public interest" may call for less than reimbursement of the full market value of the expropriated property. In the Court's view, the protection of the historical and cultural heritage is one such objective.

Neither the rarity of the expropriated building nor its architectural or historical features were taken into consideration in calculating the amount of expropriation compensation. In this regard, the Court can accept the Government's argument emphasising the difficulties inherent in calculating the market value of properties classed as being of cultural, historical, architectural or artistic value. The determination of this amount may depend on numerous factors, and it is not always easy to assess it through comparisons with properties on the market that do not have the same status or the same architectural and historical features. It considers, however, that these difficulties cannot justify a failure to take these features into consideration in any way.

This valuation system enables the depreciation resulting from a property's listed status to be taken into account during expropriation, while any eventual appreciation is considered irrelevant in determining the compensation for expropriation. So, the Court notes that this valuation system is unfair, in that it places the State at a distinct advantage.

Moreover, the Court, like the Chamber, observes that the practice of a number of Council of Europe member States in the area of expropriation of listed buildings indicates that, despite the absence of a precise rule or common criteria for valuation, the option of taking into account the specific features of the properties in question when ascertaining appropriate compensation is not categorically ruled out.

In the light of the foregoing, the Court therefore considers that, in order to satisfy the requirements of proportionality between the deprivation of property and the public interest pursued, it is appropriate, in the event of expropriation of a listed building, to take account, to a reasonable degree, of the property's specific features in determining the compensation due to the owner.

There has accordingly been a violation of Article 1 of Protocol No. 1. Having regard to these factors, including the legitimate public interest aim pursued by the disputed expropriation, and ruling on an equitable basis, it considers, like the Chamber, that it is reasonable to award the applicant the sum of EUR 75,000, together with any tax that may be chargeable on this amount.

3.4 The Grand Chamber's Judgment

The Grand Chamber seems to state that the relevant Turkish legislation was clearly defective and, accordingly, that the outcome of the domestic judicial proceedings was in contradiction with the Convention. The Chamber considered that the total failure to take into consideration the above-mentioned features of the property in calculating the compensation for expropriation had upset the requisite fair balance and deprived the applicant of that part of the property's value which was attributable to those features. It found that an amount reasonably related to those features ought to have been determined, in order to maintain a relationship of proportionality between the deprivation of the disputed property and the public interest pursued. It further held that an award of EUR 75,000 constituted just satisfaction, having regard to the conclusions of the expert reports prepared for the domestic courts and to the consideration that legitimate "public interest" aims, such as those pursued by measures for the conservation of the cultural heritage, could justify reimbursement below the full value of expropriated properties, that is, the value if all their features were taken into account.

4. CONCLUSION

An amount reasonably related to above-mentioned features ought to have been determined, in order to maintain a relationship of proportionality between the deprivation of the disputed property and the public interest pursued.

In respect of ordinary property the value is evident and clear – it is the market value average, which can be calculated on the basis of a statistical analysis of the market. But, in respect of a unique item that forms part of the cultural heritage, this method cannot be used. So clear rules and common standards should be used in order to assess and calculate the pecuniary value of unique historical and cultural objects. Valuation system should be based on objective data and supported by expert reports.

Even if it is not always easy to assess it through comparisons with properties on the market that do not have the same status or the same architectural and historical features, the valuation should be done by considering both national and international equivalents. For this purpose, we should cooperate with our international stakeholders. Finally, having regard to legislation modification, the valuation system of immovable cultural assets should be changed and legalized in line with the ECHR decisions as in some sample cases.

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BIOGRAPHICAL NOTES

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