Cultural Heritage versus Property Rights

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Key words: property rights, cultural heritage, deprivision of the property, Turkey

SUMMARY

Thanks to its geographical location, mild climate, accessibility and fertile land Turkey has been a country of civilizations that has many ancient settlements and cultural heritage for ten thousand years. These assets were protected in the period of Ottoman Empire in 1869. Today in Turkey; both legal regulations have been made and cultural heritage is aimed to be protected with international contracts. In this sense, the statement of "… acknowledges that cultural and natural heritage are universal heritage which should be protected without giving harm to property rights provided by international laws…" in the 6. article of The Agreement of the Protection of World Cultural and Natural Heritage, emphasizes that property rights should be respected in the process of protection. The process management of protection of cultural assets is conducted under the Law of the Protection of Cultural and Natural Heritage (Law no. 2863) which is in force in Turkey. In this law, it is expressed that real assets which are classified as cultural heritage can be acquired by the state providing that the state pay the price. However in practice, the process of expropriation cannot be conducted due to administrative, financial, technical and legal imperfections. The most important of these is that there is no comprehensive planning policy about protected area and that the management of these areas is not done with a holistic approach. But at the same time; lack of financing, active inexistence of a digital information system about cultural assets and projects about property expropriation extending over a long period of time and should be included. Due to such kind of problems, damnification of the owners of these real assets whose tenancy has been restricted seriously and for an undetermined period of time has become chronic and unbearable. This important problem needs a solution with a sustainable approach. The aim of this study is to determine management problems of cultural assets, reveal the form of restriction on the right of property and offer solutions that would provide a fair balance between cultural heritage and private property.

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1.INTRODUCTION

Turkey has a rich cultural heritage as a result of hosting several civilizations for centuries. The conservation and handing down to next generations of this heritage can be provided with the cooperation of both local and regional government units. These cultural assets are protected by national laws and conventions. The Law of the Protection of Cultural and Natural Heritage (Law no. 2863) enables the operation of procedures such as the determination, registration and protection of the cultural and natural heritage. However it is clearly seen that by this law and related regulations, restrictions on the right of property have been brought into these places which are called protected sites. Active landowners whose lands are transfered to the state ownership by the notice of protected site, are mostly deprived of property and their development rights are restricted. Although the aforesaid deprivation serves for a legitimate purpose, that is the conservation of the state's cultural heritage, there are problems in enabling the balance between the deprivation and just compensation. By 2011 Turkey as the most convicted country by European Court of Human Rights (ECHR) in terms of property right, must show sensitivity on this matter. The valuation processes of the immovable properties which are kept by the state by expropriating or similar implementations, extending the ''management of cultural heritage'' programmes over a long period of time and not being able to use the information systems effectively make these processes more chronic.

2. LEGISLATIVE and ADMINISTRATIVE PROCESS

2.1 Cultural Assets

The immovable cultural and natural assets in Turkey are defined as protected site and have been grouped as natural, archaeological, urban, historical and mixed by the IEHC. In 2010 the number of the protected sites was 10627 while today the number has risen to 11337 and the registration and grouping have been done. It is seen that the highest rate belongs to the archeologically protected sites by 82 % in this division (Figure 1).

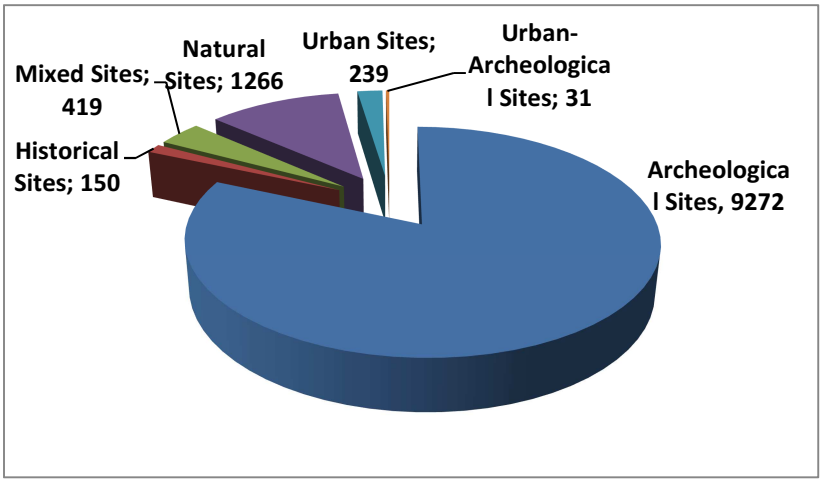
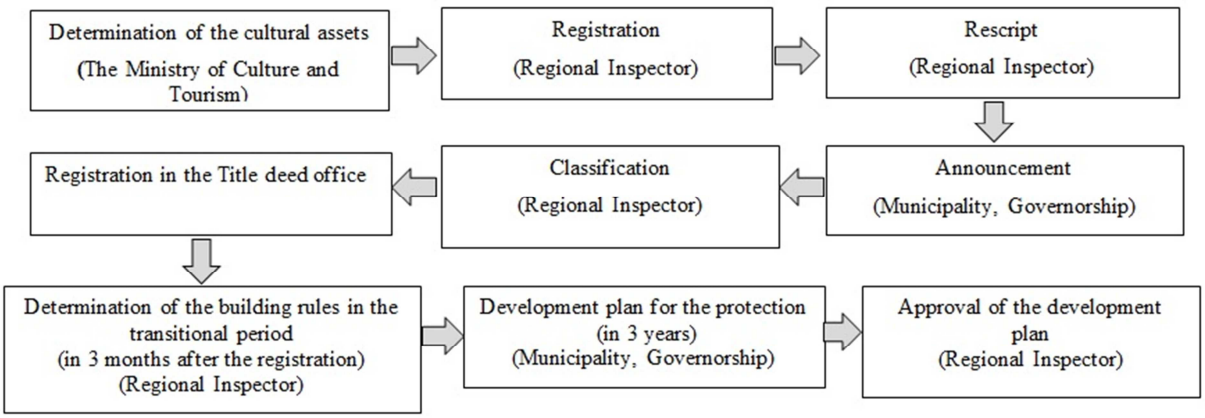


Figure 1. The Distribution of Protected Sites (URL1, February 2012, The Ministry of Culture and Tourism)

2.2 Administrative and Legislative Process

The determination, registration, announcement, conservation utilization and the transfer of the property rights to the state of the cultural assets are carried out by the Ministry of Culture and Tourism, however; together with the legal amendments in 2011 in the law no 2863 (The Law of the Protection of Cultural and Natural Heritage) the administration of the natural protected sites has been assigned to the Ministry of Environment and Urban Planning. The Committee for the Protection of Cultural Heritage in city centres, regional inspector of cultural assets in county seats and Protection, Implementation and Control Offices established by the municipalities are responsible for the management of cultural assets. Besides these, municipalities and governorates are also responsible for the conservation of these sites. The General Directorate of Land Registry is also included in this system because the cadastral map has a great importance in this relationship. By this way, a multifaceted governing system emerges (Table 1). The absence of an effective communication network in this multifaceted system makes the administration of these assets difficult. However, for instance in Netherlands the conservation of cultural assets have been tried to provide by moving away from collectivism as a result of making necessary regulations in the administrative structure (Yıldız, 2005). In Turkey on the other hand it can be said that a new administrative structure study which can protect the cultural assets under the pressure of intense structuring is not available.

Table 1
The administrative and legislative process of the cultural assets in Turkey.



3. RESTRICTIONS ON THE IMMOVABLE CULTURAL ASSETS

All the properties which have the characteristics of immovable cultural assets are exposed to some restrictions according to their classifications. All the current plans and other plans to be carried out later are stopped. All kinds of construction, repair and building works are subject to permission of the Ministry. The public improvements are suspended. Separation – integration cannot be done on parcels. The immovable property cannot be sold or donated without the permission of the Ministry. Agricultural and livestock farming activities in the rural sites are allowed to a certain extent. In some sites partial or certain construction is prohibited. Especially in the first and second degree archaeological and first degree natural protected sites, there is a declared construction prohibition. These sites are under a tighter control when compared to other sites.
All the precautionary actions mentioned above bring about a mechanism that directly restricts the ownership and that restricts power of decision on the immovable property. Both protection of the cultural assets and the rights of landowners who have title deeds are the fundamental duties of the state. Actually the state confirms to set up the balance between the deprivation of property and fair indemnification by making laws and signing conventions but most of time the balance cannot be set because of financial, technical or administrative deficiencies or delays.

4. TRANSFORMATION TOOLS OF THE PRIVATE OWNERSHIP INTO THE STATE OWNERSHIP

The methods that have been used during the course which the immovable cultural assets in private ownership have transformed into the state ownership have differed in years. Firstly, the transformation of the property into the state ownership has been provided by temporary expropriation. The expropriation prices have been assessed in accordance with the Expropriation Law**,** no 2942**,** but this has not been an effective method of compensation against the restrictions on property and this method has not been utilized on the required level because of the insufficiency of the source of financing. In order to come up with a solution to

this trouble, a provision has been added to the law numbered 2863 and the immovable properties have been decided to transform by barter. According to this, upon the request of the landowner, -as a result of being protected site with a construction prohibition- the parcels, which are occupied with immovable cultural and natural assets that have to be protected, can be bartered with another treasury land. As the supply couldn't meet the demand in years and the treasury lands were used up, the process was blocked. For this reason, the need for a different regulation has arisen.

With this new method called site certificate, it has been proposed that upon the landowners' requests, a document (certificate) stating the cost of the immovable properties shall be given in order to enable the landowners to participate in the tender of the immovable properties which belong to the Treasure. However the regulation, which was in use for only three years, has been quashed by the Council of the State on account of the fact that "It is illegal to make a regulation that cannot appear in the law or in the legem by notification." From the year 1998 when the notification came into force till the year 2001 when the regulation was cancelled, 2455 certificates worth 100 trillion have been distributed. In the same period in ten years' time, expropriating worth 33 trillion and barter worth 15 trillion have been done. As it is seen in Table 2 the blockages experienced during expropriating and barter have been tried to overcome by certificates. But by the year 2011, it has been ceased to use the certificates as pecuniary means in treasury land tenders. Apart from these three implementations, as stated in the article 17/c of the law numbered 2863, it is possible that restricted parts of the developments rights can be transferred to the another receiving zone by the zoning ordinance. Unfortunately the transformation model of the development rights which is implemented successfully in the U.S.A and in many countries of Europe couldn't be implemented in Turkey sufficiently (Yamak, 2006). When international experiences are taken into consideration, the purpose of TDR is to protect the sites by transforming development rights that already exist or the potential rights that may exist under the pressure of development entirely or partially with another movable property (Goksu, 2008). It would be right to generalize this method in order to protect the cultural assets, which are under the pressure of urbanization, by minimum cost.

Table 2

Implementations according to years.

Years	**The immovable cultural asset subject to private property**	
	Numbers	**Implementations**
1990-2000	519	Expropriation
1992-2005	1055	Barter
1998-2005	3093	Site certificate

5. TROUBLES AND SOLUTIONS

5.1 Valuation

The fundamental data that is used in the expropriation of the immovable cultural assets is the market value. In order to determine this value, the related articles of the Expropriation Law, numbered 2942 are used. Moreover, in the Law numbered 2863, it is stated that the age, rarity and artistic features are not considered; that is, although the immovable property is a cultural asset, it is assessed in accordance with its state before being a protected site and the precedent sales in its neighbourhood. It is not always easy to assess this amount when compared to the immovable that are not in the same state or that do not possess the same historical or architectural features. However, the aforesaid difficulties do not justify the fact that these features are not taken into consideration. And The European Court of Human Rights decisions emphasize that this valuation system is unfair in terms of creating an advantage in favour of the state. Furthermore, the ECHR states that while the registered property is being expropriated, it would be proper to consider the certain features of the building to a reasonable extent while determining the compensation for the owner. Such valuations by excluding the taking into account of such features cause not to get right amount of compensation of the landowners.

In order to protect our cultural heritage that serves to all humanity with their presence and enables us to touch the past, the necessity for a new and international valuation mechanism arises. Instead of assessing these immovable properties by comparing to other properties that are not in the same condition, the valuation should be done by considering both national and international equivalents. For this purpose, we should cooperate with our international stakeholders. We should bring a new standard to the valuation system. We should charge only the experts in appraisal committees and create a coordination network to be in communication with the international stakeholders. Most importantly, the valuation maps should be created and a database consisting of valuation elements pertinent to the equivalents in the world should be modelled and created for all the registered immovable properties that are included in the Council of Europe's inventory for the protection of the cultural and natural heritage.

5.2 Development Plan for Protection

The development plan for protection is the starting point of the transformation process. Even if these plans that have to be completed in three years, are carried out in the right time, it takes a long time to wait for the expropriation subsidy, to determine the proper treasury land and to schedule for the transfer. Especially in protect sites where absolute construction prohibition and protection measures are implemented strictly, this indefinite and open-ended process causes troubles for the property owners. The state support granted for the protection of the constructions on the immovable cultural asset can not be sufficient in providing this balance. In addition to this, other pecuniary damages should be compensated by the state during this period of time.

5.3 Transfer of Development Rights (TDR)

As a result of rapid urbanization, historical assets are destroyed especially in big cities of Turkey (Nisanci et al., 2003). In order to protect the cultural assets which are under the pressure of structuring and putting them under the administration of the state, faster and more effective methods should be developed. Till now the restrictions on the property have been tried to resolve by methods such as expropriating, barter and site certificate, yet have not been applied effectively. Instead of these, TDR as an implementation tool which protects the balance of public- private ownership, which creates options based on the sides' wills and choices, and which is more fair has taken its place in the Cultural and Natural Heritage (Protection) Act (Law no. 2863) (Kocalar, 2010). Despite being legal, the fact that a detailed definition has not yet been done and the relevant regulation has not yet been issued have caused the method not to find an implementation area. What should be done urgently is to enact a regulation that includes the technical and the administrative procedures regarding the transfer of the property and development right. After this, local authorities responsible for this implementation (municipalities, governorships) should prepare themselves for the new transfer of development rights system which has been occupying the country's agenda for so long, yet will find the implementation area recently by bringing about new approaches to the future plans and programmes.

5.4 The availability of Information Systems

For the effective management of the cultural assets a digital database is required. During the process of building the database, to use GIS based systems would be useful. Because some required base-maps such as cadastral maps, development plans, and current topographical maps are under responsibility of different foundations, it is not easily possible to use this data in digital form (Reis et. al, 2003). For this reason analysing the cultural assets with holistic approach by integrating the cultural assets with other geographical data will be faster and more effective by the integration of GIS into this system.

6.CONCLUSION

It is seen that every implementation performed to protect the cultural heritage destroys the right of ownership and that the compensation phases do not satisfy the needs sufficiently. In order to prevent this, the legal regulations in Turkey should be revised and the technical and the administrative deficiencies should be eliminated. Instead of solving the landowners' problems by expropriating, the problem should try to be solved permanently by transferring development rights in the context of protection of property. The development plans for protection of all the registered immovable cultural assets should be made and the valuation maps should be created by assessing the valuation standards. In order to control all these efficiently the information system should be included into the process. For this reason, a GIS based database which consists of all the data sets should be built for the administration of the cultural heritage. By so doing, both the cultural heritage can be protected and the rights of the owners of these properties will not be restricted.

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BIOGRAPHICAL NOTES

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