



**REPUBLIC OF TURKEY**  
**CONSTITUTIONAL COURT**

**FIRST SECTION**

DECISION

Application No: 2013/1568

Date of Judgment: 8/5/2014

**FIRST SECTION**

DECISION

**President** : Serruh KALELİ  
**Members** : Zehra Ayla PERKTAŞ  
Burhan ÜSTÜN  
Hicabi DURSUN

Zühtü ARSLAN

**Rapporteur** : Selami ER

**Applicants** : Tülay ŞAHİN

**Counsel** : Att. Abdullah YALÇINKAYA

## **I. SUBJECT OF APPLICATON**

1. The applicant alleged that her right to property and right to a fair trial had been violated due to the fact that the price of the immovable property that she owns had been determined lower than what it should have been in the case for the determination and registration of price filed because of the expropriation of the immovable property and that the price of expropriation determined based on the date of the case had been paid to her without interest being charged and filed a request for material compensation.

## **II. APPLICATION PROCESS**

2. The application was directly lodged to the Constitutional Court on 26/2/2013. In the preliminary examination of the petition and annexes thereof as conducted in terms of administrative aspects, it was found out that there was no deficiency that would prevent referral thereof to the Commission.

3. It was decided by the Second Commission of the First Section on 19/9/2013 that the examination of admissibility be conducted by the Section and the file be sent to the Section.

4. In accordance with the interim decision of the Second Section dated 23/1/2014, it was decided that the examination of admissibility and merits of the application be carried out together.

5. The facts and cases which are the subject matter of the application and a copy of the application were sent to the Ministry of Justice for its opinion, the Ministry of Justice stated that there was no need for the submission of a new opinion by referring to the opinions which were previously submitted through its letter dated 25/3/2014 and the decisions of the Constitutional Court.

## **III. FACTS AND CASES**

### **A. Facts**

6. As expressed in the application form and the annexes thereof, the facts are summarized as follows:

7. A decision of expropriation was issued by the Council of Istanbul Metropolitan Municipality on 5/9/2006 and 12/12/2006 on all of the immovable properties of which the applicant is a shareholder at a rate of 200/4126, which are located in East quarter of Pendik district of Istanbul province and which have the section number of 104, the block number of 849 and the parcel numbers of 541, 542, 543, 544 and 2030.90 m2 of the immovable property with the parcel number of 545 on the ground that they were located within the area allocated for public in the zoning plan dated 23/9/2005 and for the purposes of road construction.

8. Upon the fact that no agreement was reached over the price of expropriation, Istanbul Metropolitan Municipality filed a case for the appraisal and registration of the price of expropriation before the 1st Civil Court of First Instance of Pendik on 28/9/2009.

9. The share percentage of the applicant on the immovable properties was determined through the expert report dated 16/4/2010, the value of the area of the immovable property which fell into the share of the applicant was determined as 31.010,00 TL, the value of the building on the immovable property which fell into the share of the applicant was determined as 10.429,00 TL through the expert report dated 30/7/2010, the applicant stated her oppositions against this determination through her petition dated 14/12/2010 by indicating the fact that the social and economic state, the proximity to peripheral roads and marine and air transport of the places where the immovable properties were located, that the basement floor was a workplace, that it was a place which yielded a rent were not taken into account and that it would not be realized from outside that the building was old.

10. By including the parcel numbered 545 which was not included in the calculation by mistake in the previous report through the on-site viewing performed upon the opposition and the second expert report dated 26/5/2011 as submitted to the court subsequently and by considering the fact that the entire ownership of the building belonged to the applicant, the value of the area of the immovable properties to be expropriated which fell into the share of the applicant was determined as 200.290,00 TL and the value of the building on them as 212.841,00 TL, the total price of expropriation as 413.131,00 TL.

11. The applicant objected to the determinations on the social and economic state and the proximity to peripheral roads and marine and air transport of the places where the immovable properties were located and the age, material and construction quality of the building once again through her petition dated 12/5/2011.

12. The value appraised by the expert was blocked to the bank account of the applicant on 23/12/2011 through the decision of the Court.

13. By deciding that the case be accepted and the price be paid to the applicant, the Court decided on the acceptance of the case through its decision dated 29/12/2011 and numbered M.2009/466, D.2011/625 by determining the price of expropriation as 413.131,00 TL in line with the expert report dated 26/5/2011.

14. The applicant appealed the decision on the ground that the price was determined at a low level and no decision was issued on the payment of interest, the request for appeal was dismissed through the decision of the 5th Civil Chamber of the Supreme Court of Appeals dated 7/6/2012 and numbered M.2012/5790, D.2012/12088 and with the justification that no inappropriateness was found in the determination made by making comparison with its precedents and by deducting the depreciation and the decision of the local court was approved.

15. The request for the revision of decision by the applicant was dismissed with the decision of the same chamber dated 27/12/2012 and numbered M.2012/23077, D.2012/28740.

16. This decision was notified to the applicant on 6/2/2013.

17. The applicant lodged an individual application to the Constitutional Court on 26/2/2013.

## **B. Relevant Law**

18. The relevant parts of Article 10 of the Code of Expropriation dated 4/11/1983 and numbered 2942 with the side heading "*Determination of the price of expropriation by the court and registration of the immovable property in the name of the administration*" are as follows:

*"In the event that expropriation cannot be performed by the procedure of purchasing, the administration shall apply to the civil court of first instance and request that the price of expropriation of the immovable property be determined and registered in the name of the administration.*

*The court shall summon the owner of the immovable property to participate at the hearing by notifying to him/her the date of hearing that it has determined for at least more than thirty days after the date of application by the administration. The date of hearing shall also be notified to the administration.*

*In the event that the parties cannot agree over the price at the hearing held by the court, the judge shall carry out an on-spot viewing for the appraisal of the value of the immovable property through the experts stipulated in article 15 and all concerned parties by determining a date of within at least ten days at the latest and a date of hearing for more than thirty days later.*

*The experts shall submit their reports indicating the value of the immovable property within fifteen days in line with the principles in article 11 by also considering the statement of the parties and other concerned parties. The court shall notify this report to the parties without waiting until the date of hearing. The judge shall summon the parties or their attorneys and experts to the hearing to be held. At this hearing, the oppositions, if any, of the parties against the expert reports shall be heard and the statements of the experts against these oppositions shall be taken.*

*In the event that the parties cannot agree over the price, if necessary, a new panel of experts shall be appointed by the judge on the condition that it will be concluded within fifteen days and the judge shall determine a fair and equitable price of expropriation by making use of the report or reports and statements of the parties and the experts. This price which is determined by the court is the price of expropriation of the immovable property, source or the right of easement. . In the event that a receipt indicating that the price of expropriation has been deposited in the name of the right holder is submitted by the administration, it shall be decided by the court that the immovable property be registered in the name of the administration and that the price of expropriation be paid to the right holder and this decision shall be notified to the title deed office and the bank in which the money has been deposited. The ruling of registration shall be final and the rights of appeal of the parties as regards the price shall be reserved.*

*(Additional paragraph: 11/04/2013-6459 S.K./6. art.) In the event that the case which has been filed for the determination of the price of expropriation cannot be concluded within four months, legal interest shall be charged over the determined price following the end of this period. "*

19. Paragraph three of article 11 of the Code numbered 2942 as amended by the Code dated 24/4/2001 and numbered 4650 is as follows:

*"As for the determination of the value of the immovable property, increases in value that the attempts of zoning and service which requires expropriation will cause and the profit that it will generate depending on the types of use envisaged for future shall not be taken into account."*

#### **IV. EXAMINATION AND JUSTIFICATION**

20. The individual application of the applicant dated 26/2/2013 and numbered 2013/1568 was examined during the session held by the court on 8/5/2014 and the following are ordered and adjudged:

**A. Claims of the applicant**

21. The applicant alleged that her right to property defined in article 35 and right to a fair trial defined in article 36 of the Constitution had been violated due to the fact that the price of expropriation was determined in a way that would be lower than the precedent values without considering the objective criteria such as the location, means of transport, material and construction quality of the immovable property and carrying out sufficient examination and legal interest was not ruled for the period which elapsed from the date of the case to the payment of the price of expropriation in the case for the determination and registration of the price of expropriation before the Civil Court of First Instance, requested that the legal interest of 83.124,22 TL which would be charged as of the date of 28/9/2009 over the price of expropriation and 200.000,00 TL be paid to her as material compensation on the condition that her rights for the extra money in return for the real value of the immovable property to be determined through an expert.

**B. Evaluation**

**1. In Terms of Admissibility**

**a. Claims as Regards the Right to a Fair Trial**

22. The applicant requested that the real price be determined and be paid to her by claiming that the price of expropriation of the immovable property was determined in a way that would be lower than the precedent values without considering the objective criteria such as the location, means of transport, material and construction quality of the immovable property and carrying out sufficient examination.

23. It was stated briefly by the Ministry of Justice that the claim of the applicant as regards the determination of a low price was related to the evaluation of the evidence, the implementation of legal rules and the fact that the solution which the courts of instance have proposed as regards the dispute was not fair.

24. In this case, as the essence of the complaints of the applicant as to the effect that the price of expropriation was determined at a low level without considering the objective criteria such as the location, means of transport, material and construction quality of the immovable property is related to the fact that the decision of the court is wrong and to the consequence of the decision of the court and associated with the right to a fair trial, it is necessary to examine these complaints in terms of the right to a fair trial rather than the right to property.

25. In paragraph four of Article 148 of the Constitution and paragraph (6) of Article 49 of the Code numbered 6216, it is stated that the matters that need to be taken into account in the legal remedy in examinations as regards individual applications cannot be subjected to an examination; in paragraph (2) of article 48 of the Code numbered 6216, it is stated that a decision can be issued on the inadmissibility of the applications which are clearly devoid of basis by the Court.

26. In accordance with the aforementioned rules, the certainty of the incidents which are made the subject matter of a case before the courts of instance, the evaluation of the evidence, the interpretation and implementation of legal rules and whether the consequence reached as regards the dispute by the courts of instance is fair in terms of merits or not cannot be a subject matter of the examination of an individual application. As long as the rights and freedoms stipulated in the Constitution are not violated and unless the decision of the courts of instance do not contain any evident discretionary mistake or obvious arbitrariness, material and legal mistakes in them cannot be handled in the examination of an individual application either. In this framework, unless an evident discretionary mistake or an obvious arbitrariness is present in the evaluation of the evidence of the courts of instance, the Constitutional Court cannot intervene in this discretion (App. No: 2012/1027, 12/2/2013, § 26).

27. In the event that the parties cannot agree over the price following the decision of expropriation in accordance with articles 10 and 11 of the Code numbered 2942, it is necessary that the price of the immovable property be determined by the court in a fair and equitable way based on the date of the case.

28. The Court, in the case which is the subject matter of the application, supplied the title deed records, sketch information and the documents showing precedent sale prices as regards the immovable property which is the subject matter of expropriation in accordance with article 10 of the Code numbered 2942, carried out an on-spot viewing, had the share percentage of the applicant over the immovable properties determined through an expert report, then had an appraisal made through an expert report, had a panel composed of five experts appraise the value of the immovable property by making an additional expert review made in line with the oppositions of the applicant against this price, the right of opposition was recognized again upon the notification of the additional expert report to the parties and it determined the price of expropriation in line with its procedure. The 18th Civil Chamber of the Supreme Court of Appeals decided that there was no inappropriateness on the determination of the price of expropriation in the appeal examination that it carried out.

29. In the incident which is the subject matter of the application, the judge has discretionary power over the determination of the price of expropriation, the method used in this determination, the selection and evaluation of precedents, the determination of the effect of the characteristics of the immovable property such as proximity to means of transport and material and construction quality on its value within the framework of the procedures that the Code prescribes. Unless an obvious arbitrariness is present in the decisions that the courts of instance have issued in the case for the determination of the price of expropriation, the Constitutional Court cannot intervene in this discretion.

30. For the reasons explained, as it is understood that the claims of the applicants as regards the case for the determination of the price of expropriation are related to the matters which need to be taken into account in the legal remedy, that the decisions of the courts of instance do not contain any evident discretionary mistake or obvious arbitrariness, it should be decided that the application is inadmissible due to the fact that "*it is clearly devoid of basis*" without examining it in terms of other conditions of admissibility.

#### **b. Claims as Regards the Right to Property**

31. As the complaint of the applicant as to the effect that her right to property was violated due to the fact that the price which had been determined based on the date of the case in the case for the determination and registration of the price of expropriation was paid to her without interest being charged at the end of the case is not clearly devoid of basis and there is

no other reason that will require the issuance of a decision on its inadmissibility, it should be decided that it is admissible.

## **2. In Terms of Merits**

32. The applicant complains about the fact that there was a decrease in the value of the price of expropriation as the price of expropriation which had been determined based on the date of the case was paid to her without interest being charged at the end of the case and requests that it is ruled that 83.124,22 TL be paid to her by applying legal interest on the price of expropriation for the period which elapsed from the date of the case to the date of payment.

33. It was stated by the Ministry of Justice that there was no need for the submission of a new opinion with regard to the applicant's request for interest by referring to the opinions which had been previously submitted and to the decision of the Constitutional Court.

34. Article 35 of the Constitution with the side heading of "*Right of Ownership*" is as follows:

*"Everyone has the right to property and inheritance.*

*These rights may be restricted by law only for the purposes of public interest.*

*The exercise of the right to property cannot be contrary to public interest."*

35. The relevant sections of article 46 of the Constitution with the side heading of "*Expropriation*" are as follows:

*"When the public interest requires so, the State and public entities are entitled to completely or partly expropriate real estate under private ownership and establish administrative easement on them on the condition that their real value is paid in advance and in accordance with the principles and procedures set forth by law.*

*The expropriation compensation and the fee for increase as it is finally decided are paid in cash and in advance. In such cases where the law may allow payment in installments, the period of installments cannot exceed five years; in such a case, the installments are paid in equal amounts.*

*The highest interest rates specified for public receivables apply to the installments mentioned in paragraph two and to any expropriation compensation not paid for any reason."*

36. Article 13 of the Constitution with the side heading of "*Restriction of fundamental rights and freedoms*" is as follows:

*"Fundamental rights and freedoms may only be restricted on the basis of the reasons mentioned in the relevant articles of the Constitution and by law without prejudice to their essence. These restrictions cannot be contrary to the letter and spirit of the Constitution, the requirements of the democratic social order and of the secular Republic and the principle of proportionality."*

37. Article 1 of the Protocol (1) to the Convention on Human Rights (Convention) with the side heading "*Protection of property*" is as follows:

*"Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.*

*The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."*

38. In the concrete application, the applicant did not file any complaint as to the effect that expropriation is not directed to a legitimate aim as public interest. When the application file is examined, it is observed that the immovable property of the applicant was expropriated due to the fact that it was along the route of the road and that the expropriation process was proceeded and completed in accordance with the Law numbered 2492. In this case, as it is understood that there was a legitimate aim in deprivation from ownership and it was performed in accordance with the law, the complaints of the applicants as regards the non-payment of interest will be examined in terms of the principle of proportionality within the scope of articles 13 and 35 of the Constitution.

39. According to article 35 of the Constitution, the properties of individuals can only be revoked through the procedures prescribed by law and on the condition that its payment is made in accordance with public interest. In line with the principle of proportionality stipulated in article 13 of the Constitution, in the event that individuals are deprived of their properties, a fair balance needs to be struck between the public interest to be obtained and the rights of the individual who is deprived of his/her property (App. No: 2013/817, 19/12/2013, § 37).

40. Expropriation which is prescribed in article 46 of the Constitution and whose main element is considered as "*public interest*" is the termination of the right to private property over an immovable property by the state without the consent of the owner for the sake of public interest and on the condition that its payment is made. The presence of public interest, the compliance with the principles and procedures of the expropriation decision as shown in the law, the payment of real price in advance and cash are the constitutional elements of expropriation. (CC, M.2004/25, D.2008/42, D.D. 17/1/2008)

41. In order for the intervention made in the applicant's right to property to be proportionate, the amounts that are paid need to be updated by offsetting the effects of inflation; in other words, interest needs to be applied so as to offset the tangible decrease in value in the period that elapsed from the date of expropriation to the date of payment. (*Scordino v. Italy (no:1)*, App. No: 36813/97, 29/3/2006, § 258).

42. The price of expropriation that is determined based on the date of the case in the cases for the determination of the price of expropriation which last long is paid to the individuals whose immovable property is expropriated without interest being charged at the end of the case and results in the depreciation of the price that the individuals need to receive against inflation. In order for the price of expropriation which is paid to the individuals whose immovable property is expropriated to compensate for the loss inflicted on the individual, in addition to it being the real price of the immovable property, it should not lose a considerable value in proportion to the inflation observed in the period which elapses from the determination of the paid price to its payment either (App. No: 2013/817, 19/12/2013, § 59).

43. In the event that the price of an article on the date of assignment is paid later on, the real value of the property decreases through the considerable depreciation in the value of the money due to the inflation in the period which elapses in the meantime and there is no possibility of benefiting from the return of this price as a saving or investment instrument

either. In this way, individuals are deprived of their rights to property and made to be aggrieved (CC, M.2008/58, D.2011/37, D.D. 10/2/2011).

44. In this framework, the ECHR has concluded in many cases that a disproportionate and extreme burden has borne on the applicants, which cannot be shown as justified through legitimate public interest and their rights to property have been violated due to the fact that the prices of expropriation are paid late in Turkey and there is a depreciation in the value of the price as a result of inflation and the situation is not compensated by paying interest over the price in the period that elapses in the meantime or the paid interest is much lower than inflation (*Aka v. Turkey*, App. No: 19639/92, 23/12/1998, § 48-50; *Akkuş v. Turkey*, App. No: 19263/92, 9/7/1997, § 28-31; *Yetiş v. Turkey*, App. No: 40349/05, 6/7/2010, § 57-60)

45. As a matter of fact, the lawmaker added a provision by adding the additional paragraph "*In the event that the case filed for the determination of the price of expropriation cannot be concluded within four months, legal interest shall be charged on the determined price following the end of this period.*" to article 10 of the Code numbered 2942 with article 6 of the Code numbered 6459 in order to eliminate the legal deficiency as regards the aforementioned matter and to prevent similar victimizations by compensating for the decrease in value that the price of expropriation will be subject to as a result of inflation in the event that the case cannot be concluded in time in the cases for the determination of the price of expropriation and allowed for the payment of interest on the price of expropriation until the date of payment in the cases for the determination of the price of expropriation which cannot be concluded in time (App. No: 2013/817, 19/12/2013, § 53).

46. In the expropriation process which is the subject matter of the concrete application, as the case was concluded before the date of entry into force of the aforementioned provision of the law, no legal interest payment was made. In this case, it is necessary to examine whether there is a reasonable proportionality between the methods used and the aim pursued for achieving public interest in the expropriation process or not and whether a disproportionate and extreme burden was borne on the applicant who was deprived of his/her property or not.

47. The case for the determination and registration of the price of expropriation which is the subject matter of the application was filed on 28/9/2009, the Court decided that the price which was blocked to the bank in the name of the applicant on 23/12/2011 be paid to the applicant through its decision dated 29/12/2011. In this case, the price of expropriation which was determined on the basis of the date of the case was paid to the applicant 27 months later. According to the data of the Central Bank, the increase in inflation that occurs between September 2009 during which the case petition was filed and which was taken as the basis for the determination of price and December 2011 during which the price was paid is 22,52% In other words, the equivalent amount of 100 TL on the date of September 2009 whose decrease in value was compensated against inflation in December 2011 is 122,50 TL.

48. As for 413,131.00 TL which was determined based on the date of the case and paid to the applicant, the equivalent amount whose decrease in value is compensated against inflation by using the data of the Central Bank on the date of payment of the price of expropriation. In other words, the difference that will compensate for the decrease in value to which the price of expropriation is subject is 93,045.00 TL.

49. By considering the aforementioned elements, it is understood that the difference observed between the value of the price of expropriation on the date on which the case was filed and its value on the date of payment results from the failure to add interest to the price of

expropriation. This unpaid difference violates the right to property of the applicant by disrupting the fair balance that needs to be present between the protection of the right to property of the individual and public interest, by causing a disproportionate and extreme burden to be borne on applicant in a way that is contrary to the principle of proportionality stipulated in the Constitution.

50. As a result of the evaluation of the application, it has been concluded that the price of expropriation which had been determined based on the date of the case in the case for the determination of the price of expropriation which is the subject matter of the application was paid to the applicant without interest being charged 27 months later, that the increase in inflation that occurs within this period is 22,52% according to the data of the Central Bank, that when the aforementioned decrease in value is taken into consideration, a disproportionate and extreme burden which cannot be justified through legitimate public interest that the administration wanted to achieve was borne on the applicant.

51. For the aforementioned reasons, it should be decided that the applicant's right to property which is enshrined in article 35 of the Constitution was violated.

### **C. In Terms of Article 50 of the Code Numbered 6216**

52. The applicant requested that the legal interest of 83,124.22 TL be paid to her due to the fact that the case for the determination of the price of her immovable properties which had been expropriated by the administration lasted for 27 months and that the price which had been determined based on the date of the case was paid to her without legal interest being charged.

53. In the opinion of the Ministry of Justice, it was stated that there was no need for the submission of a new opinion with regard to the non-payment of interest for the price of expropriation by referring to the previous opinion letters and to the decision of the Constitutional Court.

54. Paragraph (2) of article 50 of the Code numbered 6216 with the side heading of "*Decisions*" is as follows:

*"If the determined violation arises out of a court decision, the file shall be sent to the relevant court for holding the retrial in order for the violation and the consequences thereof to be removed. In cases where there is no legal interest in holding the retrial, the compensation may be adjudged in favor of the applicant or the remedy of filing a case before the general courts may be shown. The court, which is responsible for holding the retrial, shall deliver a decision over the file, if possible, in a way that will remove the violation and the consequences thereof that the Constitutional Court has explained in its decision of violation."*

55. As it is understood that a serious decrease in value has occurred as regards the price of expropriation due to the inflation at a rate of 22.52% that occurred within this period as a result of the payment of the price of expropriation which had been determined based on the date of the case to the applicants without charging interest at the end of the case which lasted for 27 months, that this situation caused a disproportionate and extreme burden which cannot be justified through legitimate public interest that the administration wanted to achieve to be borne on the applicants, in order for the aforementioned material decrease in value to be compensated, the price of expropriation should be paid to the applicant by charging interest in

a way that will eliminate the decrease in the value of the price of expropriation. As the applicant filed a request for material compensation of 83.124,22 TL in proportion to the legal interest and the proportion of this request to the price of expropriation is lower than the rate of 22.52% which is the decrease in value to which the price of expropriation is subject, it should be decided that a material compensation of 83,124.22 TL be paid to the applicant in line with her request. Member Burhan ÜSTÜN has disagreed with this opinion.

56. It should be decided that the trial expenses of 1,698.50 TL in total composed of the fee of 198.35 and the counsel's fee of 1,500.00 TL which were made by the applicant and determined in accordance with the documents in the file be paid to the applicant.

## V. JUDGMENT

In the light of the reasons explained, it is decided on 8/5/2014 as regards the application

### A.

**1. UNANIMOUSLY** that it is **INADMISSIBLE** in terms of the complaint with regard to the right to a fair trial as "*it is clearly devoid of basis*",

**2. UNANIMOUSLY** that it is **ADMISSIBLE** in terms of the complaint with regard to the right to property,

**B. UNANIMOUSLY** that the right to property which is enshrined in article 35 of the Constitution was **VIOLATED**,

**C. BY MAJORITY OF VOTES** and the dissenting vote of Burhan ÜSTÜN that the material **COMPENSATION** of 83,124.22 TL be **PAID** to the applicant in line with her request,

**D. UNANIMOUSLY** that other requests of the applicant be **DISMISSED**,

**E. UNANIMOUSLY** that the trial expenses of 1,698.50 TL in total composed of the fee of 198.35 and the counsel's fee of 1,500.00 TL which were made by the applicant be **PAID TO THE APPLICANT**,

**F.** That the payments be made within four months as of the date of application by the applicant to the Ministry of Finance following the notification of the decision; that in the event that a delay occurs as regards the payment, legal interest be charged for the period that elapses from the date on which this period comes to an end to the date of payment.

**G. UNANIMOUSLY** that a copy of the decision be sent to the relevant court.

President  
Serruh KALELİ

Member  
Zehra Ayla PERKTAŞ

Member  
Burhan ÜSTÜN

Member  
Hicabi DURSUN

Member  
Zühtü ARSLAN

### **LETTER OF DISSENTING VOTE**

The applicant alleged that her right to property and right to a fair trial had been violated due to the fact that the price of the immovable property that she owns had been determined lower than what it should have been in the case for the determination and registration of price filed because of the expropriation of the immovable property and that the price of expropriation specified based on the date of the case had been paid to her without interest being charged and filed a request for compensation.

It was decided by our court that it was inadmissible in terms of the complaint with regard to the right to a fair trial due to the fact that it was clearly devoid of basis, that it was admissible in due to the complaint with regard to the right to property and that the right to property was violated, that material compensation be paid to the applicant in line with her request.

Although I totally agree with the majority opinion of inadmissibility with regard to fair trial, admissibility with regard to the right to property and the violation of the right to property, it is not possible to agree with the opinion with regard to the payment of material compensation to the applicant. Because, actions for compensation are types of action which require adversarial trial. For this reason, the plaintiff needs to apply to the court through a petition by depositing its fee. By the case petition being notified by the court to the opposing party, it is granted with the right to defense and evidence is collected by the Judge depending on the type of the case, the text of verdict is established at the end of the trial. In the text of verdict, obligations encumbered on and rights granted for the parties on each of the results of the requests of the plaintiff need to be specified in a way which is clear and which will not raise doubt and hesitation in numbered fashion, the amounts of interest, fee, trial expense and counsel's fee need to be shown.

The Constitutional Court opts for ruling compensation for nearly every violation that it has determined by implementing the procedure of the payment of material and spiritual compensation to the applicant in the event that a violation is detected by taking the judgments of the ECHR as example. As the ECHR is a court which carries out international proceeding, all rules that it takes as basis have an international quality. The applicant (plaintiff) of each case filed there certainly has a national state as an opposing party (defendant). In the ECHR, the application petition is notified to the opposing party (defendant) and it is granted with the opportunity of defense and the introduction of evidence, it is allowed to participate in all stages of the case and it is concluded. As there is no other judicial authority which carries out international proceeding as regards compensation, it is appropriate that the ECHR also issues a decision on compensation depending on its structure. The issue of the payment of compensation has not been regulated at all in the legislation of some of European countries which implement individual application, there are examples of the payment of compensation in limited number as regards very special cases in the practices of the countries in which the payment of compensation is accepted.

In terms of the payment of compensation, it will be more appropriate to depend on the practices of the national courts in Europe which are known to be successful in individual application rather than taking as example the case-law of the ECHR which is an international court whose procedure, implementation and structure are different.

Paragraph (2) of article 49 of the Code numbered 6216 with the side heading of "Examination on merits" has been regulated as "In the event that a decision is issued on the admissibility of an individual application, a copy of the application shall be sent to the Ministry of Justice for its information. In cases where it deems necessary, the Ministry of Justice shall submit its opinion to the the Court in writing".

In individual applications, the applicant (plaintiff) does not have any opposing party (defendant). According to the article, the Ministry of Justice is not a party to the case, but just a respondent to which notifications are made. If it deems necessary, it can submit its opinion, not its defense, in writing. According to amended article 71 of the Internal Regulation of the Constitutional Court, the Constitutional Court is not obliged to wait for the opinion of the Ministry of Justice in order to issue a decision. As the respondent of the incident which results in compensation is another public institution, in effect, the Ministry of Justice cannot be the party of the compensation plaintiff either. As it is not correct to decide on compensation without considering any international or national procedure and material law rule as regards the action for compensation, without the formation of parties being completed, without a notification being made to the opposing party (defendant), without its defense and evidence being received, not to pay regard to the presence of the elements which have to be present in the text of verdict, to eliminate the examination of the decision in the second instance, the presence of the right to a fair trial cannot be mentioned in the incident.

According to paragraph (2) of article 50 of the Code numbered 6216 with the side heading of "Decisions", it is stated that "If the determined violation arises out of a court decision, the file shall be sent to the relevant court for holding a retrial in order for the violation and the consequences thereof to be removed. In cases where there is no legal interest in holding a retrial, compensation can be adjudged in favor of the applicant or the remedy of filing a case before general courts can be shown. The court which is responsible for holding a retrial shall deliver a decision over the file, if possible, in a way that will remove the violation and the consequences thereof that the Constitutional Court has explained in its decision of violation."

The part of the rule "compensation can be adjudged in favor of the applicant" is a discretionary authority which is granted to the court for use in very special cases, in an exceptional way. In practice, this authority is exercised by the court as the payment of spiritual compensation in nearly every case in which a violation is detected if there is a request, sometimes as the payment of material compensation in an optional way without complying with any rule of the trial.

Individual application is not a venue for the granting of personal rights of individuals by determining them one by one. In essence, the Constitutional Court needs to contend with the determination of a violation, if any, to show the remedy of filing a case as regards compensation before general courts for the applicant, the competent general court needs to ensure the formation of parties in accordance with its procedure, to reach to a conclusion by carrying out trial, to grant the parties a right to request for the performance of an examination in the second instance. In the event that such a preference is made, the applicant will not have any loss.

Due the reasons explained, I do not agree with the majority opinion as to the effect that material compensation be paid due to the fact that the applicant's right to property has been violated.

Member  
Burhan ÜSTÜN