

Different Approaches to Pecuniary Damages: ECHR vs Turkish Constitutional Court

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A 2010 amendment to the Turkish Constitution allowed Turkish citizens to individually apply to the Constitutional Court if there had been an abuse of their constitutional rights. The amendment provided individuals with a direct and domestic opportunity to obtain remedies for violations of their rights. It is also likely that the amendment intended to reduce the large number of applications Turkish citizens were making to the European Court of Human Rights (ECHR).

Before the amendment, Turkey had 15,200 applications pending before the ECHR. At the time, only Russia had a higher number of pending applications. Many Turkish applications arose from violations of the right to a fair trial or property rights, which are set forth under Protocol No. 1 of the European Convention on Human Rights (Convention). Thus, most complaints submitted to the Constitutional Court since the 2010 amendment involve rights which are echoed in both the Turkish Constitution as well as in the Convention. If the Constitutional Court has given a ruling, questions arise for claimants about whether a later application to the ECHR would produce a different outcome.

An analysis of the two approaches taken by the Turkish Constitutional Court and the ECHR show that there are some differences when awarding pecuniary compensation to claimants.

The Turkish Constitutional Court's approach to pecuniary damages

A recent decision (in an application by Akün Gıda Maddeleri San. ve Tic. A.Ş., dated 6 May 2015) illustrates the Constitutional Court's approach to awarding pecuniary damages. The court of first instance considered the claimant's allegation that the Customs Office had charged an excessive amount of customs tax for rice imported from Egypt. The claimant initially filed a lawsuit seeking USD 40,000 reimbursement of the over-imposed customs tax, along with interest accrued since the payment date. The court of first instance (Balıkesir Tax Court) partially accepted the claimant's request, awarding the USD 40,000 reimbursement, but rejected the request for accrued interest.

The Court of Appeal confirmed the court of first instance's decision. It held that Article 216 of the Customs Law explicitly states that if courts require reimbursement of customs taxes, the administration is not required to pay interest. Accordingly, the Court of Appeal rejected the claimant's application to correct the lower court's decision.

The claimant subsequently complained to the Constitutional Court. It based the claim on Article 35 of the Turkish Constitution which regulates property rights. The Article states that all citizens hold property and inheritance rights, that those rights can only be restricted for the purpose of public welfare and that the exercise of property rights cannot be against the benefit of society.

The Constitutional Court noted that the legitimacy of the disputed tax had become inarguable when the court of first instance's decision became final (at the Court of Appeal). It went on to say the right to claim receivables (and the related secondary right to claim interest) should be evaluated within the scope of property right protections. The court commented that another Constitutional Court judgment was made after the court of first instance's decision had become final and this decision had quashed the relevant legislative prohibition on interest payments. The Constitutional Court therefore held that dismissing the claim for accrued interest had been unconstitutional.

Rather than awarding the claimant compensation for pecuniary damages, the Constitutional Court sent the file back to the court of first instance to make the award.

The ECHR's approach to pecuniary damages

In most cases, despite similar legal grounds existing, the ECHR's practice for compensating pecuniary damages differs from the Turkish Constitutional Court. *Zammit and Attard Cassar v Malta* is a good example of the ECHR's approach.

In 2000, two Maltese residents inherited a property. At the time of inheritance, the property was leased to a company for the equivalent of approximately EUR 862 per year. The lease agreement began in 1971 and was automatically renewed every six months. Maltese law requires changes to lease conditions to be authorised by the Rent Regulation Board (RRB). The claimants arranged a property valuation with a view to obtaining RRB approval to increase the rental. An architect valued the property's annual rental value at EUR 7,000. Accordingly, the claimants notified the renter that the rental amount would increase to EUR 7,000 per year.

The renter applied to the RRB, seeking dismissal of the rental increase. The RRB appointed two architects to evaluate the property and give their opinion on whether Maltese law allowed the rent increase. The architects concluded that the current rent amount (EUR 862 per year) was within the legal limits. Accordingly, the RRB rejected the claimants' proposed rental increase.

The claimants appealed the decision on the basis that they claimed the RRB had breached their rights under Article 1 of Protocol No. 1 of the Convention (the equivalent to Article 35 of the Turkish Constitution).

In its constitutional jurisdiction, the Maltese Civil Court held that the claimants' constitutional property rights had been breached by the RRB's disproportionate interference. The Maltese Constitutional Court later reversed the civil court's judgment. The claimants then brought the case before the ECHR.

The ECHR specifically examined whether the Maltese government's rental restrictions violated the claimants' rights under Article 1 of Protocol No. 1 of the Convention. The ECHR noted that the Convention required that any public authority interference with peaceful enjoyment of possessions should be lawful and in accordance with general interests. It went on to note that the Convention requires a fair balance between interference and general interests.

The ECHR concluded that although the Maltese government's interference in the present case was lawful and in line with the general interest, the burden imposed on the claimants was excessive and disproportionate. Therefore, the ECHR concluded that the Maltese government violated the claimants' property rights under the Convention.

The ECHR awarded the claimants EUR 40,000 as pecuniary damages to compensate for the loss of market rental of the property. The decision demonstrates how the ECHR identified the presence of a violation and also rendered an executable decision to eliminate the violation's outcome.

Comparison of the different approaches

The Turkish Constitutional Court and the ECHR refer to similar factors when evaluating whether an act should be considered a violation of property rights. However, generally, the Turkish Constitutional Court hesitates to award pecuniary damages, while the ECHR almost always awards compensation in similar fact scenarios.

The difference in approach arises primarily from the Turkish Constitutional Court's strict interpretation of Article 50 of its establishment law. The provision states that if a violation arises from a court's decision, the Constitutional Court can return the file to the original court to correct the violation. However, Article 50 allows the Constitutional Court to directly award compensation if there is no legal interest in returning the file to the court of first instance. In practice, the Constitutional Court still tends to rule on nonpecuniary damages itself, but returns files to the court of first

instance to award pecuniary compensation.

The Turkish Constitutional Court's approach may cause inconvenience in some cases. It could unnecessarily prolong judgments to eliminate the unfavourable effects that property right violations can cause to claimants, as well as further aggrieve claimants who have already suffered damages.

The Constitutional Court's approach cuts itself off from the compensation process, requiring the court of first instance to correct the violation. Potentially, this could cause further unjust treatment to occur, such as the original court awarding insufficient pecuniary compensation. Leaving awards of pecuniary damages to a lower court could create a vicious circle of violations, forcing victims to repeatedly apply to the Constitutional Court. Arguably, this undermines the purpose of allowing citizens to make individual applications to the Constitutional Court.

The Constitutional Court has a substantial role in compensating and addressing human right violations locally, without claimants needing to apply to the ECHR. However, the court's reluctance to award pecuniary damages may leave the ECHR as the only viable alternative in certain cases. If the circle created between the Constitutional Court and lower courts fails to meet a claimant's legitimate request for pecuniary damages, the claimant can always apply to the ECHR and may ultimately receive a different outcome.

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