Protection of property rights and compensation rights for property users

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Abstract

Since the drawn of the civilization, when the importance of land was appreciated, land ownership has been linked with certain rights and duties for the owners which have evolved over the centuries to the idea of ownership as it is understood today. The basic rights in land are the right to the use and enjoyment of land, the right to income from land and the right to alienate or transfer land. The aggregate of ownership rights over a piece of land, comprised what has been termed as the bundle of property rights.

Property rights have a very significant role to play both at international and national level in the current socio-economic environment and have been a matter of dispute between nations as well as between affected owners and central or local governments.

The aim of this paper is to outline the fundamental property protection rights at international and national level by reference to UN Conventions, European Conventions as well as comparative overview of different countries. Within the scope of this paper an attempt is made to outline the main property compensation rights regarding illegal occupiers or users of in the occupied area of Cyprus, since the Turkish invasion in 1974.

Specifically, this paper is divided into three basic sections which are described below:

- Outline the major provisions of International and European Law as regards property protection rights. These include the right of ownership and the conditions under which a compulsory purchase and compensation could take effect. Some violations of the property rights are described in this section, which have been extracted from Court Case decisions in an attempt to present the extent to which rights in Property are safeguarded.

- Comparative country overview of major provisions in their Constitution and legislative provisions regarding property protection rights. Also, this section attempts to outline the basic rules of compensation assessment as well as practical examples of their application by reference to court case decisions, when these rights are affected.

- Outline the main legislative provisions, court decisions and property valuation practices regarding the calculation of compensation of illegal users or occupants of Cypriot properties in the occupied area of the Cyprus Republic since the Turkish invasion in 1974.

Keywords: Property protection rights; Property compensation rights; occupational or user rights; tenants’ rights; compulsory purchase and compensation; eminent domain; compensation claims under requisition law; Property Restitution
1. Protection of property rights under international and European law

The History of the United Nations as an international organization has its origins in World War II. On December 10, 1948 the General Assembly of the United Nations adopted and proclaimed the Universal Declaration of Human Rights as a common standard of achievement for all people and all nations, to the end that every individual and every organ of society, keeping this Declaration constantly in mind, shall strive by teaching and education to promote respect for these rights and freedoms and by progressive measures, national and international, to secure their universal and effective recognition and observance, both among the people of Member States themselves and among the peoples of territories under their jurisdiction.

Article 17 is the fundamental part that deals with property rights and provides that

(a) Everyone has the right to own property alone as well as in association with others and

(b) No one shall be arbitrarily deprived of his property.

Considering the Universal Declaration of Human Rights proclaimed by the General Assembly of the United Nations on 10 December 1948, the governments who were members of the Council of Europe on 4.1.1950 agreed and signed a number of Protocols, as one step further to implement the universal declaration of Human Rights of UN. The first Protocol, namely, the Enforcement of certain Rights and Freedoms not included in Section I of the Convention, was signed in Paris on 23.3.1952 and under this protocol, Article 1 has laid down the following fundamental declaration:

“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.

It is evident from the above declaration, that deprivation of property rights is only possible for the public interest. Further, Article 60 of Section 5 the Convention provides that

“Nothing in this Convention shall be construed as limiting or derogating from any of the human rights and fundamental freedoms which may be ensured under the laws of any High Contracting Party or under any other agreement to which it is a Party”

The meaning of the above article is that the laws of country members can secure much more rights but not less of those in any circumstances.

Cyprus is a member of United Nations Organization as from 23 August 1960 and has confirmed the European Convention of Human Rights under Law N. 39/1962.

An example of those property rights that have been protected by UN Charter and Resolutions, is the case of Cyprus after the Turkish invasion and occupation of one third of the island since 1974. The Turkish Cypriot Authorities under the encouragement of Turkey, on 15th November 1983, declared the creation of an independent state in “northern Cyprus”. Further, the illegal authorities of the occupied area of Cyprus drafted their own constitution. The proviso of Section 159(1)(b) of their constitution stated that,

“All immovable properties, buildings and installations which were found abandoned on 13th February, 1975 when the Turkish Federated State of Cyprus was proclaimed or which were considered by law as abandoned or not being owned after the abovementioned date, or which should have been
in the possession or control of the public even though their ownership had not yet been determined, 
*shall be the property of the “Turkish Republic of Northern Cyprus” notwithstanding the fact that they are not so registered in the records of the Land Registry Office; and the Land Registry Office records shall be amended accordingly, even though their ownership had not yet been determined...*”

The UN Security Council issued a Resolution 541(1983) on the above action, stating that

- The attempt to create a Turkish Republic of Northern Cyprus is invalid
- Deplores the declaration of the Turkish Cypriot Authorities of the purported secession of part of the Republic of Cyprus
- Considers the declaration referred to above as legally invalid and calls for withdrawal

The above resolutions, reaffirmed that property rights cannot been expropriated as regards the political situation in Cyprus. This was also reassured by the European Court of Human Rights, in its judgment of 18 December 1996, on the individual application of the Greek Cypriot displaced owner from Kyrenia, Mrs Titina Loizidou, against Turkey, and the Fourth Interstate Application of Cyprus against Turkey on May 2001, upheld the rights of the refugees to their properties. In Loizou case, the Court ordered the government of Turkey to compensate the applicant for the time period of deprivation of the use of her property and to provide full access and to allow peaceful enjoyment of her property in Kyrenia. Further, a very interesting case law came up and was a matter of discussion of the legal world society. In its judgment of 15 November 2004, in the case of Meletios Apostolides v David and Linda Orams (British couple), the Nicosia District Court found the Defendants liable for trespass in the property of the Plaintiff, ordering them to demolish the villa and other buildings erected on the property in the occupied area of Cyprus, surrender vacant possession to the Plaintiff and pay damages. Pursuant to EC Regulation 44/2001, the judgments of the Civil Courts of the Republic of Cyprus can be enforced in any of the Member States of the European Union against the assets of the Defendants in that state.

In conclusion of the first part of this paper, an attempt was made throw more light as regards the right of ownership in the international arena. No owner can be expropriated or displaced from its property or home as regards illegal enforcements, violations or military operations in the political arena. This is supported by UN Charter, Resolutions and substantial case law of the European Court of Human Rights for the EU member Countries.

2. Comparative Country overview of major provisions in their constitution and legislation regarding property protection and compensation rights

For the purpose of comparative analysis, an attempt was made to outline the major provisions of the constitutional protection of property rights and respective legislations regarding property compensation for a number of countries, as follows:

*Australia:*

According to John Sheeham¹, the constitution provides a very weak protection in property rights and this weakness is reflected in the respective statutory law on regulatory takings. Only in extreme situations these rights are recognized. Right to compensation for decrease in economic value arising from planning decisions, is rare in

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¹ Alternam R, (2010), Chapter 5 – Australia, John Sheeham, Takings Intenrational, (1st ed), US, ABA, pp.107-118
Australian legislation. However, betterment was successful and more easily applied to expropriation of properties for the public interest, to set off against compensation including injurious affection. Reverse to other states, in New South Wales the basis for assessment of compensation uses the wording “just terms compensation”. The issue remains that states are not constitutionally obligated to provide “just terms compensation”. Compensation is more clear where the whole or part of the property is expropriated, while diminution in value of a property due to rezoning or land use changes these are not compensable. It is rather difficult to draw definite conclusions for the whole country, unless research is made separately for each state. In general terms, it is rather easier to succeed in receiving compensation where ownership rights are affected for a “public purpose” or where a property is zoning or reserved again for the “public purpose” or when private use is absolutely prohibited. It is interesting to refer that some local governments in an attempt to limit compensation arising from rezoning or reservation (e.g. sterilizing significant tracts of nature, protect biodiversity, prime crop and pasture land) they might include additional uses that still owners are left with a “residual or alternative form of use”.

United Kingdom:

It has the world’s longest legislative history on planning and compensation rights. UK does not have a constitution, but it sometimes referred to as “unwritten” or “uncodified” constitution and is a sum of laws and principles that make up the country’s body politic. Starting from the 1947 major reform of the British town planning law, all development rights were vested to the state (removed from owners) and for this purpose a compensation fund (£300 millions) was set aside to pay compensation to claims that could be raised by owners with unbuilt development rights. Owners were left only to their existing use rights and values in their land. Therefore, owners of land have no direct legal right to compensation caused by a particular designation of land in a development plan or for refusal of planning permission or for placing conditions on the land use planning. Typically, compensation is left in cases of revocation or modification of a valid planning permission or permission deemed to have been granted under existing development order or within specific class uses specified in the order. To prove compensation there must be a direct link between the damage and the revocation or modification. Further, injurious affection can be claimed in cases where physical damage is caused by the severance of the land compulsorily acquired from the owner’s other land or remaining land. The enactment of the Human Rights Act 1998 brought into force in UK law most of the rights set out in the Articles 8 and 1 of the First Protocol of the Convention. The ECHR and the UK courts have held that the public interest justifies the existence of planning control and the interference with the rights but this must be proportionate. Planning control is control over the use of property rather than taking unless the land is rendered worthless (no beneficial use), because it cannot be used for an alternative purpose. It is worth highlighting, that the right of owners to appeal to the ECHR is probably lost after the Brexit and the owners will be left to exhaust all legal remedies that prevail at national level.

France:

In 1932 the first zoning plan was introduced and thereafter the Urban Code stating that no compensation should be paid for restrictions or even total denial of development rights. This principle of non-compensation became a pillar under the Town and Country Planning Law in this country and codified in Article L 160-5 of the Urban Code. In particular, “no compensation due to restrictions in land use, development rights, height of buildings etc”. On the other hand, two general exceptions were noted in the Article, namely, a) “compensation is due if these restrictions result in decrease in vested rights or b) a modification of the previous status of the property rights resulting in a damage which is direct, material and certain”. Regarding the first general exception, the courts held that owners to

2 FAO, Land Reform, (2008/1), The epistemology of vale in the assessment of just terms compensation, V. Mangioni, pp 47-55
do not have vested rights to develop their land as long as building permits have not been granted. Therefore, a downzoning or a local plan in France does not grant a landowner a vested right to develop and furthermore revision or termination of a local plan does not lead to a right for compensation unless a building permit was previously granted. In other words, development rights belong to the state. Regarding the second general exception, this is used more frequently, which is modifying the status of the property rights, which result is some direct, material and certain damage. Having recognized that the principle of non-compensation in some instances created inequalities by urban regulations, the Urban Development Reform Act 1976 was introduced. This act made it possible in some zones to be able to transfer development rights (TDR) from the affected property to other properties. This new provision generated a great deal of debate and ambiguity, among other things excluding agricultural areas from the transfer mechanism. Practically, the TDR has rarely been applied in lieu of compensation due to legal complexity of the transfer mechanism and entailed a high risk of litigation. Other mechanisms of compensation available is the “Inverse Condemnation Principle”. This can be activated where the value of the owner’s property has diminished considerably due to zoning decision and the local authority is obligated to buy the property. This principle is widely used for several types of regulations (e.g reserved areas in local plans for road, highways, public park or other infrastructure. In general, the French principle of no compensation is said to be compatible with the ECHR.

Greece:

The Greek constitution guarantees protection of property rights. The main Articles relating to takings are the 24 and 17 and allows the government to expropriate private property for public benefit. Full compensation must be paid and this can be monetary or in-kind, such as replacement of the land or transfer of property rights. Article 24 places urban and regional planning as a state constitutional duty and sets obligations for landowners to contribute for the public services. Typical restrictions on land use and development do not purport an obligation to compensate. This power enables the state to limit property rights to promote broader public interests, such as the protection of safety, health, amenities and welfare. These are authorized in specific legal provisions and take a proportional position. On the other hand, if landowners can prove that land use regulations eliminate all economic beneficial uses of property, this is a de facto expropriation and subject to compensation provisions of Article 17. Two criteria are used to distinguish an expropriation from a decrease in owner’s property rights. The first is a quantitative one and the hardness of the regulatory measure’s effect on property and the second is the duration of which of the economic hardship to the property. The Supreme Court (Arios Pagos), acknowledges that the total and permanent prohibition of construction on a parcel constitutes a deprivation, if no other use is possible or economically beneficial. The burden of proof lies with the owner which is costly and time consuming administrative and judicial processes. It is said that the ECHR could be another driver that would finally force changes in the Greek legislation. The vertices in a number of ECHR cases4, proved a greater protection in property rights in comparison with the Greek Courts and the respective legislation. It is important to outline the two types regulatory takings in the Greek planning law, in order to understand whether the intervention to private ownership can give easily rise to compensation. Under planning law, there are areas covered by town plans and those which are outside any plan. Statutory town plans may have development rights as they are covered by rules such as minimum plot area, densities and coverages, street alignments, heights etc., whereas areas outside plans do not have extensive development rights and are set to have broad variety of uses and sometimes are used for agricultural purposes. Some exceptions to this was allowing for erecting a single house. In order to serve land needed for public open space and public services within town plans, implementation plans were applied and compensation is paid for properties taken other than contributions assigned to each property in proportion to its area. In the real world, the Supreme Court has never

taken position in favour of the owners regarding the de facto expropriation for holding the properties for prolonged periods and thus could offer compensation as the properties have been effectively deprived. Regarding takings in areas not covered by Town Plans, in court case it was decided that the limitations (subdivision limitations) to the properties are not unconstitutional because they are justified by the broader public interest which is the prevention of urban sprawl and environmental protection. Further, the Court took the stance that development rights in non-urban areas are not a substantial component of property rights. The ECHR can play a critical role in the Greek Planning System toward a more just protection of property rights.

United States:
In the US the language used for expropriation is usually referred to as “Eminent Domain”. The fifth Amendment of the US constitution provided that “property shall not be taken for public use without just compensation”. Regulations with excessive economic impact can be takings under constitution and require compensation. Some states have statutory takings law, which provide tests more favorable to land owners. It is noted that regular takings fall into three basic categories, namely, a) a regulation that deprives the owner of all economically viable use, b) a regulation that imposes less than total economic loss (partial economic deprivation) but where “justice and fairness” require that economic injuries cause by public action be compensated. In this category (b), the Court acknowledged that there is no formula for determining when “justice and fairness” require that economic injuries created by public action be compensated but has set out three considerations before deciding: (i) the economic impact of the owner (ii) the extent to which the regulation interfered with the investment-backed expectations (meaning: at what point a land use regulation goes “too far” and constitutes a taking) and (iii) the character or extent of the government action. Finally, c) category is the physical invasion that occurs as a consequence of the regulation. These tests are very important to identify the interference with owner’s rights and the respective regulatory actions needed to be taken by the owners. This can be equal to direct expropriation where the state will initiate eminent domain procedures, whereas if some kind of restriction imposed in the bundle of owner’s property rights, the owner has to sue the state.

Germany:
According to Article 14 of the Basic Law property rights are protected. The article states: i) Property rights are guaranteed ii) Property necessitates obligations and its use also serve public good iii) Expropriation shall only be permissible for the public good. Expropriation is only possible when the respective compensation is paid under law. There are various planning decisions that may give rise to compensation and are briefly outlined below: Under the German planning system development is initiated through the preparation of land use plans (F plans) and subsequently land use plans so called “B plans” are binding developed through “F plans”. The F plans are only binding to public administration and do not produce any right or claim to compensation. When the B plan comes into force, is binding and owners can make an application for planning permission. When a property is designated for public land use (schools, parks) owners have the right to claim compensation. In such a case, the authority can either negotiate the purchase or expropriate the property. Another important right of owners is when the land use of a private land is “rezoned” or “downzoned”. When a binding land use plan is changed e.g. from mixed residential and commercial to residential. Under the current law, compensation can be claimed for the depreciated value of the property within a period of seven years due to the change of the plan. The authority after the seven-year period may change the binding plan if the owner didn’t develop its land, without being liable to compensation. The noted rule is subject to three exceptions, namely: i) When the private land use value has less value than the existing one.

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5 Laureotiki Peninsula ZUDC
6 Lucas V South Carolina Coastal Council 505 US 1003 (1992)
7 The test arose in Penn Central Transportation Co V New York City 438 US 104 (1978)
compensation must be paid ii) the private land use is changed to public use, compensation is paid and iii) when the use of the property after modification is significantly limited compensation is paid. Further, compensation is payable for expenses incurred while the owner relied on government decisions or policies and suffered economic loss. Further, in cases where part property is expropriated the owner may claim compensation for the whole property if the remainder is “no longer capable of being put to building or economic use”. In conclusion, it can be said that the German regulations regarding owner’s compensation rights and injuries are very robust and effective and are balanced between the public interest and private interest.

Republic of Cyprus:

S1 of Article 23 of the Cyprus Constitution, provides that “every person, alone or jointly with others, has the right to acquire, own, possess, enjoy or dispose of any immovable property and has the right to respect for such right”. Further, S3, provides that “restrictions or limitations, which are absolutely necessary to the promotion of the public benefit or for the protection of the rights of others, may be imposed by the law on the exercise of such right. Just compensation shall be promptly paid for any such restrictions or limitations which materially decrease the economic value of such property; such compensation to be determined in the case of disagreement, by the civil court”.

Under the Compulsory Acquisition Law 90/1962, a property is acquired (expropriated) for public benefit and specific rules of assessment are applied to compensate the property owners. Rule (a) provides that compensation is based on market value principle. In addition, S68 of the Town and Country Planning Legislation 90/1972, provides that compensation is payable due to planning decisions provided that there is a material decrease in the economic value of the property. The rules of assessment for estimating compensation for planning restrictions are the same with those in the compulsory acquisition law, where applicable. It can be noted that property rights in Cyprus are highly protected under the current constitution and the respective compulsory purchase, planning and other regulations.

3. Rights of illegal users or occupants holding Cypriot owners’ properties in the occupied area since the Turkish invasion in 1974

An attempt is made in this section to briefly outline the rights of illegal users or occupant holding Cypriot properties in the occupied area, since the Turkish invasion, however the need to address at the same time the original housing owners who are now Refugees or Displaced Persons in the free government area is of higher importance as well as their Restitution rights.

The issue for Cyprus has been initiated after the Turkish military invasion and occupation of 36,2% of the island since 1974 and have forcibly expelled approximately 170.000 Greek Cypriots (GC) from their ancestral homes and placed their properties at the disposal of its authorities. The GC properties were initially used for the needs of the Turkish army and the Turkish Cypriots and with the commencement of the Turkish organized colonization of occupied Cyprus many such properties were handed over to 160.000 Turkish mainland settlers in order to change the demographic structure of Cyprus. Had the plan been implemented, it would have allowed for the settlers to retain possession of such properties, thus legitimizing Turkey’s policy of ethnic cleansing in Cyprus. One of the main issues discussed with Turkey in an attempt to find a peaceful solution for Cyprus and reunite the island under the auspices of the UN, is the “property issue “ for those owners who have been internally displaced from their first house, while others happened to be property owners in the occupied area.

At an international level, a handbook on Housing and Property Restitution for Refugees and Displaced Persons has been issued by the by the UN Sub-Commission on the Protection and Promotion of Human Rights in August 2005 so called the “Pinheiro Principles”, provides an important and invaluable practical guidance to all those practitioners
and officials working on housing and property restitution issues. To this end, the Principles reflect some of the most useful provisions from various national restitution policies, programmes and practices, including those developed for Afghanistan, Bosnia-Herzegovina, Burundi, Cambodia, Cyprus, Guatemala, Iraq, Kosovo, Rwanda, South Africa and Sudan. The handbook consists of 23 principles and are not a treaty or a formal law, but have the same legal status accorded such texts. These principles can be considered as an important source of “International Standard”. Nevertheless, the Principles do have persuasive authority and are explicitly based on existing international, regional and national law. The Principles apply in all cases of involuntary displacement resulting from international or internal armed conflict, gross human rights violations such as ‘ethnic cleansing’, development projects, forced evictions and natural and manmade disasters. With respect to restitution, the basic principle state that “Restitution should, whenever possible restore the victim to the original situation before the violation of human rights law or serious violations of international humanitarian law occurred. Restitution includes, as appropriate: “restoration of liberty, enjoyment of human rights, identity, family life and citizenship; return to one’s place of residence, restoration of employment and return of property”. It needs to be recognized that enforcing the restitution rights of a refugee or displaced person with a legitimate restitution claim, confirmed by an impartial body, may require the eviction of the current occupant of the home or land concerned. This would be the case when a secondary occupant of a refugee home, for instance, is found to have no rights over the refugee’s home, and either has access to another home or land plot or is assisted in finding some form of adequate alternative accommodation.

4. Conclusions

An attempt has been made to outline the major provisions at international and national level around the world concerning protection of property rights. This is further elaborated on compensation issues stemming from public intervention to provide public good or to control and guide sustainable development and regulate planning uses based on country comparatives. Finally, an outline of the very basic provisions of the “Pinheiro Principles” included in the handbook on Housing and Property Restitution for Refugees and Displaced Persons 2005, prepared by the UN Subcommittee, has been made and can provide an invaluable source in guiding and assisting officials in the process of resolving one of the various pillars of the “Cyprus Problem”, namely that of “property rights of owners and users and compensation” before reaching an agreement to reunite the island.

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