

PROTECTION OF PROPERTY RIGHTS IN VIEW OF EUROPEAN COURT OF HUMAN RIGHTS AND SOME NEW LEGAL CHANGES IN TURKISH LAW

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I. APPLICABLE LAW

As it is known, that Rights, which historically emanated from concept of ownership are also the origin of Private Law. Guaranty for Property rights (particularly ownership) is one of the essential elements for a democratic society and individual freedoms in it.

In conformity with that situation, Article 1 of Protocol No.1 to the Convention for The Protection of Human Rights and Fundamental Freedoms ("the Convention") provides a certain guaranty for the ownership and for some other property rights in a well-rounded style This Article to which European Court of Human Right refers frequently in its judgments, consists of two subsections as follows:

"Every natural or legal person is entitled to the peaceful enjoyment of his possession. 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."

First of all, we should point out that above mentioned provision ensures the enjoyment of some rights referred to as "possession of natural or legal persons". In other word, formulation of first sentence in provision indicates that Convention guaranties only the rights which have been already acquired by persons in accordance with their domestic Law but it does not guaranty their rights to acquire possession. As a result of this, any restriction and condition for acquisition of ownership in domestic laws can not

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be considered as contrary to Article 1 of Protocol No.1. But provided possession is already acquired properly, obstruction or delaying of enjoyment of that possession by any member State violates the same article.

As it is prescribed by the first sentence of the first subsection that the subject of guaranty is "peaceful enjoyment of possession". Thus, scope of guaranty must be determined by clarifying the concepts of "peaceful enjoyment" and "possession" separately.

In Art.1 of Protocol N.1, the right which every person is entitled to peaceful enjoyment is designated as "possession". This word principally includes "ownership". Likewise it is considered that the concerning provision has been put into effect basically for the protection of ownership. However the scope of this concept is broader than ownership. Word of possession in law terminology usually corresponds with "Besitz" in German and "zilyetlik" in Turkish. But as it appears in the case law of Court of Human Rights, term of possession has a wider meaning in one way and a narrower meaning in another way in comparison with *besitz/zilyetlik*. Possession term in Art.1 of Protocol No.1 has a narrower meaning than *Besitz/zilyetlik* such that possession is guaranteed by Protocol only if it was considered rightful and justified while *besitz/zilyetlik* is guaranteed in our law even it does not based on a right. On the other hand, possession has a wider meaning in Protocol because it is accepted for some kind of rights which *besitz/zilyetlik* can not be established on them. As it is seen through the cases cited below, some compensation derived from interference with some assets and even some bank accounts were considered by Court of Human Rights as possession.

Finally, guaranty in Article 1 of Protocol No.1 has been carried for legal persons beside natural persons. Regulating a fundamental right like enjoyment of possession for legal persons equally with natural persons in such a Convention related to Human Rights reflects the influence of real personality theory for juristic persons.

Depriving someone of his right to peaceful enjoyment of possession is entitled only in the presence of three elements. These are: 1- public interest, 2- provisions of law, 3- being in accordance with general principles of International Law. As it is understood from the expression of Article existence of all three elements is needed for legality of deprivation and absence of only one of them constitutes a violation of Convention. Providing by law is a formal condition. Being in accordance with general principles of International law is sought in the case of international interference with possession. Element which needs to be clarified is "public interest". Court of Human rights is in the opinion that any ordinary public interest is insufficient for interference with possession. According to the Court, public interest must bear enough importance to justify the interference with possession. In other words, any interference with the property must also satisfy the requirement of proportionality, which means that, as the court has repeatedly stated, "a fair balance must be struck between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights" particularly peaceful enjoyment of possession.

Second Subsection of Article 1 designated two situations of public interest which

allow the state to interfere with possession : 1- Right of state to enforce such Laws as it deems necessary to control the use of property in accordance with the general interest. 2- Right of state to secure the payment of taxes or other contributions or penalties. These situations are indicative rather than exhaustive.

II. SOME CASES

Below some of the cases of Court of Human Rights will be dealt briefly as examples.

1- In case law of Court of Human Rights, member States have been considered as being in violation of Art.1 of Protocol No.1 provided there have deprived anybody of his ownership or obstructed the using of any power derived from ownership.

a) A sample to deprivation of ownership is "Case of Brunaresscu v. Romania 28 October 1999":

In 1950 Romanian State took possession of the applicant's parent house in Bucharest, allegedly under Decree no. 92/1950 on nationalization. The applicant's parents were never informed of the grounds or legal basis for that deprivation of property. In 1973, the State sold the house to the third person. In 1993 the applicant, as the beneficiary of his parents' estate, brought an action in the Bucharest Court of First Instance seeking a declaration that the nationalization was null and void on the ground that Decree no. 92/1950 provided that the property of employees could not be nationalized and his parents had been employed at the time of the nationalization of their house. In a judgment of 9 December 1993 the court of First Instance held that the nationalization of the applicants' parents house had been a mistake, as his parents had belonged to a category of persons whose property the decree exempted from nationalization.

Procurator-General of Romania lodged an application with the Supreme Court of Justice to have the judgment of 9 December 1993 quashed on the grounds that the court of First Instance has exceeded its jurisdiction in examining the lawfulness of the application of Decree no.92/1950. On 1 March 1995 the Supreme Court of Justice quashed the judgment of 9 December 1993 and dismissed the applicants claim.

Court of Human Rights considered that the applicant had a "possession" for the purpose of Art. 1 of Protocol No.1 The house in question had been nationalized in breach of Decree no.92/1950 on nationalization and held with the retrospective effect, that the applicant, as his parents' successor in title, was the lawful owner of that house. The court finds that the effect of the judgment of the Supreme Court of The Justice was to deprive the applicant of his possession within the meaning of the second sentence of the first paragraph of Article 1 of Protocol N.1, while in particular, he was no longer able to sell, devise, donate or otherwise dispose of his property.

b) An example to obstruction of the enjoyment of ownership is the Case of Del Sole v. Italy 17 July 2003 (08-17) which is one of the five identical and consecutive

judgments with the same defendant and the same claim:

In this case applicant was the owner of a flat in Naples and there was a tenant in the flat. Applicant communicated his intention to terminate the lease and summoned the tenant to appear before the Naples Magistrate. By decision of 13 December 1987, the Naples Magistrate upheld the validity of the notice to quit and ordered that the premises must be vacated by 30 June 1991. The applicant made a statutory declaration that he urgently required the premises as accommodation for his father.

Between 16 July 1991 and 28 April 1998 (almost 7 years) the bailiff made totally twenty five attempts to recover possession. Each attempt proved unsuccessful, as the applicant was never granted the assistance of the police in enforcing the order for possession. Finally on 3 July 1998, the applicant repossessed the flat with the assistance of the police.

The court has examined and finds that there are no facts or arguments from the Government which would excused that applicant had to wait approximately seven years before being able to repossess the flat. Consequently, there has been a violation of Article 1 of Protocol No.1 of Convention.

c) An other sample to obstruction of enjoyment of ownership is the case of Allard v. Sweden 24 July 2003:

In 1935 the applicant's mother and her four siblings jointly inherited two estates from their father. On the land (one of the islands in the archipelago of Stockholm) managed by the applicant's mother. The applicant applied to the Building Committee of Öst-raker/Stockholm for a building permit. Committee granted a permit for the erection of a new house further away from the shore. The new house was erected in 1988.

On August 1989 the applicant's mother died, leaving four children, i.e. the applicant and her brother and sisters. On 21 December 1989 practically all the other joint owners of the estate instituted proceedings against the applicant in the District Court, requesting that she be obliged to remove the new house as it had been erected without their consent, contrary to the requirements of the Act on Joint Ownership. By a judgment of 10 May 1990 the District Court decided that the applicant was to remove the house because she had erected it without the necessary consent of all the other joint owners.

The applicant appealed to the Supreme Court and requested that no further action should be taken on the case pending the outcome of division proceedings which she had instituted in October 1990. In these proceedings, the applicant claimed that the joint ownership of the estate should be dissolved and individual plots be assigned to the family members.

By a decision of March 1996 the Supreme Court rejected the applicant's request. Following the Supreme Court's decision, several family members requested that the Enforcement Office enforce the removal judgment. The Enforcement Office, on 20 May

1996 decided that the house was to be demolished by a construction firm on June 1996. The demolition of the house began on 3 June 1996 and was concluded ten days later.

On 22 November 1996 the real Estate Court gave judgment in the division proceedings. It decided that estate in question should be divided into six individual plots and one common plot. The applicant was awarded a plot where the now demolished house had been situated.

Court of Human Rights took into account that it would have been reasonable for the Supreme Court to await the outcome of the division proceedings, in particular when regard is had to the irreparable effects of demolition of a house and the economic consequences of such a measure. Court also has regard to the fact that the division proceedings had been instituted by the applicant already in October 1990. In being ordered to remove her house and later having it demolished, the applicant had to bear an individual and excessive burden. There has accordingly been a breach of Article 1 of Protocol No. 1 to the Convention.

2- Beside deprivation of ownership or prevention from enjoyment of ownership, Court of Human Rights also accepted as a violation of Art.1 of Protocol No.1 where a compensation for a legal nationalization had not been fully paid or had not been paid on time

a- A sample to paying not fully is the case of Jasiuniene v. Lithuania 6 March 2003:

Before the Second World War the Applicant's mother occupied a dwelling house in the center of the Palanga City on the Baltic sea coast. Following the Soviet occupation of Lithuania in 1940, the land was nationalized and the house was demolished in the 1960's.

By a decision of 25 September 1992 the Palanga City Council, by reference to the restitution of Property Act, decided to restore the property rights of the applicant in regard to her late mother's land.

But the decision of 25 September 1992 was not implemented as no land was returned and no compensation was offered. In January 1995 the applicant brought a court action against the local authority, claiming that the plot should have been returned to her and her sister.

On 15 December 1995 the Palanga City District Court dismissed the applicant's action. The court held that the applicant was not entitled to recover the plot, but that she should have been offered an alternative parcel in compensation as required by law.

The applicant appealed, stating that the plot had to be returned to her.

On 3 April 1996 the Klaipeda Regional Court quashed the judgment of the District court. The Regional Court held that the local authority had to resolve the question of which land or what amount of money should have been offered to the applicant as a compensation.

The Governor requested the applicant to approach planners at the Palanga council to choose an alternative parcel. He warned her that a different parcel would be allotted without consent.

On December 1997 the applicant wrote to the Prime Minister, stating that she had been entitled to the plot, that the alternative parcels offered by the local authority were located in the outskirts of Palanga, and that their value was thus not equivalent to the plot in the center of town.

Until 1999 the applicant was proposed and refused three offers by the County Governor for alternative parcels of land in various areas of Palanga.

Court of Human Rights stated that, "Possession" within the meaning of Article 1 of Protocol No.1 can be either "existing possession" or assets, including claims, in respect of which an applicant can argue that he has at least a "legitimate expectation" that they will be realized. On the basis of the judgment of 3 April 1996, applicant had a "legitimate expectation" from the authorities to take appropriate measures to afford her compensation in land or many provided by law on restitution of property rights.

Consequently, by failing to comply with the judgment, the national authorities prevented the applicant from obtaining the compensation she could reasonably have expected to receive. The Government have advanced no plausible justification for this interference acceptable from the point of view of Article 1 of Protocol 1.

b) An example to delayed payment is the Case of Almeida Garret Mascarenhas Falcao and Others v. Portugal:

The six applicants who are Portuguese nationals, all owned land that had been expropriated and nationalized as part of the agrarian reform policy in Portugal. Under the agrarian reform policy, two of the plots were nationalized by Legislative Decree of 30 July 1975. Legislative decrees provided for the payment of compensation, for which the amount, the time-limit and the terms of payment had yet to be determined.

In accordance with the relevant legislation, the provisional compensation to which the applicant was entitled was assessed in March 1983 at 16,204,266 Portuguese escudos. On 16 September 1991 that sum was made available to the applicant in the form of government securities.

On 30 December 1992 the applicant brought an action in damages against the state before the ordinary courts because of its failure to pay the final compensation following the expropriation. He alleged that in view of the length of time he had been kept waiting for payment of the final compensation since the expropriation, the general law on expropriation should have been applied. He therefore sought payment of compensation that took into account the period that had elapsed since the expropriation. In a decision of 14 January 1993 the Court of First Instance dismissed the action holding, as a preliminary point, that it had no jurisdiction *ratione materiae*. The applicant appealed, but the Lisbon Court of Appeal upheld the impugned judgment in a decision of 9 December 1993. The applicant appealed on points of law to the Supreme Court, which, in a decision of 31 May 1994, dismissed the appeal holding, *inter alia*.

On 17 June 1994 the applicant lodged a constitutional appeal with the Constitutional Court. On 7 June 1995 the Constitutional Court declared the appeal inadmissible.

Court of Human Rights observed that Article 1 of Protocol No.1 protects pecuniary assets, such as debts. The Court found that the applicants could therefore claim to be entitled to recover their debt against the State; accordingly, it concludes that Article 1 of Protocol No.1 is applicable. The Court observed that the interference with the applicant's right to enjoyment of their possession is constituted by the continuing failure to pay the final compensation. For the purposes of the first sentence of the first paragraph of Article 1 of Protocol No.1, the Court must determine whether a fair balance was struck between the demands of the general interest of the community and the requirement of the protection of the individual's fundamental rights. The Court noted that twenty-four years have not elapsed without the applicants being paid the final compensation. The delay is indisputably attributable to the State and neither the complexity of the authorities' activities in that sphere nor the number of people entitled to compensation can justify a delay as long as that which has occurred here. In conclusion, there has been a violation of Article 1 of Protocol No. 1.

3) Court of Human Rights applies to Art.1 of Protocol No.1 in the cases that applicants suffered some loss of property other than loss of ownership or loss of any power emanated from ownership:

a) One example is the Case of *Stretch v. The United Kingdom*: In this case, frustration of Applicant who constructed some installations on a public land trusting a contract made by a public authority was held as a violation of possession.

By a lease dated 27 November 1969 the applicant was granted a building lease of industrial land by Dorchester Borough Council for twenty-two years from 29 September 1969. The lease required him to erect up to six buildings at his own expense for light industrial use and included an option to renew for a further twenty-one years.

The applicant states that he had requested a 43 year term in the course of negotiations. By this time West Dorset County Council (West Dorset) had become the statutory successor to Dorchester. In August 1991, West Dorset notified the applicant that it considered that the option could not be exercised. Main argument of Council was that the option was not capable of being exercised by the applicant because of that the option was *ultra vires* Dorchester.

On 26 September 1991 the applicant applied to the Chancery Division of the High Court for a declaration that he was entitled to the grant of the further term and for an order of specific performance to enforce his right. This application was dismissed on 25 April 1996.

On 10 November 1997 the Court of Appeal upheld the judge's decision, on the ground that the grant of the option had been beyond Dorchester's power.

Court of Human Rights pointed out that, a interference must strike a "fair balance" between the demands of the general interests of the community and the requirements

of the individual's fundamental rights. The concern to achieve this balance is reflected in the structure of Article 1 as a whole, including the second paragraph. There must therefore be a reasonable relationship of proportionality between the means employed and the aims pursued. The Court has found that there has been an unjustified interference with the applicant's possessions due to the disproportionate consequences of the invalidity of the option to renew the lease. Since however the local authority itself considered that it had the power to grant an option, it does not appear unreasonable that the applicant and his legal advisers entertained the same belief. The applicant not only had the expectation of deriving future return from his investment in the lease but the option to renew had been an important part of the lease for a person undertaking building obligations and who otherwise would have had a limited period in which to recoup his expenditure.

Having regard to those considerations, the Court found that in this case there was a disproportionate interference with the applicant's peaceful enjoyment of his possession and therefore, concludes that there has been a violation of Article 1 of Protocol 1 to the Convention.

b) Court of Human Rights has accepted even the right of depositor on his bank account as "possession" and also accepted the default of that account as "interference with possession". However paying interest lesser than the rate of inflation was not held as a violation of Art.1 of Protocol No.1.

There is a similar judgment in Case of Ryabykh v. Russia: In this case Applicant claimed that the value of her personal savings that had accrued in her accounts by 1991 had significantly dropped following the economic reforms. Her saving were the result of decades of hard work, and she had intended to buy a flat with money. However, the State had not revalued the amounts on deposit to offset the effects of inflation, as it had been required by the Law on Revaluation and Protection of the Savings of Citizens of the Russian Federation enacted on 10 May 1995.

On 30 December 1997 the Novooskolskiy District Court of the Belgorod Region found in the applicant's favor and awarded her 129,544,106 roubles payable by the State treasury. On 28 February 1998 the judgment was set aside on appeal by the Belgorod Regional Court and the case remitted for a retrial. On 8 June 1998 the Novooskolsky District Court, sitting in the same composition, delivered a judgment similar to its judgment of 30 December 1997. The award, however, was readjusted to 133.963,70 roubles. No appeal was lodged against the judgment and it became final ten days later.

On an unspecified date in 1999, while the enforcement proceedings were in progress, the President of the Belgorod Regional Court lodged an application for supervisory review of the Judgment of 8 June 1998, on the ground that it conflicted with substantive laws.

On 19 March 1999 Presidium of the Belgorod Regional Court set aside the judgment of 8 June 1998 and dismissed the applicants claims altogether. On 17 June 1999 the enforcement proceedings were discontinued.

On 4 January 2001 the Supreme Court a deputy president of the Supreme Court lodged an application for supervisory review of the judgment of the Presidium of 19 March 1999. The case was remitted to the Novooskolskiy District Court for a fresh examination.

After four judgments following each other, finally on 1 November 2002 the applicant and a deputy president of the Government of the Belgorod region signed a settlement agreement, in which the applicant promised to abandon her claims arising out of the judgment of 10 June 2002 for a consideration of 248,724 rouble.

On 19 November 2002 the applicant withdrew that application, saying that the Government had purchase her a flat in Novyi Oskol at a price of 330.000 ruble, and that she had no more claims against the state.

On 23 March 2003 the applicant informed the Court that the price of the flat did not cover the damage sustained by her because the money she had had on her savings account in 1999, if converted to US dollars, would exceed the price of the flat. The applicant asked the Court to recover the difference from the state.

The Court of Human Rights reiterates that a judgment debt may be regarded as a "possession" for the purposes of Article 1 of Protocol No.1. Furthermore, quashing such a judgment after it has become final and unappealable will constitute an interference with the judgment beneficiary's right to the peaceful enjoyment of that possession.

However, the Court has examined in detail complaints arising out of the State's failure to revalue deposits in the Savings Bank and found that they do not disclose any appearance of a violation of Article 1 of Protocol No.1 to the Convention. In that case the Court pointed out that although applicant's savings decreased due to inflation, Article 1 of Protocol No.1 do not oblige the State to maintain the purchasing power of sums deposited with financial institutions. It follows that there has been no violation of Article 1 of Protocol 1 to Convention.

III. NEW CHANGES IN TURKISH LAW

Article 35 of Turkish Constitution provides security for ownership and inheritance together considering them as fundamental rights. Aforesaid provision provided that "Everybody has the rights of ownership and inheritance. Those rights can be limited only by law and by reasons of public interest. Enjoyment of ownership can not be contrary to the interest of society."

This provision as protecting directly ownership but not every type of possession, seems that it carried a narrower security than Art.1 of Protocol 1 of Convention. However in a different point of view, security provided in Turkish Constitution is wider. Differing from the principle in Art.1 of Protocol No.1 which guarantied only the enjoyment of possession owned formerly, expression in Turkish Constitution is comprehensive as to include the possibility of acquisition of ownership.

The most important improvement in Turkish law is the enactment of New Civil

Code, which came into force in 1 January 2002, replacing 76 years old former Civil Code. In spite of several amendments brought by this new code for rules involving ownership and other real rights, they do not have importance for the protection of ownership.

The most important innovation in the area of protection of ownership in Turkish law is the amendment of Expropriation Act No. 2942 by the Act No. 4650 dated 24 April 2001.

Before this amendment, expropriation of someone's ownership could be completed by the decision of authorized administration. The person who lost his ownership due to such decision had to bring a suit against the administration before administrative courts. Subject of suit could be either cancellation of expropriation or increasing of the price which had been designated by administration for expropriation. Provided that he won the suit, depending on his demand, he would regain the ownership or have the price increased.

As an important difference from former provision, new Act regulated that expropriation can be completed only by a judgment of a civil court. Administrative decision about expropriation just allow the administration in question to apply to the competent court in order to obtain a verdict for expropriation. Until that judgment becomes final, owner keeps his ownership. However we should point out that civil court can supervise and assess the application only in view of formal conditions of administrative decision and determine the price for expropriation. If the owner wishes to cancel the administrative decision by asserting that public interest does not justify the expropriation, he has to apply to administrative courts. In such case, this action would be held as a suspending question for the lawsuit which has been filed by administration before civil court for expropriation. Consequently new system is protecting the right of ownership more effective than the former system in such wise that owner does not lose his ownership unless the court's verdict finalizes and also does not have to file a lawsuit to increase the price determined by administration (While the administration can not define the price unilaterally).