

Family Housing Concept, Elements and Importance in Turkey

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Abstract : Family housing has a very important place in terms of family members due to it has been the center of life activities in addition to meeting the housing need, one of the basic needs of family members. In order to ensure the benefits of the family to the family dwelling while the marriage union is continuing, it is stated in Turkish Civil Law, the article no. Article 194, the termination of the marriage unity of the spouses to protect the right to housing rights Turkish Civil Code Art. The provisions of 240, 254, 255, 279 and 652 are regulated. This is a partly new issue and needs to be developed. In this study, the possible results with the current applications were evaluated.

Keywords: Family, Family House, Marriage Association, Transaction

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I. INTRODUCTION

The family, according to the law dictionary, it is the smallest social association of family that consists of wife, husband and children [1] is the oldest type of society that begins with the existence of human beings. The simplest family form; family of husband, wife and children. This family form is called conjugal family because it has a wife-husband relationship. However, it is called as nuclear family because it forms the basis of more complex family forms [2]. In the definition of family, the number of individuals who make up the family revealed the definitions of family in narrow sense, “nuclear family “and “large family” [3]. Although the concept of family includes differences since the existence of human beings, it is understood that the structure formed by the union of separate sexes (male and female). The family is formed by women and men coming together not only for sexual intercourse, but also for the purpose of establishing a continuous union together [4]. Even today there is no association between how and from whom the family is formed in different countries and communities, and the meanings expressed by the term family in the history of humanity are very diverse [5]. For this reason, it is not possible to define a universal family. 1982 Constitution of Turkey in art. 41, is mentioned that the family forms the basis of Turkish society but does not make any definition about the concept of family [6]. The constitution refers that the family has a very important place in the society and includes many regulatory provisions, as described in art. 41, 10, 20 and 174. It is understood from the contents of these regulatory provisions in the 1982 Constitution that no clear definition has been made, which refers to the nuclear family [7]. The Turkish Civil Code numbered 4721 has been also a model for the nuclear family. However, there are provisions in the law that regulate the larger family [8]. In this respect, the provisions in the narrow sense include family, as described in TMK 118 and 281, broadly family, as described in TMK 282 and 363, and in the broadest sense family, as described in TMK 367 and 368.

II. HOUSING CONCEPT

In terms of the dictionary meaning, the dwelling is defined as the building, house, residence, residence and also the place where a person lives without seeking the purpose of the settlement [9]. The family housing concept of the Supreme Court is described as the place where spouses perform all their life activities, live their bitter, sweet days and intensify their life activities [10]. To make a definition, housing is protected from adverse weather conditions and various dangers, where people are separated from the external environment and are protected from various dangers and also it is protected legally, secured area [11]. Land registered in land registry or land registered as immovable property suitable for use as housing can be found. Turkish Civil Code, art. This rule in 718 Art. is referred to as top soil. [12] In this case, the immovable structures in question become an integral part of the land or the property, which is the nature of the land [13]. The real thing is the owner of the complementary thing as described in Turkish Civil Code, Art. 684. The integral parts cannot be the subject of transaction apart from the main thing and the transactions on the main thing also connect the integral part. Therefore, if there is an immovable property that is used as a family residence on the actual status, even if it is registered as a land or land in an immovable land registry, it is a narrow and technical means of making

transactions and saving it in a broad sense. The validity of the transactions must depend on the consent of the other spouse [14]. In the doctrine, this view previously defended and adopted by Gumus. According to Gumus [15], Although the structure on a field is actually used as a family residence, it does not eliminate the quality of the family dwelling acquired by the actual use because it does not appear in the land registry. In the context of commenting on the issue of family housing, the Supreme Court also stated that the building on the real estate could be given annotation of family housing in accordance with Turkish Civil Code Art.194/f.3 [16]. It is carried on land or land-like immovable If they are seen that they may be unattainable rather than providing mobility [17]. The transfer of these movable structures that can be used as family dwells, limiting the rights on them or termination of the lease is subject to the consent of the other spouse. In fact, since such conservative processes, which only relate to movable structures, do not have an impact on the immovable property they are located on, they do not have any property to discuss whether land and farm properties are subject to provisions specific to the family house.

However, the owners of such structures may also be entitled to land or land on which the movable structures are located, in which case the restriction or termination of the right on the immovable property may affect the right to housing in the family house. For example, if a farmer with a prefabricated house, which can be used as a family residence on the farm where the owner is located, will only be affected by the transfer and assignment of the property on the prefabricated house used as a family residence when it carries out a transfer and assignment operation on the property. However, since the right of ownership on the field has ended, it will be an unfair handover to the new owner's property if the family dwelling remains on the field (if the transfer contract is not entitled to the right to a former owner or the right to use a personal right) and the new owner shall be unfairly handled as described in Turkish Civil Code art.683 / f.2. For this reason, the transfer of the land or the field of the immovable property, the limitation of rights on them or the termination of the lease agreement on these properties does not affect the ownership of rights on the family structure of the family members affect the interests of the family on the negative impact, such transactions' validity is in accordance with the provision of Article 194, Turkish Civil Code. It must be subject to the consent of the other spouse. Otherwise, the house, which the spouses and children make into the center of life, may be lost due to the thoughtless or abusive processes of the spouse [18].

2.1. Transaction

The principles expressing the sovereignty of the Party should be evaluated separately in relation to the scope of the civil trial and the case/field of evidence. As the scope of civil proceedings is shaped by the authority to transact in the material law, the norms in this field are the authority norms. The freedom of the party and the freedom of will are absolute in determining the scope of the civil trial. It is not seen that the intervention of the judge, the forbidden authority (the appointment of a guardian, the taking of measures on the children's goods, etc.) or the judgment to be subject to the will of the party (which should be accepted in the divorce case, etc.) and the lighting assignment (the subject of the case is uncertain etc.) is possible. The results of this field belonging to the principle of transaction should not be expected to be explained with material fact. Because a trial in the civil trial (waiver, acceptance, peace) would be possible to conclude a trial without reflecting on the situation in material law. It is even possible to say that a new situation of material law has been created [19]. Although the principle of transaction is expressed in more than one jurisdiction norm, it is based on the principle of freedom of the party which is guaranteed by the constitution [20]. However, this conclusion does not mean that the principle of transaction in civil jurisdiction law is the procedural aspect of the power of saving in the substantive law and the constitutional freedom of will that the constitution recognizes to the individuals in the matter of law, and even it does not seem to be a necessary consequence or affiliation. Therefore, the civil jurisdiction law cannot be explained by the values of material law, nor by the principle of saving. However, this civil jurisdiction does not undermine the function of revealing and analyzing material legal situations. The link with material law is due to this function. Apart from that, the principle of saving which dominates the civil trial and the existence of norms expressing it is the freedom of the constitution. In this context, the principle of saving should be seen as the form of the right of the constitutional right on the right to claim reflected in the field of jurisdiction, and should be considered under the constitutional guarantee, such as the guarantee of impartial and statutory judges, provision of material truth or fair trial [21].

III. CONCEPT OF FAMILY RESIDENCE, ITS ELEMENTS AND ITS IMPORTANCE

The Family House entered into Turkish law with the Civil Code numbered 4721. Family housing is an important concept which has been included in the provisions of both the Family Law and the Law of Inheritance within the Civil Code. Although it has just entered our law, no definition has been made about this important concept in the Civil Code [22]. As a new institution, there is the idea that there is no definition in the Civil Code about the family residence and the reason for not restricting the meaning of the concept by defining a definition and leaving the implementation of this concept in the application [23]. If we make a definition about the family

residence by acting from these definitions in the doctrine, we can say that the family residence is the place where the spouses, who are officially married as determined by the law, the family residence is chosen together and settled regularly and the family life is intensified in order to carry out the vital activities of the family they have established. According to the Court of Cassation; family housing, spouses' housing and family housing are the same concepts [24].

3.1. Elements

While different distinctions [25] are made on the elements of family dwelling, for the implementation of provisions on family dwellings; marriage association should be established. According to Turkish Civil Code art. 185/1, the marriage union is established only by marriage. A valid marital union should be established between the spouses in order for the provisions of the family dwelling to be applicable in the general provisions of the marriage. The fact that one of the spouses leaves the dwellings does not eliminate the character of the family dwelling. For this reason, it cannot be claimed that this residence is no longer a family residence and cannot benefit from legal protection. Because it is against the purpose of the law to admit that a house that has acquired the character of a family residence will lose this character just because a wife or a husband leaves the residence. In this case, there is no legal obstacle to the implementation of Turkish Civil Code art.194 [26]. Since the existence of a valid marriage union is considered to be one of the elements of the family residence; death, divorce, annulment of marriage etc. as the marriage unity ends when the marriage ends because of the reasons of the family housing will end. When the decision on the enforcement of the divorce decision given in a foreign country is decided, the nature of the family dwelling ends as of the date of the finalization of the enforcement decision on marriage [27].

According to Turkish Civil Code art.186/1, spouses choose their dwellings together. This rule is art.185/3 is an extension of the obligation to live together with spouses [28]. While the rule is that the spouses choose the family residence together, it is not obligatory for the housing selection to be done together at the same time. One of the spouses will give the consent of the other spouse regarding the choice of the family house or the consent of the other spouse after his/her choice. The important thing is to have the consent of both spouses in determining the family dwellings that they will live together [29]. A family housing with a condensed family life; It is the residence where the family lives in daily life and the family life is concentrated [30]. As a rule, the family residence is a single residence [31]. However, it is argued that in exceptional cases, more than one residence may be a family residence [32]. The spouses may have more than one residence and may have more than one residence. The Supreme Court of Appeals, 82/12 [33]. The concept of family dwelling in the interpretation of the implementation of the article discusses broadly. However, in exceptional cases where family life is regularly carried out in different houses, more than one dwelling family dwelling may be considered in the presence of other conditions related to family residence. However, the use of different housing of spouses with a temporary nature will not lead to the acquisition of the quality of a family residence. Because the loss of this type of housing, the law does not harm the right to shelter in terms of other spouses and children wants to protect and often, such as holiday, recreation, private entertainment because they are homes acquired as a result, the loss of any home, not a family residence. Family housing has an important place in Turkish family structure. Because of the economic conditions of our country, being a host or sitting in a rented residence is one of the most important problems for families [34]. It is very difficult for people to have a home without having to save enough resources to force their livelihoods without undermining their budgets. In the reason of Turkish Civil Code art.194, it is stated that the family dwelling has a very important asset value. In addition to being a place where the housing needs of spouses and children are met, the family dwelling has a spiritual and emotional value. As stated in the rationale, Turkish Civil Code art. 194, [35] family housing is the place where the spouses spend their sweet and sweet days together and share all their personal and social relations and privacy [36].

Generally, the family residence was a concept not included in the Turkish family law until the entry of our Turkish Civil Code No. 4721. Although it was regulated in Swiss law, it took time for Turkish legal life to take its place. First of all, it is necessary to focus on the entry of the family housing into our law and the place in comparative law [37]. The place of family residence in Turkish Family Law, The Turkish Civil Code No. 741 had been in use for more than 75 years until the adoption of the Turkish Civil Code no.4721, However, in the face of developments and changes in social, cultural and economic life in the world and in our country, it has become insufficient and inadequate to meet the emerging needs [38]. Family dwelling is one of the most important elements that enables the family to live together and collects the family under one roof [39]. For all these reasons, family housing has been integrated into family life and has become an integral part of the family. All these characteristics and importance of the family dwelling brought about a close relationship with the other members of the marriage union and even made arrangements for the spouse to have a say in the family housing in the family house. In this way, the legislator has put into practice the legal system of the family housing with these 6 articles of the Civil Code. Although various criticisms and debates are made in terms of the regulation of

the articles and the systematic aspects of the law, the compliance with the Constitution and international conventions was ensured by the arrangement of the family dwelling in civil law [40]. The place of family residence in comparative law, family residence gained importance in comparative law after the 1950s. In the French Civil Code, in 1965 we see that the family residence is protected. In the 1980s, the Recommendation R (81) 15 of the Council of Ministers of the European Union of 16 October 1981 underlined the importance of family housing and household goods. Based on this European Union Recommendation, various countries have made changes in this way in Civil Laws. Nowadays, almost all European countries have the provisions of the Civil Laws to protect family housing [41].

The concept of family housing entered the Swiss Civil Code in 1984. Significant new provisions on family housing have been introduced [42]. Firstly, the Swiss Civil Code art.169 included the regulation on the protection of the family housing. With this provision, it has been arranged that the spouse who is the rightful owner in the family residence and in case of any termination of the lease, the consent of the other spouse may be taken, the consent cannot be obtained or the intervention of the judge may be requested if the non-owner wife refrains from giving consent without a just cause [43]. Amendments were made to the provisions of the Swiss Code of Obligations related to the lease agreements. With the amendment of this law, if the rented house is a family residence, the lease agreement is terminated. With this family law revision of 1984, “the regime of acquired property” was accepted as a legal property regime. With the provision of art.219 in the acquisition of acquired goods, the surviving spouse is entitled to usufruct or residence on housing and household goods. In the case of justifiable reasons, the right to property rights on the housing and the rights of the deceased will be maintained in a profession and the arts will not be used in the sections allocated to perform [44]. In the Swiss Civil Code, the law on inheritance has been amended in the Law on inheritance and it has been agreed that the art.612a regulation allows the surviving spouse to exercise its rights on the family dwelling, irrespective of its inheritance share. The new regulations on the protection of the family housing after the divorce came into force on 1 January 2000. With the Swiss Civil Code art.121 regulation, the marriage unity and the rights of the spouses and children involved in this union have been ensured after the marriage ended with divorce [45]. With all these amendments, the Swiss legislator has filled the existing gap in the practice of family law. In the Swiss Civil Code and Swiss Law of Obligations changes and new regulations in the field of family housing in accordance with the requirements of the age and international norms have brought in parallel provisions and the Turkish legislator has also been enlightened with the legal arrangements related to the family residence [46].

3.2. International Conventions and Family Residence

Family residence is addressed in the Recommendation of the Committee of Ministers of the Council of Europe on 16.10.1981 and R (81) No. 15 on the Rights of Spouses on Seating, Injury and Use of Household Goods in the Family Residence [47]. Recommendation decision art.1 is arranged that the other spouse must be given the consent of the other spouse in legal proceedings related to the family dwelling and if the other spouse is unjustified or not possible to consent, it can be taken by the competent authority. In Article 2, it was stated that the transaction would be canceled as a sanction for the non-consent of the other spouse in legal proceedings concerning the family residence. Article 3 states that it is possible to allocate the family house to one of the spouses if the marriage ends. Article 4 shows that the surviving spouse has the right to housing in the family dwelling and that the same rules apply to the lease agreements in art.5, and that the other spouse may continue the lease agreement under certain conditions [48].

Following the Convention, European countries have achieved significant reforms in the area of family law and have met the requirements of the era. The publication of the Recommendation decision including primarily with Switzerland, France, Belgium, Austria, Germany and Turkey finally have made changes to domestic law in this direction. Thus, the family housing institution was accepted and supported in international law [49]. Family housing is an important concept that enters our law with the 4721 Civil Code. Provisions regarding family dwellings were extended to both family law and inheritance law of Turkish Civil Code. Despite its importance, the Civil Code does not contain any definition of family housing. Moreover, the Swiss Civil Code did not provide a definition for the family residence [50]. In our Civil Code, family housing was not identified and its meaning was prevented from being narrowed. Turkish Civil code art.194 rationale, Circular No. 2002/7 of the General Directorate of Land Registry and Cadastral, definitions in the teaching and the decisions of the Supreme Court are evaluated; It is possible to define the concept of family dwelling as a common, movable or immovable shared housing that is visually and emotionally integrated with the family, which is selected by the spouses together with the formal marital union, and which they become the focal point of their social and physical lives [51].

Importance; the family residence has a more important position in the Turkish family structure than in other countries. Because of the economic conditions of our country, having a home or sitting in a rented residence constitutes a significant problem for families. In the economic conditions of our country, families can usually have a single home with many years of savings [52]. Family housing has an important place in the life of

the family. Together with them, the spouses have become part of their lives, which are integrated with the family housing they have acquired with great difficulties and laid out according to their tastes and needs [53]. During the continuation of the family and marriage unity, the family residence has been protected against the third parties and the spouses' own transactions in the marriage union.

Elements; the concept of family housing consists of a number of elements. In order to be able to talk about family housing, the existence of the family, the fact that this family has come together in the official marriage unity and a family that has become the center of family life must be found. The concept of family from a sociological point of view is composed of individuals who have biologically connected ties, and refers to sexual life togetherness, reproduction and common origin [55]. At various times and in various societies, the concept of family differs. Despite this temporal and social difference, the basis of the family concept, there is a structure consisting of women and men. It is a phenomenon that has a deep-rooted history that extends to the existence of humanity, has developed and changed in the historical process and has always been accepted as the basic structure within the societies. The definitions of family in the narrow sense, nuclear family “and” large family are due to this element. From a sociological point of view, the family has been influenced by the development and change of political and economic life and has undergone a historical process from large to nuclear family [56].

Marriage Association; A valid marital union should be established between the spouses in order to apply the provisions of the family residence. The starting point of all these legal arrangements is the existence of a family formed by marriage [57]. If a residence to be considered a family residence, it must be used by persons with formal marriages. The dwellings of unmarried people cannot be accepted as family housing. Indeed, the concept of marriage unity and spouses arise from the establishment of a marriage contract that the state concerned has set out within the rules of family law [58]. The formation of marriage, religious ceremonies in various legal systems, official marriage etc. can be connected to different shape conditions. Or, in some western states, it is seen that legal conditions related to the marriage unity are connected to only the parties living in the form of a family without necessity [59].

Housing; Since ancient times, religions have accepted housing as a sacred place. Various jurisdictions have also introduced regulations that protect housing. In contemporary legal order, housing has been preserved in terms of personal immunity and privacy. With the constitution art .21, housing immunity is guaranteed by the constitution. Family housing may be owned by one of the spouses, or may be owned by the spouses, or may be a rented house and may be used on the basis of any personal or limited real rights owned by a spouse. What is important here is that the dwelling is reserved for a family and is used by a specific family [60]. Properties; In the process of enactment of the Civil Code, the regulation of family housing, which can be only a single house, the fact that the family's social life and the concrete situation of the family is taken into consideration, we believe that acceptance is possible [61]. Selection; According to the Civil Code art.186 f.1, Spouses shall choose their dwelling together. This article may be expressed in the wording of the spouses' dwelling house in the Civil Code art.164, the concept of “common housing” has been used. It should be kept in mind that when a house is chosen as a family residence by spouses, this will of the spouses must be made known to third parties. This is possible by the fact that the house becomes the center of family life as a result of its actual and continuous use [62]. Protection Time; It is sufficient that the formal marriage link between spouses is established and the residence is family-specific. One or both of the spouses on the family dwelling, in kind or personal; property, upper usufruct, residence, rent, or even may be entitled to the contract. The main criterion here is that the house has been transformed into a living center of the family by referring to the family [63]. In the event that marriage ends with the decision of divorce or cancellation, the protection of the family residence ends. In Swiss Law, family housing, which is different from our law and in place, is protected even in the next phase after divorce in the interests of other spouses and children. However, Swiss Civil Code art.121. regulation has not been taken into Turkish Civil Code.

IV. CHARACTERISTICS OF FAMILY RESIDENCE

The inclusion of the collateral in the collateral pool by the establishment of a mortgage on the land which has an independent section or a residential property on which the property has a residential property will be designated as family residence. Family dwelling is defined as the place where the family members are settled and maintained their lives in a continuous manner, which is determined by the will of their own or they can be understood by third persons as their permanent place of residence [64]. According to the Court of Appeals, the concepts of family dwelling and settlement are concepts that have different meanings and are not synonymous [65]. The first paragraph of Article 194 states that unless one of the spouses has the express consent of the other spouse, it cannot terminate the lease agreement related to the family house, transfer the family house or limit the rights on the family dwelling. It is seen that the legal nature of the limitation imposed is controversial [66]. In this context, in cases where a receivable in the collateral pool is guaranteed by a mortgage facility on an immovable property that is a family residence, the spouse who has the right to ownership must have received the

express consent of the other spouse. Otherwise, the transaction will be suspended [67]. In other words, in cases where the spouse's consent has not been taken from the beginning, if the other spouse agrees with the mortgage facility operation, if it is certain that it will become effective from the moment the transaction is made, it is not given approval or not, the transaction will be null and void. In cases where the consent of the other spouse cannot be obtained without justification or if it is not possible to obtain the consent, the Turkish Civil Code Art. 194/f.2, it should be noted that the intervention of the judge may be requested. The registration of the limited real rights that affect the family dwelling without the consent of the spouse or the authorization of the judge is a legal registration. In this context, corrections may be made against the third party registered in favor of the mortgage in favor of the other party, by the other spouse, by opening a case for the revision of the land registry. It should be emphasized that the mortgage credited will not validate the mortgage facility process if he or she does not know or does not need to know that the immovable property subject to mortgages has the character of family housing.

On the other hand, if the creditor, who has established a mortgage in favor of the mortgage, has transferred this receivable to a favorable third party, the person who trusts in this corrupt registration shall be entitled to the mortgage right, the right to mortgage. Turkish Civil Code art.1023 will be won within the framework of the provision. However, if the other spouse, who finds out that a mortgage has been established on his family dwelling outside his consent and has filed a lawsuit for the correction of title deed, demands the removal of the authorizing power of the processing partner, the decision of the judge to abolish the power of disbursement shall be decided by the Art. 199/f.3 may also decide to annotate the title deed. This annotation shall be an annotation of the restrictions of the power of transacting granted for the purpose of protecting the unity of marriage and shall be effective before the annulment by a decision of power limitation. Within the framework of these determinations, the credit receivable should be considered as the possibility of transferring this unsecured bank to another bank which is not required to secure the mortgage on a real estate which is a family residence, but which does not have the right to obtain the mortgage due to the absence of the consent of the other spouse [68]. The Bank shall have earned the mortgage right in the form of the receivable which it has taken over by relying on the title deed registry in accordance with the provisions of Turkish Civil code art. 1023, before the decision of the bank is transferred to the title deed by the judge.

V. CONCLUSION

The Family House entered into Turkish law with the Civil Code numbered 4721. Family housing is an important concept which has been included in the provisions of both the Family Law and the Law of Inheritance within the Civil Code. The Turkish Civil Code does not contain any definition regarding this important situation which has recently entered in Turkey's law. This new concept is not included in the Turkish Civil Code to prevent the restriction of the definition of the application of the concept to fill the inside through the application, in this case, it is a candidate to create their own problems.

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