

An Evaluation on the Real Right of Family Housing in Civil Law in Turkey

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Abstract: Family, regardless of development and social structure, constitutes the basic structure of each society. Family law is a branch of law within the scope of civil law, which deals with family issues, the main subjects of engagement, the conditions and provisions of marriage, the conditions and consequences of divorce, property regimes, family housing, genealogy, adoption, custody, the right of child support It regulates rights such as guardianship and trustee. In Article 240 of the Turkish Civil Code, the rights of the surviving spouse, family dwelling and household goods can be demanded. This arrangement gives the surviving spouse the right to demand the same right in favor of family housing, instead of cash payment, if the property regime is to take part in the event of death due to death. The demand for real rights on family housing is subject to certain conditions in the law. These; the validity of the regime of participation in acquired goods, the end of the regime with death, the existence of the surviving spouse's participation, the ownership of the family house, the surviving spouse, the survival of the surviving spouse and the existence of the right of the surviving spouse for the family residence. This study focuses on the problems encountered in practice and their interpretation.

Keywords: Family and Marriage Union, Family Residence, Death, Real Rights, Civil Law in Turkey

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I. INTRODUCTION

The Right to Register the Real Rights On Family Residence; With the TMK m.240, the rights that the surviving spouse can claim on family housing and household goods are regulated. According to this regulation, the surviving spouse may request the establishment of the real right in favor of family housing instead of cash payment if the goods regime is to be included in the case of death due to death. In the regime of acquired property, the lawmaker provided the surviving spouse with more than the right to receive a relative receivable after the liquidation of the property regime. Thus, the independence of the property rights of spouses and the principle that the spouses shall have the right to have the rights of the spouses in the liquidation of the regime are abandoned in certain conditions as of the end of the liquidation [1]. In the regime of acquired property, Regarding the conditions of termination of marriage by divorce or annulment decision, there is no regulation regarding the same claim on family housing [2]. The house where the right to demand for the surviving spouse will be used is the family residence. In secondary houses, it is not possible to make a request on the basis of this provision. Because secondary housing is not considered as a family residence. Turkish Civil code art.240 edge title is u family residence and household goods “. In the text of the article, the housing where the spouses live together is mentioned. For example, spouses live in Samsun and they have a house in Istanbul. He is the property of your husband in both dwellings and his wife is his second wife. When their daughter won an Anatolian high school in Istanbul, the mother daughter settled in Istanbul and the father stayed in Samsun. However, he often comes to Istanbul with his family. In this case, the existence of two separate family residences arises. Upon the death of the husband, the surviving spouse should be able to demand the same right facility on the residence in Istanbul. In this broad interpretation of the family dwelling, it is clear that there is the benefit of both the surviving spouse and the child [3]. Let us assume that spouses have lived in Erzurum for many years and that they have a flat in İzmir and one of the spouses has health problems. The doctor, who undertook the treatment in Erzurum, advised him warmly and told him that a doctor had been successful in the treatment and received results. The spouses decided to leave their homes in Erzurum and stay at their homes in İzmir during the treatment period. As a result of the treatment and the increasing fight between the spouses, the other spouse has returned to Erzurum. The patient is living in İzmir. Thus, the spouses actually began to live separately. Returning to Erzurum, the wife died in a traffic accident. Both houses belong to the inheritor. Two possibilities can be considered here: The surviving spouse may request the same right facility on the residence in

İzmir. He continues his treatment in Izmir and the spouses last lived together at home in Izmir. In this case, this house will be accepted as a family residence and the same right facility will be in place for the surviving spouse. Or the surviving spouse may request the same right facility on the housing in Erzurum. The wife survived after the death of her husband, lived with his wife for many years returned to the family home in Erzurum. He wants to spend his remaining life in this residence. In this case, the house where spouses live together for many years is a family residence. It is evident that the housing did not lose the character of family housing when they were living in İzmir for treatment and the parties had lived separately for a while [4]. In order for the surviving spouse to claim the same right on the family residence, the surviving spouse shall have participation after the liquidation; that the property of the family dwelling belongs to the deceased spouse, the surviving spouse is to maintain his old life and make a request for this right which is recognized by the law.

II. CONDITIONS

To Be Valid for Participation in Acquired Property Regime; If one of the elective goods regimes is preferred before the marriage or if another property regime has been adopted by the decision of the judge, the surviving spouse will not be able to use the right of claim arising from art. 240. However, it should not be forgotten that marriages in our country are mostly subject to legal property regimen [5]. The regime should be ended with death; Except the death, the goods regime; If divorce, the annulment of the marriage, the spouses with the contract of the goods regime or by the decision to go to the arbitrary property regime, the court cannot make a claim in accordance with the provisions of Turkish Civil Code art. 240 [6]. However, the arrangements made by the spouses with the goods regime are reserved. The fact that the same claim on the family dwelling has been arranged as unique to death is criticized in our law. The focus of criticism is that there is no provision for the use of spouses from the family home if the regime for acquiring property ends with the divorce or cancellation decision except death [7]. In Swiss law, legal arrangements have been made regarding the status of the family residence after the divorce. Swiss Civil Code art.121, the marriage termination or divorce if the termination of the lease contract, the transfer of the other spouse; If the property of the family dwelling belongs to one of the spouses, there are provisions for the other spouse to be granted the right to live [8]. In case of death to be seen in a definite way, the presumption of death in accordance with Turkish Civil Code art. 31. The presumption of death, like death, would end the regime of acquiring property [9].

According to our opinion, it is not necessary for the termination of the marriage to be requested in order to use the same claim issued with Turkish Civil Code art. 240. Turkish Civil Code art. 240 is one of the provisions regulating the liquidation of the regime of acquisition of acquired goods. The liquidation of the property regime is possible, although the union of marriage continues. In the case of the acceptance that the regime of goods will continue in cases where the annulment of the marriage is not demanded, the property regime will not be liquidated and therefore it will not be possible to share the heritage. However, in order to determine the share of inheritance and landfill, it is necessary to liquidate the goods regime. In this case, even if the termination of the marriage is not requested, the provision of Article 32 of the Turkish Civil Code art. 35 f.1 shall result in the termination of the legal property regime [10].

That The Surviving Spouse has the right of Participation; The right to claim such right is granted to the surviving spouse and the fact that the spouse who has died as a result of the liquidation shall have the right to participate shall not give the heirs the right to claim this participation [11]. At the end of the determination of the spouses' residual values, it is possible that the surviving spouse and the surviving spouse will get equal. These receivables will be exchanged for Turkish Civil Code art. 236. In this case, there is no participation fee that the spouses may request from each other. Although the surviving spouse is eligible for participation, it may also be that the debtor has become debtor in exchange for the receivables. In this case, the surviving spouse does not have any participation [12]. The doctrine also states that the opinion cannot be determined by the swap outcome of the surviving spouse. In the case of the participation claim opened by the surviving spouse, it is not determined that the deceased spouse will participate. In this case, the heirs of the deceased spouse, if he did not open a case for participation in the swap is not possible to make. Participation receivable is a transferable right. If the surviving spouse has the right to participate, but has transferred this receivable to someone else, the possibility of claiming the same will be eliminated [13]. If the court considers that the surviving spouse is faulty, the marriage proceeds as if the marriage ended with divorce instead of death. If the judge decides to remove his participation credit in this way, the surviving spouse will not be able to make any claims based on the art. 240 regarding the family residence, as he will no longer have a participation grant. In the case of other reasons for divorce, the judge is not entitled to disagree on the right to reduce or remove the participation fee. The reason for this limitation is the existence of the labor and the contribution of the other spouse in the goods acquired in the goods regime, in contrast to the inheritance [14].

Family Home Ownership to the deceased spouse; The property of the family dwelling on which the surviving spouse will claim the same rights must belong to the deceased spouse. This issue is regulated by the expression belongs to the deceased wife in Turkish Civil code art. 240. It does not matter whether the deceased

spouse's family dwelling is acquired or personal [15]. The date of death is the date to be taken into account as the family dwelling is the property of the deceased spouse. As of the date of death, there will be no implementation of the art. 240 for the family housing that is not the property of the deceased spouse. The property of the family dwelling may be owned by the deceased spouse as an independent section, and the family dwelling may not be registered as an independent section. Is it possible for the surviving spouse to claim the same rights if the deceased spouse is a mere owner, but a part of a multi-apartment building that is not converted into a condominium is used as a family residence by spouses? An opinion in the doctrine advocates that the surviving spouse can claim the right of usufruct or residence on this section with the determination of the section used as family residence. According to this, the surviving spouse cannot demand that the property of the place where they live has been converted into condominium. The acceptance of the contrary is contrary to the purpose of the provision. In this case, the only solution is to have the right partner, usufruct or residence [16]. Another view assumes that the right to property must be interpreted broadly and that the building, which is used as the family residence of the surviving spouse, may be converted to an independent section according to the Property Law and may require the registration of the property. In the event that the family dwelling is the spouses' spousal ownership, this provision may be applied first among spouses. However, the surviving spouse may also benefit from art. 240. In the event that the rights are in competition and the surviving spouse chooses art. 226, the provision art. 240 shall not be applicable. According to our opinion, the surviving spouse will not be able to claim the same rights based on art. 240. The surviving spouse will not be able to use the dwelling alone on the basis of its share by transfer of the share of the deceased spouse to its share. In this case, the rights of third parties may be violated.

The Surviving Spouse Who Will Continue His/her Life; This purpose condition constitutes the rationale for art. 240 regulation. The main idea in providing the right to demand the right of the wife who survives on the family dwelling is to enable the surviving spouse to continue to live in the same way even after the death of his wife and to spend his unfortunate life in the dwelling where he shares his memories with his wife [17]. Here, the need to use the spouse's own family home must be taken into consideration. If the surviving spouse is not going to live in this residence after the death of his / her spouse, the purpose of the legislator shall not be realized and shall not be able to make a request. For example; the spouse who is in need of care after his wife's death, may have to be hospitalized in a health care facility due to severe health problems. The surviving spouse may choose to stay with one of their children or settle in a nursing home due to illness or old age. Or the surviving spouse may leave the city, where the family continent is large and difficult to live, and settle down in his or her own country, where the relatives are present and their living conditions are easier [18]. The surviving spouse has the freedom to decide whether to continue living in the family residence. In this case, it will be necessary to protect the surviving spouse from the intervention of the heirs. The surviving spouse will not be able to live alone in the family residence or be able to use all the rooms of the family house. Here, the remaining life of the surviving spouse on the family residence is the will to continue [19].

That The Surviving Spouse Has a Claim for Family Housing; The surviving spouse must make a request in order to benefit from the art. 240 provision. In the article, requestable and recognizable statements have been used. The surviving spouse does not have the right to establish a real right on the dwelling of the deceased spouse in order to maintain its former life [20]. The heirs may give an appropriate time for the surviving spouse to make the same claim. The surviving spouse is obliged to inform the heirs that he or she will use the right to demand within this period. The surviving spouse is entitled to demand the same rights as art. 240 and it is at its sole discretion whether or not to exercise this right. The surviving spouse will be able to make a request on this issue. The heirs cannot force the surviving spouse to request or request a facility of a particular right. The right to claim is attached to the will of the surviving spouse [21]. **Rights to Be Claimed;** The right of property can only be claimed if a just cause is found and this right is given to both the surviving spouse and the legal heirs of the deceased spouse. In this way, the benefits of the surviving spouse on the family dwelling and the benefits of the heirs were balanced. We will examine the real rights that can be established in favor of the spouse who survives on the family dwelling in accordance with the order in the text.

Usufructory or Residence Rights; The usufruct right, which is regulated by Turkish Civil Code art.240, is not a matter of similarity with the legal right of usufruct of the surviving spouse in Turkish Civil Code art.444 and it is completely separate regulations. Turkish Civil Code art.444 contained a provision on the share of inheritance and did not require any provision. However, the usufruct right, which is regulated by Turkish Civil code art.240, is an arrangement specific to the participation in acquired goods and requires a provision for participation in the participation of the participant [22]. The right of the surviving spouse on the family dwelling, firstly the right of usufruct or residence, has been in place in terms of ensuring the balance of interests between the surviving wife and the heirs. Thus the surviving spouse will be able to continue to live in the family residence, where he lived for the most part, without having to give up the entire participation fee. As a result of the establishment of the right, the surviving spouse will still be able to provide the other needs with this amount [23]. **Property Rights;** The right to property is regulated in Turkish Civil Code art.240 f.3 as a secondary right

qualification facility in consideration of the benefits of other heirs. According to this provision, the surviving spouse must have justified reasons for the establishment of the property right on the family residence. The right to advocate the existence of justified reasons has been recognized by both the surviving spouse and the legal heirs of the deceased spouse. In case of demand of the surviving spouse; it is possible that the surviving spouse may object to the claim that the rightful reason is not valid in the case of the heirs [24]. The legislator recognized the spouse and the legal heirs of the deceased spouse yet to exercise the right to claim the right to property instead of usufruct or residence in the presence of justifiable reasons. In this case, it is clear that the heirs whom the deceased spouse, who has been assigned by the death-saving savings, and the heirs to whom the deceased has specific goods in favor of certain goods [25].

Arrangements Made by Law; In art. 240, the right of the surviving spouse is regulated in the same way that this right cannot be used. With this provision, the legislator prioritized the economic interest in the conduct of the profession and art. In the text of the article, these rights cannot be used but it is used as a definite expression style and no agreement can be made [26]. In this respect, it should be taken into account whether the execution of the profession and the arts and the family house are in a unity. Moreover, it is possible for the surviving spouse to claim the same rights in the sections other than the departments required for the execution of the profession or art. Descendants must assert his wish to continue the same profession and art as his deceased partner against the inheritance partnership. However, if the surviving spouse has claimed a right in relation to the family residence, then the descendants should direct the claim based on the provision of m.240 f.4 to the surviving spouse. **Arrangements Made by the Goods Regime Agreement;** It is possible to change the scope of the right to demand by the goods regime contract. For example, spouses may arrange that the surviving spouse may request the right of residence in a certain part of the residence, not just in the entire residence. Spouses may also limit the content of the right to claim by this agreement. They can decide that the surviving spouse can only claim the usufruct or only the right of residence or property rights on the family dwelling [27]. The validity of the contract of the goods regime is subject to the written form of the Turkish Civil code art. 205 provision. The contract of goods regime should be made by notarization or approval. It is also possible for the spouses to make some arrangements regarding the property regime with the heritage contract [28]. In this way, spouses will be able to determine whether or not they can use the right to claim the right of the spouse with the property regime or the inheritance contract. **Arrangements Made with Death Transaction;** The deceased spouse may have saved a death on the family house. In this way, it is possible to prevent the death of the surviving spouse based on Turkish Civil Code art.240 with a death-dependent transaction? In this regard, different views are included in the doctrine. These views, which bring separate solutions in general, merge at the point that the abolition of the provision of art.240 with death-related transactions contradicts the purpose of the legislator [29]. The generally accepted solution in the doctrine is the demand for the cancellation of the death from the death of the family in accordance with Turkish Civil Code art. 557 b.3. With Turkish Civil Code art. 557 b.3, it is stipulated that the contents of the death-related disposition may be sued for cancellation if the conditions or loads in which it is linked are contrary to law or morality. In this case, the death due to the death of his wife is contrary to the art. 240 provision. With the cancellation of the savings, the surviving spouse will be able to use the right of demand based on art. 240 [30]. Thus, the surviving spouse will not have to wait for the outcome of the cancellation case for the use of the claim. Because in terms of the surviving spouse does not matter who belongs to the bare property of the family dwelling.

III. LEGAL NATURE

That the legal nature of the right regulated by Turkish Civil Code art. 240 is controversial. There are many different qualifications in this subject. According to the authors who describe this right as the right that gives rise to founding innovation, a new legal relationship is established with the surviving spouse using its demand based on art.240. The surviving spouse owing to the demand of the innovator, the heirs of the indebted spouse are under the obligation to provide the establishment of the requested right. Thus, the uncertainty regarding the performance to be used in the performance of the right to the participation of the surviving spouse with a unilateral declaration of will is eliminated, and for the performance of a change relationship is created. Another view qualifies this right granted to the surviving spouse by art.240 as known the right to legal procurement. The right to legal purchase constitutes a sale relationship between the parties with the unilateral declaration of will of the beneficiary. With the provision of Turkish Civil Code art.240, the right to legal right is accepted not only for the acquisition of the right of ownership, but also for the right to benefit the owner of the right [31]. According to opinion, the right to claim the right of the spouse cannot be regarded as a right that creates innovation. Innovations that give birth are the result of a unilateral declaration of will without the need for acceptance by the other party.

IV. SHARED GOODS SEPARATION REGIME

The separation of shareable goods is regulated in the Turkish Civil Code between the optional goods regimes. The principle of separation of goods lies in the basis of the principle of the separation of share goods. With the provision of Turkish Civil Code art. 244, each spouse has the right of administration, utilization and saving on its own property within the legal limits [32]. In this regime, the right to request of spouses is of the same nature, unlike the regime for the acquisition of property. According to Turkish Civil Code art. 253, the allocation is the same. For whatever reason the goods regime has ended, the spouse who does not own the property of the family and the household will be able to ask the other spouse to refer to them. The legislator felt the need to regulate with art. 254 and art. 255 within the diverging goods separation regime, taking into account the importance of family housing and household goods. In order to apply this provision, the shared allocation regime between spouses should be valid.

V. CONCLUSION

The demand for real rights on family housing is subject to certain conditions in the law. These; the validity of the regime of participation in acquired goods, the end of the regime with death, the existence of the surviving spouse's participation, the ownership of the family house, the surviving spouse who continues his/her former life and the existence of the right of the surviving spouse for the family residence. These views, which bring in separate solutions in general, are combined with the death-related saving and the elimination of the contradiction with the purpose of the legislator. It is controversial whether the rightful spouse on the family dwelling will be able to transact on the death associated with this dwelling. Discussions are about these transactions with the surviving spouse. Whether or not it prevents the rights arising from art. 240 and art. 557/3 within the scope of the unlawful transactions can be canceled by claiming whether it can be canceled.

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