

Restriction of Legal Transactions Regarding the Family Home in Turkish Law (Article 194 CC)

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I. Introduction

The Turkish Civil Code [*Türk Medenî Kanunu*¹, 'CC'], which is based on the Swiss Civil Code of 1907 [*Zivilgesetzbuch*, 'SCC'], came into force in 1926. The SCC and the CC have undergone several amendments, and in 1988 the parts regarding the Family Law and the Law of Inheritance of the SCC were thoroughly amended. The amendments made in the Family Law reflect the fact that equality between the spouses has become the norm; in an increasing percentage of marriages both spouses are working outside, and must be considered as breadwinners on an equal basis, wherefore it can no longer be considered acceptable that the husband should be legally entitled to have sovereignty in the family. The amendments, however, also reflects the fact that in some marriages one spouse may be economically much weaker than the other, and therefore in need of protective measures.

In the amendment of the SCC Family Law one of the important novelties was Article 169 SCC, which regulates certain transactions regarding the family home. Inspired by the SCC, the CC was

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1 Law No: 743 of 17 February 1926.

amended in 2002². The Turkish regulation of certain transactions regarding the family home is found for example in Article 194 CC that corresponds to Article 169 SCC.

II. Protection of the Family Home: Article 194 CC

A. In General

According to the new Article 193 CC/Article 168 SCC all transactions between the spouses, as well as between one or both and a third party, are encompassed by the general rule about freedom of capacity to act (Article 9-10 CC/Article 12-13 SCC), unless the law states otherwise. The law states otherwise already in the immediately following Article 194 CC/Article 169 SCC.

B. The Restriction in Article 194 CC

Turkish Family Law, like Swiss Family Law, abides by the principles of the equality and independency of the spouses and of the freedom of both to conclude and terminate contracts on their own hand, and to dispose of their own property.

However, the general freedom of the spouses to conclude or terminate contracts or make decisions regarding their own property is, as far as certain kind of contracts and property are concerned, restricted by Article 194 CC/Article 169 SCC³.

This can be seen as the logical supplementary rule to Article 186(1) CC/Article 162 SCC⁴, which states that the spouses shall jointly make the decision about where they should live. Further, according to Article 186(2) CC, they shall also administer the matrimonial union together. One of the basic elements of the matrimonial union is that spouses make important decisions regarding their communal living by consensus⁵.

Article 194(1) CC states that one spouse cannot terminate a tenancy agreement regarding the family home without the consent of the other, or limit or transfer any kind of right over it (whether

² Law No: 4721

³ *Botschaft über die Änderung des Schweizerischen Zivilgesetzbuches (Wirkungen der Ehe im allgemeinen, Ehegüterrecht und Erbrecht)* vom 11. Juli 1979, 217. 221.

⁴ In the SCC the word used is “Ehewohnung”, which is a wider concept than “family home”. See Ursula Schmid, ZGB 162, N 1, in Jolanta Kren Kostkiewicz/ Ivo Schwander/ Stephan Wolf (Hrsg.), *ZGB Handkommentar zum Schweizerischen Zivilgesetzbuch*, Orell Füssli Verlag AG, Zürich 2006.

⁵ Franz Hasenböhler, “Frag-würdiges zur Familienwohnung”, in *Familie und Recht*, Festgabe für Bernhard Schnyder zum 65. Geburtstag, Universitätsverlag, Freiburg 1995, p. 399.

it is a hired home or owned by one spouse). The consent must be 'explicit'.

If consent cannot be obtained, or if the other spouse refuses to consent without just cause, the spouse who has the right over the home can apply to the courts to obtain permission (Article 194(2) CC).

The non-owner spouse can have her/his status as spouse registered as a declaratory note in the Land Register (Article 194(3) CC).

If the family home is a rented residence, the spouse who is not party to the tenancy agreement can inform the landlord of her/his status of spouse. Thereby this spouse becomes a party to the contract (Article 194(4) CC), and the landlord can no longer accept an independent termination from the other spouse.

C. The Legal Quality of the Restriction

It is a topic of discussion in Swiss and Turkish literature whether the almost similar regulations of Article 169 SCC and Article 194 CC constitute a restriction of the spouse's capacity to act, or whether they constitute a restriction of the spouse's right to dispose of the family home. The majority of authors⁶ are of the opinion that it constitutes a restriction of the capacity to act. A convincing argument for this opinion is that a binding obligation regarding the family home cannot be entered into, nor may an act of disposal regarding it be made without the consent of the other⁷. The second (minority) opinion is that it is just a restriction of the spouse's right to dispose of the family home⁸. A third opinion⁹ is that Article 169 SCC/Article 194 CC neither restrict the capacity to act, nor the right to dispose. It is one of the regulations, which in

6 See Tuor/Schnyder/Rumo-Jungo, p. 285, in Peter Tuor/Bernhard Schnyder/Jörg Schmid, *Das Schweizerische Zivilgesetzbuch*, 12. Auflage, Schulthess, Zürich 2006; Cyril Hegnauer/Peter Breitschmid, *Grundriss des Eherechts*, 4. Auflage, Stämpfli Verlag AG, Bern 2000, N 17. 17; Schmid, ZGB 169, N 8; Bilge Öztan, *Aile Hukuku*, 4. Bası, Turhan Kitabevi, Ankara 2004, p. 206.

7 Hegnauer/Breitschmid, N 17. 17; see also Heinz Hausheer/Thomas Geiser/Esther Kobel, *Das Eherecht des Schweizerischen Zivilgesetzbuches*, Stämpfli Verlag AG, Bern 2000, N 08. 103.

8 See Heinz Hausheer/Ruth Reusser/Thomas Geiser, *Kommentar zum Eherecht, Band I, Kommentar zu Art. 159-180 ZGB und zu Art. 8a und 8b SchlT*, Verlag Stämpfli&Cie AG, Bern 1988, ZGB 169 and OR 271a, N 37 etc..

9 See Ivo Schwander, ZGB 169, N 15, in Heinrich Honsell/Nedim Peter Vogt/Thomas Geiser (Hrsg.), *Basler Kommentar zum Schweizerischen Privatrecht – Zivilgesetzbuch I, Art. 1-456 ZGB*, 2. Auflage, Helbing&Lichtenhahn, Basel 2002; Ahmet M. Kılıçoğlu, *Medenî Kanun'umuzun Aile – Miras ve Eşya Hukukunda Getirdiği Yenilikler*, Ankara 2003, p. 36.

order to protect public or private interests, imposes the necessity of consent from any person affected by certain transactions for the said transactions to be valid¹⁰.

III. The Purpose of Article 194 CC

The purpose of Article 194 CC/Article 169 SCC is to protect the integrity of the family home, and protect the non-owner and the non-tenant spouse against certain of the other spouse's actions, thereby strengthening the protection of the joint interest of the couple¹¹. The restrictions have been found necessary in order to minimize the risk that a spouse with much lesser economical power than the other loses her/his basis in life without warning.

The protection of the spouse is provided by the demand for consent, and by offering the non-tenant spouse the possibility to become party to the tenancy contract.

The purpose is not to protect the family against actions of the State or a third party.

IV. The Legal Nature of Article 194 CC

Article 194 CC/Article 169 SCC is a *mandatory rule*¹², according to which any kind of transaction regarding the family home, be it a hired residence or owned by one spouse, by sale, gift, sub-letting or otherwise, requires the consent of the other spouse to be valid. The rule applies whatever the Matrimonial Property Regime may be¹³. Thus, one spouse may invoke Article 194 CC, whether the family home in question belongs to the acquired property, personal property or to the exclusively separate property of the other.

V. The Consent

A. Generally

According to Article 194(1) CC/Article 169(1) SCC the consent must be '*explicit*'. There is no definition of what constitutes an '*explicit*' consent. A silent consent does not suffice, but the explicit

10 See Schwander, ZGB 169, N 15; Hasenböhler, p. 399.

11 See Botschaft, 217. 221. For Turkish Law see 4721 sayılı Türk Medenî Kanunu Tasarısı – Genel Gerekeçe, Article 194.

12 BGE 114 II 396, 399; Hausheer/Reusser/Geiser, ZGB 169 and OR 271a, N 10; Hegnauer/Breitschmid, N 17. 17.

13 Hausheer/Reusser/Geiser, ZGB 169 and OR 271a, N 11; Schwander, ZGB 169, N 4; The Turkish Supreme Court [Yargıtay] 2. Hukuk Dairesi, Esas 2005/1615, Karar 2005/4471 (See <http://emsal.yargitay.gov.tr/VeriBankasiIstemciWeb/yeniTasarim/> (10. 04. 2007)).

consent need not be given in writing¹⁴. However special regulations may require a written consent¹⁵.

B. If Consent Cannot Be Obtained

If consent cannot be obtained, or is refused without valid reason, the case should not simply rest because of that. A refusal of consent may in some circumstances be against the interest of the matrimonial community. Article 194 Paragraph 2 CC/Article 169 Paragraph 2 SCC, therefore, gives the spouse entitled to the rights over the home the possibility to apply to the courts¹⁶. If consent cannot be obtained, or if the other spouse refuses to consent without just cause, the first can, according to Article 194(2) CC, obtain *permission* for the transaction from the court.

The judge can empower the spouse to act independently. The judge in such a case should, because of the nature of the case, be one who also deals with other matters of matrimonial nature, not the authority of guardianship¹⁷.

C. The Implication of a Missing Consent

According to the wording of Article 194 CC/Article 169 SCC, a legal transaction regarding the family home is *void* if the other spouse does not give consent, or the judge does not empower the owner spouse to act independently¹⁸. Because of the mandatory nature of Article 194 CC/Article 169 SCC and its aim, consent cannot be given generally and not before there is a present transaction. Further, it must be given anew and separately for every relevant transaction. The consent may be given *before, during and after* the conclusion of the transaction¹⁹. Therefore, for example, if the landlord has not refused the termination of the tenancy agreement because (s)he was not shown a consent, then termination will be legally effective if the consent or the empowerment is subsequently given²⁰.

Any legally interested person may file a claim of invalidity, and there is no statute of limitation. In principle, it is possible to state

14 *Botschaft*, 217. 22; *Hausheer/Reusser/Geiser*, ZGB 169 and OR 271a, N 48.

15 See *Hausheer/Reusser/Geiser*, ZGB 169 and OR 271a, N 49; *Schwander*, ZGB 169, N 19.

16 *Botschaft*, 217. 221.

17 *Botschaft*, 217. 221.

18 *Botschaft*, 217. 221; see also *Hegnauer/Breitschmid*, N 17. 18; *Hausheer/Geiser/Kobel*, N 08. 107.

19 *Schwander*, ZGB 169, N 17-18.

20 *Botschaft*, 217. 221.

the claim of invalidity out of court, but in practice it will generally be necessary to apply to the courts²¹.

VI. Definition of the Family Home

Neither the CC nor the SCC give any definition of the concept of ‘the family home’. According to the preparatory works of the CC the concept should be understood as “*the place where all the self-expressions of the spouses take place, where they have adapted their lives with consideration of the family’s existence and which holds the memories of their good as well as bad times.*”²² In Swiss literature, the definition is less poetic: “*any residence, which according to the decision of the spouses serves, or is intended to serve, as their joint accommodation.*”²³

VII. The Scope of Article 194 CC

A. In General

There has to be an existing marriage for it to be established that a residence is a family home²⁴, but there need not necessarily be children in the marriage²⁵. The home does not have to meet any specific physical requirements to be recognized as a family home, it may be anything from a detached house, an apartment, a single room in a house or in a flat, a houseboat or a trailer, etc.²⁶.

One important element for establishing whether the home is a family home is the intention of the spouses. According to some Swiss authors, the intention should suffice to establish the quality of a family home²⁷. However, if a third person has an interest in establishing whether the home is a family home or not, (s)he would rarely have any knowledge of the intention of the spouses²⁸. There-

21 The Family Court has jurisdiction in these matters; see Yargıtay 2. Hukuk Dairesi, Esas 2005/12409, Karar 2005/11944 (see <http://turkhukuksitesi.com/showthread.php?t=3290> (02. 04. 2007)).

22 4721 sayılı Türk Medenî Kanunu Tasarısı – Madde Gereççeleri, Article 194.

23 Hausheer/Reusser/Geiser, ZGB 169 and OR 271a, N 14; Schwander, ZGB 169, N 6; see also Roger Weber, “Der zivilrechtliche Schutz der Familienwohnung“, AJP/PJA 1/2004, p. 30; Reto Thomas Ruoss, “Der Einfluß des neuen Eherechts auf Mietverhältnisse an Wohnräumen“, ZSR, I. Halbband, 1988, p. 79.

24 See Hausheer/Reusser/Geiser, ZGB 169 and OR 271a, N 11; Schwander, ZGB 169, N 4; Kılıçoğlu, p. 41.

25 Hegnauer/Breitschmid, N 17. 20; Hausheer/Reusser/Geiser, ZGB 169 and OR 271a, N 15.

26 Hausheer/Reusser/Geiser, ZGB 169 and OR 271a, N 15.

27 See Hasenböhler, p. 401.

28 Hasenböhler, p. 402.

fore a home, which has recently been acquired, but not yet moved into, is not protected²⁹.

The residence of an unmarried couple or of other cohabitants is outside the sphere of Article 194 CC.

B. Recording of the Marriage Certificate on the Deed of the Home

The spouse who is non-owner of the family home can have her/his status as spouse registered as a declaratory note in the Land Register (Article 194(3) CC). The Turkish Circular [‘Genelge’]³⁰ no: 2002/7, 11 June 2002, Paragraph I(1) demands that the non-owner spouse, to have her/his status as spouse recorded, should show her/his identity-card [*nüfus cüzdanı*], which shows whether a person is married or not³¹, and documentation from the national register [*muhtar*] that (s)he is living together with the owner. According to Paragraph I(2), if the owner-spouse wants to register the residence as a family home, it is sufficient to show either her/his identity card or marriage certificate³². It is mandatory for the Land Register office to make the registration upon proper application³³.

If the owner-spouse wants to have such a registration erased, and there is a dispute, it is necessary to apply to the courts and prove either that the marriage has ended, or that the home has been replaced by a new one³⁴.

C. The Good Faith of the Third Party

According to Swiss law, the good faith of the third party is without relevance for whether a contract of transfer of the family home is valid. The legal transaction is void if consent has not been given³⁵.

If registration according Article 194(3) CC has been made in the Land Register, such a registration will make it impossible for

29 *Hasenböhler*, p. 402; *Schwander*, ZGB 169, N 8.

30 www.tkgm.gov.tr (27. 08. 2007).

31 According to Article 187 CC the wife must take the surname of the husband. Thus the id-card will also indicate to whom a person is married.

32 The marriage certificate gives all details of the couple and contains passport photos of each of them.

33 See Yargıtay 2. Hukuk Dairesi, Esas 2005/1615, Karar 2005/4471 (<http://emsal.yargitay.gov.tr/VeriBankasiIstemciWeb/yeniTasarim/> (10. 04. 2007)).

34 See Yargıtay 2. Hukuk Dairesi, Esas 2004/14195, Karar 2004/15887 (<http://yargitay.gov.tr> (15. 11. 2006)).

35 *Schmid*, ZGB 169, N 8; *Hegnauer/Breitschmid*, N 17. 18; *Hausheer/Geiser/Kobel*, N 08. 109.

the third party to be in good faith³⁶. It should be noted that Article 169 SCC does not have a provision corresponding to Article 194(3) CC. However, according to the Swiss Regulation for the Land Register³⁷ Article 13a, the person applying to the Land Register for registration of legal transactions regarding real estate must show information about her/his marital status³⁸.

It is established that the protection is not conditional on registration. Yargıtay has ruled that if the purchaser is not in good faith the transaction is void, whether the status as family home is registered or not³⁹.

D. More Than One Residence

In general only one of several residences that belong to the spouses can be the family home according to the concept of Article 169 SCC⁴⁰ and Article 194 CC⁴¹. This is because they are not of vital importance to the matrimonial community. Neither the second residence nor accommodations, which exclusively serve as accommodation for profession or trade, are to be considered as the “family home”⁴².

If the spouses have more than one residence, the family home will be the residence where the children live⁴³. If both of the spouses are either owner or tenant of each their place suitable for residence, and they divide their family life more or less equally between the two, it may be that none of these fulfils the requirements for being recognized as a family home according to Article 194 CC/Article 169 SCC. On the other hand, if one of the spouses is shuttling between the two residences, while the other resides in one of the residences

36 According to Article 1015 CC the seller must by application to the Land Register show proof of the right to dispose, and according to Article 1016 CC the Land Registrar must refuse entry if proof is not presented.

37 Grundbuchverordnung (GBV) SR 211.432.1 vom 22. Februar 1910 (Stand am 5. Dezember 2006).

38 There is no corresponding article in the Turkish Regulation for the Land Register (Tapu Sicil Tüzüğü, published in Resmi Gazete 7. June 1994 no: 21953).

39 Yargıtay 2. Hukuk Dairesi, Esas 2005/2547, Karar 2005/7234. In this case it was obvious that the property in question was a family home, and that no consent had been given (See <http://emsal.yargitay.gov.tr/VeriBankasiIstemciWeb/yeniTasarim/> (10. 04. 2007)).

40 *Botschaft*, 217. 221; *Hausheer/Reusser/Geiser*, ZGB 169 and OR 271a, N 18; *Schwander*, ZGB 169, N 7; Thomas Geiser, “Neues Eherecht und grundbuchführung”, *ZBGR*, 68. Jahrgang, 1987, p. 17.

41 See Turgut Akıntürk, *Türk Medenî Hukuku - Aile Hukuku, İkinci Cilt*, 10. Bası, Beta, İstanbul 2006, p. 125.

42 *Botschaft*, 217. 221.

43 Geiser, p. 17; *Hausheer/Reusser/Geiser*, ZGB 169 and OR 271a, N 17; *Schwander*, ZGB 169, N 6.

together with the child or children the majority of the time, then the place where the children reside will generally be considered as the family home⁴⁴.

However, it is possible that more than one residence can be said to meet the conditions for being a family home, the centre of family life⁴⁵. For example a farmer may have one residence in the village where the family resides in winter, and another on the mountain pasture, where they reside in summer⁴⁶.

A summer residence is as a general rule considered as being outside the sphere of protection⁴⁷, because it is not considered vital for the self-expression of the family life.

According to the Genelge Paragraph I(3), a demand to have a holiday residence registered as a family home must be rejected. Yargıtay refused that a summer residence could be covered by Article 194 CC, on the grounds that *"in as much as it was acquired to cover the holiday needs of the family it could not be said to be the place where all the self-expressions of the family's life generally took place"*⁴⁸. The extract of the verdict is very short, and it is not clear whether the family had had the summer residence for a longer period of time, and thus spent part of their life together there.

It is not unusual in Turkey that (one of) the spouses owns a holiday residence, which is used regularly during the summer months, and thus becomes an integrated part of the family life. In my opinion, the protection ought to be extended to encompass a secondary home if it can be proven that it is, and for several years has been, an integrated part of the family life. If such circumstances exist, the secondary home will hold a great part of the family's memories of good and bad times, and a singlehanded transaction over it, for example a sale, will noticeably affect the whole family.

E. Place of Trade or Occupation

Article 194 CC only protects the family home as such and the curtilage, while a property, which is the place of trade or occupation

44 *Hausheer/Reusser/Geiser*, ZGB 169 and OR 271a, N 17.

45 *Geiser*, p. 17; *Hegnauer/Breitschmid*, N 17. 20; *Hausheer/Reusser/Geiser*, ZGB 169 and OR 271a, N 16; *Schwander*, ZGB 169, N 6.

46 *Hausheer/Reusser/Geiser*, ZGB 169 and OR 271a, N 16; *Schwander*, ZGB 169, N 6.

47 *Hegnauer/Breitschmid*, N 17. 20; *Hausheer/Reusser/Geiser*, ZGB 169 and OR 271a, N 16; *Schwander*, ZGB 169, N 7; *Akıntürk*, p. 125.

48 Yargıtay 2. Hukuk Dairesi, Esas 2003/3071, Karar 2003/4352 (see <http://emsal.yargitay.gov.tr/VeriBankasiIstemciWeb/yeniTasarim/> (10. 04. 2007)).

of one or both spouse(s), is not protected. Thus, if one spouse is sole owner of a place, which holds the trade or occupation of both or of the other, but is not an inseparable part of the family home, (s)he may sell it without consent.

In Swiss law, it is recognized that Article 169 SCC also protects properties, which hold both the family home and the place of trade or occupation of one or both, unless the property is mainly used for the trade or occupation⁴⁹. In such a case consent from the other spouse is only necessary if the property is in joint ownership, or both spouses are tenants.

It is not unusual that one spouse owns a property, which holds the occupation of the other, for example the wife owns a farm that the husband is running, or the husband owns a building that houses a beauty-parlour run by the wife.

In my opinion, even if the property does not also serve as the family home, the consent of the non-owner ought to be required, if the non-owner is the sole, main or equal partner in the trade or business, as for example is the rule in Danish law⁵⁰. Transferring rights over the place of the other spouse's occupation should be one of the decisions that must be made by the spouses together.

F. Co-owning Third Party

The protection also covers a family home where there is a third party, who is co-owner⁵¹.

G. Curtilage

If the family home is surrounded by a garden, a courtyard, etc., not only the residence as such, but also the curtilage is protected⁵².

H. Chattels

Article 194 CC does not require the consent of the non-owner spouse for a sale of the chattels belonging to the joint home. There is no such provision in the SCC either. In the original draft both the

49 *Hausheer/Reusser/Geiser*, ZGB 169 and OR 271a, N 19; *Schwander*, ZGB 169, N 7; *Hegnauer/Breitschmid*, N 17. 20.

50 See for example the Danish Supreme Court judgment of 7 April 1967, case no: I 190/1966 in *Ugeskrift for Retsvæsen* 1967, p. 458, and case no: IV 219/1956, in *Ugeskrift for Retsvæsen* 1957, p. 432.

51 *Geiser*, p. 18; Jörg *Schmid*, "Neues Eheerrecht und Grundbuchführung", *ZBGR*, 68. Jahrgang, 1987, p. 295-296.

52 *Geiser*, p. 18; *Hausheer/Reusser/Geiser*, ZGB 169 and OR 271a, N 20; *Schwander*, ZGB 169, N 7.

home and its chattels were to be covered by Article 169 SCC, but as a result of the hearings it was decided that restriction of the rights over the movables of the home must be waived⁵³.

Several articles, such as Article 240 CC about the *priority claim* of the surviving spouse of a couple, who had the statutory Matrimonial Property Regime, Article 279 CC, which is about the priority claims of the surviving spouse when there is Joint Property regime, and Article 254 CC, which is about the Division of Separate Property at annulment or divorce, separately mention the family home and its chattels. Likewise the CC 3rd Book on the Law of Inheritance, Article 652 CC, about the priority claims of the surviving spouse, expressly mentions the family home and its chattels.

It is difficult to see any reason why the spouse should be better protected against losing the chattels of the home in these circumstances, than he or she is during the marriage. The law would not fulfil its purpose, equality between the spouses and protection of the integrity of the family home, unless the non-owner spouse is given the possibility to protest against a sale of the home's furniture, etc.. In my opinion, either the very broadest interpretation of what constitutes the family home must be applied, or the provision must be changed so that the protection includes the home's furniture and utensils, because there is as much need to protect these during the marriage as after its dissolution.

VIII. Transfer of Rights Regarding the Residence to a Third Party

A. Usus and Ususfructus Easements

Especially the creation of personal easements can restrict the family's use of the family home, therefore creation of easements in general require the consent of the other spouse, regardless of whether they are time-limited or not. Thus, a creation of a right to build, establish a road, water pipe, etc. will, as a general rule, require consent from the other spouse⁵⁴.

B. Mortgaging

Neither Article 169 SCC⁵⁵ nor Article 194 CC expressly mention mortgaging. The Botschaft mentions that the establishment of

53 *Botschaft*, 217. 221.

54 *Botschaft*, 217. 221. See also Dieter Zobl, "Die Auswirkungen des neuen Eherechts auf das Immobiliarsachenrecht", *SJZ*, Heft 8, 15 April 1988, 84 Jahrgang, p. 133.

55 Mortgaging is however mentioned in *Botschaft* 217. 221.

a lien on an already heavily burdened building may endanger the conservation of the family home⁵⁶. In spite of this, no clear rule has been established. It is a topic of discussion in Swiss theory⁵⁷ whether putting the family home up as security for own or a third party's debt requires the consent of the spouse. The prevailing doctrine⁵⁸ is that it is only possible to require consent if the mortgage is an evasion of the protection (overburdening to enforce a realisation)⁵⁹. The argument is that the aim of Article 169 SCC/Article 194 CC is not an absolute protection of the family home⁶⁰.

In Turkish theory, the predominant view is that mortgaging the home must be one of the actions encompassed by the general limitation of power. Since the aim of Article 194 CC is to protect the family's home, and since according to the Turkish legislation about secured debts even a small mortgage can entail the risk of a forced sale, mortgaging should be one of the actions that require the consent of the other spouse in order to be valid⁶¹. The Banks Association of Turkey in their circular of 10 January 2002/67957, directed to the Turkish banks, announced that no loans with security in a family home should be made without proof of existing consent from the non-owner spouse. The proof should be a written document, authorised by a notary⁶².

IX. The Time Limit of the Use of Article 194 CC

Article 194 CC is also effective for some time after cessation of communal living, that is, the home does not immediately lose its status of being the family home just by one of the parties' leaving it, either because of work, discord or violence⁶³.

If the owner or tenant spouse leaves the home with the purpose of final cessation of cohabitation, and a separation or divorce case is filed, the other spouse can claim protection provided by

56 *Botschaft*, 217. 221.

57 *Tuor/Schnyder/Rumo-Jungo*, p. 286.

58 See *Schwander*, ZGB 169, N 16.

59 See ZBGR, Heft 4, Juli/August, 2003, pp. 239-241; see also critically *Schwander*, ZGB 169, N 16.

60 ZBGR, Heft 4, Juli/August, 2003, p. 241.

61 See *Akıntürk*, p. 126 ; Şükran Şıpka, *Türk Medenî Kanunu'nda Aile Konutu ile İlgili İşlemlerde Diğer Eşin Rızası*, Beta, İstanbul 2002, p. 122-123; Mustafa Dural/Tufan Ögüz/Mustafa Alper Gümüş, *Türk Özel Hukuku, Cilt III, Aile Hukuku*, Filiz Kitabevi, İstanbul 2005, p. 208.

62 Şıpka, p. 122.

63 According to the *Turkish Protection of the Family Act [Ailenin Korunmasına Dair Kanun]* no: 4320 of 14 January 1998, the spouse who suffers violence from the other can file a petition to have the violent spouse banned from entering the home, regardless of who is the owner.

Article 194 CC until it is settled which spouse is to be given the right of continued residence in the home⁶⁴. According to Article 169 CC the judge, taking into consideration the respective need of the spouses, and especially the welfare of the children, decides which of the spouses temporarily keeps the right of residence. The home will continue to be regarded as the family home if the spouse, who was not entitled to rights over it, is given the right to reside there⁶⁵. To give this right of residence would be meaningless, unless the protection of Article 194 CC/Article 169 SCC can be extended to after the cessation of cohabitation. If it were not, the spouse entitled to the rights would be able to transfer the rights to a third person or cancel them as soon as the cessation of cohabitation was an established fact.

In Swiss theory, it was a topic of discussion whether Article 169 SCC can be applied if it is the spouse, who is neither tenant nor otherwise entitled to the home, who deserts it. Some authors found that Article 169 SCC can be applied regardless, while others found that Article 169 SCC can no longer be applied, if at least it is clear that the non-tenant/non-owner spouse has made her/his own, unforced decision to leave and settle elsewhere, or has in fact for a longer period of time been settled elsewhere, or there is an agreement between the spouses that (s)he or both of them should settle elsewhere, or it in any other way is clear that the home in question no longer can be recognized as the family home⁶⁶. The latter opinion is now the rule according to BGE 114 II 396, 399 etc..

X. Hired Residences

Even though Article 194 CC only expressly mentions the termination of the tenancy agreement by one spouse, the protection also encompasses any kind of action or default that can lead to the termination of the tenancy agreement⁶⁷, i. e. to accept a landlord's declaration to terminate the contract. If this were not the case the protecting aim of the provision would not be achieved to a sufficient degree.

XI. Testamentary Dispositions

The protection of Article 194 CC/Article 169 SCC cannot be claimed after the death of the owner-spouse, because these provi-

64 Yargıtay 2. Hukuk Dairesi, Esas 2005/16473, Karar 2006/799 (See <http://www.turkhukuksitesi.com/showthread.php?t=3290> (02. 04. 2007)).

65 *Hasenböhler*, p. 405.

66 *Hausheer/Reusser/Geiser*, ZGB 169 and OR 271a, N 22.

67 See also *Kılıçoğlu*, p. 44.

sions only are meant for actions made *in vivo*, and *mortis causa* actions are not considered as such. The consent of the non-owner spouse is, thus, not necessary for testamentary dispositions regarding the family home⁶⁸.

Conclusion

Since the Turkish society and family patterns have developed, so that married couples today are to a much larger degree than before partners on an equal footing, the CC has been amended to mirror this development. Both spouses now have an equal say about matters concerning the marital union. It is logical that both should have a say about decisions concerning the foundation of their communal life: the family home. However, in spite of the rule in Article 186 CC, if a marriage becomes unstable, or if the spouse who has the rights over the family home for some reason does not want to involve the other in her or his plans regarding it, the other will be at risk of losing the roof over her or his head without warning, because Article 193 CC as a general rule gives both spouses the right to make independent legal transactions. Article 194 CC provides the necessary protection against this risk.

It could be argued that Article 199 CC/Article 178 SCC, which gives a judge the option, under certain conditions, to forbid one spouse to dispose of certain valuables without the consent of the other, should be sufficient protection against such actions. In such cases, however, interventions by the judiciary would often come *too late*. This was one of the reasons for introducing Article 194 CC/Article 169 SCC, which give the possibility to annul already performed actions (Botschaft, 217. 221). The rule has shown its justification, as numerous court decisions testify.

68 Hausheer/Reusser/Geiser, ZGB 169 and OR 271a, N 36.

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