

**H^HAN ASSESING RELATED ON ACQUIRING IMMOVABLE
PROBLEM OF RELIGIOUS MINORITY (COMMUNITY)
FOUNDATIONS WITHIN THE ECHR'S DECISION IN
FENER RUM ERKEK LİSESİ VAKFI V TURKEY**

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Abstract

Religious minority (community) foundations, which are charitable institutions created by non-Muslim Turkish citizens at the time of Ottoman Empire. They have existed at the Turkish Republic. By virtue of Law no.2762, religious minority foundations have acquired legal personality. Until 1974 there wasn't any problem to purchasing or accepting a gift of immovable properties for the religious minority (community) foundations. In 1974 Court of Cassation judged a controversial decision. It held that if their "Declaration of 1936" did not contain a statement that they had a capacity to acquire immovable property, they would be precluded from purchasing or accepting a gift of such property. After this date, was applied to the courts for deleting name of foundation who did not provide "that can acquire immovable properties or can accept a donation" in their "Declaration of 1936", from the land register. After these processes, some religious minority (community) foundations started to applied to European Court of Human Rights because of the violation of their rights. One of these was the Fener

H Hakem incelemesinden geçmiştir.

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Rum Erkek Lisesi Vakfı. We tried to evaluate acquiring immovable problem of religious minority (community) foundations in the Turkish legislation, ECHR's decision in Fener Rum Erkek Lisesi Vakfı vs Turkey and the changes in the legislation after this court decision.

Keywords

Religious Minority (Community) Foundations, Foundations Law no.2762, Declaration of 1936, Foundations Law no.5737, European Court of Human Rights, property right, constitutive instrument

AIHM'İN FENER RUM ERKEK LİSESİ V TÜRKİYE KARARI ÇERÇEVESİNDE DİNİ AZINLIK (CEMAAT) VAKIFLARININ TAŞINMAZ EDİNME PROBLEMİ HAKKINDA BİR DEĞERLENDİRME

Öz

Cemaat Vakıfları, Osmanlı İmparatorluğu zamanında gayri müslüm vatandaşlar tarafından kurulmuş hayır kurumlarıdır. Türkiye Cumhuriyeti zamanında da varlıklarını devam ettirmişlerdir. 2762 sayılı Vakıflar Kanunu ile tüzel kişilik kazanmışlardır. 1974 yılına kadar Cemaat Vakıfları, sorunsuz şekilde taşınmaz edinmişlerdir. 1974 yılında Hukuk Genel Kurulu tartışmalı bir karar vermiştir. 1936 beyannamesinde taşınmaz edinebileceğine dair bir hüküm bulunmayan cemaat vakıflarının taşınmaz edinmeyeceği hükmedilmiştir. Bu karardan sonra, 1936 beyannamesinde taşınmaz edinebileceğine ya da bağış kabul edebileceğine dair hüküm bulunmayan, cemaat vakıfları adına kayıtlı taşınmazların tapu sicilinden silinmesi için mahkemeye başvurular yapılmıştır. Bunun üzerine cemaat vakıfları, mülkiyet haklarının ihlal edildiği gerekçesi ile Avrupa İnsan Hakları Mahkemesine başvurmaya başlamıştır. Bunlardan biriside Fener Rum Erkek Lisesi Vakfı'dır. Biz bu çalışmamızda, Türk mevzuatında cemaat vakıflarının taşınmaz edinme problemi, Avrupa insan hakları mahkemesinin Fener Rum Erkek Lisesi Vakfı

hakkında vermiş olduđu kararı ve bu karardan sonra mevzuatta meydana gelen deęişiklikleri incelemeye çalışacağız.

Anahtar Kelimeler

Dini Azınlık Vakıflar, 2762 sayılı Vakıflar Kanunu, 1936 Beyannamesi, 5737 sayılı Vakıflar Kanunu, Avrupa İnsan Hakları Mahkemesi, mülkiyet hakkı, vakıf senedi

I. INTRODUCTION

According to the Turkish Civil Code the meaning of the foundation is an organization of goods who acquires legal personality that is founded by real persons or legal persons who assign it's enough goods and rights for the permanent and specific purpose¹.

Existences of the foundations belong to previous history of Turkish Republic. Foundations are the historical organization that had a legal status at the time of the Ottoman Empire². According to Ottoman Law System,

¹ Law no 4721 Turkish Civil Code Article 101 and the rest (Official Journal (o.j.), Date of Issue 8.12.2001).For more information about the foundations look at **Güriz**, Adnan: Hukuk Başlangıcı, Siyasal Kitapevi, Ankara 2013, p.203-204; **Akıpek**, Jale G./ **Akıntürk**, Turgut/**Ateş Karaman**, Derya: Türk Medeni Hukuku, Başlangıç Hükümleri, Kişiler Hukuku, Birinci Cilt, İstanbul 2014, p.661 ff.; **Dural**, Mustafa/**Öğüz**, Tufan: Türk Özel Hukuku, Cilt II, Kişiler Hukuku, Filiz Kitapevi, İstanbul 2006, p.318 ff.; **Em**, Ali: Türk Hukuk Sisteminde Vakıflar, Ankara 2011, p.10 ff.; **Gözler**, Kemal: Hukukun Temel Kavramları, Ekin Basım Yayın Dağıtım, Bursa 2010, p.195; **Gözübüyük**, Şeref: Hukuka Giriş ve Hukukun Temel Kavramları, Ankara 2004, p.92 ff.; **Kılıçoğlu**, Ahmet M.: Medeni Hukuk Temel Bilgiler, Turhan Kitabevi, Ankara 2015, p.243 ff.; **Serozan**, Rona: Medeni Hukuk, Genel Bölüm/Kişiler Hukuku, Vedat Kitapçılık, İstanbul 2014, p.504 ff.; **Yarayan**, Ali: Türk Medeni Hukuku Temel Bilgiler, Ankara 2013, p.242; **Zevkliler**, Aydın/**Acabey**, M. Beşir/**Gökyayla**, K. Emre: Medeni Hukuk, Seçkin Yayınevi, Ankara 2000, p.637 ff.; **Zevkliler**, Aydın/**Ertas**, Şeref/**Havutçu**, Ayşe/**Gürpınar**, Damla: Yeni Medeni Kanuna Göre, Medeni Hukuk, Turhan Kitabevi, Ankara 2015, p.189 ff.

² In the Islam civilization the first foundation accepted at the time of the Calip Omar. After the conquest of Hayber he commanded with the part of his booty which is piece of land that will be used for to help poor, slave, guest and name of God that won't be sold, won't be bequeted, won't be donated (For more information look at www.vgm.gov.tr date accessed 1.12.2016; **Akgündüz**, Ahmed: İslam Hukukunda ve Osmanlı Tatbikatında Vakıf Müessesesi, İstanbul 1996, p.59; **Ballar**, Suat: Yeni Vakıflar Hukuku, Seçkin Yayınevi, Ankara 2008, p.27; **Berki**, Ali Himmet: Vakıflar, Basımevi, İstanbul 1946, s. 5, 42; **Özden**, H. Ömer: Türk Vakıf Kurumunun Duygusal ve Felsefi Temelleri, Atatürk Üniversitesi Sosyal Bilimler Enstitüsü Dergisi, V.4, N.2, 2010, p.340). Also is claimed that before the Islam civilizaiton there was a foundation in the Turkish culture. For more information look at **Berki**, Ali Himmet: Vakıflar, İkinci Kitap, Nur Matbaası, Ankara 1950, p.5; **Güneri**, Hasan: Türk Medeni Kanunu Açısından Vakıfta Amaç Kavramı ve Amacına Göre Vakıf Türleri, Sevinç Matbaası,

dedicated goods to the foundations couldn't be sold, assigned and descended. These goods had been changed hands and they became the property of God³. These historical establishments have existed after the foundation of the Turkish Republic.

The date of 17.02.1926, Civil Code came in to force. This Code regulated how the foundation will be established⁴. But this regulation was enforced to the foundation which will be established after the date of 17.02.1926⁵. The regulation related with the foundations which were established before the Civil Code (1926) that came in to force in by virtue of Law no.2762⁶ of 13 June 1935. Thus, foundations which were inherited from Ottoman Empire to Turkish Republic that were regulated under the name of fused foundation, appendant foundation, craftsmen foundation⁷ and religious minority (community) foundation by law.

The foundations that were transferred from the Ottoman Empire under the doctrine were called old foundations⁸, and the foundations founded according to the Civil Code were also called new foundations.

Ankara 1976, p.2 ff. For the against view look at **Hatemi**, Hüseyin: *Önceki ve Bugünkü Türk Hukuku'nda Vakıf Kurma Muamelesi*, Fakülteler Matbaası, İstanbul 1969, p.11 ff.; **Özden**, p.341 ff. According to another view first foundation in the history was established by the Hittite King Hattusilis. (For more informatin look at **Ballar**, p.25).

³ **Güriz**, Adnan: *Hukuk Başlangıcı, Siyasal Kitapevi*, Ankara 2013, s. 199-200; **Hasan**, p.5; **Zevkliler/Acabey/Gökyayla**, p.638.

⁴ When the Law no. 4721 Turkish Civil Code came into force, 1926 dated Civil Code was repealed. 1926 dated Civil Code use the "Facility" term instead of "Foundation" term (For the criticism look at **Berki**, İkinci Kitap, p.11. Also look at **Kılıçoğlu**, p.243; **Oğuzman**, M. Kemal/**Seliçi**, Özer/**Oktay-Özdemir**, Saibe: *Kişiler Hukuku*, Filiz Kitap Evi, İstanbul 2012, p.337; **Zevkliler /Acabey/Gökyayla**, p.638).

⁵ **Oğuzman/Seliçi/ Oktay-Özdemir**, p.337.

⁶ Official Journal, Date of Issue: 13.6.1935, Issue: 3027, Law no.2762, Foundations Code.

⁷ It is like a safe-deposit boxes in Ottoman Empire. For more information look at **Oğuzman/Seliçi/Oktay-Özdemir**, p.351.

⁸ **Aydoğdu**, Murat: *Cemaatlere (Azınlıklara) Ait Vakıfların Taşınmaz Mal Edinmeleri Sorunundaki Son Hukuki Durum*, Erciyes Üniversitesi Hukuk Fakültesi Dergisi, V.3, N.1, 2008, p.208; **İşeri**, Ahmet/**Akünel**, Teoman/**Tezel**, Adnan/**Bayrakeri**, Feridun: *Türkiye'de Medeni Kanuna Göre Kurulmuş Vakıflar ve Sorunları*, Vehbi Koç Vakfı Yayınları No:1, Ankara 1975, p.1 ff.; **Özdamar**, Demet/**Değer**, Senem/**Uçkan**,

II RELIGIOUS FOUNDATION

A. Definiton And Legal Basis

Religious minority (community) foundations, which are considered as old foundations, are charitable institutions created by non-Muslim Turkish citizens before the Republic⁹.

These foundations had not same definition today's Civil Code. Firstly most of them hadn't got any constitutive instrument (vakıfname) which is needed to establish a foundation according to Turkish Civil Law¹⁰.

Actually until 1912, non-Muslim religious minorities in the Ottoman State had no legal personality status¹¹. So, when they wanted to build a church for the place of worship they could not show the property of their place in the name of their community¹². They were obliged to show them on real people or holy person, in fact this was a complicated process.

In 1912 (for hijri calendar 16 February 1328) regulation came in to force which called "Eşhas-ı Hükmiyenin Emvali Gayrimenkuleye Tasarrufu

Mertkan: 5555 Sayılı Yeni Vakıflar Kanunu Üzerine Bir Değerlendirme, Erciyes Üniversitesi Hukuk Fakültesi Dergisi, V.2, N.1-2, 2007, p.140.

⁹ **Oğuzman/Seliçi/ Oktay-Özdemir**, p.349.

¹⁰ **Aydoğdu**, p.197.

¹¹ Until 1912 It is controversial that whether the foundations at the time of Ottoman Empire had legal personality or not. (look at **Adnan**, p.200). According to Turkish Civil Law foundations can acquire legal personality with registration. (look at; **Akipek/Akıntürk/Karaman**, p.679; **Dural/Öğüz**, p.333; **Gözler**, p.195 ff.; **Gözübüyük**, p.95 ff.; **Kılıçoğlu**, p.245; **Oğuzman/Seliçi/Oktay-Özdemir**, p.368; **Serozan**, p.506; **Yarayan**, p.243 ff.; **Zevkliler/Acabey/Gökyayla**, p.646; **Zevkliler/Ertas/Havutçu/Gürpınar**, p.196).

¹² **Dalamanlı**, Lütfü: Eski-Yeni Vakıf Davaları (Açıklamalı-İçtihatlı), Ankara, 1986, p.57; **Em**, p.39; **Kentel**, Ferhat/**Karakaşlı**, Karin/**Özdoğan Göksu**, Günay/**Üstel**, Füsün, Türkiye'de Ermeniler: Cemaat-Birey-Yurttaş, İstanbul Bilgi Üniversitesi Yayını, 2009, p.228; **Karinabadizade**, Hilmi Ömer/**Sungurbey**, İsmet: Eski Vakıfların Temel Kitabı, Sulhi Garan Matbaası Varisleri Koll. Şti., İstanbul 1978, p.619 ff.; **Sungurbey**, İsmet: Eski Vakıfların Yeni Sorunları, TC. Maltepe Üniversitesi Yayınları No:11, İstanbul 2011, p.349; **Şimşek**, Suat: Avrupa İnsan Hakları Mahkemesi İçtihatlarında Cemaat Vakıflarının Taşınmaz Edinimi, Türkiye Barolar Birliği Dergisi, N.88, 2010, p.30.

Hakkında Kanun". By this regulation at the Ottoman Empire, religious minority foundations acquired legal personality¹³. With this regulation, religious minority foundations gained right to register immovable properties under their name.

On 29 October 1923 Republic of Turkey was established. In the Turkish Republic, the legal status of the religious minority foundations base on The Lausanne Treaty of 1923¹⁴. Article 40 of the Lausanne Treaty states that: "*Turkish nationals belonging to non-Muslim minorities shall enjoy the same treatment and security in law and in fact as other Turkish nationals. They have equal rights to establish, manage and control at their own expense, any charitable, religious and social institutions, any schools and other establishments for instruction and education, with the right to use their own language and to exercise their own religion freely therein*".

Article 42/3 of the Lausanne Treaty states that: "*The Turkish Government undertakes to grant full protection to the churches, synagogues, cemeteries, and other religious establishments of the above-mentioned minorities. All facilities and authorisation will be granted to the pious foundations, and to the religious and charitable institutions of the said minorities at present existing in Turkey, and the Turkish Government will not refuse, for the formation of new religious and charitable institutions, any of the necessary facilities which are guaranteed to other private institutions of that nature.*"

¹³ **Alkan**, Mustafa: Azınlık Vakıfları (Tarihi Arka planı, Hukuki Yapısı ve İç Analizi), Akademik Bakış, V.2, B.4, 2009, p.99; **Çelikel**, Aysel: Gayrimüslim Cemaat Vakıflarının Taşınmaz Mal Edinmesi ve 27.04.2004 Tarihli Yargıtay Kararı, İstanbul Ticaret Üniversitesi Sosyal Bilimler Dergisi, N.8, 2005, p.58; **Sungurbey**, p.349, 353.

¹⁴ Lausanne Treaty, 24 July 1923, Düstur, Üçüncü Tertip, Volume 5, Ağust 1339-19 Teşrinevvel 1340, p.13-357. For the Text of Treaty look at <http://www.ttk.gov.tr/index.php?Page=Sayfa&No=249> date accessed (26.03.2016). **Civil Department No:1 of the Supreme Court**, Date:22.9.2004, Docket no:2004/8622, Decree no:2004/9589 state that "By Treaty article 42, foundations were guaranteed". (www.kazanci.com.tr date accessed, 27.3.2016). **Civil Department No:17 of the Supreme Court**, Date:2.4.2002 Docket no:2002/2188, Decree no:2002/2113 (www.kazanci.com.tr date accessed, 27.3.2016).

By this treaty religious foundation which was established by non-Muslim Turkish citizens, gained the legal status in Republic of Turkey too.

By virtue of Law no.2762 of 13 June 1935, religious minority foundations have acquired legal personality. Thus, these charities belonging to the congregations were accepted as “foundations”. The Law no 2762 was repealed by virtue of Law no.5737 of 27 February 2008 Foundations Code.

In the third article of the Law No. 5737, “Community foundation: It is defined as non-Muslim community foundations in Turkey, whose members are citizens of Republic of Turkey, regardless of whether they have constitutive instruments (foundations) or not, according to the Law on Foundations No. 2762”.

Indeed, under the Turkish Civil Law it isn't possible to establish any religious foundation. Turkish Civil Law 101/4 states that: “*Formation of a foundation contrary to the characteristics of the Republic defined by the Constitution, Constitutional rules, laws, ethics, national integrity and national interest, or with the aim of supporting a distinctive race or community, is restricted.*”

Under this article, no matter if it is Muslim or not, it is not possible to establish a foundation with the aim of supporting any community. After the establishment, if it is noticed that it has an activity to support a certain community, it will be shut down under the Turkish Civil Law article 116/2.

However, according to Article 90 of the Constitution, “*International agreements duly put into effect have the force of law. No appeal to the Constitutional Court shall be made with regard to these agreements, on the grounds that they are unconstitutional. In the case of a conflict between international agreements, duly put into effect, concerning fundamental rights and freedoms and the laws due to differences in provisions on the same matter, the provisions of international agreements shall prevail.*” Along with the Lausanne Treaty, which was put into effect in accordance with the procedure, the foundations which are prohibited to establish according to the Turkish Civil Code were granted the right to continue their legal existence¹⁵.

¹⁵ Özdamar/Değer/Uçkan, p.185 ff.

B. History of Immovable Property Possession Problem For Religious Minority (Community) Foundations

In 1936, by Law no.2762 temporary article 1 was needed a declaration from religious minorities to the Directorate for Foundations about the immovable properties under their control. Under the Foundation Law no.2762 article 44; the immovable properties which they have owned after the year 1920, could be entered in the foundation register¹⁶.

According to Foundation Law. no. 2762 temporary article 1, all foundations must be declared their goods, income, outcome and the other related things with foundations¹⁷.

Therefore, they had to declare their properties. This declaration was called the "Declaration of 1936". With Declaration of 1936, the properties which had been owned until that day, were entered in to land-register under the name of foundations¹⁸.

After the Declaration of 1936, the religious minority foundations owned immovable properties until the 1974.

According to decision of General Assembly of Civil Chamber Court, Date: 8.5.1974, Docket no:1981/1180, Decree no:1981/1245¹⁹ Declaration of 1936 was accepted as a constitutive instrument. In this constitutive instrument it was stated that there was no provision to obtain an immovable property. Because of that, court decided that religious minority (community) foundations can't obtain a new immovable property.

¹⁶ **Aydođdu**, p.218; **Hilmi/Sungurbey**, p.620 ff.

¹⁷ **Alkan**, p.99; **Aydođan**, p.218; **Berki**, İkinci Kitap, p.144 ff.; **Şimşek**, Suat: Avrupa İnsan Hakları Mahkemesi İçtihatlarında Cemaat Vakıflarının Taşınmaz Edinimi, Türkiye Barolar Birliği Dergisi, N.88, 2010, p.36.

¹⁸ **Aydođdu**, p.218; **Reyna**, Yuda/**Zonana**, Ester Moreno: Son Yasal Düzenlemelere Göre Cemaat Vakıfları, İstanbul 2003, p.42 ff.; **Özdamar/Deđer/Uçkan**, p.163-164.

¹⁹ **General Assembly of Civil Chamber**, Docket no:1971/820, Decree no:1974/505, Date: 8.5.1974 For the court decision look at **Dalamanlı**, Lütfü: Eski-Yeni Vakıf Davaları (Açıklamalı-İçtihatlı), Ankara, 1986, p.209-210; **Hilmi/Sungurbey**, p.654-658; **Sungurbey**, p.353.

With this court decision that became a common practice that religious foundations could not obtain new immovable property²⁰. With this decision, the properties which did not declared in the Declaration of 1936, must be given back to the old owners. But if the old owners were dead and there weren't any inheritors, properties could be devolved on Ministry of Treasury.

After this date, the General Directorate for Foundations or the Treasury applied to the courts for deleting name of foundation who did not provide "that can acquire immovable properties or can accept a donation" in their Declaration of 1936, from the land register²¹.

After these processes, some religious minority (community) foundations applied to European Court of Human Rights (like Yedikule Surp Pirgiç Ermeni Hastanesi Vakfı²², Rum Patrikhanesi Büyükkada Yetimhanesi²³) because of the violation of their rights. One of these was the Fener Greek High School Vakfı.(we will call as applicant).

III. APPLICATION OF FENER RUM ERKEK LİSESİ VAKFI TO THE ECHR

A. Historical Process of The Application

The applicant foundation, Fener Rum Erkek Lisesi Vakfı, is a foundation under Turkish law which was set up at the time of the Ottoman Empire for the purpose of providing educational facilities in the Greek Higher Secondary School in Fener (İstanbul). Its constitutive instrument comply with the provision of the Lausanne Treaty of 1923 affording

²⁰ **General Assembly of Civil Chamber**, Docket no:2002/16-159, Decree no:2002/355, Date: 8.5.2002 (www.kazanci.com.tr date accessed, 27.3.2016).

²¹ **Alkan**, p.101; **Özdamar/Değer/Uçkan**, p.164; **Reyna/Zonana**, p.42 ff.; **Şimşek**, p.39.

²² European Court of Human Rights, Yedikule Surp Pirgiç Ermeni Vakfı v Turkey, Strasbourg, Application no:36165/02, December 2008. For the court decision look at <http://hudoc.echr.coe.int/> (access date 26.03.2016).

²³ European Court of Human Rights, Fener Rum Patrikliği v Turkey, Strasbourg, Application no:14340/05, July 2008. For the court decision look at <http://hudoc.echr.coe.int/> (access date 26.03.2016).

protection to foundations which provide public services for religious minorities.

In accordance with Law no.2762 of 13 June 1935, by virtue of which it obtained legal personality, the applicant foundation filed a declaration in 1936 of its aims and immovable property.

In 1952 the applicant foundation received a gift of part of a building in İstanbul and purchased another part of that building in 1958.

In 1992 the Treasury applied to the Turkish courts for an order setting aside the applicant foundation's title to that property and deleting its name from the land register. By a judgment of 7 March 1996, İstanbul Beyoğlu civil court of first instance granted the Treasury's application. Basing its decision on an expert report which referred to a Court of Cassation decision of May 1974, the court held that foundations whose membership was made up of religious minorities as defined by the Treaty of Lausanne and whose constitutive instrument did not contain a statement that they had capacity to acquire immovable property were precluded from purchasing or accepting a gift of such property. Accordingly, their immovable property was restricted to that set out in their constitutive instrument and finalized in declaration made in 1936, so that they were precluded from acquiring immovable property.

On an appeal on points of law by the applicant foundation, the Court of Cassation upheld the judgment of İstanbul High Court in a decision of 9 December 1996.

In October 2000, the foundation Fener Rum Erkek Lisesi Vakfi applied to the Directorate General of Foundations for permission to amend its constitutive instrument to permit it to acquire immovable property. However, its application was turned down²⁴.

The application Fener Rum Erkek Vakfi was lodged with the European Commission of Human Rights on 25 November 1996 and transmitted to the

²⁴ European Court of Human Rights, *Fener Rum Erkek Lisesi Vakfi v Turkey*, Strasbourg, Application no:3447/979, January 2007, p.4. For the court decision look at <http://hudoc.echr.coe.int/> (access date 26.03.2016).

European Court of Human Rights on 1 November 1998. It was declared admissible on 8 July 2004²⁵.

B. The Complaints of Fener Rum Erkek Lisesi Vakfi

The applicant foundation complained for the order to removal its title from the land registry. It argued that the Turkish legislation as interpreted by the domestic courts deprived religious minority foundations within all capacity to acquire immovable property. It claimed that incapacity amounted to discrimination when its position was compared with other foundations²⁶. The applicant foundation relied on Article 1 of Protocol No.1 (protection of property) and article 14 (prohibition of discrimination) taken together with Article 1 of Protocol No.1²⁷.

IV. DECISION OF THE EUROPEAN COURT OF HUMAN RIGHTS

Article 1 of Protocol No.1 to the European Convention on Human Rights, which ensures the right to property, provides: “*Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.*

The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.”.

The first requirement of Article1 of Protocol No.1 is that any interference by a public authority with the peaceful enjoyment of possessions should be lawful. It means that rules of domestic law must be

²⁵ European Court of Human Rights, Fener Rum Erkek Lisesi Vakfi v Turkey, p.2.

²⁶ For more information about the demand of the religious minority foundations look at **Özdamar/Değer/Uçkan**, p.162 ff.

²⁷ European Court of Human Rights, Fener Rum Erkek Lisesi Vakfi v Turkey, p.1.

sufficiently accessible, precise and foreseeable²⁸. Admittedly, Article 1 of Protocol No. 1 does not guarantee the right to acquire property. There is no doubt that Contracting States should enjoy a wide margin of appreciation in regulating the acquisition of land and other immovable property by legal entities such as foundations²⁹.

Interference with right to a peaceful enjoyment of possessions shall be allowed only if it is prescribed by law, it is in the public interest and it is necessary in a democratic society. Even only one of them is missed, there will be a violation of Convention³⁰.

The Court considered that the striking out by the Turkish courts of the applicant foundation's property title and its removal from the land registers, 38 and 44 years after the acquisition of the properties in question, had amounted to interference in its right to the peaceful enjoyment of its possessions.

The Court further noted that the Turkish court had based their decisions on a report stating that, under the 1974 case-law, foundations made up of religious minorities whose constitutive instruments did not contain a statement that they had capacity to acquire immovable property were precluded from acquiring such property by any means. However, no provision in Law no.2762 prohibited the foundations concerned from acquiring assets other than those which were included in the 1936 declaration. Furthermore, the applicant foundation's acquisitions had been validated by a certificate from the provincial governor's office and entered in the land register. The applicant foundation was thus certain of having acquired the properties lawfully³¹.

Consequently, the setting aside of its property titles, in application of a precedent adopted 16 years and 22 years after their acquisition, could not

²⁸ **Grgic, Aida/Mataga, Zvonimir/Longar, Matija/Vilfan**, Ana: The Right to Property under the European Convention on Human Rights: A Guide to the Implementation of the European Convention on Human Rights and Its Protocols, Human rights handbooks, No.10, Council of Europe, Strasbourg 2007, p.13.

²⁹ **Grgic/Mataga/Longar/Vilfan**, p.12.

³⁰ **Grgic/Mataga/Longar/Vilfan**, p.12.

³¹ European Court of Human Rights, *Fener Rum Erkek Lisesi Vakfi v Turkey*, p.10.

have been foreseen by the applicant foundation. In addition, in issuing certificates confirming its acquisitions, the authorities had recognized its capacity to acquire property³².

For 38 and 44 years, the applicant foundation had been able to enjoy its property as a legitimate owner, paying the various taxes due in respect of its assets. Thus, the interference in its right to the peaceful enjoyment of its possessions seemed incompatible with the principle of the rule of law. The Court noted that the legislation governing the constitutive instrument of foundations had been amended in 2002 and that they could now acquire immovable property; however, applicant foundation had not benefited from that change in law³³.

In those circumstances, the Court concluded that there had been a violation of Article 1 of Protocol No.1 and considered that it was not necessary to examine separately the complaint under Article 14³⁴.

The Court held that Turkey to re-enter the property in question in the land-register under the applicant foundation's name within three months of the date on which the Court's judgment becomes final. Failing such re-registration, the State was to pay the applicant foundation 890.000 euros (EUR) for pecuniary damage. Under Article 41 (just satisfaction) of the Convention, the Court awarded the applicant EUR 20.000 for costs and expenses³⁵.

V. AMENDMENTS ON REGULATIONS RELATED RELIGIOUS FOUNDATION ON TURKISH LEGAL SYSTEM

Above mentioned explanation, foundations are divided in to two categories in Turkish Law System as "old foundations" and "new foundations". The foundations which were set up before the Civil Law no 743 of 17 February 1926 (actually all of them were set up at the time of the Ottoman Empire), are called "old foundations". And the foundations which

³² European Court of Human Rights, *Fener Rum Erkek Lisesi Vakfi v Turkey*, p.10.

³³ European Court of Human Rights, *Fener Rum Erkek Lisesi Vakfi v Turkey*, p.9.

³⁴ European Court of Human Rights, *Fener Rum Erkek Lisesi Vakfi v Turkey*, p.11.

³⁵ European Court of Human Rights, *Fener Rum Erkek Lisesi Vakfi v Turkey*, p.11.

were set up after the Civil Law no 743 of 17 February 1926, are called “new foundations”. Foundations of religious (non-Muslim) minorities are one of the “old foundations”. They are protected by the Lausanne Treaty of 1923. Article 40 of The Lausanne Treaty gives religious minorities the right to establish religious and social institutions, schools and other establishments for instruction and education. Fener Rum Erkek Vakfi is the one of these establishments.

Foundations of religious minorities obtained legal personality by virtue of Law no.2762 of 13 June 1935. This law ordered non-Muslim foundations to file a declaration in 1936, which is still generally referred to in Turkish Law as “Declaration of 1936”. In this declaration, non-Muslim foundations had to declare all of their immovable properties. The government’s purpose in ordering these declarations was to attain knowledge about religious (non-Muslim) minority foundations’ properties. Accordingly, these declarations are not constitutive instruments for the religious minority (community) foundations.

Until 1974 there wasn’t any problem to purchasing or accepting a gift of immovable properties for the religious minority (community) foundations. In 1974 Court of Cassation issued a decision about religious minority (community) foundations which would be basis for many wrongly decided cases. It held that “Declaration of 1936” is a constitutive instrument. It held that if their declaration did not contain a statement that they had a capacity to acquire immovable property, they would be precluded from purchasing or accepting a gift of such property. After this decision, Turkish courts started to give judgments about properties which the foundations owned after 1936. In those cases, Turkish courts set aside the religious minority (community) foundations’ titles to those properties and deleted their names from the land register.

We disagree with Court of Cassations of judgement. “Declaration of 1936” is not a constitutive instrument. Constitutive instrument of the foundation is needed at the time of establishment process. Religious minority (community) foundations acquired legal personality in 1912 at the time of Ottoman Empire. After 24 years, declaration which was needed for just listing their properties, could not be used as constitutive instrument. In the other hand there isn’t any definition on neither Foundation Law no.2762 nor

Foundations Law no.5737 that “Declaration of 1936” come to mean as constitutive instrument. There isn’t any legal basis to comment as a constitutive instrument.

One of the wrong decisions is related to the properties of Fener Rum Erkek Vakfi. In 1952 the foundation received a gift of a building in İstanbul and purchased another part of that building in 1958. In 1992 the Treasury applied to the Turkish courts for an order setting aside the Fener Rum Erkek Vakfi’s title to that property and deleting its name from the land register. In 1996, the İstanbul High Court granted the Treasury’s application. The Court based its decision on the Court of Cassation decision of 1974.

Court of Cassation started to give decisions at the same conclusion³⁶. After these kind of decisions, the religious minority (community) foundations started to apply to the European Court of Human Rights. In consideration of increasing application to the European Court of Human Rights and the effect of the European Union harmonization process, Turkey had to make some changes to Law no. 2762.

As a result of the changes made in article 1 of the Foundation Law (No. 2762) both immovable acquisitions of religious minority (community)

³⁶ **Civil Department No:1 of the Supreme Court**, Date:9.2.1981, Docket no:1981/1180, Decree no:1981/1245, state: “For Religious Minorities Foundations to having an immovable properties, there must be a legal regulation or constitutive instruments which give permission. If there is no any provision on the constitutive instruments, the foundation hasn’t got a capacity to acquire immovable property. When we look at the 1936 declaration of the Balıklı Rum Hastanesi, this declaration replace the constitutive instruments of the foundation. In this declaration there is no any permission to have immovable property.” (www.kazanci.com.tr date accessed, 27.3.2016). For the same direction decision look at **Civil Department No:16 of the Supreme Court**, Date:09.5.2002, Docket no:2002/4873, Decree no:2002/4337 (www.kazanci.com.tr date accessed, 27.3.2016). **Civil Department No:16 of the Supreme Court**, Date:09.5.2002, Docket no:2002/4872, Decree no:2002/4336 (www.kazanci.com.tr date accessed, 27.3.2016). **Civil Department No:17 of the Supreme Court**, Date:2.4.2002 Docket no:2002/2188, Decree no:2002/2113 (www.kazanci.com.tr date accessed, 27.3.2016). **Civil Department No:1 of the Supreme Court**, Date:22.9.2004, Docket no:2004/8622, Decree no:2004/9589 (www.kazanci.com.tr date accessed, 27.3.2016).Some scholar were against this decision (look at **Karinabadizade/Sungurbey**, p.654; **Sungurbey**, p.349 ff.).

foundations had been opened up and the immovable that cannot be registered on behalf of foundations had been allowed to be registered on behalf of these foundations, even though they were used by community foundations³⁷.

The first change was made by Law no. 4771 of 3 August 2002³⁸. Law no. 4771 added a new paragraph to Article 1 of Law no.2762 which said that religious (non-Muslim) minority foundations, to satisfy their religious, social, cultural and educational needs, can acquire immovable properties by obtaining permission from the Council of Ministers. Without have to show that they have constitutive instruments³⁹.

This new requirement of obtaining permission from the Council of Ministers was criticized because it made the procedure more difficult. Because of this arduousness, a second change was made by Law no 4778 of 2 January 2003⁴⁰. The requirement for getting permission from Council of Ministers was eliminated by this regulation. By the aforesaid regulation, the religious minority (community) foundations had to get permission from General Directorate of Foundations⁴¹. It made the procedure easier. After these regulations Court of Cassation started to chance its judicial opinion. It stated “Law no 4778 legislated that without constitutive instruments, religious foundations can acquire immovable properties”. It decided that “religious minority (community) foundations can acquire immovable properties”. Even in these decisions Court of Cassation was still defending that “Declaration of 1936” is a constitutive instrument of foundation. According to the new regulation they had to accept legal capacity of religious minority foundations⁴².

³⁷ **Şimşek**, p.39.

³⁸ Official Journal, Date:09.08.2002, N.24841.

³⁹ **Alkan**, p.101; **Aydoğdu**, p.229; **Çelikel**, p.59; **Em**, p.42.

⁴⁰ Official Journal, Date:11.01.2003, N.4778.

⁴¹ **Civil Department No:1 of the Supreme Court**, Date:22.9.2004, Docket no:2004/8622, Decree no:2004/9589 state that “Religious minority foundations can acquire immovable property by permission from General Directorate Foundations”. (www.kazanci.com.tr date accessed, 27.3.2016).

⁴² **Civil Department No:1 of the Supreme Court**, Date:7.7.2004, Docket no:2004/7507, Decree no:2004/8334 state: “By Law no.4771 and 4778, religious minority foundations can obtain immovable possession. Whether it has constitutive instruments or not,

By this regulation, religious minority (community) foundations acquired 12 and received as a gift 38 immovable properties.

After these regulations, religious minority (community) foundations could acquire immovable property.

Even these changes this development did not inure to the benefit of Fener Rum Erkek Lisesi Vakfi. As a result of this the European Court of Human Rights concluded that there had been violation of Article 1 of Protocol No.1 in 09 January 2007⁴³. Turkey had interfered in the foundation's right to peaceful enjoyment of its possessions. Fener Rum Erkek Lisesi Vakfi's application was not the only case in European Court of Human Rights. There was another application which applied by another religious minority (Surp Pirgiç Ermeni Hastanesi Vakfi) about the same subject. The result in this case was the same.

After these European Court of Human Rights decisions, a new foundation code Law no.5555 was legislated. But this code was vetoed by president of Turkish Republic in 2006⁴⁴.

Same regulation came to Turkish Grand National Assembly again. After that, a new foundation code was legislated again (Law no.5737 of 20 August 2008). Law no.5737⁴⁵ repealed the Law no.2767. Temporary Article

religious minority foundations with the permission from General Directorate of Foundations can obtain immovable for the purpose of education, social, religious and culture." (www.kazanci.com.tr date accessed, 27.3.2016). **Civil Department No:1 of the Supreme Court**, Date:22.9.2004, Docket no:2004/8622, Decree no:2004/9589 (www.kazanci.com.tr date accessed, 27.3.2016). **Civil Department No:1 of the Supreme Court**, Date:11.5.2005, Docket no:2005/5214, Decree no:2005/5919 (www.kazanci.com.tr date accessed, 27.3.2016). **Civil Department No:2 of the Supreme Court**, Date:03.10.2005 Docket no:2005/14788, Decree no:2005/17872 (www.kazanci.com.tr date accessed, 27.3.2016).

⁴³ European Court of Human Rights, Fener Rum Erkek Lisesi Vakfi v Turkey, p.11.

⁴⁴ President Ahmet Necdet Sezer criticised the new foundation code. He claimed that this code is giving more rights to the minorities than the Laussane Treaty. (For more information look at **Ballar**, p.119 ff.).

⁴⁵ Foundation Law No.5737 repealed the Law No.2762. With new code the right of the possession was defined clearly.For Foundations Law No.5373's preamble look at **Ballar**, p.73-119.).

7 of Law no.5737 states that immovable properties acquired or received as gifts after declaration of 1936, that were still registered under the name of the Treasury, the Directorate General of Foundations, donors or legatos, were to be re-registered under the religious minority (community) foundation's name in the land register after the foundation had received affirmative decision⁴⁶ from the Foundations Council⁴⁷.

With this code, old foundations and new foundations were legislated in the same regulation. There was no longer difference between old foundation and new foundation in terms of obtaining immovable properties⁴⁸. According to Law no.5737 article 12, religious minority foundation doesn't need any permission from Directorate General of Foundations to obtain immovable properties⁴⁹. In other word, after this regulation the immovable properties which still under the name of Treasury, Directorate General of Foundations, donor or legato in the land register, could be re-registered under the name of the religious minority (community) foundations. By this regulation 150 immovable properties were re-registered in the land register.

But there was still a problem. Not all the immovable properties which religious minority (community) foundations had acquired or had received gifts after the declaration of 1936, were in the name of the Treasury or the Directorate General of Foundations. The Treasury or the Directorate General of Foundations had transferred some of these properties to third persons. Unfortunately, there was no regulation in Law no 5737 about immovable properties which registered under the name of third persons.

To solve this problem a new article was added to Law no. 5737 on 27 August 2011. By this regulation, the above cited immovable properties registered under the name of third persons, are assessed at the current market value by the Ministry of Finance. Then the Treasury or the Directorate General of Foundations is supposed to pay that price to the religious minority (community) foundation.

⁴⁶ It is not a permission.

⁴⁷ **Em**, p.43; **Oğuzman/Seliçi/Oktay-Özdemir**, p.350.

⁴⁸ It was criticized by some scholars. (look at: **Özdamar/Değer/Uçkan**, p.192 ff.).

⁴⁹ **Aydoğan**, p.242; **Em**, p.43.

VI. CONCLUSION

Even they were established in the Ottoman Empire, religious minority (community) foundations have legal status in the Turkish Republic too. Lausanne Treaty is the warranty of this. The Turkish Republic recognized the legal personality for the foundations of religious minorities by virtue of Foundation Law no.2762 (actually they obtained legal personality at the Ottoman Empire with the regulation in 1912). As a legal person, religious minority (community) foundations can acquire possession. There was no limitation or prohibition about obtaining immovable property in Law no.2762 for the religious minority (community) foundations.

“Declaration of 1936” was just a list which shows the immovable properties that foundations had owned. It can not be commented as a constitutive instrument. There was no definition in Law no.2762 to understand it in this way.

Until 1974, there was no problem for the religious minority (community) foundations to acquiring immovable properties. They could buy or receive bequest immovable properties. These properties were registered under their names. In 1974 Court of Cassation gave a decision related religious minority foundations. In this decision Court of Cassation claimed that religious minority foundation hadn’t got capacity to act for own immovable properties if its “Declaration of 1936” hadn’t contained any definition that foundation can acquire immovable properties. Court of Cassation claimed that “Declaration of 1936” is a constitutive instrument of foundation.

After the Court of Cassation’s wrong decision in 1974, Courts started to give decision in the same direction. After this date, the General Directorate for Foundations or the Treasury applied to the courts for deleting name of foundation who did not provide “that can acquire immovable properties or can accept a donation” in their Declaration of 1936, from the land register. Turkish courts set aside the religious minority (community) foundations’ title from the land register. These properties were registered under the name of the Treasury or the Directorate General of Foundations.

After this process, some religious minority (community) foundations applied to European Court of Human Rights because of the violation of their property rights. Fener Rum Erkek Lisesi Vakfi was one of them.

The European Court of Human Rights reached that principle of peaceful enjoyment of properties at Article 1 of Protocol no.1 was violated.

European Court of Human Rights state that there is no provision in Law no.2762 prohibited the foundations concerned from acquiring assets other than those which were included in the 1936 declaration. Furthermore, the applicant foundation's acquisitions had been validated by a certificate from the provincial governor's office and entered in the land register. The applicant foundation was thus certain of having acquired the properties lawfully.

In consideration of increasing application to the European Court of Human Rights and the effect of the European Union harmonization process, Turkey had to make some changes in Foundation Law.

The first change was made by Law no. 4771 in 2002. It added a new paragraph to Article 1 of Law no.2762. It said that religious (non-Muslim) minority foundations, to satisfy their religious, social, cultural and educational needs, can acquire immovable properties by obtaining permission from the Council of Ministers. Without have to show that they have constitutive instruments.

Second change was made by Law no 4778 in 2003. By this new regulation, the religious minority (community) foundations had to get permission from General Directorate of Foundations.

After these regulations Court of Cassation started to change its judicial opinion. It decided that "religious minority (community) foundations can acquire immovable properties".

A new foundation code Law no.5555 was legislated. But this code was vetoed by president of Turkish Republic in 2006.

After that, a new foundation code was legislated again in 2008. Foundations Law no.5737 repealed the Law no.2767. Temporary Article 7 of Law no.5737 state that immovable properties acquired or received as gifts after declaration of 1936, that were still registered under the name of the

Treasury, the Directorate General of Foundations, donors or legatos, were to be re-registered under the religious minority (community) foundation's name in the land register after the foundation had received affirmative decision from the Foundations Council.

But these regulations didn't solve the all problem. There were a problem for the properties which were transferred to third persons by Treasury or the Directorate General of Foundations. To solve this problem Temporary Article 11 was added to Law no. 5737 in 2011. By this regulation, the above cited immovable properties registered under the name of third persons, are assessed at the current market value by the Ministry of Finance. Then the Treasury or the Directorate General of Foundations pay that price to the religious minority (community) foundation. After the regulation of 2011, the religious minority (community) foundations' immovable properties problem was completely solved.

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