

The Ombudsman Institution of Turkey and its role in ensuring access to justice for the right to housing and property

The Ombudsman Institution of the Republic of Turkey, also known as the Ombudsman, was established in 2012 with the Law No.6328 as a constitutional public entity affiliated with the Grand National Assembly of Turkey. The Ombudsman Institution follows all developments in society within the scope of its duties, evaluates complaints of any individual or legal entity, regardless of religious, cultural, and/or ethnic affiliation and reports them.

Pursuant to the Article 5 of the Law on the Ombudsman No. 6328, the Institution has been assigned *“to examine, investigate, and submit recommendations to the Administration with regard to all sorts of acts and actions as well as attitudes and behaviours of the Administration upon complaint on the functioning of the Administration within the framework of an understanding of human rights-based justice and in the aspect of legality and conformity with principles of fairness”*.

Particularly since the early 2000, Turkey has taken significant legal and administrative steps in promoting “rule of law”, “democracy” and “respect for human rights” and has been decisively continuing to institutionalize the mechanisms for protecting and improving the fundamental rights and freedoms.

The Ombudsman Institution has achieved to serve as the strong voice of the public conscience in a very short time by means of its examinations and investigations carried out independently and objectively with a view to promote rule of law, democracy, respect for human rights as well as with a sense of responsibility towards the society. In this respect, the Ombudsman Institution creates an opportunity for both the individuals and the public administration, contributes to reaching an agreement between the administration and the citizens in the subjects conflicting with the public conscience, and serves to ensure that a modern approach of administration based on good governance principles is adopted in Turkey. Also, the Institution assumes the role of ensuring that individuals can communicate their problems directly and free of charge in seeking justice, and thereby engage in administration.

Like other Ombudsman Institutions in the world, the Turkish Ombudsman Institution serves two purposes: “protecting” the fundamental rights and freedoms, and “promoting” them. The works on eliminating the violations identified after the examinations and investigations carried out upon complaint applications filed by native and foreign natural and legal persons serve for protecting the rights.

Creating an opportunity for both individuals and the public administration, contributing to reaching an agreement between the administration and the citizens in the subjects conflicting with the public conscience, and serving to ensure that a modern approach of administration based on good governance principles is adopted in Turkey, the Ombudsman Institution works with a sense of responsibility to the society in protecting and promoting fundamental rights and freedoms, and the rule of law.

Moreover, the Law on the Ombudsman No. 6328 and the Regulation on the Procedures and Principles regarding the Implementation of the Ombudsman Institution include good governance principles similarly to the regulations in Europe. These good governance principles embedded in the abovementioned regulations include legality, justice and proportionality,

prevention of discrimination, equality, compliance with procedural guarantees, as well as code of conducts such as objectivity, integrity, kindness, transparency and accountability.

In this regard, the Ombudsman Institution acts in examining the complaints not solely by the power of the laws but also provides recommendations to the administration to ensure that decisions are made within a reasonable period and with justifications, the authority to be applied is identified, and examinations are made in terms of good governance principles. Thus, the Institution contributes to improving the reforms in the field of public administration.

Acting upon applications, the Ombudsman Institution meticulously examines and investigates the claims of unjust treatments, wrongdoings and violations in every area of daily life and has settled numerous disputes in this way. Moreover, in many of its recommendations, the Institution has underlined the importance of promoting and protecting of fundamental rights in economic, social and all areas, thus has served as a bridge allowing individuals to engage in public decision making processes and contributed to the good functioning of the administration.

Within this concept, the application filed to the Institution regarding right to housing is as follows:

In the application No. 2016/3154, the applicant expressed that he was handicapped, working as a civil servant at Izmir Metropolitan Municipality and having financial problems and therefore requested for allocation of public housing for himself by taking into account of his disability. The Ombudsman Institution issued a Recommendation dated 28/01/2017 for the Ministry of Finance stating that the Regulation on Public Housing should be amended in a manner to include reasonable regulations to remove unjust treatments of the handicapped staff by taking into account their disability rate and disability status.

Regarding “Right to Property”, the Ombudsman Institution of Turkey receives applications concerning the immovable of which the citizens claim ownership but they are classified as forest, meadow etc. and passed into the ownership of Treasury, applications claiming that the public authority seizes the privately owned immovable without expropriation, applications concerning the fact that the immovable of citizens within the framework of development plans are not expropriated for years since they are allocated for public services and citizens are not able to dispose of their immovable, and applications concerning the unpaid expropriation prices despite court decisions.

Right to property provides the individual to peacefully enjoy his/her possessions, and to dispose of them except in the public interest and subject to the conditions provided for by law. This right is guaranteed by the Article 35 of the Turkish Constitution. The restrictions regarding the right to property are stated in the same Article. Similar regulations are also available in the Protocol No 1 of the European Convention on Human Rights.

According to the **Article 35 on the Right to Property** in the Turkish Constitution, *“Everyone has the right to own and inherit property. These rights may be limited by law only in view of public interest. The exercise of the right to property shall not contravene public interest”*.

And according to the **Article 1 on “Protection of property”** of the Protocol No 1 of the European Convention on Human Rights, *“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”.

It is an undeniable fact that in the ongoing globalization process of our time, the right to property is, above all, a human right and cannot not be solely considered as a law of property. General principles to be complied with regarding the limitations of fundamental rights and freedoms are guaranteed with the Article 13 of the Constitution. Accordingly, the Article 35 of the Constitution qualifies the right to property as a human right and states that it may be limited by law in view of public interest. And the Article 46 of the Constitution implies special provisions on limitation of right to property.

As the right to property, which is a very popular and significant right, is not characterized as absolute right, it is subject to interference and limitation of public authorities where public power is used. However, the public authorities cannot arbitrarily limit the right to property just like the other rights. Interference with the right to property and immunity shall be possible only by providing the following three conditions: when required by law, for public interest and when necessary in terms of a democratic society.

As an example which is the most striking one among the applications filed to the Ombudsman Institution of Turkey regarding violation of “Right to Property”, the immovable owned by our citizens are defined as lands allocated for public services by land use plans and renovations made in these plans and their disposal are legally restricted. This subject is regulated in the Article 10 of the Development Law stating that the municipalities shall prepare their 5-year development programs within 3 months at the latest as of the entry into force date of development plans and the lands which are within the borders of five-year development programs and allocated to the public authorities shall be expropriated by relevant public authorities within the duration of this program. However, relevant public authorities do not start any actions for long years and therefore our citizens become suffering parties as they are not entitled to dispose of their immovable during this period.

According to the judgment of the Turkish Court of Cassation dated 12.15.2010 and numbered E: 2010/5-662 K: 2010/651“...owing to the fact that confiscation without expropriation is not based on the Constitution and laws, and in essence, this act hampers the property right of the proprietor on the real asset without a legal base,...that the right to property is among natural rights of the individuals just like right to freedom, security etc....that although full enjoyment of right to property is restricted when necessary for public interest and for the benefit of society, it is stated that in both cases, the property is not confiscated but the use of it is restricted,...however, as the development plan was not realized for years, it made impossible for the proprietor to dispose of the real asset for an undetermined time, and therefore the proprietor could not dispose of the real asset appropriately, there is no difference between the prevention of the proprietor’s disposal of a real asset totally or partially and imposing restrictions on the disposal of a real asset by a development plan; both bears the same result in terms of restricting the right of property,...the Administrative defendant party that did not prefer expropriation and exchange intervened in the real asset on the condition of being passive; and the deed of the Administration disturbed and abolished the essence of the property right, it is concluded that the decision of persistence of the court of first instance is appropriate.

According to the judgement of **the Council of State, plenary session of the chambers for administrative cases dated 23.06.2014 No. 2014/1615 E., 2014/2763K**, “Owing to the fact

that the disputed parcel owned by the plaintiff has been allocated as school area in the development plan since 1994, it is not allowed to construct anything on this parcel and therefore the proprietor's right to dispose has been restricted, ... there is no doubt that in this dispute, the right to property of the plaintiff has been unlawfully restricted for undetermined time, ... it is legally obligatory to remove the restriction on the parcel of which the plaintiff's right to property is violated, the judgement has been rendered in line with the abovementioned judgement of the Turkish Court of Cassation.

In the Hüseyin Kaplan v. Turkey - 24508/09 Judgment 1.10.2013 of the European Court of Human Rights; the applicant stated that in 1982 the applicant's land which was initially classified as meadow had been assigned to a public authority. However, since then his property had still not been expropriated and he was informed that he could neither build on the land designated as building land nor even plant trees on it. The court dismissed the applicant's claim for damages against the authorities, on the ground that the municipality had not taken possession of the disputed land and that the applicant had not provided evidence of the alleged pecuniary damage. The applicant's appeal was dismissed. However, on the grounds that the applicant is not been deprived of its property but due to restrictions on the use of his property, the applicant couldn't do anything with his property..., that the right to property still exists but lost its validity,..., the European Court of Human Rights concluded violation of the Article 1 of Protocol No. 1.

In the application No. 2015/5199 filed to the Ombudsman Institution of Turkey against Istanbul Metropolitan Municipality regarding right to property; *owing to the fact that the interference of the Administration with the applicant's real estate as per the development law for 19 years hampers the essence of the right to property, causes uncertainty on the future of the applicant's real estate, in case of violation of the right to property,, the fair balance between the individual interest and public interest is damaged against the applicant, this interference causes a heavy burden on the applicant,..... the Ombudsman Institution made a recommendation to the Istanbul Metropolitan Municipality in favor of the applicant.*

There have been lots of applications filed by the citizens to the Ombudsman Institution of Turkey regarding this matter and applications are still being continued to be filed to our Institution.