

## Protection of Right of Easement

The right of easement is a right in rem which provides the right of utilization from a good to the rightholder on that good. This right may be asserted to anyone because of being a right in rem. The right of easement contains the right of usage and usufruct (usus - abusus). The rights in rem are subject to principle of “numerus clausus”, so parties may not create a new right in rem between them by agreeing.

These rights of easement are specified as right of habitation, usufructuary right, right of construction, resource right and other rights of easement in Turkish Civil Code. The use frame of the right of habitation, usufructuary right, right of construction and resource right is certain. But, saying that the rights of easement are numerus clausus is impossible because of not specifying how the other rights of easement is used according to some opinions in doctrine. (*Oğuzman-Seliçi-Oktay Özdemir Law of Property p.776*)

There is a general provision related to protection of the easement rights mentioned above in the Turkish Civil Code numbered 4721, Art. 786.

**Article 786** – *The owner of easement right may take necessary precautions for protection and usage of its right, but it must use its right in such a way as to cause minimum damage to the owner of property.*

*The owner of property may not behave to prevent or complicate the use of easement right.*

This article has been taken from Swiss Civil Code, Art. 737 by only translating and there was no change on it. The same article was in previous Turkish Civil Code numbered 743, Art. 710, with same content, it was only arranged for making it more convenient to current language.

The right of easement which is one of restricted real rights is such a right that even the owner of property which is inflicted with easement right may not restrict or prevent the usage of the owner of easement right, as can be seen in second subclause of the article. Therewithal, the owner of easement right also should behave in such a way as to cause minimum damage to the owner of the property. As can be seen from the article, the owner of easement right may take necessary precautions for protection or usage of its right.

As can be seen when Turkish Civil Code is examined, there is no special provision about protection of type of easement rights mentioned above. However, comparative application can be done from Art. 683 of Turkish Civil Code in the subject mentioned above. (*Oğuzman-Seliçi-Oktay Özdemir Law of Property p.784*)

**Article 683** - *Someone who owns a thing has the right to use, utilize and save as he or she wishes on that thing within the boundaries of legal order.*

*The owner of property can sue against anyone who holds his or her property unlawfully for preventing unlawful interference just like he or she can sue for act of recovery.*

Action of recovery and case of preventing unlawful interference are specified as the cases which the owner of property can sue while he or she is protecting his or her right. Possessory action, declaratory action, case of correcting land registration and action for compensation can be sued with mentioned cases by the owner of easement right.

**Action of recovery;** specified in statute can also be sued by the owner of easement right. The owner of easement right who is also possessor to property can sue action of recovery for taking back the property which is removed from his or her possession or retained.

*(Akıntürk Law of Property p. 634)*

**The case of preventing unlawful interference;** is a case to sue preventing ongoing intervention.

**Cancelation and replacement cases;** Someone whose right in rem is damaged can sue cancelation and replacement cases according to Turkish Civil Code, Art. 1025.

**Declaratory action;** is the case that the owner of easement right demands fixation of the existence of his or her right from judge.

**Possessory action;** The owner of positive easement can benefit from facilities which is recognized to possessor because of being also possessor of the property for protecting possession. When there is a negative easement right, possessory action can be sued because of that right possession is accepted as actual use according to Turkish Civil Code, Art.973.

**Action for compensation derived from tort;** The owner of easement right can demand compensation if there are all conditions of compensation derived from tort which is specified in Turkish Civil Code, Art 49.

## **CONCLUSION**

As can be seen from above explanations, the owner of easement right can take necessary precautions to protect and use his or her right and this is specified in Turkish Civil Code. But these precautions which can be taken by the holder of the easement right are not specified in the legislation. Each of easement rights can be protected with different cases. Action of recovery and action of preventing unlawful interference which is specified as a case sued by owner can also be sued by the owner of easement right. With these cases, possessory action, cancelation and replacement actions, declaratory action and action for compensation can also be sued by the owner of easement right when necessary conditions are occurred.

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