



Retroactive application of a law in a trademark protection case violated the Convention

In today's Chamber judgment¹ in the case of [Kamoy Radyo Televizyon Yayıncılık ve Organizasyon A.Ş. v. Turkey](#) (application no. 19965/06) the European Court of Human Rights held, by a majority of six to one, that there had been:

a violation of Article 1 of Protocol No. 1 (protection of property) to the European Convention on Human Rights.

The case concerned the applicant company's proceedings to protect a trademark, which led to the domestic courts applying a piece of legislation retroactively and its action being rejected.

The Court noted that the Turkish Constitutional Court had subsequently annulled the piece of legislation which had led to the applicant company losing its case as it had found that the law in question had conflicted with fundamental property rights.

Furthermore, the Court saw no public interest reason to justify the interference with the applicant company's property rights and found there had been a violation of the Convention.

Principal facts

The applicant company, Kamoy Radyo Televizyon Yayıncılık ve Organizasyon A.Ş., is a Turkish company which is registered in Ankara (Turkey).

A company affiliated with the applicant company began publishing a newspaper, *Özlenen Gazete Vatan*, in 1999 after registering the name as a trademark, but it closed the title after two months for financial reasons.

Another company, Bağımsız Gazetecilik Yayıncılık A.Ş., began publishing a newspaper called *Vatan* in September 2002, prompting the affiliated company to start proceedings to protect its trademark in the Istanbul Intellectual Property Court. The trademark was later transferred to the applicant company and it became a party to the proceedings.

The first-instance court rejected the applicant company's trademark protection claim in 2004, a decision which was upheld on appeal in the Court of Cassation in 2005.

In particular, the domestic courts relied on section 31(2) of the Turkish Patent Institute Act, which came into force in November 2003, during the proceedings. That law stated that publishers of periodicals could not be prevented from publication by trademark law, specifically Legislative Decree no. 556 on the Protection of Trademarks.

Bağımsız Gazetecilik began its own proceedings in 2004 and succeeded in 2006 in having the applicant company's trademark registration annulled and being given the right to the name.

Separately, the Constitutional Court in 2008 annulled section 31(2) of the Patent Institute Act, finding that it did not conform to the property rights guaranteed by the Constitution.

1. Under Articles 43 and 44 of the Convention, this Chamber judgment is not final. During the three-month period following its delivery, any party may request that the case be referred to the Grand Chamber of the Court. If such a request is made, a panel of five judges considers whether the case deserves further examination. In that event, the Grand Chamber will hear the case and deliver a final judgment. If the referral request is refused, the Chamber judgment will become final on that day. Once a judgment becomes final, it is transmitted to the Committee of Ministers of the Council of Europe for supervision of its execution. Further information about the execution process can be found here: www.coe.int/t/dghl/monitoring/execution.

Complaints, procedure and composition of the Court

Relying on Article 1 of Protocol No. 1 (protection of property), the applicant company complained of an unlawful restriction on its use of its property because of the retroactive application of legislation, which had protected the other party in the dispute.

The application was lodged with the European Court of Human Rights on 20 April 2006.

Judgment was given by a Chamber of seven judges, composed as follows:

Robert **Spano** (Iceland), *President*,
Paul **Lemmens** (Belgium),
İşıl **Karakaş** (Turkey),
Julia **Laffranque** (Estonia),
Valeriu **Grițco** (the Republic of Moldova),
Ivana **Jelić** (Montenegro),
Darian **Pavli** (Albania),

and also Stanley **Naismith**, *Section Registrar*.

Decision of the Court

The applicant company argued that it had been unjustifiably deprived of its right to the trademark by a retroactive application of the law to its disadvantage.

The Government submitted that there had been no interference with the applicant company's rights. In particular, it had only had a conditional right to the trademark as a newspaper called *Vatan* had existed in the past and it was a well-known name. In addition, by the time *Bağımsız Gazetecilik* had begun its own proceedings to annul the applicant company's trademark, the applicant company had not used the name for five years.

When it came to the retroactive application of legislation, the Government argued that the courts had to apply the laws that were in force at the time of their judgments.

The Court held that the applicant company could claim to have had a possession within the meaning of the Convention as it had had a right recognised by law and not just a legitimate expectation of obtaining a property right.

There had also been an interference with that possession owing to the application of section 31(2) of the Turkish Patent Institute Act. The Court had to assess whether the interference had been justified, specifically, whether there had been a public interest at stake.

The Court gave no weight to the Government's argument that the applicant company had not used the trademarked name for five years when *Bağımsız Gazetecilik* had begun its own trademark proceedings.

In fact, the applicant company had not complained about its trademark registration being annulled because it had not used it for five years, which was allowed under patent law, but that the courts had not protected its right to the trademark during the five-year period of validity.

That period had not expired when the courts had applied section 31(2) of the Patent Institute Act, which had by then come into force. Furthermore, the Court of Cassation had made no mention of the five-year period, only section 31(2).

The Court noted that the Constitutional Court had subsequently annulled that provision as it had made the law on the protection of trademarks meaningless and had breached fundamental rights.

The Government had not made any arguments for their having been a legitimate aim for the piece of legislation in question. Nor could it see any justification on general interest grounds for the way the legal dispute between the companies had been settled by the retroactive application of the law.

For those reasons the Government had not shown that the interference with the applicant company's property rights had served a public interest and there had been a violation of Article 1 of Protocol No. to the Convention.

[Just satisfaction \(Article 41\)](#)

The Court held that Turkey was to pay the applicant 1,500 euros (EUR) in respect of non-pecuniary damage.

Separate opinion

Judge Lemmens expressed a dissenting opinion which is annexed to the judgment.

The judgment is available only in English.

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The European Court of Human Rights was set up in Strasbourg by the Council of Europe Member States in 1959 to deal with alleged violations of the 1950 European Convention on Human Rights.