[H] PRACTICALITY OF ARTICLE 242 OF TURKISH CODE OF OBLIGATIONS

(TÜRK BORÇLAR KANUNU MADDE 242'NİN UYGULANABİLİRLİĞİ)

Av. Nazım KARADAĞ[*] [**]

ABSTRACT

Article 242 of Code of Obligations[1] looks practical, but once the right is triggered it proves to be unfavorable for the holder. In this article, with the help of sample formal documents, contractual pre-emption right will be questioned in the light of Article analysis and technological means activating notification mechanisms, making the exercise of the right possible and favorable for the preemptor. In addition to sample application scenarios, how the right may be exercised through the e-governance portals and benefits of paperless communication will be discussed.

Keywords: Contractual pre-emption right, Priority Notice, Land Register, BK 242, Formal Deed, TAKBIS, WEBTAPU, E-Governance.

ÖZ

Borçlar Kanunu madde 242[1] pratikte uygulanabilir gibi gözükse de, kaleme alındığı şekliyle kullanımı hak sahibine fayda sağlamaktan uzaktır. Bu çalışmada, resmi senet örneği ile sözleşmeden doğan önalım hakkı ve ihbar mekanizmasının çalışır kılınması, önalım hakkı sahibinin yararına sunulması; kanunun lafzı ve teknoloji çağının imkanları ışığında sorgulanacaktır. Uygulama senaryoları üzerinden elektronik devlet ile sözleşmeden doğan önalım hakkının nasıl kullanılabileceği ve kağıtsız iletişimin faydaları tartışılacaktır.

Anahtar Kelimeler: *Sözleşmesel Önalım Hakkı, Şerh, Tapu, BK 242, Resmi Senet, TAKBİS, WEBTAPU, E-Devlet.*

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I. INTRODUCTION

Preemption is not drafted in one sit. It has arms both in Turkish Code of Obligations (BK)[1] and Turkish Civil Code (MK)[2]. The pillars the right stands on are either constructed by contracts (contractual pre-emption right) or embedded in Turkish Codices (statutory pre-emption right).

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[*] Stajyer Avukat (İstanbul 1 No.lu Barosuna Kayıtlı).

[**] Yazarın ORCID belirleyicisi: 0000-0002-5256-8816.

[1] Official Gazette, Date: 4 February 2011, Number: 27836.

[2] Official Gazette, Date: 8 December 2001, Number: 24607.

Esere Atıf Şekli: Nazım Karadağ, "Practicality of Article 242 of Turkish Code of Obligations", YÜHFD, C.XVIII, 2021/2, s. 1423-1435.

Turkish Codices have sale event (satış ilişkisi) related articles both in BK (§§237-242) and MK (§§732-736, §1009). These articles touch right to repurchase, right to purchase and pre-emption right.

Exercising the contractual right of pre-emption is subject to a detail in the Land Register and requires court action. Priority Notice in the registry as a reference may sound comforting to secure the right compared to a non-registered form of it, but how to exercise the right may be a difficult question to answer. Besides a sales transaction, the pre-emption right may as well come to life after a legal transaction economically equivalent to a sale (pre-emption event, Vorkaufsfall, önalım olgusu)[3] is taken. Yet again, in practice, the claimants have to trace the property owner closely to defend their rights within the time bar defined in the code.

How to send notifications for asking whether the pre-emptor will exercise the right is not clearly stated in the Code. Alerting the pre-emptor electronically and use of provisional entries in the registry will be scrutinized because it affects the time bar on exercising the right.

Right of pre-emption is a unilateral right and in theory, may be used even out of court, provided the parties are eager to stand by their bond, but almost always an action in the court is needed and court intervention is clearly stated in the Code.

Renunciation of the pre-emption right requires a visit to Notary Public. The pre-emptor may waive the exercises of the right, in the form of a deed prepared by the Notary Public (MK §732).

II. BRIEF HISTORY

In *De Iure Praedae*, Hugo Grotius was the man to question (the) tradition of ownership rights (same) stemmed from the Roman Law[4].

In Roman Law, pre-emption right was available both as statutory and contractual right. If the right was attached to a sales contract, it only carried right in personam function without producing the results of right in rem. The result of the pre-emption right was totally personal[5].

Centuries later, Roman Law was accepted in Germany probably due to Germanic peoples' judges practicing what they learned in Italy and was distributed around in Continental Europe by means of universities of 14th century (Prague 1348, Vienna 1365, Heidelberg 1386)[6].

Germanic law had provisions on contractual pre-emptive rights[7]. Later on, German Civil Code (BGB) paid broader attention to same in Book 3 of the Code, Law of Property, Special Type of Purchases, Right of Preemption (BGB §§1094-1104)[8], and in Book 2 of the Code, Law of Obligations, Particular Types of Obligations, Preemption (BGB §§463-473).

[3] OR Article 216c, https://www.droit-bilingue.ch/rs/lex/1911/00/19110009-a216c-en-de.html (Accessed 19 Feb 2021).

[4] Hugo GROTIUS, De Iure Praedae, Oxford,1950, as sited in TONG, 2009, p.124.

[5] M. Tahir SEBÜK, Şüf'a, Vefa ve İştira Hakları: Nazariyat ve Tatbikat, İstanbul, 1951, p.7.

[6] Coşkun ÜÇOK, "Alman Hukukunun Tarihi Gelişmesine Bir Bakış", AÜHFD 7 / 1, 1950, p.309.

[7] SEBÜK, p.8.

[8] Ibid.

Preemption scent puffed into "Mecelle" (flawed civil code of late Ottoman era) in articles §§950-956, and §§1008-1044[9]. However, contractual pre-emption right was not included in Mecelle[10].

When Turkish Codices were revolutionized, they were based on the French version of Civil Code of Neuchâtel Canton, Switzerland, but the script used was in German (probably due to German professors' active role in code writing). It is safe to say Swiss Canton Code would not have been chosen if the then Turkish Minister of Justice, Mahmut Esat Bozkurt had not studied law in Neuchâtel[11].

III. RELATED DOCUMENTS

A. Public Deed

In order to be binding, a contract to transfer immovable property ownership must be executed as a public deed. (MK §706)

Forming the deed is under the supervision of the officially authorized persons taking part in the transaction, and they prepare the deed *ex officio*. Mere approval of the signatures in the Notary Public is distinct but would not suffice to form the deed.

Land Registrar, Notary Public, civil peace judge (sulh hukuk hakimi) are usually among the authorized persons[12].

Public deed[13] is an official agreement bonding the parties and when the change of ownership of an immovable property is the issue, Article 26 of the Land Registry Law Nr. 2644[14] authorizes no one but the officials at the Land Registry Offices to prepare such deeds.

Front page of the public deed contains the chart of agreements and the back page has the tables with more details of the property and the transaction. On a separate sheet of paper, title deed is prepared with a QR Code (Quick Response Code is added recently) and handed to the new owner.

The consent on the transfer of ownership (*Auflassung*, *conveyance*) brings on the "imminent" request (*Antrag*) for registry and transaction is completed with the registration (*Eintragung*) in Land Registry by the registrar. This "matryoshka transaction" is the crucial, difficult to contemplate procedure, grinded in the Code.

B. Sales Contract of an Immovable Property

The only place where one can sign a sale contract of an immovable property is the Land Registry, as dictated in current Land Registry Law[13]. The deed is signed in the presen-

[9] İlyas YILDIRIM, "Şüf'a-Önalım Hakkı: Mecelle ve Türk Medeni Kanunu Merkezli Bir Mukayese", İslam Hukuku Araştırmaları Dergisi, s.31, y.2018, 2018, p.318.

[10] Ibid, p.320.

[11] Chibli MALLAT, The Oxford Handbook of Comparative Law, Oxford, 2006, p.532.

[12] Halûk TANDOĞAN, Borçlar Hukuku, Özel Borç İlişkileri, Cilt I/1, İstanbul, 2008, p.226-227; MK §532/II.

[13] See. Deniz DENİZ, " Tapu Sicilinin Elektronik Ortamda Tutulması ve Tapu Kadastro Bilgi Sistemi (TAKBIS). Uygulamaları", Ankara Üniversitesi Fen Bilimleri Enstitüsü Dönem Projesi, Ankara, 2013, p.78-79, and a free translated English version of the deed available at http://www.yeditepelaw.info/hbarpaci/ (Accessed 19 Feb 2021).

[14] Official Gazette, Date: 29 December 1934, Number: 2892.

ce of authorized officers with the word "sale" dissolved in the body of the public deed, making the public deed the sale contract itself.

C. Pre-sale Agreement

Land Registry Officer has the authority to draft a pre-sale agreement and/or a sale agreement, however they are always too busy. To lighten their workload, and some of the work is pushed to Notary Public. Any buyer/seller headed to Land Registry Office for sale transaction should visit a Notary Public first, because the Land Registry Officer asks for a pre-sale agreement. With that pre-sale agreement ready in hand, the parties can either "request registry" or one of the two can ask for a priority notice recorded in the registry, as the need may be. Validity for this priority notice would be five years, and cancellation is done *ex officio* by the registrar (the officer at Land Registry Offive) at the end of this period, yet renewal of a priority notice would be possible. In any case, due to heavy work load, one has to ask for action rather than waiting for the officer to use *ex officio* authority. In other words, without application, priority notices can not be cancelled.

Land Registry Office does not have to question whether or not consensus is formed, as the proof of consensus on this official agreement comes from the Notary Public in the form of a pre-sale agreement, and it is the proof, bonding the parties.

D. Pre-emption Contract

Preemptor's signing a contract with the immovable property owner means the owner agrees to give priority to the preemptor at the time of change of hands under certain circumstances and in return, would expect the preemptor to perform as per the agreement (i.e. pay for the value of the property). Simple written form is enough for the contract to be valid (BK §237/III). The immovable property owner is obliged to request the registrar to record the right in the Land Registry. This would turn a relative right into an empowered right establishing the in rem relationship carrying the obligation of the current owner[15] onto third party (potential future owners), favoring the pre-emptor when the right is triggered. The maximum duration unless renewed is ten years for this priority notice. The contract may be enriched with terms defining how the pre-emptor will be notified using technological means.

E. Priority Notice Agreement

Parties should agree on the point that the right of pre-emption will be recorded at the Land Registry, with a priority notice agreement. A simple written form would suffice[16]. This agreement may be a separate agreement or may as well be embedded in the Pre-emption Contract. This supports the pre-emptor and pushes the owner to ask the registrar to record this "allowed" right in the Land Registry.

IV. ESSENTIAL ACTIONS

A. Prevention

Restricting a right in rem should take place at the time or before the right of pre-emption is born[17], otherwise it will not prevent the owner using his absolute rights at full power. The pre-emptor has to drag the owner to the Land Registry to record a priority noti-

[15] Fikret EREN, Borçlar Hukuku Özel Hükümler, Ankara, 2018, (Eren_Özel), p.205-206.

[16] Ibid. p.204.

[17] Vedat ORUÇ, https://www.hukukihaber.net/onalim-hakki-ve-uygulamadaki-sorunlar-makale,4760.html (Accessed 19 Feb 2021).

ce, after signing a preemption contract at a Notary Public. Otherwise, although the impossibilities on the performance will be discussed at court, eventually will fail the preemptor at the end[18].

B. Protection

Even though the right is protected with a priority notice, it is doubtful that it protects the owner of the right. The preemptor should be economically viable to file a suit in order to protect his right if the need be and should be consistent enough to check the registry with less than two-year intervals (because the time bar is maximum two years) to confirm the owner is still the same.

V. ANALYSIS OF ARTICLE 242 OF THE TURKISH CODE OF OBLIGATIONS

Drafting a pre-emption contract and the necessity of a record of priority notice in the Land Registry are comprehensible and as clearly stated in Article 242 of the Code; "*As long as it is recorded as a priority notice in the land registry, a person wishing to exercise his right of pre-emption borne with a contract must sue the buyer if immovable property ownership is registered under the buyers' name, otherwise must sue the seller, within three months when a sale or any other transaction economically equivalent to a sale is reported to him, and in any case within two years commencing from the date of sale transaction*". However, whom the pre-emptor selects to sue is the confusing part. Actually it is a zugzwang (Zwischenzug).

The pre-emptor cannot sue the seller because the seller does not have the option to keep his promise to sell but postpone the request (*Antrag*) for registry during the process[19] at the Land Registry Office (the application includes the implied request to change ownership - *matryoshka transaction*), unless the transaction is electronically intervened. In other words once the transaction commences the seller is unable to keep the ownership from "shifting" to the buyer's court, unless technological warnings prevent the transaction. It is also difficult to trace any transaction economically equivalent to sale before the "moment" of registry. Wording of the article brings no restriction on the absolute right of the seller[20].

The pre-emptor can go to the buyer because the purpose of the priority notice is to keep the door open for the fulfillment of the pre-emption contract after the sale is reported to him. If the buyer does not report the sale to the pre-emptor or prevents the pre-emptor from bringing up the issue without filing the case for a period of say three months and a day, or the pre-emptor is not financially strong to pay expenses for court procedure, time limit will restrict him from taking further action and has to wait until the next sale transaction, after missing the deadline for application on the first sale.

Pre-emption right might have been specifically agreed for the first sale only. Then the right should be exercised in the time frame allowed after this agreed sale. If not exercised, it cannot be used during any other sale transaction. On the other hand, if there is no

[18] Abdülkadir ARPACI, Lecture Notes, İstanbul, 26 March 2019.

[19] Fikret EREN, "Türk Medeni Kanununa Göre Yasal Önalım Hakkı", Gazi Üniversitesi Hukuk Fakültesi Dergisi C. XII, Y. 2008, Sa. 1-2, Ankara, 2008, (Eren_Makale), p.120.

[20] ARPACI, Lecture Notes, İstanbul, 26 March 2019.

article in the contract referring to this singularity and the right has a priority notice in the registry, the right will not expire and may be exercised at the following sales[21].

Articles on exercise and renunciation of statutory pre-emption right are applied to contractual pre-emption right (MK §735) extending the effect to the new buyers if the right is not used timely. When the obligation of the current owner[22] is carried onto potential future owners, the pre-emptor refreshes his right to exercise it on the "new" buyers. This right in rem effect powered with the priority notice can be waved at the new buyers. (Time limit reminder: Two years commencing from the sale transaction).

Turkish Civil Code §733 points at the Notary Public as the party to expect the notification of sale to come from when a statutory pre-emption right is in question. Unless the buyer or seller reports the sale to the pre-emptor, three months does not commence to count[23], but two-year clock ticks. In order to protect the right of the pre-emptor before time expires, a technological process should be formulated to turn the wheels in such a smooth way that the workload is not increased on the proposed party, i.e. Notary Public. If none of the parties request the Notary Public to send notifications, then pre-emptor faces the time limit issues and eventually after two years, loses the right due to notification issues.

In Swiss Civil Code and earlier Turkish Civil Code (eMK), the pre-emption right was a unilateral right possible to exercise without litigation, yet MK §734/I now states, "*Pre-emption right is exercised with a suit against the buyer*"[24]. There are transactions like exchange (*trampa*) and donation[25]; these transactions are not regarded as economically equivalent to a sale and the pre-emptor cannot use his right over these transactions, even though the ownership changes hands.

Turkish Code of Obligations, Article 242 does not look for whether the transaction was reported or not, to run the time to the limit of two years. Although it may sound unfair, textbook explanation in the General Assembly of Civil Chamber decision[26] which is referred to even today is, the *ratio legis* of time limit of two years: The time bar is there to prevent the pre-emptor holding onto the right for (upto) ten years (general time bar - mentioned in the Code of Obligations - based on contractual agreements and for collection of debt), claiming the sale was unknown to him/her, and thus the pre-emption right is still time resistant. The idea behind the time bar is, as the land register is open to public, pre-emptor is expected to visit the Land Registry (every now and then) to see if any changes take place and if it necessitates, he has to bring the issue up in the court, if he can.

If there is no priority notice recorded, the right is a relative right negotiable with the pre-emption contract opponent, which would in the best case, end with compensation in pre-emptor's favor only. He may collect the money, but unfortunately cannot secure the property itself [27].

Renunciation of the pre-emption right requires a visit to Notary Public for authenticity and another visit to the Land Registry for waiving the priority notice (MK §733/II).

[21] EREN, (Eren_Özel), p.205.
[22] Ibid. p.205-206.
[23] Ibid. p.215.
[24] EREN, (Eren_Makale), p.117.
[25] See for more EREN, (Eren_Özel), p.210-212.
[26] YHGK 21.9.2005 8-358/470.
[27] ARPACI, Lecture Notes.

On the other hand, to give an idea, English translation of OR Art. 216e available online[28] reads:

"A person wishing to exercise his right of pre-emption must give notice of his intention within three months to the seller or, if it is entered in the land register, to the owner. This time limit commences on the day on which the person with the right of pre-emption became aware of the conclusion and content of the contract of sale".

OR is flexible and reasonable, on the awareness of the pre-emptor and not rushes him every now and then to the Land Registry to check the status. Time does not expire before his becoming aware of the conclusion and the content (which means the sooner he is alerted the better it is for the parties). The process does not hide any "matryoshka transaction". The intention is to be declared within three months, after learning the status, which is enough time to protect parties' economical concerns.

VI. TECHNOLOGICAL MEANS

A. Electronic Governance

Electronic Governance in Turkey is provided via e-Government Gateway website[29]. It offers access to all public services and applications including e-Justice system.

E-Justice, the National Judiciary Informatics System (UYAP)[30] is an e-Government application and an institutional automation infrastructure used by the Ministry of Justice for judicial and administrative transactions[31].

Part of UYAP, the "*UYAP SMS (short message service) Information System*" sends warnings, transfers data and announces transactions on the system, including litigation status and execution of debts. Data can be sent by short message service (SMS) to user[32] mobile devices.

Developing technologies enable the government to use joint databases. There are four main databases used throughout agencies to conduct transactions in Turkey. These are the Central Registration Administration System (MERNİS) used for registering natural persons, and the Central Commercial Registration System (MERSİS) used for registering business legal persons, and the Land Register and Cadastre Information System (TAKBİS) for property ownership information and the National Address Database (UAVT), which contains address information[33].

B. Paperless Land Registry

Ministry of Environment and Urban Planning and many governmental officces keep working hard on paperless transaction technologies since 2006. Circular No.1766 dated 23

[28] OR Article 216e, https://www.droit-bilingue.ch/rs/lex/1911/00/19110009-a216e-en-de.html (Accessed 19 Feb 2021).

[29] https://www.turkiye.gov.tr/ (Accessed 19 Feb 2021).

[30] http://www.e-justice.gov.tr/ (Accessed 19 Feb 2021).

[31] 2017 E-Government In Turkey: An Outlook, Tübitak Bilgem Yazılım Teknolojileri Araştırma Enstitüsü, 2017 (https://dijitalakademi.bilgem.tubitak.gov.tr/wpcontent/uploads/2017/01/TUBI TAK-BILGEM-YTE- EGovernmentinTurkeyAnOutlookReport_2017.pdf), (Accessed 19 Feb 2021) p.48.

[32] Ibid.

[33] Ibid. p.24-25.

June 2015[34] computerized all priority notices and declarations[35] in the Land Registry records nationally, joining databases with mortgage information and lien orders which were kept electronically since 2015. Land Registry office is good at paperless communication and has been signing protocols with banks and other creditors since 2016, supporting transaction flexibility[36]. E-mortgage diminished paperwork while registering or altering mortgage (the right, encumbering the property given to banks or similar creditors) on electronically transmitted mortgage agreements. Mortgage related requests are sent electronically to Land Registry, and processed swiftly. Cooperation on such protocols with the creditors is widely supported and official deeds with Quick Response (QR) Codes are introduced in 2018[37], making the transactions faster and safer. These signs show Land Registry Offices are taking it seriously to make the system run electronically and swiftly.

C. Land Register and Cadastre Information System (TAKBIS)

Since May 2012, all Land Registry offices have been using Land Register and Cadastre Information System (LRCIS, TAKBIS). Immovable property information across the country is transferred into the computer systems[38], making the Land Registry data computer aided.

There are several screens on TAKBIS software where the registrar recognizes warnings easily. One screen checks for priority notices, declarations, and encumbrances, a second screen checks for whether any third party is entitled with a right having a distinct and permanent nature (i.e. rights mentioned in MK §704, §826, §837, §998) that is recorded in the land registry on an immovable property. If the holders of such rights are to be notified, without sending the "proper notifications" (duyurular), the registry (Eintragung), cannot be completed.

TAKBIS online data is shared with seventeen government agencies, including municipalities, as well as the Notary Public Offices[39].

D. Notary Info (Noterbilgi)

Notary Info is a service that sends information to the subject person, stating a transaction is made on behalf of that person. The information is sent to the mobile devices in the form of a short message since May 16, 2018. The service aims to increase the security level of the transactions concluded at the Notary Public[40].

E. Web Land Registry (Web Tapu)

Web Land Registry is accessible online and shows property details and geographical position electronically, collects registry related duties and taxes, enables the users to authorize others to represent them at the land registry, or get appointments online, minimizing the

[34] https://tkgm.gov.tr/tapu-db/20154-sayili-genelgede-degisiklik (Accessed 19 Feb 2021).

[35] A. Lâle SİRMEN, Eşya Hukuku, Ankara, 2016, p.110.

[36] https://tkgm.gov.tr/tapu-db/e-ipotek-islemleri (Accessed 19 Feb 2021).

[37] https://www.tkgm.gov.tr/en/node/2421 (Accessed 19 Feb 2021).

[38] See for more of TAKBIS, DENİZ, p.61-64; https://www.tkgm.gov.tr/en/land-registry-and-cadastre-information- system-takbis (Accessed 19 Feb 2021).

[39] See https://www.tkgm.gov.tr/bt-db/tapu-ve-kadastro-bilgi-sistemi-takbis (Accessed 19 Feb 2021).

[40] See https://portal.tnb.org.tr/Sayfalar/SMSHiz.aspx (Accessed 19 Feb 2021).

waiting time at the land registry. In order to become a Web Land Registry user, registering a mobile phone number is enough[41].

F. Duty to Notify and Law of Notification

Parties (buyer, seller, pre-emptor) would fall into a cauldron of no solution with a priority notice recorded in the Land Registry unless answers to these two questions are given: 1.Who notifies the preemptor and 2. How?

Swiss Civil Code, Article 681a states, "*Where a purchase agreement is concluded, the vendor must notify persons with a right of pre-emption of the terms thereof* " and eMK §658 was similar in wording. Currently, only one article related to sale transaction notification points at Notary Public in an ambiguous way (MK §733).

TAKBIS already implemented procedures which ask whether any notifications are to be sent. The questions are to be answered before completing the registry procedure (where currently the registrar usually responds with the answer "no" and skips the step for sound completion of the procedure). This notification data will be (if not already) shared with Notary Public, making them the whistleblower as intended in MK §733, and short messages will be sent to mobile devices to commence and complete the notification procedure with the click of a button. Then the preemptor will react to exercise the right. This way, the main questions (who and how) are simply answered.

The weak part of alerting the pre-emptor electronically is the time of acknowledgement. It affects the time bar on exercising the right. The preemptor may choose to register an e-mail address during negotiations with the owner and the rest will be taken care of as per Law of Notification (Tebligat Kanunu[42]), Article 7/a. The article states, "*the person who asks for notifications (to) be sent to an electronic address, upon (his) presenting suitable electronic address for sending notifications, (he) may be electronically notified*".

Currently when a relevant transaction takes place, the Notary Public or the Land Register Office sends short messages to mobile devices alerting the party of the transaction, provided the mobile number of the person is known or registered in the system of any e-government service. Although not enforced by the law yet, short messages are being sent with electronical time-stamps and authorized parties can track the transactions.

VII. APPLICATION SCENARIOS

Article 705 of Turkish Civil Code states, "*The acquisition of land ownership must be recorded in the land register. In the case of inheritance, court judgment, debt enforcement, appropriation, compulsory purchase and other events specified by the law, the acquirer becomes the owner even before registration in the land register. But obtains the power of disposal (*usus, fructus, abusus*) over the immovable property only once recorded as the owner in the land register"*[43]. And change of ownership occurs only in Land Registry Office as per Article 26 of the Land Registry Law Nr. 2644[44].

If not concluded at the Land Registry, daily life transactions take place either in Notary Public Offices or concluded in the form of synallagmatic agreements. Following simple samples would serve the purpose.

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[41] See https://webtapu.tkgm.gov.tr (Accessed 19 Feb 2021).

[42] Official Gazette, Date: 19 February 1959, Number: 10139.

[43] See for more, Tuğrul ANSAY, Introduction to Turkish Law, Ankara, 2020.

[44] Official Gazette, Date: 29 December 1934, Number: 2892.

A. At the Land Registry (TAPU)

αα. If there is no pre-sale agreement, it will be surprising to see the registrar complete the request without asking for a pre-sale agreement prepared at notary public, although the registrar has the authority given by the law to complete the formalities without a pre-sale agreement. Daily life experience forces the acquirer to bring in the notarized pre-sale agreement and the registrar completes the registry, provided there are no warnings like priority notices or other encumbrances in the registry.

1. If there is a pre-sale agreement, and the record has no priority notice or other encumbrances, and the registrar finds the pre-sale agreement in good order, the transaction would be flawless.

The seller will be discharged of responsibilities related to the property and the buyer is not a party to the pre-emption contract anyways, and exercising the right against him will not be possible. This proves the need for the priority notice. The right is not a restriction on the absolute right of the owner. The buyer would avoid compensation charges from the pre-emptor holding rights enforceable against the seller only[45].

2. If there is a pre-sale agreement, and the record has a priority notice related to a pre-emption right, preemptor should be able to step in activating Article 242 of Code of Obligations.

In order to step in, the preemptor should be aware or made aware of the transaction against him. Provided an e-mail address or a mobile number is registered with e-Governance database, the technology will alert the preemptor. The registrar sees the priority notice, and warns the buyer and alerts the preemptor by either sending a SMS or an e-mail message.

When the transaction is put on hold waiting for the response of the preemptor, he may exercise the right against the seller in the time frame allowed (three months) and if the transaction is completed and ownership changes hands, then the preemptor will exercise the right against the buyer within the same time frame defined in the Code.

Freezing the registry will speed up the process as well. Concerned parties would push the preemptor for reply and until the preemptor responds (probably will take less then three months) the registry record will be frozen with a provisional data entry protecting the parties, securing the asserted rights in rem[46].

3. At the Notary Public

At the Notary Public, properly authorized parties can agree on a pre-sale agreement or check the priority notices and other encumbrances recorded in the registry by means of a QR Coded title deed. If they conclude a pre-sale agreement for an immovable property with a priority notice attached on the registry earlier, it is possible to pre-alert the preemptor, warning him of the situation, saving time and money.

4. Out of offices (Neither Notary Public, nor Land Registry)

Written agreements in the simple form between the parties would only mean Pacta Sunt Servanda (agreements must be kept). If there is no priority notice recorded, the right is a relative right negotiable with the pre-emption contract opponent, which would probably end with compensation in pre-emptor's favor only. He collects only the money without securing the property[47].

[45] ARPACI, Lecture Notes.

[46] See MK §1011.

[47] ARPACI, Lecture Notes.

The pre-emptor has to bring the owner to the Land Register to record a priority notice, after sign- ing a preemption contract.

VIII. PRACTICALITY

The government is working on increasing e-services. Governmental agencies send messages to mobile devices and registered electronic addresses instantaneously. Authorized agents (Notary Public) are able to do the same.

With the help of technology, all transactions expect changing of ownership would be made possible at the Notary Public. This would decrease the workload of the Land Registry.

IX. CONCLUSION

It is a fact that technology runs fast. Photos are sent in a matter of seconds over mobile devices, messages are beeping with different tones almost nonstop. Police Forces, departments of the State can send messages, warning the citizens. Celebrations are in the form of short messages nowadays, rather than family visits. This fashion took hold of the Notary Public and Land Registry as well. Paperless communication brings in paperless transactions. Offices do send messages, warning the party of a given transaction, dimming the possibility of oversight. Technology is widely used but for protecting rights, still a priority notice (whether ordered electronically or not) is a must in the core of the property rights.

Notary Public Offices are able to send short messages to citizens for their transactions since May 16, 2018 and provided the data flow sustained, it is reasonable to expect receiving immovable property related short messages from Notary Public, in coordination with Web Land Registry applications within e-Government framework.

There are weak parts both in technological methods and the Codices. The Code pushes the holder into unnecessary litigation, leaves him in the dark because of parties not being obliged to notify the preemptor. On the other hand paperless technology is not used efficiently.

For practicality of Article 242 of Code of Obligations, the two questions (*who notifies the preemptor and how?*) must be answered in the Code. Out of court solutions should be prioritized as well.

Although it looks impractical, with electronic notifications sent from Notary Public Offices or messages activated by Land Registry automated systems, Article 242 of Code of Obligations will be practical, comforting the preemptor.

Without prejudice to sea urchins, this sea of thoughts would not have been rolled unless we travelled on the shoulders of the giant who once quoted: "*Eventually, only a pleasant echo remains under this high dome*"[48].

BIBLIOGRAPHY

ARPACI, Abdülkadir, Lecture Notes, Yeditepe University, Istanbul, 26 March 2019.

ANSAY, Tuğrul, *Introduction to Turkish Law*, ANSAY Tuğrul - WALLACE Jr. Don (Ed.), Ankara, 2020.

BÂKÎ, Gazel 218, (http://www.siirparki.com/baki6.html), (Accessed 10 Sep 2019).

CIRCULAR 2015-4 of Ministry of Environment and Urban Planning,

[48] Gazel 218 by Bâkî, (1526-1600), http://www.siirparki.com/baki6.html (Accessed 19 Feb 2021).

(https://tkgm.gov.tr/tapu-db/20154-sayili-genelgede-degisiklik), (Accessed 10 Sep 2019).

DENİZ, Deniz, "TAPU SİCİLİNİN ELEKTRONİK ORTAMDA TUTULMASI VE TAPU

KADASTRO BİLGİ SİSTEMİ (TAKBİS) UYGULAMALARI", ANKARA

ÜNİVERSİTESİ FEN BİLİMLERİ ENSTİTÜSÜ, DÖNEM PROJESİ, Ankara, 2013,

(http://gayrimenkulgelistirme.fenbilimleri.ankara.edu.tr/wp- content/uploads/sites/274/2015/01/Deniz-Deniz.pdf), (Accessed 19 Feb 2021).

E-Hypothec Announcement, (https://bis.tkgm.gov.tr/tapu-db/e-ipotek), (Accessed 19 Feb 2021).

E-Hypothec Transactions, (https://tkgm.gov.tr/tapu-db/e-ipotek-islemleri), (Accessed 19 Feb 2021).

E-Governance, (https://www.turkiye.gov.tr), (Accessed 19 Feb 2021).

EREN, Fikret, *Borçlar Hukuku Özel Hükümler*, Ankara, 2018, (Eren_Özel).

EREN, Fikret, "Türk Medeni Kanununa Göre Yasal Önalım Hakkı", Gazi Üniversitesi Hukuk

Fakültesi Dergisi C. XII, Y. 2008, Sa. 1-2, Ankara, 2008,

(http://webftp.gazi.edu.tr/hukuk/dergi/12_5.pdf), (Accessed 19 Feb 2021).

GROTIUS, Hugo, *De Iure Praedae*, Oxford, 1950.

GROTIUS, Hugo, *Property, piracy and punishment: Hugo Grotius on war and booty in De iure praedae: concepts and contexts*, BLOM, Hans W. (Ed.), The Netherlands, 2009.

LRCIS (TAKBIS) Sales Procedure, (https://www.tkgm.gov.tr/sites/default/files/2020-12/satis.pdf), (Accessed 19 Feb 2021).

Notary Public SMS Info, (https://portal.tnb.org.tr/Sayfalar/SMSHiz.aspx), (Accessed 19 Feb 2021).

QR Coded Title Deed Introduction, (https://www.tkgm.gov.tr/en/node/2421), (Accessed 19 Feb 2021).

REIMANN, Matthias, *The Oxford Handbook of Comparative Law* - REIMANN Matthias, ZIMMERMANN Reinhard (Ed.), Oxford, 2006.

SİRMEN, A. Lâle, *Eşya Hukuku*, Ankara, 2016.

SEBÜK, M. Tahir, *Şüf'a, Vefa ve İştira Hakları: Nazariyat ve Tatbikat*, İstanbul, 1951.

TAKBIS Info, (https://www.tkgm.gov.tr/bt-db/tapu-ve-kadastro-bilgi-sistemi-takbis), (Accessed 19 Feb 2021).

TANDOĞAN, Halûk, *Borçlar Hukuku, Özel Borç İlişkileri, Cilt I/1*, İstanbul, 2008.

TONG, Io Cheng, "The Origin of Ownership and the Legitimacy of the Existence and Continuation

of the System: A Civil Law Person's Interpretation of the Private Property Protection

System in the Basic Law of the Macao ", Academic Journal of "One Country, Two Systems" (English Edition), Macao 2009,

(http://www.ipm.edu.mo/cntfiles/upload/docs/common/1country_2systems/issue1/p120.pdf), (Accessed 19 Feb 2021).

ORUÇ, Vedat, "Önalım Hakkı ve Uygulamadaki Sorunlar", (https://www.hukukihaber.net/onalim-hakki-ve-uygulamadaki-sorunlar-makale,4760.html), (Accessed 19 Feb 2021).

ÜÇOK, Coşkun, "Alman Hukukunun Tarihi Gelişmesine Bir Bakış", AÜHFD 7 / 1, 1950, (http://dergiler.ankara.edu.tr/dergiler/38/245/2187.pdf), (Accessed 19 Feb 2021).

Web Tapu Info, (https://webtapu.tkgm.gov.tr/), (Accessed 19 Feb 2021).

YHGK 21.9.2005 e 2005/8-358 k 2005/470 t 21.9.2005, http://www.turkhukuksitesi.com/serh.php?did=8723), (Accessed 19 Feb 2021).

YILDIRIM, İlyas, "Şüf'a-Önalım Hakkı: Mecelle ve Türk Medeni Kanunu Merkezli Bir Mukayese", İslam Hukuku Araştırmaları Dergisi, s.31, y.2018, 2018, (http://isamveri.org/pdfdrg/D02533/2018_31/2018_31_YILDIRIMI.pdf), (Accessed 19 Feb 2021).

"2017 E-Government In Turkey: An Outlook", Tübitak Bilgem Yazılım Teknolojileri Araştırma Enstitüsü, 2017,

(https://dijitalakademi.bilgem.tubitak.gov.tr/wpcontent/uploads/2017/01/TUBITAK-BILGEM-YTE-EGovernmentinTurkeyAnOutlookReport_2017.pdf), (Accessed 19 Feb 2021).