Common Fallacy on the Guarantee Function of Mortgage: An Empirical Approach[(*)]

İpoteğin Teminat İşlevine Dair Yaygın Yanılgı: Bir Ampirik Yaklaşım

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Abstract:

There is a common fallacy in the property law coursebooks that mortgage has constant function of guarantee in favor of creditor. However, the guarantee function of mortgage is not constant. It changes from country to country and even from time to time, because the guarantee function of mortgage is dependent on the performance of the foreclosure procedure of a particular country. This paper aims to analyze this link empirically for Turkey. Correlation analysis consists of two components. First is "Total Resolved Cases (TRC)" that presents the performance of foreclosure procedure through Execution Office. Second is "Number of Mortgaged/Hypothecated Transactions (NHT)" via Land Registry. Correlation analysis consists of 19 indicators between 2000-2018. It is shown that there is a positive correlation between the guarantee function of mortgage and the performance of foreclosure procedure betwen the years 2000-2018 in Turkey. This empirical finding proves that the guarantee function of the mortgage is not constant and that the invariability proposition in property law coursebooks constitutes a common fallacy.

Keywords:

Mortgage, Foreclosure, Lex Commissoria, Performance, Correlation.

Öz:

Eşya Hukuku kitaplarında, ipoteğin alacaklı lehine değişmez bir güvence işlevine sahip olduğu yönünde yaygın bir yanılgı yer almaktadır. Hâlbuki ipoteğin güvence işlevi değişmez değildir. İpoteğin güvence işlevi, ülkeden ülkeye zamandan zamana değişebilir, çünkü ipoteğin güvence işlevi, belli bir ülkedeki ipoteğin paraya çevrilmesi prosedürünün performansına bağlıdır. Bu çalışma, Türkiye özelinde ipoteğin paraya çevrilmesi prosedürünün performansı ile ipoteğin alacaklıya sağladığı güvence işlevi arasındaki ilişkiyi ampirik olarak analiz etmektedir. Çalışmamızda, korelasyon analizi iki unsurdan oluşmaktadır. Birincisi, "Çözüme Bağlanmış Toplam Dosya Sayısı (*Total Resolved Cases*)" olup, bu unsur icra dairelerinin ipoteğin paraya çevrilmesi performansını göstermektedir. İkincisi, Tapu Sicili'nde kayıt altına alınmış "İpotekli İşlem Sayısı (*Number of Mortgaged/Hypothecated Transactions*)"dır. Korelasyon analizi, 2000-2018 yıllarını kapsayan toplam 19 göstergeden oluşmaktadır. Korelasyon analizi sonucunda

görülmüştür ki, Türkiye'de 2000-2018 yılları arasında ipoteğin güvence işlevi ile ipoteğin paraya çevrilmesi prosedürünün performansı arasında pozitif bir korelasyon bulunmaktadır. Bu ampirik bulgu, ipoteğin güvence işlevinin (Türkiye özelinde) değişmez olmadığını ve eşya hukuku kitaplarındaki değişmezlik önermesinin yaygın bir yanılgıyı teşkil ettiğini kanıtlamaktadır.

Anahtar Kelimeler:
İpotek, Paraya Çevirme, Lex Commissoria, Performans, Korelasyon.

I. INTRODUCTION

The chapter of security rights[1] in all coursebooks on law of property unexceptionally starts with the following sentence: Mortgage (hypothec)[2] has a function of guarantee in favor of creditor. Legal doctrine implicitly assumes that guarantee function of mortgage is constant/invariable. However, it is not constant and it depends on the performance of foreclosure proceedings in a given country. So that the guarantee function of mortgage vary from one country to another and even from one time period to another in the same country. This paper hypothesizes that guarantee function of mortgage is dependent on the performance of foreclosure (*Zwangsversteigerung*) proceedings in a given country. Thus, we claim that there is a positive correlation between the number of mortgaged transactions and total resolved cases (performance of foreclosure proceedings) by the Execution Office in Turkey. On this account, we test the hypothesis via correlation method empirically.

The rest of the study is organized as follows. Section 2 introduces foreclosure proceedings of mortgages. Section 3 presents the results of correlation analysis and its interpretation. Finally, Section 4 concludes the paper.

II. FORECLOSURE OF MORTGAGES

A. Securities on Immovable Property

Real securities (property security rights) are in the category of limited real rights and unlike personal securities they can be asserted against any third person.[3] If debtor fails to discharge of his debt, creditor has right to realize real security through the

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[1]   The concept of "security rights" indicates property and personal security rights according to civil law.

[2]   In this paper, hypothec and mortgage are used interchangeably in different places.

[3]   DÜRR, David, Kommentar zum schweizerischen Zivilrecht Erste Lieferung Systematischer Teil und Art. 793-804 ZGB, Zürich, 2009, p. 48; SİRMEN, A. Lâle, Secured Transactions (Securities and Suretyship), Introduction to Turkish Business Law, Ed. Tuğrul Ansay/Eric C. Schneider, The Netherlands, 2014, p. 59.

Execution Office (Bailiff's Office). There are two main types of real securities: 1. Securities on immovable property and 2. Securities on movable property.

Turkish Civil Code Nr. 4721 (hereinafter TCC) art. 850 regulates three types of securities on immovable property which are mortgage, mortgage certificate and land charge note. According to the principle of *numerus clausus*, it is impossible to add other types to that list. Although Turkish civil law is based on Swiss model since 1926, mortgage certificate and land charge note are not used in Turkish practice,[4] but they are regulated in the TCC. The immovable pledge is a secondary right that depends on the actual claim. It means that if the actual claim is invalid or terminated in any way, immovable pledge becomes invalid or terminated as well.

The lapse of time shall not be interrupted after the immovable pledge is registered to Land Registry (TCC art. 864). On the other hand, the claim assured by movable pledge shall not interrupt lapse of time for this claim; nonethless, the creditor shall reserve his right to demand from the pledge according to Turkish Code of Obligations Nr. 6098 (hereinafter TCO) art. 159.

Securities on immovable property consists of three basic principles which are principle of determinacy, principle of publicity and principle of fixed ranks. Principle of determinacy has two dimensions which are determinacy of the claim to be secured by immovable property and determinacy of immovable property.[5] According to determinacy of the claim, a certain amount must be registered in the Land Registry. If a certain amount of money is registered during the creation of the hypothec, it is called principal hypothec. On the other, if the amount of claim is not certain, parties decide the maximum amount in the immovable pledge contract as a legal basis of immovable pledge, it is called maximal hypothec (TCC art. 851/I). Determinacy of the immovable property is regulated by TCC art. 853. According to this rule, right of immovable pledge is only created on immovables registered in the Land Registry. Immovable property consists of land, independent and permenant rights, and independent parts of a building subject to flat ownership (TCC art. 704). Hypothec can also be created on the shares of co-owners of land (TCC

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[4]   SİRMEN, A. Lâle, Eşya Hukuku, Ankara, 2018, p. 650. Some provisions regarding immovable pledge were revised by Swiss legislators in 2009. According to new regulations which was taken into effect in 2012, immovable pledge can only be created as hypothec and hypothec certificate (Swiss Civil Code art. 793/I). On the other hand, land charge note rules were repealed from the Swiss Civil Code (SİRMEN, Eşya, p. 650).

[5]   KÖPRÜLÜ, Bülent / KANETİ, Selim, Sınırlı Ayni Haklar, İstanbul, 1982-1983, p. 283.

art. 688/III, 857/I). Immovable property must be certain during the creation of immovable pledge. If it is desired to create an immovable pledge on a part of the immovable property, this part should be registered as a separate parcel. Otherwise, it cannot be the subject of immovable pledge (TCC art. 854). According to TCC art. 855, several immovables can be pledged for the same debt. When the properties belong to the same owner or to debtors who are jointly and severally liable, each property would be charged with the entire debt. In all other circumstances where several properties are given as security for the same debt, each property is charged with a specified part of the debt.[6]

According to the principle of publicity, pledge on immovable property is created via registration to Land Registry. Thus, all immovable pledges must be registered to Land Registry (TCC art. 856). Registration ensures the publicity of the right of pledge on immovables. For the creation of immovable pledge, its legal basis must be valid. Legal basis of immovable pledge is the prerequisite of registration which refers to a contract between creditor and mortgagor before registration. This contract must be made or concluded officially in order not to be null and void. In Turkey, this contract is drawn up by the officer of Land Registry according to art. 26 of the Land Register Act Nr. 2644.[7] If immovable pledge contract is null and void, registration becomes improper. Furthermore, if a right of immovable pledge is arised from a particular law, pledge on immovable property is automatically created without a registration.

Unlike Roman law, if there is more than one pledge right on an immovable, the priority relationship is determined according to the system of fixed ranks.[8] In the fixed ranks system, the immovable is divided into putative value segments independently of each other and they constitute the ranks. In each rank, the immovable pledge can be created limited to the amount allocated to the rank of that rank. In the fixed ranks system, when the right of pledge that has been created to a certain rank is eliminated, the right of pledge in the lower rank does not automatically move up to the vacant upper rank (TCC art. 871/I), but parties may agree to move up the vacant place. If this agreement is noted to the Land Registry, right to move up to vacant upper rank can be asserted against every new owner of the property and other creditors (TCC art. 871/III). On the other hand, owner of immovable property can create a new

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[6]   SİRMEN, p. 70.
[7]   Art. 26 does not require a formal contract when the lender is a bank, a public institution or a credit or guarantee cooperative for craftsmen and artisans.
[8]   KÖPRÜLÜ/KANETİ, p. 350.

pledge to the vacated rank. The owner can classify his real estate in certain amounts without creating any pledge. The maximum amount of each rank is stated in the Land Registry. The owner of immovable property can create a pledge in one of these ranks by agreeing with the owner of the pledge. In addition to these, more than one pledge may be created but their total amount cannot exceed the maximum amount allocated to that rank. According to TCC art. 874/II, among the creditors in the same rank, the sales price falling in that rank is distributed in proportion to their claims.

Immovable pledge covers all integral parts and accessories of property (TCC art. 862/I). Thus, land, independent and permenant rights, and independent parts of a building subject to flat ownership (TCC art. 704) fall within the scope of immovable pledge. In addition to these, integral parts of the immovable are included in the scope of the pledge such as structures, plants etc. If these become movable, they are automatically excluded from the scope of the immovable pledge. Rental fees, running from the beginning of the foreclosure proceeding to the sale of the pledged property, also fall within the scope of the pledge on the leased real estate (TCC art. 863/I).

The assurance provided by the immovable pledge to the creditor includes; principal capital, expenses of foreclosure proceedings and default interest and matured three years interest until the date of bankruptcy or demanding the sale of property and interest starting from the last maturity (TCC art. 875/I). Interest rate must be registered to Land Registry in order to fall within the scope of assurance. On the other hand, for the maximal hypothec (*Höchstbetragshypothek*), maximum amount in the Land Registry comprises maximum limit of all claims of creditor.[9]

B. Foreclosure Proceedings

In the event of failure of payment by the debtor, creditor has a right to demand to sale the pledged property through the Execution Office (TCC art. 873/I) in accordance with the provisions of the Code on Execution and Bankruptcy (hereinafter CEB) Nr. 2004 art. 145-153. It should be noted that an agreement made between the parties granting creditor to take the ownership of immovable pledged property is null and void according to TCC art. 873/II. This is called Lex Commissoria Prohibition (*Das Verbot der Verfallsklausel*)

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[9] WIELING, Hans Josef, Sachenrecht, Berlin, 2007, p. 458-459; ERMAN, Hasan, Eşya Hukuku Dersleri, İstanbul, 2018, p. 180; OĞUZMAN, M. Kemal / SELİÇİ, Özer / OKTAY-ÖZDEMİR, Saibe, Eşya Hukuku, İstanbul, 2015, p. 954.

comes from the Roman Law.[10] Lex Commissoria Prohibition is also applied to movable pledge (TCC art. 949). However, an agreement providing that the creditor will take the ownership of the immovable pledge property is valid, if this agreement is made after the maturity of pledge debt. Furthermore, like in the realization of movable pledged property, creditor has power to real-ize immovable pledged property into money through private sale without Execution Office. However, it should be noted that creditor must repay the surplus to debtor in order not to be fall into the Lex Commissoria Prohibition. This perspective is consistent with German Bürgerliches Gesetzbuch (BGB) § 1147-1149.[11]

III. CORRELATION ANALYSIS AND FINDINGS

Driving power of this paper is the comment of Hans-Bernd Schäfer on the law and economics of secured lending.[12] In his paper, Schäfer comments that "The value of secured credit is dependent on the efficiency of the bankruptcy procedure."[13] In order to prove his hypothesis, he uses World Bank's data set and to show a close correlation between the recovery rate in a bankruptcy procedure and the time to resolve insolvency. His findings display that most countries with short procedures the recovery rate is often between 80 and 90%, whereas in countries with longer periods of 8 to 10 years, it is between 0 and 15%. It means that the value of secured credit reduces for the creditor in case of inefficient bankruptacy procedure. However, in our paper, we only concentrate on Turkish experience from 2000 to 2018. Our study is more specific, since it includes dataset of the number of mortgaged transactions and total resolved cases (days) by the Execution Office taken from the open data of General Directorate of Land Registry and Cadastre[14] (*Tapu ve Kadastro Ge-nel Müdürlüğü*) and General Directorate of Criminal Records and Statistics[15] (*Adli Sicil ve İstatistik Genel Müdürlüğü*).

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[10] KARADENİZ-ÇELEBİCAN, Özcan, Roma Eşya Hukuku, Ankara, 2015, p. 300; SEROZAN, Rona, Eşya Hukuku I, İstanbul, 2014, p. 357. Lex Commissoria clause in the contracts was banned by Constantinus A.D. 326, because of harmful effect on debtors.

[11] WIELING, p. 448; ERMAN, p. 179; SİRMEN, p. 72. For the foreclosure procedure of mortgage in Germany, please see WIELING, p. 449-450.

[12] SCHÄFER, Hans-Bernd, The Law and Economics Debate About Secured Lending: Lessons for European Lawmaking?, The Future of Secured Credit in Europe, Ed. Horst Eidenmüller / Eva-Maria Kieninger, Berlin, 2008, p. 30-35.

[13] SCHÄFER, p. 31.

[14] https://www.tkgm.gov.tr/en (Access: 5.3.2021).

[15] https://adlisicil.adalet.gov.tr/ (Access: 5.3.2021).

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Covariance Analysis: Ordinary
Date: 08/18/20  Time: 20:18
Sample: 2000 2018
Included observations: 19

Correlation
Probability          TRC          NHT
      TRC          1.000000
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      NHT          0.543806     1.000000
                   0.0161       -----
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Table 1: Covariance analysis: TRC and NHT

Correlation analysis consists of two components which are TRC (total resolved cases by the Execution Office) and NHT (the number of hypothecated/mortgaged transactions). While the TRC is preferred to use for the performance of foreclosure procedure, NHT represents the guarantee function of mortgage. Analysis includes 19 observations between the years 2000-2018. Correlation results are in line with our expectations claimed in the hypothesis. The results imply that there is a positive correlation (**0.543806**) between the number of mortgaged transactions and total resolved cases (performance of foreclosure proceedings) through the Execution Office in Turkey. Therefore, the performance of foreclosure proceedings in Turkey is one of the factor that influence the guarantee function of mortgage in time.
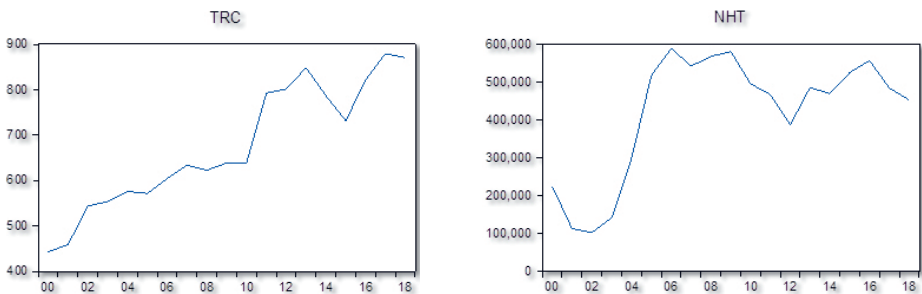

Figure 1: Relationship between TRC and NHT, 2000-2018

First component of the Figure 1 (TRC) shows that there is an increasing stability for total resolved cases via Execution Office. There is an increasing trend during 13 years from 2000 to 2013. After 2013, increasing trend starts to decrease in the years of 2014 and 2015. However, the trend is rising again after 2015. In 2017, 880 cases were resolved by the Execution Office which is the peak point between 2000-2018. Second component of the Figure 1 (NHT) shows that there is an increasing trend between 2003-2006. A sharp decline started in 2009 and continued until 2012.

IV. CONCLUSION

This paper aims to reveal the common fallacy of legal doctrine on the guarantee function of mortgage by using an empirical method. In this context, hypothesis of the paper claims that the performance of foreclosure procedure has an effect on the guarantee function of mortgage. Therefore, the guarantee function of mortgage is not constant, it is changeable from time to time and country to country. Correlation result supports the hypothesis that there is a positive correlation between TRC and NHT which present the performance of Executive Office's foreclosure proceedings and the number of mortgaged transactions.

Our study can be developed and extended for other countries and other types of secured transactions like personal securities and securities on movable property.[16] Although we investigated the correlation with two components, other components can be added. In other words, empirical result of this paper may shed some light on future researches concerning the effect of macroeconomic indicators on the number of mortgaged transactions in addition to the performance of foreclosure proceedings.

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[16]   It should be noted that one of the most important limitation of this paper is that apart from the number of mortgaged transactions other kinds of secured transactions could not be used because of data problems in Turkey.

REFERENCES

DÜRR, David, Kommentar zum schweizerischen Zivilrecht Erste Lieferung Systematischer Teil und Art. 793-804 ZGB, Zürich, 2009.

ERMAN, Hasan, Eşya Hukuku Dersleri, İstanbul, 2018.

KÖPRÜLÜ, Bülent / KANETİ, Selim, Sınırlı Ayni Haklar, İstanbul, 1982-1983.

OĞUZMAN, M. Kemal / SELİÇİ, Özer / OKTAY-ÖZDEMİR, Saibe, Eşya Hukuku, İstanbul, 2015.

SCHÄFER, Hans-Bernd, The Law and Economics Debate About Secured Lending: Lessons for European Lawmaking?, The Future of Secured Credit in Europe, Ed. Horst Eidenmüller / Eva-Maria Kieninger, Berlin, 2008.

SEROZAN, Rona, Eşya Hukuku I, İstanbul, 2014.

SİRMEN, A. Lâle, Eşya Hukuku, Ankara, 2018.

SİRMEN, A. Lâle, Secured Transactions (Securities and Suretyship), Introduction to Turkish Business Law, Ed. Tuğrul Ansay/Eric C. Schneider, The Netherlands, 2014.

WIELING, Hans Josef, Sachenrecht, Berlin, 2007.

Websites

https://www.tkgm.gov.tr/en (Access: 5.3.2021).

https://adlisicil.adalet.gov.tr/ (Access: 5.3.2021).