

ACQUISITIVE PRESCRIPTION/ADVERSE POSSESSION: TURKISH AND CHINESE LEGAL SYSTEMS^(*)

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ABSTRACT

With the passage of time, sometimes a right is lost, sometimes a right is acquired, and sometimes an existing right is prevented from being brought to court. The role of time can be seen clearly in the prescription. In the article, the role of the time has been examined within the context of acquisitive prescription/adverse possession. The scope of the article has been limited only to the acquisition of immovable property by prescription. The first chapter of the article examines the legal requirements and consequences of ordinary and extraordinary acquisitive prescription under Turkish law. The second chapter provides a comprehensive overview of the evolution and practice of the acquisitive prescription system in China, including mainland China, Hong Kong, Taiwan, and Macao. First, the "Qing She" system in ancient China was examined. The second part of the chapter describes the development of mainland China's statute of acquisitive prescription in modern society. The third part is a study of the adverse possession in Hong Kong. The last part is concerned with the acquisitive prescription in Taiwan and Macao. The concluding chapter provides a comparative analysis to identify similarities and differences in how the examined jurisdictions solve similar problems and tries to find some common rationale between these systems.

Keywords

Prescription, Acquisitive Prescription, Possession, Immovable Property, Comparative Law.

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KAZANDIRICI ZAMANAŞIMI: TÜRK VE ÇİN HUKUK SİSTEMLERİ

ÖZET

Zamanın geçmesiyle bazen bir hak kaybedilir, bazen bir hak kazanılır, bazen de var olan bir hakkın mahkemeye taşınması engellenir. Zamanın rolü, zamanaşımı sisteminde açıkça görülebilir. Makalede zamanın rolü kazandırıcı zamanaşımı bağlamında incelenmiştir. Makalenin kapsamı taşınmaz mülkiyetinin zamanaşımı ile kazanılması ile sınırlandırılmıştır. Makalenin ilk bölümünde, Türk hukukunda olağan ve olağanüstü kazandırıcı zamanaşımının hukuki koşulları ve sonuçları incelenmektedir. İkinci bölüm, Çin anakarası, Hong Kong, Tayvan ve Makao dahil olmak üzere Çin'deki kazandırıcı zamanaşımı sisteminin evrimi ve uygulamasına ilişkin kapsamlı bir genel bakış sunmaktadır. İlk olarak, antik Çin'deki "Qing She" sistemi incelenmiştir. Bölümün ikinci kısmında, Çin anakarasının modern toplumdaki kazandırıcı zamanaşımı sisteminin gelişimi anlatılmaktadır. Üçüncü bölümde, Hong Kong'daki zamanaşımı sistemi incelenmiştir. Son bölümde ise Tayvan ve Makao'daki kazandırıcı zamanaşımı sistemi ele alınmıştır. Sonuç bölümü, incelenen yargı sistemlerinin benzer sorunları çözmeye biçimlerdeki benzerlik ve farklılıkları belirleme ve bu sistemler arasında bazı ortak gerekçeler bulmak için karşılaştırmalı bir analiz yürütmektedir.

Anahtar Kelimeler

Zamanaşımı, Kazandırıcı Zamanaşımı, Zilyetlik, Taşınmaz, Karşılaştırmalı Hukuk.

INTRODUCTION

“All human interactions and, hence all legal rules have a temporal dimension. Offer precedes acceptance; cause precedes effect; parents are born before their children... Time marches on and in one direction, forward”¹. These impressive sentences of Epstein show the prominent role of “time” for humans. Time also plays a very significant role in law. With the passage of time, sometimes a right is lost, sometimes a right is acquired, and sometimes an existing right is prevented from being brought to court. The role of time can be seen clearly in the system of prescription.

The forms of prescription can be divided into two main classes: the acquisitive (usucapion)²/adverse possession³ and extinctive prescription/limitation (praescriptio)⁴. Although there is an important similarity between the two forms

¹ **Epstein, Richard Allen** (1986) “Past and Future: The Temporal Dimension in the Law of Property”, *Washington University Law Quarterly*, V. 64, pp. 667-722, p. 667.

² The rationale for establishing this institution, which was first recognized in history by the Law of the Twelve Tables, has been accepted as public interest and the protection of public order. **Karadeniz-Çelebican, Özcan** (2006) *Roma Eşya Hukuku*, Ankara, 2006, p. 185. In Roman Law, different terms were used in different periods to correspond to the acquisitive prescription. These were ‘usus’, ‘usus auctoritas’, ‘usucapio’, ‘praescriptio longi temporis’, ‘praescriptio adquisitiva’ and ‘diutina possessione capere’. **Umur, Ziya** (1983) *Roma Hukuku Eşya Hukuku (Ayni Haklar)*, İstanbul, 1983, pp. 51, 52. However, ‘usucapio’ was the most widely used of the mentioned ones.

³ For the opinion that this term does not fit the nature of the institution because it is possession, not the passage of a long period of time that confers property, see **Akipek, Jale/Akıntürk, Turgut/Ateş, Derya** (2018) *Eşya Hukuku*, İstanbul, Beta Yayınevi, p. 481. For the opposite view, see **Kılıçoğlu, Ahmet M.** (2024) *Eşya Hukuku*, Ankara, 2. Bası, Turhan Kitabevi, p. 352.

⁴ In ancient Rome, extinctive prescription was unknown. In other words, no one lost a right, no matter how long he had neglected to assert it against a third party. However, Roman law recognized acquisitive prescription (usucapion). See **Thibaut, Anton Friedrich Justus** (1802) *Ueber Besitz und Verjährung*, Mauke, p. 67; **Savigny, Friedrich Carl von** (1841) *System des heutigen Römischen Rechts*, Vierter Band, p. 310; **Bilgen, Mahmut** (2010) *Özel Hukukta Zamanaşımı, Gözden Geçirilmiş ve Genişletilmiş 2. Baskı*, Ankara, Adalet Yayınevi, p. 3. The XII Tables first regulated that a citizen should acquire the dominium quiritarium in two years for immovable property and in one year for movable property through quiet possession obtained bona fide and iusto titulo. “A prescriptive title (usucapio) of movable things is completed by one year’s [possession], but [a prescriptive title] of an estate and buildings [is completed] by

of prescription, i.e. that they both require a certain amount of time to elapse, there is also a crucial difference, and it lies in their legal effect. Acquisitive prescription/adverse possession has a positive result, promoting an existing position to the right. Extinctive prescription has a negative result, ending somebody's right or the action with which this right can be upheld⁵. Thus, the term prescription has a comprehensive nature and covers both acquisitive and extinctive prescriptions. In the article, the role of time has been examined only within the context of acquisitive prescription/adverse possession.

As can be seen, there are two terms regarding the same legal rule. Most jurisdictions have a legal rule that stipulates that factual control of a thing over time grants a legal entitlement on that thing in favor of such controller, provided that further conditions are met. Under civil law and mixed legal systems, this mechanism is known as *acquisitive prescription*, which is usually an original way of acquiring the right of ownership. In common law countries, these issues are addressed under the doctrine of *adverse possession*, which technically extinguishes the right-holder's claim to possession vis-à-vis the actual possessor⁶. They come in different dogmatic shapes. In civil law traditions, uninterrupted possession by a non-owner⁷, or the uninterrupted loss of possession by the own-

two years' [possession]". See "The Twelve Tables" <<https://archive.org/stream/thetwelvetables14783gut/14783.txt>> s.e.t. 15.08.2024. Roman lawyers borrowed the institution of extinctive prescription from Greek law in the fifth century. Emperor Theodosian introduced a general rule of extinctive prescription of legal actions. See **Thibaut**, p. 73; **Jansen, Jelle E.** (2012) "Thieves and Squatters: Acquisitive and Extinctive Prescription in European Property Law", *European Property Law Journal*, V. 1, I. 1, pp. 153-165, p. 156; **Paksoy, Meliha Sermin** (2012) *Zamanaşımından Feragat (TBK 160)*, İstanbul, On İki Levha Yayıncılık, p. 47.

⁵ **Savigny**, p. 310.

⁶ **Mezzanotte, Francesco** (2019) "Italian Perspectives on Acquisitive Prescription of Immovables", Hoops, B./Marais, E.J. (Editors), *New Perspectives on Acquisitive Prescription*, Netherlands, Eleven International Publishing, pp. 23-53, p. 23.

⁷ See, for example, Dutch Civil Code Article 3:99: "Acquisitive prescription - 1. Property rights in not-registered movable things and debt-claims to order and to bearer are acquired by a possessor in good faith after having the continuous possession of that thing or, respectively, of negotiable document for three years; property rights in other property are acquired by a possessor in good faith after having the continuous possession of the underlying asset that for ten years - 2. Paragraph 1 does not apply to movable things which pursuant to the Act on the Conservation of Culture Heritage are

er⁸, for a period laid down in legislation may form the basis of an acquisition of ownership by operation of law⁹. In common law jurisdictions, uninterrupted adverse possession during a prescribed period extinguishes the owner's claim to the property and confers the strongest right on the adverse possessor¹⁰. However, for both of them, time limits play a decisive role¹¹.

qualified as a protected object or which form a part of a public collection or of an inventory as meant in Article 14a, second paragraph of that Act, provided that the possession of such an object has started after this qualification or during the time that the object was a part of the public collection or inventory as described here. - 3. Paragraph 1 cannot be invoked against legal claims (rights of action) as meant in Articles 3:86a, paragraph 1, and 3:86b, paragraph 1". "Dutch Civil Code" <<http://www.dutchcivillaw.com/civilcodebook033.htm>> s.e.t. 16.08.2024.

⁸ See, for example, Dutch Civil Code Art. 3:105: "Acquisition by a possessor through an acquisitive prescription - 1. He who possesses an asset (property right) at the moment on which the right of action (legal claim) to end that possession has become prescribed, acquires that asset, even if he did not possess it in good faith. - 2. Where a person had lost possession before that moment, but regains it within one year after he had lost it or regains it as a result of a legal claim that was filed within that year, he is regarded to be the possessor meant in the previous paragraph". "Dutch Civil Code" fn. 6.

⁹ **Mingrui, Guo** (2017) "Reflections on the Legislation of the Statute of Limitations System in the General Principles of the Civil Law", Law Forum, No. 1, p. 5.

¹⁰ See, for example, Section 13 of the Irish Statute of Limitations, (1) (a) Subject to paragraphs (b) and (c) of this subsection, no action shall be brought by a State authority to recover any land after the expiration of thirty years from the date on which the right of action accrued to a State authority or, if it first accrued to some person through whom a State authority claims, to that person. (b) An action to recover foreshore may be brought by a State authority at any time before the expiration of sixty years from the date on which the right of action accrued to a State authority. (c) Where any right of action to recover land, which has ceased to be foreshore but remains in the ownership of the State, accrued when the land was foreshore, the action may be brought at any time before the expiration of sixty years from the date of the accrual of the right of action, or of forty years from the date on which the land ceased to be foreshore, whichever period first expires. "Irish Statute of Limitations" <<https://www.irishstatutebook.ie/eli/1957/act/6/section/13/enacted/en/html#sec13>> s.e.t. 16.08.2024.

¹¹ **Schmid, Jörg/Hürlimann-Kaup, Bettina** (2022) *Sachenrecht*, 6. Auflage, Schulthess, § 855; **Liming, Wang** (2012) *Studies on the General Principles of Civil Law*, 2nd ed., People's University of China Press, p. 715. Despite their ancient age, acquisitive prescription and adverse possession are still controversial legal institutions. It has been claimed that neither legal certainty nor the punishment rationale seems strong enough to justify the acquisition of land by non-owners who knowingly occupied land. See **Marais, Ernst J.** (2011) *Acquisitive Prescription in View of the Property Clause* (LLD thesis), Stellenbosch University, p. 184.

Some jurisdictions, such as Türkiye, Switzerland, Taiwan, and Macao, accept the acquisition of movable and immovable property by prescription. However, the scope of the article is limited only to *the acquisition of immovable property* by prescription. This choice is made because immovable property is more contentious in literature¹².

In addition, the article examines the legal systems of Türkiye and China to illuminate the legal problems regarding acquisitive prescription and adverse possession and reach a basis for comparing the two legal systems. There are two primary reasons for the choice of these two jurisdictions. First, due to the recent earthquakes experienced in Türkiye, legal disputes related to this issue will increase, bringing the issue back onto the agenda¹³. Therefore, it is crucial to consider the provisions in a critical and comparative context. Second, since China has four different regimes (Mainland China, Hong Kong, Macao, and Taiwan) regarding acquisitive prescription, it is a perfect choice for examining the problem from all angles. Besides, each jurisdiction around the world addresses specific issues surrounding the acquisition of immovables through long-term use. To improve one's legal system, it is essential to look at other legal systems, study parallel developments in other countries, and make a comparison¹⁴. This comparison can help arrive at a more coherent moral, philosophical, and legal system on prescription.

The method used in the article must also be delved into. In the doctrine, there are different comparative research methods¹⁵. The article prefers *the func-*

¹² **Didin, Dilara Buket** (2024) "Kazandırıcı Zamanaşımı: Felsefi ve Ekonomik Bir Değerlendirme", Kadir Has Hukuk Fakültesi Dergisi, V. 12, I. 1, pp. 23-38, p. 26.

¹³ **Didin**, p. 36.

¹⁴ **Zweigert, Konrad/Kötz, Hein** (1996) Einführung in die Rechtsvergleichung auf dem Gebiete des Privatrechts, 3. neubearbeitete Auflage, Tübingen, J. C. B. Mohr (Paul Siebeck), § 2 I.

¹⁵ These are the functional method, the structural method, the analytical method, the law-in-context method, the historical method, and the common core method. These methods do not exclude each other; in other words, all these methods can be used in the same research. See **Hoecke, Mark Van** (2015) "Methodology of Comparative Legal Research", Law and Method, pp. 1-35, p. 8.

tional method since it is more interested in concrete problems and specific rules or institutions¹⁶. This method also fits with *micro-comparison*, which deals with individual legal institutions or legal problems¹⁷ like acquisitive prescription/adverse possession.

The article first examines Turkish legal acquisitive prescription law. The second chapter deals with the Chinese legal system. The concluding chapter includes a comparative analysis to identify similarities and differences in how the examined jurisdictions solve similar problems and find some common rationale for acquisitions through possession.

I. TURKISH LAW

In general, a property not enjoyed by its owner cannot be lost or acquired by someone else due to the passage of a certain period of time. The nature of the right of property and the principles governing land registry law prevent this. Nevertheless, the Turkish Civil Code (TCC) under Articles 712-714 (Articles 638-640 of the previous Civil Code No. 743) recognizes, albeit with some exceptions, that under certain conditions, a long period of possession may confer the right of property over movable and immovable property. This is called the acquisition of property by prescription¹⁸.

TCC accepts the acquisition of immovable property by prescription and regulates this as two separate institutions: ordinary (*olağan zamanaşımı*, *adi müruruzaman*)¹⁹, *kütük-içi zamanaşımı*²⁰, *sicil(e dayanan) zamanaşımı*²¹, *alelade*

¹⁶ The functional method has been supported by the assumption that, although rules and concepts may differ, most legal systems will ultimately solve legal problems in a similar way. In other words, the legal remedy may be the same, notwithstanding the different paths taken to reach that remedy. See **Hoecke**, p. 9.

¹⁷ **Zweigert/Kötz**, § 1 II.

¹⁸ **Akıpek/Akıntürk/Ateş**, p. 481; **Yağcıoğlu, Burcu** (2014) *Kazandırıcı Zamanaşımı*, Ankara, Adalet Yayınevi, p. 3. In some other laws, there are also regulations on the acquisition of immovable property through acquisitive prescription. The most important of these regulations are the provisions in the Cadastral Law No. 34022.

¹⁹ **Kılıçoğlu**, p. 352.

zamanaşımı²²) and extraordinary (olağanüstü zamanaşımı, sicil dışı kazanma²³, sicil dışı zamanaşımı²⁴).

A. ORDINARY PRESCRIPTION

This institution is regulated in Article 712 of the Turkish Civil Code: “Where a person has been wrongly recorded in the land register as the owner of immovable property, his or her ownership may no longer be challenged if he or she has been in possession of it in good faith, uninterruptedly and without challenge for ten years”. According to this provision, the legal requirements for the acquisition of immovable property by ordinary prescription can be classified as the requirements related to *the immovable property, the acquirer, and the possessor*.

1. Legal Requirements

The immovable property must be registered in the land registry²⁵. The immovable registered in the land registry may be a land or an independent and permanent right registered on a page²⁶. The ownership share in an immovable property may also be acquired by ordinary prescription²⁷. In addition, the im-

²⁰ **Hatemi, Hüseyin/Serozan, Rona/Arpacı, Abdulkadir** (1991) Eşya Hukuku. İstanbul, Filiz Kitabevi, p. 594.

²¹ **Oğuzman, Kemal/Seliçi, Özer/Oktay-Özdemir, Saibe** (2024) Eşya Hukuku. Güncellenmiş ve Eklèmeler Yapılmış 25. Bası'dan Tıpkı 26. Bası, İstanbul, Filiz Kitabevi, p. 487; **Akipek/Akıntürk/Ateş**, p. 481.

²² **Akkanat, Halil** (2011) “Taşınmaz Mülkiyetinin Olağan Zamanaşımı Yoluyla Kazanılması”, İstanbul Üniversitesi Hukuk Fakültesi Mecmuası, V. 62, I. (1-2), pp. 317-332, p. 319.

²³ **Akipek/Akıntürk/Ateş**, p. 489.

²⁴ **Oğuzman/Seliçi/Oktay-Özdemir**, p. 494.

²⁵ **Oğuzman/Seliçi/Oktay-Özdemir**, p. 488; **Akipek/Akıntürk/Ateş**, p. 483; **Hitz, Flurina** (2023) CHK - Handkommentar zum Schweizer Privatrecht, 4. Auflage, Schulthess Juristische Medien AG, Art. 663 N 5, 8; **Strebel, Lorenz** (2023) Basler Kommentar Zivilgesetzbuch II, Hrsg. Thomas Geiser&Stephan Wolf, 7. Auflage, Basel, Helbing Lichtenhahn Verlag, Art. 661 N. 9.

²⁶ **Nomer, Haluk N./Ergüne, Mehmet S.** (2023) Eşya Hukuku, Gözden Geçirilmiş, Genişletilmiş Onuncu Bası, İstanbul, On İki Levha Yayınları, p. 506; **Akipek/Akıntürk/Ateş**, p. 482; **Oğuzman/Seliçi/Oktay-Özdemir**, p. 488; **Sirmen, Lale A.** (2018) Eşya Hukuku, 6. Baskı, Ankara, Yetkin Yayınları, p. 360.

²⁷ **Akipek/Akıntürk/Ateş**, p. 482; **Oğuzman/Seliçi/Oktay-Özdemir**, p. 488; **Strebel**, Art. 661 N. 1.

movable registered in the land registry must not be public property²⁸. According to Article 999 of the TCC, the ownership of public property cannot be acquired by ordinary prescription²⁹.

The name of *the acquirer*, or the title of the acquirer if it is a legal entity³⁰, must be registered on the page of the immovable property without a valid legal reason (wrongful entry)³¹. However, it is accepted in the literature that heirs can also acquire ownership based on the wrongful entry made in the name of their heirs, even if they are not registered in their own names³².

²⁸ **Oğuzman/Seliçi/Oktay-Özdemir**, p. 489; **Akipek/Akantürk/Ateş**, p. 482; **Yağcıoğlu**, p. 42; **Gürsoy, Kemal T./Eren, Fikret/Cansel, Erol** (1984) *Türk Eşya Hukuku*, Gözden Geçirilmiş İkinci Baskı, Ankara, Ankara Üniversitesi Basımevi, p. 515. On the other hand, whether an acquisitive prescription of ownerless and public property can be considered is controversial under Swiss law. The Swiss Federal Supreme Court has left the question open about the ordinary acquisitive prescription but has answered it negatively concerning the extraordinary acquisitive prescription. See **Schmid/Hürlimann-Kaup**, § 856.

²⁹ **Strebel**, Art. 661 N. 7. See “Property of state forests shall be non-transferable. State forests shall be managed and operated by the State by the law. These forests cannot be acquired by prescription.” See Turkish Court of Cassation General Assembly of Civil Chambers, E. 2019/46, K. 2022/309, 15.03.2022.

³⁰ Article 683 of the Civil Code does not differentiate between real and legal entities in terms of ownership. Again, in the provisions of the Civil Code regulating the acquisition of immovable property by acquisitive prescription, no distinction is made between real and legal entities in terms of benefiting from both ordinary acquisitive prescription and extraordinary acquisitive prescription. Since legal entities have the same legal capacity as natural persons to the extent their qualifications allow, and therefore, they can benefit from property rights as a rule. In this respect, it should be accepted that legal entities, like real persons, can also acquire immovable property on the basis of acquisitive prescription. See **Öncü, Özge** (2005) “Tüzel Kişilerin Kazandırıcı Zamanaşımı Yoluyla Taşınmaz Edinmesi”, *Dokuz Eylül Üniversitesi Hukuk Fakültesi Dergisi*, V. 7, pp. 239-282; **Oğuzman/Seliçi/Oktay-Özdemir**, p. 489; **Strebel**, Art. 661 N. 6; **Hitz**, Art. 663 N 7.

³¹ A wrongful entry is a registration that exists only in form, does not reflect the material and real situation and does not bind the parties. By this nature, it does not change the property status between the parties. See **Akipek/Akantürk/Ateş**, p. 483; **Oğuzman/Seliçi/Oktay-Özdemir**, p. 489; **Gürsoy/Eren/Cansel**, p. 514; **Strebel**, Art. 661 N. 9; **Hitz**, Art. 663 N 8; **Meier-Hayoz, Arthur** (1974) *Berner Kommentar Kommentar Zum Schweizerischen Privatrecht Band IV Das Sachenrecht*, Bern, Verlag Stämpfli & Cie AG, Art. 661 N 13.

³² **Strebel**, Art. 661 N. 9; **Hitz**, Art. 663 N 8. The lack of good faith on the part of the heir does not prevent his heirs from acquiring a real estate inherited from him in good faith. However,

The possessor should be the person who appears as the owner in the land registry. It is also possible for the possession to continue indirectly. For example, in the case of a lease, the secondary possession of the lessee does not prevent the person who appears as the owner in the entry from acquiring ownership³³. Another condition is that the person who appears as the owner in the land registry must be in *good faith*. To be deemed to be in *good faith*, he/she must not know that the existing entry in his/her name is wrongful, even though he/she has made all the effort expected of him/her. This good faith must continue throughout the entire prescription period³⁴. Possession must be without litigation. What is meant by the litigation here is the lawsuit for correction of the registration in the land registry to be filed by the original owner³⁵. However, in the event that the original owner or a third party notifies or reports the real situation, or in the event that the possessor learns of the irregularity of the existing entry in his/her name in any way, the good faith will be extinguished³⁶. Possession must have continued for ten years without interruption³⁷. Continued uninterruptedly

in this case, the acquisitive prescription starts to run as of the heir's death. In this case, the heirs cannot add the period of possession of the heirs to theirs based on Art. 996. See **Akipek, Jale Gürol** (1953) "Gayrimenkul Mülkiyet Hakkının Adı Zaman Aşımıyla İktisabı Üzerinde Bir İnceleme", Ankara Üniversitesi Hukuk Fakültesi Dergisi, V. 10, I. 1, pp. 577-612, p. 603. Entry based on inheritance shall take effect at the time of death and the possession of the heirs during the period between the death of the heir and the entry of the title in their names shall also be taken into consideration. However, unless the entry is made in the name of the heirs, they cannot benefit from the acquisitive prescription. See **Oğuzman/Seliçi/Oktay-Özdemir**, p. 492. For the contrary view, see **Sungurbey, İsmet** (1956) *İsviçre Türk Hukukuna Göre İktisabı Müruruzaman*, İstanbul, İstanbul Üniversitesi Yayınları.

³³ **Akipek/Akıntürk/Ateş**, p. 483; **Sungurbey**, p. 121; **Hitz**, Art. 663 N 9.

³⁴ **Akipek/Akıntürk/Ateş**, p. 485; **Oğuzman/Seliçi/Oktay-Özdemir**, p. 490; **Hitz**, Art. 663 N 11. Since good faith is presumed, the opposing party must prove that the possessor was in bad faith at the time of acquisition or during the term of the possession or that his good faith cannot be protected because he inexcusably failed to pay the attention that may be required of him under the specific circumstances. See, **Strebel**, Art. 661 N. 14.

³⁵ **Akipek/Akıntürk/Ateş**, p. 486; **Oğuzman/Seliçi/Oktay-Özdemir**, p. 490; **Strebel**, Art. 661 N. 13.

³⁶ **Akipek/Akıntürk/Ateş**, p. 486; **Oğuzman/Seliçi/Oktay-Özdemir**, p. 491; **Strebel**, Art. 661 N. 14.

³⁷ **Oğuzman/Seliçi/Oktay-Özdemir**, p. 490; **Hitz**, Art. 663 N 10; **Meier-Hayoz**, Art. 661 N. 19. As generally agreed, the entry in the land registry and possession must have lasted ten years. In oth-

means that the possession must not have been lost during the prescription period. If it has been proved that his possession has continued without interruption and dispute for ten years, the possessor will be declared the owner of the real property. Tax bills, witnesses, avowal of the ex-owners, and expert witness can be used as evidence. If the possession is lost and recovered, a new prescription period will begin to run. Anyone wishing to acquire property must be exercising actual control over the property and have the will to own the property as its owner³⁸. Lastly, possession must be personal possession, i.e. the possessor must have the will to possess the thing as his property³⁹. It is presumed that the possession continued between the beginning and ending of the possession period. Anyone claiming otherwise must prove his/her claim⁴⁰.

According to article 996 of TCC, the possessor who has the right to benefit from the acquisitive prescription may add the period of possession of the person who transferred the possession to him. There are two basic conditions for the periods of possession to be added to each other. Firstly, the previous possessor must have the right to benefit from the acquisitive prescription⁴¹. Secondly, the possession must have been acquired via transfer⁴².

The ten-year prescription period begins to run from the date someone other than the rightful owner has established the actual control over the immovable

er words, the prescription shall be deemed realized only after ten years of possession based on a ten-year entry in the land registry. See **Akipek/Akıntürk/Ateş**, p. 486, **Oğuzman/Seliçi/Oktay-Özdemir**, pp. 491, 492; **Haab, Robert/Simonius, August/Scherrer, Werner/Zobl, Dieter** (1977) *Kommentar zum Schweizerischen Zivilgesetzbuch, Das Sachenrecht. ZK - Zürcher Kommentar Band/Nr. IV/1*, Schulthess Polygraphischer Verlag AG, Art. 661, N 13.

³⁸ **Akipek/Akıntürk/Ateş**, p. 484; **Hitz**, Art. 663 N 9.

³⁹ **Akipek/Akıntürk/Ateş**, p. 484; **Meier-Hayoz**, Art. 661 N 17.

⁴⁰ **Akipek/Akıntürk/Ateş**, p. 485; **Hitz**, Art. 663 N 10.

⁴¹ See Turkish Court of Cassation General Assembly of Civil Chambers, E. 2010/627, K. 2010/649, 15.12.2010.; 16. Civil Chamber, E. 2014/3992, K. 2014/6486, 21.05.2014. <<https://karararama.yargitay.gov.tr/>> s.e.t. 20.08.2024.; **Hitz**, Art. 663 N 10.

⁴² **Antalya, Gökhan** (2019) "Zilyetlik", Gökhan Antalya (Editor), *Eşya Hukuku, Genişletilmiş Üçüncü Baskı*, Ankara, Seçkin, p. 239; **Reisoğlu, Sefa** (1977) *Türk Eşya Hukuku Cilt I, Beşinci Bası*, Ankara, Ankara Üniversitesi Basımevi, p. 87.

property. However, the earliest date is the date of the wrongful entry which was made in the land register⁴³. The ten-year period starts to run upon the combination of both conditions of wrongful entry and possession. If the acquisition of possession is after the wrongful entry, the prescription period shall commence to run from the date of acquisition of possession; if the possession is acquired before the wrongful entry, the prescription period shall commence from the date of entry⁴⁴. The rules for computing, interrupting, and suspending of the prescription period are stipulated in Article 714 of the TCC, by referring to the Code of Obligations.

2. Legal Consequences

Upon the completion of the prescription period, the wrongful entry shall be corrected, the possessor in whose name the wrongful entry is registered shall acquire ownership, and the person who had ownership until then but was not shown as the owner in the entry shall lose his/her right of ownership⁴⁵. Acquisition by ordinary prescription is accepted as the original form of acquisition in the doctrine. It occurs *ipso iure*; no legal adjudication of ownership is required. There is also no requirement of a new entry in the land register, as the previous entry was not wrong in itself, it merely lacked a valid material basis⁴⁶.

Ordinary acquisitive prescription is effective from the time of entry in the land registration. In this respect, the existing wrongful entry in the land registry shall take effect as if it had been valid from the beginning upon the realization of the prescription period. The limited rights in rem established on the immovable property before the date of the start of the prescription period shall continue to exist⁴⁷. The registered valid owner can also invoke acquisitive prescription to

⁴³ **Strebel**, Art. 661 N. 11; **Hitz**, Art. 663 N 10.

⁴⁴ **Haab/Simonius/Scherrer/Zobl**, Art. 663, N 13.

⁴⁵ **Sirmen** (2018) p. 363; **Aybay, Aydın/Hatemi, Hüseyin** (2014) *Eşya Hukuku*, Gözden Geçirilmiş 4. Baskı, İstanbul, Vedat Kitapçılık, p. 196.

⁴⁶ **Oğuzman/Seliçi/Oktay-Özdemir**, p. 493; **Akıpek/Akıntürk/Ateş**, p. 488; **Yağcıoğlu**, p. 68; **Meier-Hayoz**, Art. 661 N 27.

⁴⁷ **Akıpek/Akıntürk/Ateş**, p. 488; **Schmid/Hürlimann-Kaup**, § 859.

prove his right, which has the advantage for him that he does not need to go into the material reasons for the creation of his right⁴⁸.

The property right acquired this way can no longer be contested. Neither a lawsuit for rectification of the land registry nor an action for appropriation can be filed against this person. Because, upon the fulfillment of the requirements, the former owner loses the right of ownership on the immovable property in question, and the possessor, on whose behalf there is a wrongful entry in the land registry, becomes the real owner⁴⁹.

B. EXTRAORDINARY PRESCRIPTION

The extraordinary prescription is regulated in Article 713 of the TCC as follows: (1) Where a person has been in possession of immovable property not recorded in the land register uninterruptedly and without challenge for twenty years as if it were his or her property, he or she has the right to be registered as the owner. (2) The same right applies on the same conditions to a person in possession of immovable property whose owner is not evident from the land register or who was presumed dead at the beginning of the 20-year acquisitive prescription period. (3) The deed registration lawsuit shall be filed against the Treasury and the relevant public legal entities or, if any, the heirs of the person who appears as the owner in the title deed. (4) The subject matter of the lawsuit shall be announced by the court at least three times in a newspaper and an internet news website, as well as in the place where the immovable is located, by appropriate means and at appropriate intervals. (5) If no objection is filed within three months starting from the last announcement, claiming that the above conditions are not met, or if the objection is not deemed appropriate and the claim of the plaintiff is proven, the judge shall decide on registration. Ownership shall be acquired as soon as the conditions set forth in the first paragraph are met. (6) Defendants and objectors may request title registration in their own names in the same lawsuit. (7) The decision shall specify the nature, location, boundaries and area of the immovable property requested to be registered, and

⁴⁸ Meier-Hayoz, Art. 661 N 27.

⁴⁹ Yağcıoğlu, p. 68.

a sketch of the immovable property containing technical information prepared by experts shall be attached to the decision. (8) The provisions of special laws are reserved.

Article 713 is not the only provision regulating this issue. Acquisition of ownership of immovable property by prescription is regulated in Cadastral Law No. 3402 and Law No. 1515 dated 02.06.1929. Article 713 is the general provision applicable to the acquisition of the ownership of immovable property registered and unregistered to the title deed by prescription⁵⁰. The article analyzes only this provision. According to this provision, requirements related to *the immovable property* and *the possessor* should be met and *the formal conditions* stipulated in the law must be fulfilled.

1. Legal Requirements

As can be understood from the wording of the Article, the ownership of three types of immovable property can be acquired by extraordinary prescription: (1) The immovable property must be an immovable property, (1) *without an entry in the land registry*, (2) *whose ownership is not clear from the entry*, (3) *whose ownership belongs to a person who has been declared absent*. The common feature of all these immovable properties is that it is unclear from the land registry who the owners are. In other words, the ownership of immovable properties whose owner is known through the entry cannot be acquired by extraordinary prescription⁵¹. As in ordinary acquisitive prescription, immovable properties that cannot be subject to private ownership cannot be acquired by extraordinary acquisitive prescription⁵².

⁵⁰ Akipek/Akıntürk/Ateş, p. 491.

⁵¹ Akipek/Akıntürk/Ateş, p. 491; Oğuzman/Seliçi/Oktay-Özdemir, p. 496; Düzceer, Ali Rıza (1984) Kazandırıcı Zamanaşımıyla Taşınmaz İktisabı, Ankara, Yetkin, p. 7.

⁵² Oğuzman/Seliçi/Oktay-Özdemir, p. 502; Oktay, Saibe (1980) Türk Hukukunda Tapuda Kayıtlı Olmayan Taşınmazların Zamanaşımı ile Kazanılması, İstanbul, Kazancı, p. 26; Gürsoy/Eren/Cansel, p. 524; Hatemi/Serozan/Arpacı, p. 602. “Since an immovable that has acquired the status of public property cannot be subject to private ownership, even if registered in the land registry...” See 20. Civil Chamber, E. 2013/10102, K. 2014/4086, 03.04.2014.; 20. Civil Chamber, E. 2010/10157, K. 2010/11097, 23.09.2010.

- (1) Immovable property without an entry in the land registry is either immovable property that has not yet been owned⁵³ or immovable property that is owned but has not been entered into the land registry⁵⁴. The prescription also applies to immovable property that is in the state's private ownership and is not entered in the land registry⁵⁵.
- (2) Failure to determine the owner from the entry in the land registry; it is impossible to extract the necessary information from the land registry to know who is the owner of the immovable property⁵⁶. It may be concluded that the owner cannot be identified based on the information and documents in the land registry in cases where anyone who pays due attention cannot understand who the owner is, and in cases such as the owner column is left blank, the owner's name is ambiguous and insufficient, the owner's name is erased and the new one is not written⁵⁷. However, even if only the first or surname is entered into the owner column in the land registry, if it is understood who is meant by this name and thus to whom the immovable property belongs, it cannot be accepted that the condition in the Law has been fulfilled. However, in cases where the name of the owner has been erased, the name of the new owner has not been written, and the owner cannot be determined according to the registry, it is mentioned that it cannot be understood who the owner is, and in this case, the existence of the element in Article 713/2 of the TCC should be accepted, and a decision should be made

⁵³ “...extraordinary acquisitive prescription is applicable, for immovable properties that were previously suitable for agriculture but were not entered in the land registry...” See Court of Cassation Great General Assembly on the Unification of Judgments, E. 2004/1, K. 2010/1, 30.4.2010.

⁵⁴ **Akipek/Akıntürk/Ateş**, p. 492.

⁵⁵ Court of Cassation Great General Assembly on the Unification of Judgments, 6/240, 19.6.1957.; Turkish Court of Cassation General Assembly of Civil Chambers, E. 2005/512, K. 2005/535, 28.09.2005.

⁵⁶ Turkish Court of Cassation General Assembly of Civil Chambers, E. 1991/8-51, K. 194, 10.4.1991.

⁵⁷ Turkish Court of Cassation General Assembly of Civil Chambers, E. 2020/686, K. 2021/334, 23.3.2021.

according to the evidence collected by investigating other acquisition requirements⁵⁸.

- (3) Initially, Article 713/II made a binary distinction with respect to properties “whose owner... deceased twenty years ago or whose absence has been declared”. In this version of the article, which had been in practice for a long time, if the possession continued for twenty years and the owner of the immovable property deceased twenty years ago, the possessor could request himself to be entered into the land registry as the owner. The existence of the heirs of the deceased owner was not important in the application of the article. What was important was that the heirs who acquired an immovable belonging to the inheritance without entry into the land registry should not have been made declaratory entry⁵⁹. However, the phrase “deceased” in the article was annulled by the ruling of the Turkish Constitutional Court, contrary to Articles 2⁶⁰ and 35⁶¹ of the Turkish Constitution:

In the event of the death of the owner of an immovable which is entered in the land registry, the owner of this immovable is the heir. The heirs acquire the right of ownership on this immovable property without requiring entry into the land registry upon the heir’s death as per the law. One of the general principles of law is that the right of property is ‘timeless’; in other words, the right of property is not subject to limitation. Therefore, the non-use of the rights granted by the Civil Code to the heirs of an immovable property owner by the right holders for twenty years does not mean that the legal relationship be-

⁵⁸ Turkish Court of Cassation General Assembly of Civil Chambers, E. 2021/757, K. 2021/1361, 9.11.2021.

⁵⁹ **Akipek/Akıntürk/Ateş**, p. 494.

⁶⁰ “The Republic of Turkey is a democratic, secular and social state governed by rule of law, within the notions of public peace, national solidarity and justice, respecting human rights, loyal to the nationalism of Atatürk, and based on the fundamental tenets set forth in the preamble.” See Constitution of the Republic of Turkey (As amended on July 23, 1995; Act No. 4121), <https://www.anayasa.gov.tr/media/7258/anayasa_eng.pdf> s.e.t. 26.08.2024.

⁶¹ 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.” See Constitution of the Republic of Turkey (As amended on July 23, 1995; Act No. 4121), fn 59.

tween them and the immovable property has ended, even if it was shown that the relationship between them and the immovable property has ceased. The continuation of the property right of the heirs includes the right to use the immovable and the right not to use it. In the face of the absoluteness of the right of property and the publicity of the land registry, allowing the possessor to unilaterally eliminate the right of ownership belonging to the heirs by not recognizing that it violates the principles of acquired rights and legal security as well as the right of property⁶².

After this annulment ruling, only “immovables entered in the name of the person whose absence was decided twenty years ago” is to be subject to extraordinary acquisitive prescription. Accordingly, upon the court’s ruling of absenteeism, the inheritance of the absent person will be opened, and the estate will pass to the heirs. If the absent person has no heirs, if the identity of the heirs is unknown, and if the heirs have not made a declaratory entry, the article shall apply⁶³.

In the event of a declaration of absence, the question of when the extraordinary prescription period starts to run for an immovable property entered in the name of the absentee is controversial⁶⁴. According to the wording of Article 713/2, it should start from the date of the court’s declaration of absence. This period should begin from the date of finalization of the court’s ruling. However, Article 35/2 of the TCC states that the declaration of absence shall be effective from the date of the peril of death or the last heard from⁶⁵. Nevertheless, both the Turkish Court of Cassation⁶⁶ and the doctrine favors the view based on the wording of 713/2⁶⁷.

⁶² Turkish Constitutional Court, E. 2009/58 K. 2011/52, 17.3.2011., Official Gazette, 17.03.2011, s. 2803.

⁶³ **Akıpek/Akıntürk/Ateş**, p. 496. For a critique of the Constitutional Court’s ruling, see, **Yağcıoğlu**, p. 109; **Aybay/Hatemi**, p. 198.

⁶⁴ **Özkaya, Erarslan** (2012) *Özel Hukukumuzda Zamanaşımı ve Hak Düşürücü Süreler*, Ankara, Seçkin, p. 47.

⁶⁵ **Oğuzman/Seliçi/Oktay-Özdemir**, p. 499; **Sapanoğlu, Süleyman** (2009) *Tapulu Taşınmaz Mülkiyetinin Tapu Dışı Yollardan Kazanılması*, 2. Baskı, Ankara, Adalet Yayınevi, p. 85.

⁶⁶ 8. Civil Chamber, E. 2010/6205, K. 2011/7505, 22.12.2011.; 8. Civil Chamber, E. 2008/2442; K. 2008/4083, 15.09.2008.; 8. Civil Chamber, E. 2008/5423, K. 2009/243, 26.01.2009.

⁶⁷ **Kılıçoğlu**, p. 361; **Strebel**, Art. 662, N. 15; **Sirmen** (2018) p. 368.

Possession must not be contested. It must have been continuous for twenty years. Finally, it must be personal, i.e., the possessor must have the will to possess the thing as his own⁶⁸. Unlike ordinary acquisitive prescription, the extraordinary acquisitive prescription requires *a lawsuit and a court ruling*. The possessor requests to be registered as the owner in the land registry and requests the cancellation of the entry and deed registration that was in the previous owner's name⁶⁹.

The deed registration lawsuit shall be filed against the Treasury and the relevant public legal entities or, if any, the heirs of the person who appears as the owner in the title deed. The subject matter of the lawsuit shall be announced by the court at least three times in a newspaper and an internet news website, as well as in the place where the immovable is located, by appropriate means and at proper intervals. If no objection is filed within three months, starting from the last announcement, claiming that the above conditions are not met, or if the objection is not deemed appropriate and the plaintiff's claim is proven, the judge shall decide on registration⁷⁰. The objection lawsuit is not an action of appropriation⁷¹. To win the lawsuit, the plaintiff must prove that the conditions of the extraordinary acquisitive prescription are not met⁷².

2. Legal Consequences

In the literature, it is controversial whether the acquisition by way of extraordinary prescription is retroactive from the commencement of the prescription period. One view is that from the commencement of the prescription peri-

⁶⁸ The explanations regarding the ordinary acquisitive prescription shall also apply here. Unlike ordinary acquisitive prescription, good faith is not required in extraordinary acquisitive prescription.

⁶⁹ **Kılıçoğlu**, p. 362; **Akipek/Akıntürk/Ateş**, p. 500.

⁷⁰ The deed registration is not constitutive but declaratory. See **Kılıçoğlu**, p. 365; **Gürsoy/Eren/Cansel**, p. 545, **Eren, Fikret** (2016) *Mülkiyet Hukuku*, Gözden Geçirilmiş 4. Baskı, Ankara, Yetkin Yayınları, p. 306; **Esener, Turhan/Güven, Kudret** (2008) *Eşya Hukuku*, Genişletilmiş 4. Baskı, Ankara Yetkin Yayınları, p. 210.

⁷¹ **Kılıçoğlu**, p. 365; **Gürsoy/Eren/Cansel**, p. 543.

⁷² **Oğuzman/Seliçi/Oktay-Özdemir**, p. 521; **Yağcıoğlu**, p. 144; **Gürsoy/Eren/Cansel**, p. 540.

od, ownership is deemed to have been acquired. The registration ruling issued by the court in the lawsuit filed and the finalization of the ruling shall have a retroactive effect⁷³. However, this view is incorrect according to Oğuzman/Seliçi/Oktay-Özdemir and Aybay/Hatemi⁷⁴. Likewise, it is understood from a decision of the Turkish Court of Cassation that it does not accept retroactivity⁷⁵.

Acquisition of property by extraordinary prescription is an original acquisition⁷⁶. The new owner's right of ownership arises regardless of the previous owner's right of ownership. In addition, the property right of the previous owner on the immovable property is terminated⁷⁷. In this respect, the acquisition of immovable property through extraordinary acquisitive prescription is one of the optional ways in which the property right is acquired outside the land registry⁷⁸. In extraordinary prescription, ownership is acquired with the limited real rights established on the immovable property⁷⁹.

II. CHINESE LAW

China is a composite country comprising mainland China, Hong Kong, Macao, and Taiwan, with different social and legal systems in these regions. Mainland China belongs to the socialist legal system, Hong Kong belongs to the Anglo-American legal system, and Macao and Taiwan belong to the civil law system. The legal system of the Hong Kong region originates from the United

⁷³ Akipek/Akıntürk/Ateş, p. 503; Sungurbey, p. 84; Oktay, p. 134; Gürsoy/Eren/Cansel, p. 546; Sirmen (2018) p. 363; Esener/Güven, p. 206; Ertaş, Şeref (2021) Eşya Hukuku, Gözden Geçirilmiş ve Genişletilmiş 16. Baskı, İzmir, Barış Yayınları, p. 349.

⁷⁴ Aybay/Hatemi, p. 200.

⁷⁵ 3. Civil Chamber, 373/400, 15.01.1952. (TİK. 1953, 99). See Karahasan, Mustafa Reşit (1977) Türk Medeni Kanunu Eşya Hukuku, 2. Cilt, Ankara Sevinç Matbaası.

⁷⁶ Oğuzman/Seliçi/Oktay-Özdemir, p. 524; Akipek/Akıntürk/Ateş, p. 503; Yağcıoğlu, p. 153.

⁷⁷ Oktay, p. 136.

⁷⁸ Yağcıoğlu, p. 153.

⁷⁹ Akipek/Akıntürk/Ateş, p. 503; Oğuzman/Seliçi/Oktay-Özdemir, p. 524; Sirmen, Lale A. (2022) Tablolara Eşya Hukuku, Ankara, Yetkin Yayınları, p. 113.

Kingdom, and the legal system of the Macao region is rooted in Portugal. In contrast, the legal systems of mainland China and Taiwan have the same origin. After the return of Hong Kong in 1997 and Macao in 1999, China established the legal framework of “one country, two systems” rooted in the socialist legal system implemented in mainland China. This framework ensures that the original legal systems of Hong Kong and Macao remain largely intact while granting these regions a high degree of autonomy. Such autonomy enables Hong Kong and Macao to function effectively within their existing social and legal systems.

Under this legal framework, the Hong Kong and Macao regions exercise executive, legislative, and independent judicial powers, including the power of final adjudication⁸⁰. Although Hong Kong and Macao’s legal systems differ from mainland China’s, they are integral to the broader Chinese legal system. At the same time, the geographical proximity of the various regions of China has resulted in frequent exchanges of people who speak and write the same language. The acquisitive prescription system can exist between different areas of a country, but each content is different, making Chinese legal systems a very important research sample.

In the legal system of mainland China, as a socialist country, property rights refer to the rights of a holder to directly dominate and exclusively control specific objects by the law. These rights encompass ownership, usufructuary rights, and security rights. Property rights are distinguished by three key characteristics: direct control, exclusivity, and legal conformity. The Civil Code of the People’s Republic of China dedicates a specific “Property Rights” section to regulate the framework and provisions governing such rights comprehensively⁸¹. The acquisitive prescription system represents a significant mechanism within property law theory for acquiring rights. It influences not only ownership but also

⁸⁰ Basic Law of the Hong Kong Special Administrative Region of the People’s Republic of China (中华人民共和国香港特别行政区基本法) Art 2: The National People’s Congress authorizes the Hong Kong Special Administrative Region to exercise a high degree of autonomy and enjoy executive, legislative and independent judicial power, including that of final Adjudication, by the provisions of this Law. (The same article in Macao).

⁸¹ Civil Code of the People’s Republic of China (中华人民共和国民法典) Book Two.

the possession and use of property, making it a topic of considerable research importance in Chinese legal studies.

This chapter covers Chinese law on acquisitive prescription and is divided into four chapters. In the first chapter, the Qing She System in ancient China has been examined. The second chapter sheds light on the development of the acquisitive prescription system of mainland China. The third chapter describes the adverse possession system in the Hong Kong region, which inherited the Common Law System tradition. The last chapter describes the content of the acquisitive prescription system in Macao and Taiwan; both regions belong to the civil law system, and both have acquisitive prescription system provisions.

A. THE QING SHE SYSTEM IN ANCIENT CHINA

Like the Western acquisitive prescription system, the “Qing She” system played a significant role in ancient China. In ancient China, regime changes were always achieved through war. War inevitably led to the exile of a large number of landlords, resulting in a large number of abandoned fields and wastelands. The generations before the Song Dynasty mostly adopted declaring abandoned fields and wasteland state-owned at the beginning of the country’s founding, dividing them into fiefs, rewarding them, or distributing them to farmers to operate according to the Land Equalization system⁸². The Song Dynasty changed the practice of the previous dynasties of confiscating abandoned fields and wastelands and returning them to state ownership and recognized and protected the rights and interests of existing cultivators of the land. The Song Dynasty established the “Qing She” system to balance the conflicting interests between the cultivators of abandoned fields and the original owners.

The ordinance was issued in the 2nd year of Sejong Xian De in the Later Zhou Dynasty to allow others to possess “escaped families and abandoned

⁸² **Hao, Liu** (刘浩) (2020) “Lun Tangsong Qingshe Zhidu de Shiyong Duixiang (论唐宋请射制度的适用对象) On the Applicable Objects of the Tang and Song Dynasties Qing She System”, *Xueshu Yanjiu* (学术研究), No. 5, p. 68.

lands” called “Qing She”. The possessors could have half ownership in three years and a full one in five years upon continuous possession. The possession period in the Northern border areas was fifteen years. The Two Song Dynasties continued the method from the Late Zhou Dynasty; the specific durations of the prescription had been changed frequently, though. In the early years of Tiansheng of Songrenzong, this ordinance was issued: “When people had left their lands for accumulative ten years, others would cultivate their lands, and the possessors of the abandoned lands could just pay half amount of two types of taxes after three-year cultivation”⁸³. It also stipulated: “Refugees are demanded to restore their production in 100 days, the remit taxes will scale down to 20% of the original ones in five years. And if they fail to restore production in a specified time, others will take their lands to cultivate”⁸⁴.

The purpose of the “Qing She” system was to end the subject-object separation of land rights from the control of the original owner, stabilize social relations, promote the effective use of abandoned land, accelerate the circulation of land rights, and promote the rapid recovery and development of the feudal economy.

There are similarities between the “Qing She” system and the acquisitive prescription in traditional civil laws in various European countries. Both recognized that non-obligees could acquire corresponding rights upon possessing others’ properties for certain terms. Both share similar value orientations to some extent, such as making the best use of everything and ending the unstable state of legal relationships, etc.

⁸³ **Qiuyun, Chen** (陈秋云) (2011) “Songdai Ziyu Diqun Fazhi de Lishi Yiyi yu Dangdai Qishi (宋代自由地权法制的历史意义与当代启示) The Historical Significance and Contemporary Revelation of Song Dynasty Freehold Legal System of the Land”, *Fashang Yanjiu (法商研究)*, Legal and Business Studies, No. 2, p. 154-155.

⁸⁴ **Yang, Wei** (2011) “The Preliminary Discussion on the Historical Comparison between Chinese and Western Acquisitive Prescription Systems”, *Canadian Social Science*, V. 7, No. 1, pp. 1-6, p. 4.

B. DEVELOPMENT OF ACQUISITIVE PRESCRIPTION IN MAINLAND CHINA

The ancient “Qing She” system implemented in China during the Zhou and Song Dynasties resembles the acquisitive prescription system. The immediate cause of the system was to solve the social problem of “fleeing households abandoning their land” caused by the long period of war and turmoil⁸⁵. During the Song Dynasty, the system became an important form of acquiring land ownership, contributing to agricultural production recovery and government tax revenue guarantee. At the same time, the system filled the “rights vacuum”, making it possible to properly dispose of land whose transactions were ineffective due to strict formalism or whose ownership was unknown due to war⁸⁶. The Draft Civil Code of the Great Qing in the Qing Dynasty referred to Japanese civil code provisions of acquisitive prescription. Still, the draft was not published and implemented, and the Qing government collapsed. Until the Republican Era of China period, the Civil Code of the Republic of China was so that the acquisitive prescription in China had systematic provisions and practice before 1949. The establishment of the new China did not set up an acquisitive prescription system.

In mainland China, academics have never stopped discussing the acquisitive prescription system, which is roughly divided into three stages: at the beginning of the founding of New China, some scholars advocated that the acquisitive prescription system should be established in socialist China out of the need for practice⁸⁷. Subsequently, in the 1980s and 1990s, there were heated debates

⁸⁵ **Xiaoxin, Ye** (叶孝信) (1993) *Zhongguo Minfashi (中国民法史) A History of Chinese Civil Law*, Shanghai Renmin Chubanshe (上海人民出版社) Shanghai, Shanghai People’s Publishing House, p. 335-337.

⁸⁶ See **Wei, Yang** (杨巍) (2015) “Lixiang zhi Men yu Xianshi zhi Zhang: Woguo Buying Jianli Qvde Shixiao Zhidu (理想之门与现实之障：我国不应建立取得时效制度), Ideal Door and Realistic Barrier: China Should Not Establish an Acquisitive Prescription System”, *Hubei Xingzheng Xueyuan Xuebao (湖北行政学院学报) Journal of Hubei Administration Institute*, I. 2, pp. 82-85, p. 83.

⁸⁷ **Dingfu, Zhang** (张定夫) (1956) “Shixiao Zhidu zhong Qvde Shixiao Wenti (时效制度中取得时效问题) The Problem of Acquisitive Prescription in the prescription system”, *Faxue Yanjiu (法学研究) Studies in Law*, No. 2, p. 34.

on whether to establish such a system in academia, with divergent views, especially in the 1980s due to the more profound influence of the Soviet Union's Civil Code. The opposing opinion was still the mainstream⁸⁸. This perspective arises from scholars who argue that the system of acquisitive prescription conflicts with the Confucian philosophy of acquiring wealth through diligent labor. They contend that allowing ownership to be acquired through passive possession alone risks endorsing a form of unearned gain. However, into the 21st century, in the case of obtaining more academic attention, and the broadening of the research environment, the acquisitive prescription system gradually become the mainstream opinion, and the majority of scholars affirmed the draft of the "Civil Code" of the National People's Congress in 2002, there is a section of the provisions of this system.

Academics argued more about the specific application of the acquisitive prescription system until the process of the draft civil code; there are still scholars who repeatedly proposed that it is necessary to provide for the acquisitive prescription system in the civil code⁸⁹. However, in 2007, the Property Law still did not provide for the statute of acquisitive prescription system; in 2021, the People's Republic of China Civil Code promulgated an acquisitive prescription system is still not realized in the current Civil Code which only provides for the statute of extinctive prescription, there is no provision about acquisitive prescription system, but in the legislative⁹⁰ and judicial cases the sporadic statute of acquisitive prescription can still be seen in practice.

⁸⁸ See **Tian, Yin** (尹田) (2005) "Lun Wuquanfa Guiding Qude Shixiao de Biyaoxing (论物权法规定取得时效的必要性) On the Necessity of Providing for the Acquisitive Prescription in the Property Law", Faxue (法学) Jurisprudence, No. 8, p. 10.

⁸⁹ **Shiyang, Wen** (温世扬) (2018) "Minfadian Ying Ruhe Guiding Suoyouquan Wuquanfa Suoyouquanbian zhi Wanshan(民法典应如何规定所有权 物权法所有权编之完善) How the Civil Code Should Provide for Ownership The Improvement of the Ownership Part of the Property Law", Faxue Pinglun (法学评论) Law Review, No. 2, pp. 128-137, p. 135.

⁹⁰ Yuan Guojia Tudi Guanliju Guanyu Yinfa Queding Tudi Suoyouquan he Shiyongquan de Ruogan Guiding de Tongzhi (原国家土地管理局关于印发《确定土地所有权和使用权的

In Mainland China, the Civil Code of the People's Republic of China, implemented in 2021, does not explicitly provide for the acquisitive prescription system, and there have always been both supportive and opposing viewpoints in the academic community as to whether the system should be retained or abolished. According to the supporters, the prescription system can effectively utilize the land and solve the problem of the existing rural land ownership in Mainland China, which cannot be confirmed⁹¹. Opponents argue that the immovable property registration system in Mainland China is sufficient to solve the current land problems in China and that the acquisitive prescription system may promote the idea of getting something for nothing, contrary to the Chinese people's traditional virtues⁹². Therefore, legislators in Mainland China are cautious about the acquisitive prescription system.

C. ADVERSE POSSESSION IN HONG KONG

Adverse possession is the process by which a person can acquire title to someone else's land by continuously occupying it in a way inconsistent with the right of its owner. Suppose the person in adverse possession (also referred to as

若干规定》的通知) Circular of the former State Land Administration on the Issuance of Certain Provisions on Determining Land Ownership and Right of Use, (promulgate March. 11 1995, effect May. 1 1995), Art 21: Where a farmers' collective has continuously used land owned by other farmers' collectives for twenty years, the land shall be deemed to be owned by the current user; where it has been continuously used for less than twenty years or where it has constantly been used for twenty years but before the expiry of that period the owner has offered restitution to the current user or the relevant department, the People's governments at or above the county level shall determine land ownership on a case-by-case basis. If the land has been used continuously for less than 20 years, or if the owner, despite having used it for less than 20 years, has submitted a request to the current user or the relevant authorities for its return before the expiry of the 20 years, the people's government at or above the county level shall determine the ownership of the land in the light of the specific circumstances.

⁹¹ **Liming, Wang** (王利明) (2013) *Wuquanfa Yanjiu Disanban Shangjuan* (物权法研究 第三版上卷), Studies in Property Law, Third Edition, Volume 1, Beijing, Zhongguo Renmin Daxue Chubanshe (中国人民大学出版社) Renmin University of China Press, p. 201.

⁹² **Zaiquan, Xie** (谢在全)/**Shang, Minfa Wuquanlun** (民法物权论 上) (1999) *Theory of Property in Civil Law*, Beijing, Zhongguo Zhengfa Daxue Chubanshe (中国政法大学出版社) China University of Political Science and Law Press, p. 147.

a “squatter”) continues to occupy the land, and the owner does not exercise his right to recover it by the end of a prescribed period. In that case, the owner’s remedy and his title to the land are extinguished, and the squatter becomes the new owner. The squatter’s new possessory title cannot normally exceed, in extent or duration, that of the former owner⁹³. After the handover of Hong Kong, the land system followed the pattern before the handover but also adapted to the local conditions for the adverse possession system in Hong Kong’s legislation to achieve localization characteristics.

The law of Hong Kong also treats “acquiring an interest in land because of the expiry of the statute of limitations” as one of the methods of acquiring an interest in land property, alongside the common law. The two basic conditions for adverse possession are the same as those in the United Kingdom. In addition, Hong Kong does not have a systematic description of adverse possession in its legal provisions, and the contents of the relevant adverse possession of land are also set out in the special chapter on limitation in the legislation. The complete structure of adverse possession, especially the “empowering effect” on unauthorized occupiers, is reflected in the jurisprudence of judges in judicial practice⁹⁴.

The Hong Kong Limitation Ordinance (Cap 347) includes the adverse possession of land acquisition and other limitations. The adverse possession is dealt with mainly in sections 7 to 25. To prove adverse possession, a squatter must establish that he has both the physical possession of the land and the required intention to possess it (*animus possidendi*)⁹⁵. As an owner is presumed to be in possession of the land⁹⁶, a squatter must establish that he has taken a sufficient

⁹³ Law Reform Commission of Hong Kong, Subcommittee on Adverse Possession: Adverse Possession, 2012, p. 2.

⁹⁴ Some have even questioned the empowering effect of the Limitation Ordinance, arguing that it does not confer a right of action but merely bars the right of action of the original owner, see Sze To Chun Keung Kwok Wai David (1997) WLR 1232.

⁹⁵ *Buckinghamshire County Council v Moran* [1990] Ch 623 at 636.

⁹⁶ *Powell v McFarlane* (1977) 38 P & CR 452, at 452 and 470.

degree of exclusive physical control of the land⁹⁷. The core concept is that the possession must be wrongful, and adverse possession has been described as “possession as of wrong”⁹⁸. Apart from showing factual possession, a squatter must establish the requisite intention, i.e., “an intention for the time being to possess the land to the exclusion of all other persons, including the owner”⁹⁹. He is not required to intend to own or acquire the ownership of the land¹⁰⁰. Even if both an owner and the squatter mistakenly believe that the land belongs to the latter, or the squatter does not realize that he is trespassing on another person’s land, the required intention can still be established¹⁰¹. The required intention must be determined objectively: “intent has to be inferred from the acts themselves”, and evidence of the squatter’s past or present declarations as to his intention is regarded as self-serving¹⁰². A squatter must manifest the required intention unequivocally, so that it is clear that the squatter is not just a persistent trespasser¹⁰³.

In the case of the effect of adverse possession, if a squatter can prove adverse possession for a period of at least twelve years, both the owner’s right of action to recover the land and his title to it are extinguished¹⁰⁴. Because of the principle of the relativity of title, on the basis of his adverse possession and the

⁹⁷ *Powell v McFarlane* (1977) 38 P & CR 452, at 471.

⁹⁸ *Buckinghamshire County Council v Moran* [1990] Ch 623, at 644D, per Nourse LJ.

⁹⁹ *Buckinghamshire County Council v Moran* [1990] Ch 623, at 643.

¹⁰⁰ *Buckinghamshire County Council v Moran* [1990] Ch 623, at 643.

¹⁰¹ *Hughes v Cork* [1994] EGCS 25; *Prudential Assurance Co Ltd v Waterloo Real Estate Inc* [1997] 17 EG 131.

¹⁰² *Powell v McFarlane* (1977) 38 P & CR 452, at 476 to 477.

¹⁰³ *Powell v McFarlane* (1977) 38 P & CR 452, at 480.

¹⁰⁴ Sections 7 and 17 of the Limitation Ordinance (Cap 347). This follows the amendment made to Cap 347 in 1991 by section 5 of the Limitation (Amendment) Ordinance 1991. Prior to that point, the limitation period for land recovery was 20 years. The 12-year limitation period applies to rights of action accrued after 1 July 1991: **Nield, Sarah** (1998) *Hong Kong Land Law*, 2nd ed, Longman, p. 169. Section 7(1) of the Ordinance stipulates that no action shall be brought by the Government to recover land after the expiration of 60 years from the date on which the right of action accrued to the Government.

lack of a better title, a squatter will hold a new estate which is subject to any third party rights which run with the land and have not been extinguished, such as easements and restrictive covenants¹⁰⁵. Even before extinguishing the owner's title, a squatter acquires an inchoate or incipient title which is good against the world, except against those who can prove a better title¹⁰⁶. The squatter can even sue a trespasser for trespassing and strangers in nuisance¹⁰⁷.

In Hong Kong, there are also two different views in favor of and against the system of adverse possession. Some academics have criticized the concept of adverse possession as unjust because it encourages "land theft". However, proponents argue that possession of land entitles a person to retain the land against the whole world, apart from someone who has a better title. Hence, even a squatter on land, who does not have documentary title to it, can still protect his possession of the land against those who do not have a better right to possession. The proponents put forward three arguments: firstly, adverse possession protects against stale claims. Adverse possession is one aspect of the law of limitations. The policy of limitation statutes applies to protect defendants from stale claims and to encourage plaintiffs not to sleep on their rights. This is because, with the passage of time, it will become more and more challenging to investigate the circumstances in which a possession commenced and continued. Therefore, the policy is that a fixed period should be prescribed for certainty. However, as pointed out by the English Law Commission¹⁰⁸, adverse possession

¹⁰⁵ **Megarry, Robert/Wade, William/Harpum, Charles/Bridge, Stuart/Dixon, Martin** (2000) *The Law of Real Property*, 6th ed, Sweet & Maxwell, at para 21-057 and 21-67. *Re Nisbet & Potts' Contract* [1906] 1 Ch 386. After extinguishing the title of the lessee paper owner, a squatter will not replace the paper owner as the new lessee. If the squatter, however, takes advantage of the lease, he may "estop" from denying that he holds under it and will be bound by the covenants: **Jourdan, Stephen** (2003) *Adverse Possession*, Butterworths, LexisNexis, at paras 24-46 and 24-57.

¹⁰⁶ **Gray, Kevin J./Gray, Susan Francis** (2000) *Elements of Land Law*, 3rd ed, Butterworths, p. 278.; *Hunter v Canary Wharf Ltd* [1997] AC 655, at 703E.

¹⁰⁷ **Gray/Gray**, p. 278.; *Hunter v Canary Wharf Ltd* [1997] AC 655, at 688E to 689D.

¹⁰⁸ English Law Commission, *Land Registration for the Twenty-first Century, A Consultative Document* (1998, Law Com No 254), at para 10.6.

does not merely bar claims; a squatter can get a title to land by his possession, and this can only be justified by factors over and above those which explain the law on limitations. Second, adverse possession prevents land from becoming undeveloped and neglected. If land ownership and the reality of possession are not working well in tandem, the particular land in question would become unmarketable. This situation can happen (a) where the valid owner has disappeared, and the squatter has assumed the rights of ownership for a long time; (b) or where there have been dealings with the land “off the register” so that the register no longer reflects the “valid” ownership of land. It is in the public interest to encourage proper maintenance, improvement, and development of land that may have been under-utilized for a long time. Thirdly, adverse possession prevents hardship in cases of mistake. The English Commission has noted that the law of adverse possession can prevent hardship in cases of mistake. The example given is that of a squatter who incurs expenditure to improve the land under mistake of ownership or boundary. Although the squatter may have a claim based on “proprietary estoppel” if the valid owner knew of and acquiesced in the squatter’s mistake, that may not always be the case.

The objector, on the other hand, also refutes the three arguments mentioned above. According to the objector, in relation to the first justification, it is assumed that the owner was aware that a cause of action had accrued in his favor. In reality, the adverse possession may be clandestine or not readily apparent, and an owner may not realize that a person is encroaching on his land¹⁰⁹. The owner is, hence, not in any true sense sleeping on his rights. Knowledge (actual or constructive) of the accrual of a cause of action is not a pre-condition for the operation of the limitation period¹¹⁰. In addition, the rule of adverse possession operates even if a squatter admits that his possession is wrongful throughout the limitation period¹¹¹. As to encouraging the development and

¹⁰⁹ English Law Commission, Report on Land Registration for the Twenty-first Century (2001, Law Com No 271), at para 2.71.

¹¹⁰ **Dockray, Martin** (1985) “Why do we need adverse possession?”, *Conveyancer*, pp. 272-284, p. 274.

¹¹¹ **Dockray**, p. 273.

maintenance of land under the second justification, Dockray believes that this objective is only relevant in limited circumstances and could not justify the universal application of the rule, which is not confined to cases of long and peaceful possession of neglected property¹¹². The rule applies indiscriminately, as much to ancient and innocent encroachment as it does to forcible ejection. As to the third argument, the dissenters argued that, as to avoidance of hardship to defendants under the third justification, the rule of adverse possession has not attempted to balance the possible hardship to a plaintiff who is unaware that time is running against him, and the hardship to a defendant, even though the length of the limitation period is fixed with this balancing act in mind¹¹³.

In response to the economic and social development of the Hong Kong region, the Law Reform Commission of Hong Kong conducted a comprehensive review of adverse possession in Hong Kong in October 2014 and made a preliminary design of the reform program. The Hong Kong Government's response to the report two times, in April 2015 and August 2024, the Hong Kong Development Bureau is now working with the Lands Department and the Land Registry on the study. It will formulate a framework for the future system¹¹⁴.

D. ACQUISITIVE PRESCRIPTION SYSTEMS IN MACAO AND TAIWAN

Macao and Taiwan are part of the civil law system, and both regions have a statute of acquisitive prescription in their legal systems. Taiwan has provided for the acquisitive prescription system in the "Property Rights Section" of the Taiwan Civil Code. The statute of acquisitive prescription in Taiwan is divided into three categories based on different objectives: movable property¹¹⁵, immovable

¹¹² Dockray, p. 277.

¹¹³ Dockray, p. 275.

¹¹⁴ Law Reform Commission of Hong Kong, <<https://www.hkreform.gov.hk/en/news/newsXML.htm?newsDate=20210817c&selectedSubSection=6&jumpToDetails=y#newsDetails>> s.e.t. 08/09/2024.

¹¹⁵ For the acquisition of movable property, the Taiwan Civil Code does not require good faith on the part of the possessor as long as the possessor meets the constitutive elements of "peaceful", "public", and "continuous". The statutory period is five years; the possessor can acquire the

property, and property rights. For the acquisition of immovable property, according to the provisions of the Taiwan Civil Code, its object only includes “unregistered immovable property”. Registered immovable property is not subject to the statute of acquisitive prescription and cannot produce the effect of a change in ownership. The long-term limitation period of 20 years and the short-term limitation period of 10 years are applicable depending on whether the possessor is in good faith¹¹⁶. At the same time, unlike the acquisition of movable property, the acquisition of immovable property requires the registration of the possessor, and the effect of the change of property rights does not occur without the registration procedure.

The provisions of the Macao Civil Code are also similar to those of Taiwan in that the statute of acquisitive prescription is stipulated in Chapter 6, Articles 1212-1225 of the Civil Code. It specifies that the object of the statute of acquisitive prescription includes ownership and other usufructuary rights related to ownership, which can be acquired after a certain period of possession. Once asserted, the effect of the statute of acquisitive prescription is retroactive to the beginning of possession.

The statute of acquisitive prescription can be divided into possession with evidence and registration and the other mere registration of process only. In the case of possession of immovable property that has a basis and has been registered, the period of acquisitive prescription is completed in ten consecutive years from the date of registration for those in good faith and fifteen years for

movable property in good faith. See Taiwan Civil Code (Amende 26.05.2015), Article 768- 1: A person who has peacefully, publicly, and continually possessed another’s personal property with the intent of being an owner for five years and was in good faith and not of negligence at the beginning of his possession, acquires the ownership of such personal property. Article 769 A person who has peacefully, publicly, and continually possessed another’s real property, which is not recorded for twenty years with the intent of being an owner, is entitled to claim to be recorded as the owner of the said real property.

¹¹⁶ **Haoren, Zhang** (张豪仁) (2013) “Dalu yu Taiwan Shixiao Zhidu Bijiao Fenxi (大陆与台湾时效制度比较研究), A Comparative Study of the Limitation Systems in Mainland China and Taiwan”, *Sheke Zongheng (社科纵横) Social Sciences Review*, No. 3, pp. 87-88, p. 88.

those in bad faith. In addition, for possession without foundation, or if no registration has been obtained for the immovable property, but the act of mere possession has been registered, the good faith possessor shall complete the statute of acquisitive prescription for five consecutive years from the date of registration; for the bad faith possessor, it shall take ten years to complete. It is worth noting that since the acquisition system in Macao does not require good faith, forcible or covert possession is allowed¹¹⁷. However, suppose the immovable property is acquired by violent or sightless means. In that case, the period of acquisitive prescription shall only begin to run when the violent means are terminated or when the covert possession is converted into public possession.

CONCLUSION

In the field of immovable property law, the acquisition of property by acquisitive prescription has become less and less practical with the increasing development of the institutions of the administration of property law guaranteeing reliability and security, especially in the domain of the legal systems that have endowed these institutions with public faith; for under these circumstances, acquisitive prescription is only practical as long as the two original contracting parties are facing each other. But even where the modern title register mediates transactions, acquisitive prescription cannot be dispensed with entirely because the legal system must reckon with the imperfections of human beings, and consequently, a means is needed “to correct and heal their errors and weaknesses insofar as they manifest themselves in legal transactions with land ownership and the land register”¹¹⁸. Therefore, it is still necessary to examine the institution from different jurisdictions.

First, it is important to note that Turkish law divides ordinary and extraordinary acquisitive prescriptions. This distinction cannot be seen in mainland

¹¹⁷ Macao Civil Code (39/99/M decree) Art 1225: If the possession was obtained by violent or covert means, the limitation period for acquisition shall commence on the date on which the violent means cease or the possession becomes public.

¹¹⁸ Das Eigentum, Art. 641-729 ZGB.

China, Hong Kong, and Taiwan. First, in mainland China, a clear acquisitive prescription mechanism is absent. On the other hand, Hong Kong's adverse possession demonstrates the various legal solutions available in different regions. Also, the Taiwan Civil Code only includes "unregistered immovable property". Registered immovable property is not subject to acquisitive prescription. However, the law of Macao is more in line with Turkish law.

However, there is a distinct difference between these jurisdictions regarding the regulation of the effect of good faith requirements. Under Turkish law, good faith is required only in ordinary acquisitive prescriptions. The extraordinary prescription requires the possessor not only to be rightful but also to be ignorant of his/her wrongfulness -in other words, his/her good faith¹¹⁹. In Macao, the requirement of good faith is only relevant to determining the necessary prescription period. For immovable property registered in the land register, the period of acquisitive prescription is ten years for those in good faith and fifteen years for those in bad faith. For possessions without registration, the good faith possessor shall complete the statute of acquisitive prescription for five consecutive years; for the bad faith possessor, it shall take ten years to complete. This shows that even if Turkish and Macao regulations have categorizations regarding the registered and unregistered immovable properties, they are deeply differentiated in their legal requirements. It is also worth noting that since good faith is not required, Macao law included a provision that states that the prescription period shall only begin to run when the violent means are terminated or when the covert possession is converted into public possession. This can be a sign of some severe conflicts because of acquisitive prescription in Macao, whereas in Türkiye, there is, for now, no need for such provisions.

To conclude, the comparative study of the acquisitive prescription systems across Türkiye, mainland China, Hong Kong, Taiwan, and Macao reveals the diverse approaches taken within different legal frameworks to address immovable property and possession issues. The "Qing She" system in ancient China and

¹¹⁹ **Acemoğlu, Kevork** (1969) "Olağanüstü Kazandırıcı Zamanaşımı Müessesesi Üzerine Bazı Düşünceler", *Journal of Istanbul University Law Faculty*, V. 33, I. 3-4, pp. 248-256, p. 249.

the acquisitive prescription systems in civil law systems like Türkiye, Taiwan, and Macao aim to promote land utilization, resolve ownership disputes, and achieve legal certainty. The absence of a clear acquisitive prescription mechanism in mainland China is a controversial issue reflected in ongoing debates. On the other hand, Hong Kong's adherence to the common law concept of adverse possession further demonstrates the various legal solutions available in different regions. This analysis underscores the importance of tailoring legal systems to each region's unique historical, social, moral, and economic contexts while addressing universal concerns regarding property rights and legal certainty.

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