

THE PRE-EMPTION RIGHT IN REAL ESTATE PROPERTY AND ITS CHALLENGES WITHIN THE ALBANIAN LAW

Irene Dule

Ms, Phd candidate, European University of Tirana, Albania, irenedule@gmail.com

Abstract

The pre-emption right, which dates as far back as the Roman times, constitutes an important legal element that shapes the nature of the legal transactions occurring over the sale of real estate property. This right is very specific in nature, for reasons related to the obligation to exercise such rights in real estate transactions, which in turn constitutes a limitation on the ownership rights by the entity that possesses them. The application of this right differs from one country to the other in terms of its applicable extent and legal meaning. In some countries this right belongs to the municipality, while in some others it is applied for instance in the sale of agricultural land. In Albania, due to its specific context as a former communist country, the application of this right is sanctioned by the Civil Code, as well as other legislation such as that related to the restitution and compensation of property expropriated during communism. This study will examine this right in some details, by analyzing the Albanian legislation and the social context that Albania faces nowadays. At first, the paper will portray an historical and legal overview in order to understand how this right has been established and how it has currently been put to use. This study will then explain the legal nature of this right, with the focus on defining whether it is a real or a contractual one. Then it will focus on the procedure and the guarantees set in place during its application. At last, this study will explore the possibility of restricting the pre-emption right in the Albanian environment, in order to decently balance the different interests of social groups and to better reflect the demands and conditions of the society.

Keywords: Pre-emption right; Albanian law; Real estate transactions; Real rights; Contractual rights

Introduction

The pre-emption right, inherited in our system from the Roman law, constitutes an important legal element in the transactions over the real estate property. This right has a very specific nature, due to the fact that its exercise poses a limitation on the right of the owner during the transaction over the real estate property. In more concrete terms it limits the opportunity of the subject owning the property to have priority in the sale of the real estate. The owner that wants to sell the property must at first propose to the holder of the pre-emption right the priority to buy it, and only after a negative response from the latter can the owner of the property freely sell it to third parties.

The extent of the pre-emption right in different subjects varies from a legal system to the other. In some countries, this right is held by the municipalities, or other authorities of the local government (France), while in other countries this right belongs to the farm owners, or it is differently acknowledged as the lessee's right. In Germany the pre-emption right usually rests with the individuals that are neighbors to the property in question. While in England this right is subject to the contract. However, there are countries such as Italy and the Netherlands that do not recognize this right at all. Judging by the variety of the solutions given in different legislations, the application of this right differs depending on the conditions and demands of the respective country. The understanding of this right varies also from a legal system to the other in regard to the extent and the circle of subjects upon which it is applied, as well as in regard to the procedures and guarantees that accompany its application. Taking into consideration this variety of applications, the focus of this essay will be the pre-emption right in the Albanian legislation and the remodeling of this right in order to adapt to the society's changing demands.

The pre-emption right as it will be noticed in the second section is a right acknowledged in the legislation since the time of the existence of the so called "*kanun*", continuing later on during the rule of the ottoman empire, until the drafting of the Civil Code of the Zog's Kingdom (1929) and at last in the Civil Code of the Republic of Albania in 1982.

The third section explains how this right is currently spread in the co-ownership relations and in those created by the right of the former owners over the privatization of the state objects built on the land that was previously under their ownership. Through a brief analysis of the legislation consulted in this section we can note the existence of gaps relating to the legal nature of the pre-emption right, the guarantees and the procedures of exercising this right as well as the possibilities of restricting it. All of the above are added to the discussion in the sections that follow, where more concretely section four will treat the legal nature of the pre-emption right and the practical importance of its definition; section five will focus on the importance of the guarantee and the legal dispositions on the procedures followed during the application of this right; while section six will attempt to answer the question whether there is room for limiting the pre-emption right in order to draw a just balance of the interest of different social groups.

1. The Pre-Emption Right in the Albanian Legislation: An Historical Overview

The pre-emption right has changed over the historical development of the Albanian legislation. This right had been at first incorporated in the *Kanuns*, which represented the codified customary laws of Albanian, before a more modern legal system was adopted. Thus, in the *Kanun of Bende* (1933) that had its jurisdiction in the region of Kruja and the surrounding areas the pre-emption right was both recognized and sanctioned. Thus before deciding to sell the property there was the obligation to notify the siblings, the kinfolks and then the villagers, where the siblings and the kinfolks had the right to buy it at a hundred *gros* (local currency of the time) cheaper than its value of. Only in the case none of them wanted to buy then the seller could offer it to anyone else. According to the *Kanun of Lek Dukagjini* (Gjecovi, 1933), the pre-emption right was recognized to three groups: at first the pre-emption right belonged to the relatives, siblings and the kinfolks. In case they refused to buy, the pre-emption right belonged to the neighbors. In case the neighbor also refused to buy then the pre-emption right would pass on the other villagers. Only after the refusal of the later could the property be sold to anyone else. Likewise in the *Kanun of Laberia*, which used to regulate the legal and civil relations in the southern part of Albania, the pre-emption right was used to protect the alienation of property by the foreigners. Thus, when deciding to sell a real estate property, one should have sought permission and verbal approval by the siblings, who in turn had the right to make the first buying offer. In case they did not desire to buy the property, then the seller could bring the property to the auction, where participation was limited only to the members of the community. Thus the pre-emption right was enjoyed at first by the siblings and in case of their refusal by the members of the community (Elezi, 2006).

Meanwhile, during the time of the Ottoman rule and its respective legislation, the civil and legal relations were regulated by the *Mecelle* (the Ottoman Civil Code, 1889). The pre-emption right, according to this code besides in the co-ownership relations was also extended in the neighboring relations. This code remained in force until it was replaced by the Civil Code of 1929 (that entered into force in 1930), which under article 1035-1043 shrank the circle of legal relations upon which the pre-emption right was applied, by excluding the obligations towards the neighbors. Thus, the pre-emption right in the Civil Code of 1929 was exercised by the co-owners, however its application was limited when the property was sold on public auctions organized by the administrative and judicial authorities, as well as when the transaction was made among parties that were blood related. Likewise, the legal persons were also excluded from the pre-emption right.

Similarly, in the Civil Code of 1982 the pre-emption right belonged to the co-owners, but different from the Civil Code of King Zog in 1929, this body of law was regressive in regard to the prediction of the procedures and exceptions of the pre-emption right. As it will be further discussed below, these gaps were inherited also in the Civil Code of 1994, which abrogated and substituted the Civil Code of 1982.

2. The Preemption Right Today

In the current Albanian legislation the pre-emption right is foreseen by two laws: the Civil Code and the Law no. 9235/2004 *"For the restitution and compensation of Property"*. The Civil Code extends the pre-emption right to the co-owner of the real estate property that has common ownership. Specifically in Article 204 of this code it is stated that: *"the co-owner, before selling its share in a real estate property to a party that is not a co-owner, it is obliged to notify in writing the other co-owners whether they would like to buy the share under the same conditions offered to the third party. In case they do not respond within three months that they would like to buy it, the selling co-owner is free to offer its share for sale to other third parties. He must introduce to the other co-owners the new co-owner."*

From this legal disposition we can derive at the conclusion that the conditions that must be fulfilled for the exercise of the pre-emption right are:

- a) *The existence of the co-ownership.* According to the Civil Code the pre-emption right is exercised only in the case of co-ownership relations.
- b) *Ownership on the real estate property.* According to the Civil Code the pre-emption right is exercised only on the co-ownership of real estate property and thus excluding other property forms.
- c) *Transferring of ownership on the property in return to compensation.* The pre-emption right cannot be exercised in case the property is being donated. The Civil Code refers only to property that is being sold, but this must be interpreted at a wide scope by including also the contracts that have as their object the exchange of property, as long as the element of compensation in return of the transaction is present (Nuni, 2007).
- d) The transfer of ownership on the property must be offered to the co-owners under the same conditions as those offered to third parties.

Article 204 of the Civil Code also foresees the procedure required for the application of the pre-emption right. Thus, the notification for the sale of property must be made in writing, by leaving to the seller the burden of proof for such action. With the passing of three months from the time of notification the other co-owners must reply to the request being made. Only with the passing of this deadline, or in case of the refusal by the other co-owners the seller is free to transfer the ownership to a third party. With the completion of the transaction, the seller has the obligation to introduce to the existing co-owners the new co-owner.

Besides by the Civil Code, the pre-emption right is recognized in the Albanian legislation also by the law on the restitution and compensation of property. According to this law, the pre-emption rights for the state owned objects that have been built over the land of the former owners belong to the latter. At first, it is necessary to explain the conditions that have led to the application of the pre-emption right in the case of the former owners, according to this legislation. The category of the former owners was established by the law on the restitution and compensation of property, according to which all the individuals that had their properties expropriated unjustly by the previous communist dictatorship regime, would be given the opportunity to apply for regaining their property or to be compensated in case their property could not be physically restituted. Over the expropriated properties by the communist regime state owned objects were built in order to help develop the centralized economy of the time. With the transformation of the economic system and the redistribution of the state owned property to the private sector, a part of these objects were transferred to the ownership of the subjects that benefited from the laws on the privatization of the state owned enterprises, and a part of them remained under state ownership. This latter part was at times leased to other third parties, and at times was left unused and abandoned. In the situation when these object had lost their economic function they could be privatized according to the respective privatization procedures. The pre-emption right starts to take effect exactly at the moment when these state owned object are put on sale according to the privatization procedures. This right belongs to the former owners that have gained the recognition of their ownership right over the land where these object have been built. Thus in order to exercise the pre-emption right foreseen by this legal provision these conditions must be fulfilled:

1. The land over which these object have been built has been recognized by the respective administrative acts as being under the ownership of the former owner.
2. The objects are state owned, meaning that until the time of the recognition of the pre-emption right of the land owner through an administrative act by the responsible Agency for the Restitution and Compensation of Property, the ownership on the object has not been legally transferred to a private party.
3. The object that is state owned is out its economic function, being this the reason that leads the state towards its privatization.

4. The Legal Nature of Pre-Emption Right in the Albanian Legislation

The evaluation of the legal dispositions of the pre-emption right discussed in the section above leads to some questions. If the pre-emption right is not exercised, by thus infringing on a legal interest of its holder, what will the legal consequences be? In more concrete terms, will the legal action for transferring the title of ownership be subject to annulment, or will the damaged party be compensated for the eventual caused damage? Can the pre-emption right be object of the ownership transferring contracts?

These questions find their answer at the definition of the legal nature of the pre-emption right, by distinguishing whether it falls under the real rights, or it belongs to the contractual rights. The classification in this understanding takes a practical as well as a theoretical importance, especially in the case of civil disagreements related to the application of the pre-emption right. Thus if the pre-emption right is a contractual

right, then the principles that accompany the obligatory contract relations must be applied, meaning that in case of disregarding the pre-emption right, its owner must be compensated. On the contrary, if the pre-emption right is placed as a real right, failure to exercise it would affect the validity of the legal transaction. Secondly, depending on the fact whether the pre-emption right is a real right or not, will also vary the answer for the mode of its transfer. For instance, as a contractual right, it cannot be object of the ownership transferring contracts. Meanwhile, different from the contractual rights, real rights have some distinguishing characteristics. First of all, these rights are not exercised by the property owner on the property in question, but they are exercised by third parties and are smaller, secondary and temporary rights compared to property rights. (Kondili, 2010) Secondly, their existence always limits the rights of the property's owner. Thirdly, over a property could be simultaneously exercised more than one real right. Furthermore, the real right follows the property and is exercised no matter who the owner is. At last, the real rights whether established in a voluntary or in an obligatory way are defined as such by the law (being this the same for all the legislations that are based on the Roman law). The pre-emption right does not fall into conflict with any of the characteristics mentioned above, besides the cases when they are not classified as real rights defined by the law. As such, The Civil Code of the Republic of Albania acknowledges the possession, usufruct, usage, inhabitation and servitude. The interpretation in this regard must be made as widely as possible by taking into consideration as real rights those created by the law (by excluding those that are created through a contract) and that have the characteristics of the real rights. Thus the pre-emption right could be established by law, contract or through inheritance, but it will constitute a real right as long as and only if it is sanctioned by law.

Returning at the pre-emption right sanctioned by the two legal norms mentioned above, in the case of Albania this is naturally a right provided by law, and thus a real right. Likewise it is a right related to the property and that derives from the property right. In this understanding this right could be vested to third parties. If it were to be a right established by a contract, then the claims related to it could be vested only to the contracting parties. As such, the pre-emption right will enjoy the protections that have the real rights in case of their infringement. In such cases we would have an annulment of the legal transaction instead of a compensation of the damage. This same stance was also held by the High Instance Court which in one of its court rulings decided to classify the pre-emption right established through the law on the restitution and compensation of property as a real right. (Decision of the High Instance Court 23/2002).

In regard to the question whether the pre-emption right could be object of the ownership transferring contracts, it can be argued that its classification as a real right makes such an action naturally possible. In article 162 of the Civil Code it is stated that: *"Property rights and other rights on property are transferrable except when they are banned by law or by the nature of the right itself."* Thus the pre-emption right could be object of the Sale Contract (Article 705 of the Civil Code), Donation Contract (Article 761 of the Civil Code), etc.

5. The Guarantee and the Procedures of Exercising the Pre-emption Right

In regard to the question on how the application of the pre-emption right is guaranteed, the law is very lacking in this regard. This can be clearly noted in concrete analyses of both the Civil Code and the law on the restitution and compensation of property. Relying on the legislative practice of countries such as Italy and France for instance, where our civil laws and that on the public notary have been mainly based, a solution in this regard could be to guarantee the exercise of the pre-emption right belonging to the co-owners by the notary public, who is in charge of drafting and notarizing the property sale procedures. While on the other hand, the pre-emption right that belongs to the former owners, based on the legislation for the restitution and compensation of property, could be guaranteed by the civil servant of the public administration in charge of following the procedures of selling the state owned property.

Likewise it is of imperative importance for concrete steps to be foreseen on how this right will be applied especially when it belongs to the former owners. This would in turn avoid biased interpretations in case of conflicts. For instance in the case of a former owner that had gained the pre-emption right for a state owned dental clinic, the lack of clear procedures resulted in the loss of the possibility for the latter to buy the property during a public auction that was organized for this purpose. The former owner that participated in the auction did not make an offer thinking that the organizers of the auction, based on the preemption right, would provide to the former owner the priority in buying the property in relation to the other participating third parties. The auction however concluded with the property being sold to a third party that made an offer. When taken to court by the former owner, in the absence of clearly defined legal procedures, the First Instance Court of Tirana (Decision no. 7758, date 10.10.2011) and the Court of Appeals of the District of Tirana (Decision no. 2257, date 02.10.2012) ruled against the former owner, considering the participation in the auction as an acknowledgment of the procedure for selling the state property and the lack of offer by the former owner as a lack of interest to buy. By analyzing this case it can be clearly noted that the legal gaps relating to the

procedures and responsibilities during the application of the pre-emption right have led the court to an interpretation that was not favorable to the former owner, who is in fact entitled by law to these rights. Lastly, because the pre-emption right might endanger the sustainability of the property relations it is necessary the provision of legal dispositions relating to the procedures of complaint and the provision of deadlines related to these complains in cases when these rights are not respected.

6. Limitation of the Preemption Rights

In an analysis of this right in itself, we can note that the pre-emption right is an extraordinary one that falls contrary to the principles of the contractual freedom, according to which the owner of the property transfers the ownership in full freedom of choice (Benussi, 1931). Thus, for instance, the provision of such a right in the Civil Code, is a sacrifice that the legislator makes to the independence of the share of each co-owner, with the aim of favoring the centralization of the property in one hand by attributing to the co-owners the pre-emption right, aiming at avoiding the inclusion of a new co-owner in co-ownership. Regarding the case of restricting this right, it must be accepted that in principle this can happen in the same way as with other rights that do not belong to the fundamental and absolute human rights (as the right of living for instance). Despite this, as noted above, this right varies depending on the interests and motives of a society. This right has incurred its limitations over time. Thus, according to the Civil Code of 1929, the pre-emption right could not be applied to the pre-born, after-born, spouse, etc. (Article 1036 of the Civil Code of 1929). Likewise the pre-emption right could not be applied to legal persons (Article 1037 of the Civil code of 1929).

Nowadays in the Civil Code in force, there are no exceptions relating to it, while in the case of the application of the pre-emption right of the former owner there are some legal acts that provide some limitations such as in the case of selling the properties of the companies with state capital under liquidation (DCM no. 428/2010). However this limitation deals only with the pre-emption right of the former owner. Thus, there are no legal limitations of this right, even in cases when the share of the property in co-ownership is sold in public auctions by the public or judicial authorities, or as part of the procedures of the legislation on the seizure and confiscation of assets. As such, for instance if a property is sold in the auction as a result of failure to pay off a debt, the law that foresees this procedure does not require to apply first the pre-emption right, different from what was the case with the Civil Code of 1929. This legal gap needs to be addressed by excluding the application of the pre-emption right in the respective legislation, and by replacing the legal provisions of the Civil Code of 1929 adapted to the current context.

Likewise it would be recommendable a limitation of this right on the properties with state co-ownership. These properties might be subject to privatization procedures with the aim of fulfilling the state functions according to public priorities and needs. This could be the case for instance in sheltering the homeless by the local government authorities, which constitutes an obligation and function of the state. However, in this case the pre-emption right of the co-owner would be an impediment for the accomplishment of the privatization in function of the homeless. Judging by the aim of the pre-emption right, which as stated above is however a limitation of the right of the owner, I argue that the pre-emption right must be sacrificed in favor of the homeless to have a shelter. By judging this situation, when two rights are in conflict, then the balance in my opinion should tilt on the one that represents the highest interest, which in this case is that of sheltering the homeless, representing not only a primary function of the local government, but also a fundamental human right. Specifically the law on the social programmes for the homeless (no. 9232/2005) in Article 3, point c) provides for the municipalities to place at the disposal of the fund for the homeless the objects that are under their ownership, by accomplishing thus one of their functions such as the provision of shelter. However the terminology used leaves rooms for interpretation on whether when discussing about ownership co-ownership will also be included. In order to avoid interpretations and the confrontation of the legal norms this must be stated clearly in the laws. Thus in the Law *"For the Social Programmes of Sheltering"* it needs to be clearly defined without leaving room for interpretation that where it is stated *"under the ownership of the municipality"* is also meant *"under the co-ownership of the municipality"*. Without being focused only on the above mentioned case, which serves as an example, it is important to stress that the pre-emption right can be limited after being accompanied with the respective legal amendments in the Civil Code.

7. Conclusions

As described in the first section the pre-emption right has changed during the historical development of the Albanian legislation, by being categorized as a flexible right under continuous change, with the aim of adapting to the social and economic conditions of the country. The continuing sections of this paper dealt with the

current conditions of the Albanian legislation within which the pre-emption right is foreseen by two laws: the Civil Code and the Law “*On the restitution and compensation of property*”. The Civil Code gives the pre-emption right to the co-owner of a real estate property under common ownership, while according to the law on the restitution and compensation of property the pre-emption right on the state objects in the process of privatization belongs to the former owners, who have had their property rights recognized over the land where these objects have been built.

By evaluating the legal provisions of the pre-emption right the later sections of this essay attempted to answer a number of questions. Thus, the first question being raised was related to the legal consequences in the case of failure to respect the application of the pre-emption right. In more concrete terms, we saw that the pre-emption right when it is a legal right as in our case study it is a real right, and as such it follows the legal norms belonging to the real rights, by making the transaction of transferring the ownership title subject to annulment. The question whether the pre-emption right can be the object of the ownership transferring contracts, finds its answer also in the classification of this right as a real one, meaning that as such this right can be the object of the contract of sale, donation, etc.

Further on this paper briefly dealt with the fact that the legal gaps and the absence of a responsible institution for ensuring the pre-emption right could be fulfilled by the public notary in the case of the pre-emption rights sanctioned by the Civil Code. This suggestion relies on the legislative practice of the other countries where the Albanian civil legislation has been based. While in regard to the guarantee of the application of the pre-emption right of the former owners sanctioned by the law on the restitution and compensation of property, besides the responsible authority, which can be the one organizing the auction, the possibility to provide a detailed procedure should be considered in order to avoid subjective interpretations in cases of disagreements. At last, we noted that the pre-emption right, which has both a flexible and limiting nature, can be restricted, especially when its application goes contrary to the interest of more vulnerable social groups, as was the case with the homeless, who cannot benefit from the privatization of the state assets, because of the exercise of the pre-emption right of the former owners.

In conclusion, we can state that the pre-emption right as part of the legislation on real estate property in Albania suffers from a legal vacuum, which must be fulfilled in order to better respond to the social and economic demands of the different groups of the society.

REFERENCES

1. Benussi, B., “*Property, Possession and its modifications*” Ministry of Justice 1931
2. Decision of the Council of Ministers no.428, date 09/06/2010 “On the Criteria for the evaluation of the state property that will be privatized or transformed and for the selling procedures.”
3. Decision of the First Instance Court of Tirana no. 7758, date 10/10/2011, let in force by the Decision of the Court of Appeals of Tirana no. 2257, date 02/10/2012
4. Elezi, I., *The Kanun of Laberia*, Toena, 2006
5. Gjecovi, Sh. *The Kanun of Lek Dukagjini*, 1933
6. Ilia, F., *The Kanun of Bende (Scanderbeg)*, 1933
7. Kondili, V., *Civil Right II, Particular Part, Ownership, Real Temporary Rights and Inheritance*, Geer 2010
8. Nuni, A. and Hasneziri, L., “*Lectures on the Property Rights*, Tirana 2007
9. The Ottoman Civil Code, Mecelle, 1889.
10. The Civil Code of the Kingdom of Zog, 1929.
11. The Law no. 9235/2004, “*On the Restitution and Compensation of Property*”
12. The Law no. 9232/2005, “*On the social programs for the homeless in the urban areas*” amended.
13. Unifying Decision of the High Instance Court no. 23/2002.