

The Legal Framework for the Exercise of the Right of Pre-emption in Algerian Legislation

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Abstract

This study aims to identify how the Algerian legislator affirms the right of the state to exercise preemption, in the same way as civil preemption, which is only a strategy aimed at protecting the property from illegal speculation, division, retailing and selling it to foreign parties. The study led to the need for the legislator to intervene, and even the judiciary to find solutions in the light of the legal vacuum, and the lack of practical and actual embodiment of the legal texts of administrative preemption, and the absence of clear procedures to practice it accurately.

Keywords: *Pre-emption; administrative preemption; pre-emptive state practice.*

الإطار القانوني لممارسة الدولة حق الشفعة في التشريع الجزائري

ملخص

هدفت الدراسة إلى التعرف على كيفية تقرير المشرع الجزائري لحق الدولة في ممارسة الشفعة على غرار الشفعة المدنية، الذي ما هو إلا إستراتيجية الغرض منها حماية العقار من المضاربة غير المشروعة، والقسمة والتجزئة، وبيعه لأطراف أجنبية، ومما أفضت إليه الدراسة ضرورة تدخل المشرع، وحتى القضاء لإيجاد حلول في ظل الفراغ القانوني، وعدم التجسيد العملي والفعلي للنصوص القانونية للشفعة الإدارية، وغياب إجراءات واضحة لممارستها بدقة.

الكلمات المفتاحية: شفعة، شفعة إدارية، ممارسة الدولة الشفعة.

Le cadre juridique pour l'exercice du droit de préemption par l'État dans la législation algérienne

Résumé

Cette étude vise à identifier comment le législateur algérien affirme le droit de l'État à exercer la préemption, au même titre que la préemption civile, qui n'est qu'une stratégie visant à protéger le bien contre la spéculation, la division, la vente au détail et la vente à des parties étrangères illégales. L'étude met en lumière la nécessité pour le législateur d'intervenir et pour le pouvoir judiciaire de trouver des solutions au vide juridique, à l'absence de concrétisation concrète des textes juridiques de la préemption administrative et à l'absence de procédures claires en ce qui concerne sa pratique avec précision.

Mots-clés: *Droit de préemption, État législation algérienne, pouvoir judiciaire exercice.*

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Introduction:

The property right is one of the basic rights that all legislations have taken care of in terms of its organization, control of its scope, use and protection, and this is due to its importance as well as the big number of complexity of real-estate problems and obligations.

The real estate system is still closely linked to its political and economic counterpart prevailing in the country, reflecting in some ways its political orientations and choices, and reflects its economic priorities.

The immediate-post-independence legal organization of the state-owned agricultural lands in Algeria adopted the strategy of development on public property. This fact opened the way for the State intervention to achieve development goals at the expense of private property which has been under restrictions by the legislator narrowing and expanding according to the political orientation.

The Tripoli Conference of 1963, Agriculture Self-Management Act, Agricultural Revolution Act, National Charter, and the 1976's Constitution played a major role in expanding state ownership at the expense of individuals' private property.

The political changes introduced by the constitutional amendment on February 23, 1989, as well as the economic reforms initiated since the beginning of 1988, led to the promulgation of the Real Estate Directive on November 18, 1990, which enabled the establishment of a free real estate market and ended State monopoly of real estate transactions, keeping on only the role of control and orientation due to the sensitivity of property and to conserve the balance between private and public property. This justifies the state's retention of administrative pre-emption, which is the most important administrative means available for the State to achieve that balance.

Consequently, the **Importance of this study** become visible through:

- Drawing up an integrated theory on the State's pre-emptive practice in Algerian law;
- Clarification of the system of pre-emption as a mechanism in the hands of the state used to preserve the real estate and its properties from speculation;
- Demonstration of pros and cons of this legal mechanism;
- Determination of conditions, procedures, and sanctions for violation or failure to accomplish such procedures in the exercise of pre-emptive state;
- Attempting to indicate the legal and jurisprudential framework by limiting the legal texts that serve the subject directly;
- Attempting to highlight the judicial decisions contained therein.

Previous Studies:

The subject of the exercising of administrative pre-emption by the State as a subject in itself is according to my knowledge, and despite its importance and legal weightiness, almost subject of no study. Indeed, the study that cared the most for this subject was Meriem BOURABA's search titled "Right of Administrative Pre-Emption under the Law Bearing Land Orientation No. 90/25, magister dissertation done at the University of Algiers. This study aimed at unveiling the efficiency and profitability of administrative pre-emption under Law No. 90/25 bearing Land Orientation. However, State intervention was ruled by a group of other special laws put by the legislator.

While administrative pre-emption is considered as a deviation from the original root of "the Power of the Will" and materializes exclusive and legal ownership of the property regardless of the will of the first owner or the purchaser for the claim of achieving balance and protecting the public interest, this issue gives rise to very important inquiries summarized in the main question, which is:

How far the administrative pre-emption's legal system is efficient and able to achieve and protect the balance between private & public interest?

What is the legal basis of administrative pre-emption and the balance it achieves between public and private interests?

From this main question, one asks sub-questions, the most important of which are:

- What are the most important differences between the administrative pre-emption provided for by the Civil Act's texts?
- What are the conditions and procedures for resorting to administrative pre-emption, and who are persons who are entitled to introduce it?
- What are the guarantees to protect private interest under the system of administrative pre-emption?

The research on the subject of the right of the state to pre-emption enables the understanding of this mechanism in terms of its philosophical and legal basis, its functioning method, the evaluation of its effectiveness in achieving its objectives under the experience of knowledge in terms of time and place.

It relies initially on the extrapolation and analysis of the legal texts regulating it. It also gets assisted by the follow up of the reality of its practice on the field and orientations of justice to solve problems resulting from its application.

This fact leads to orient the search on this subject according to the following plan:

1- The concept of administrative pre-emption and its fields of practice.

1-1- Definition and characteristics of administrative pre-emption.

1-2- Areas of Pre-Administrative Practice

2- The legal system of administrative pre-emption

2-1- Conditions of application of administrative pre-emption

2-2- Procedures for the exercise of administrative pre-emption, and the implications thereof.

1- The concept of administrative pre-emption and its fields of practice:

Judging the thing is part of its conception. Therefore, it is necessary to understand the system of administrative pre-emption to begin with a statement of its concept, characteristics and field of practice. The content of this subject is as follows:

1-1- Concept and characteristics of administrative pre-emption:

In this section, we shall address the definition of administrative pre-emption and its legal adaptation in section I, and section II will address the characteristics of administrative pre-emption.

1-1-1- Definition of administrative pre-emption, and adaptation in civil law:

We will refer to the definition of pre-emption first, through its second legal adaptation.

First: Defining Administrative Pre-emption:

« Shefaa » in the Arabic language is taken from « shafaa », or “Al-zawje which means the pair, opposite of « al-fard » which means the odd . One says the man “chafa’a” when he was alone and is joined by another⁽¹⁾.

In the Arabic language, one means by « Shoufa'a » the increase; in other words, to ask for more to add it to your possession to increase it. If it was one, you increase it through Shoufa'a⁽²⁾.

In the terminology of jurisprudence⁽³⁾, pre-emption did not exist as a system of Holy Sharia law in the Holy Quran but was guaranteed by the Prophet's tradition (Sunnah al-nabwy'a)⁽⁴⁾.

It has been reported from the last of the prophets Mohammed peace of God be upon him several "hadiths" (says) establishing pre-emption as a system endowed by its proper provisions⁽⁵⁾.

It was defined as a capacity or authority enabling the owner of its right to subrogate the buyer if he expresses his will. This subrogation concerns all the rights and commitments of the buyer instituted by the sale deed or consequential thereto.

That means that a person who disposes of one of the pre-emption's reasons, such as a partner, can subrogate the buyer in the part intended to sell by one of the partners.

In terminology, the legislator determined pre-emption in the civil act through article 794 as follows: pre-emption is an authorization that authorizes subrogation of the buyer in the sale of a Real estate...”

Pre-emption, according to this definition, is an ability or authority that enables the person who holds one of its reasons to subrogate the buyer in the sale of the property in order to add it to its original property subrogating legally and compulsorily the buyer in his entire rights and commitments.

The Real estate guidance law number 90 – 25 dated November 18, 1990, did not define the administrative pre-emption. However, it was defined in article 3 of the draft decree related to the modes of exercising of the pre-emption right by the state in transactions related to agricultural and urban lands as follows: pre-emption is an authorization that permits the subrogation of the possible buyer in the sale process⁽⁶⁾.

While this decree revolves around agricultural and city lands, the administrative pre-emption can be defined through the joining of two definitions which gives the following definition: it is an authorization that enables the state with its power to subrogate the buyer chosen by the sailor in the sale of the Real Estate.

It is an extraordinary system in terms of its conditions and procedures. it is exercised by a public organism in charge of land organization according to provisions of article 62 of the law on land orientation. this organism is created by the executive decree number 96 – 87 dated February 24, 1996, which is the national office of agricultural lands.

Second: legal conditioning of administrative pre-emption:

A considerable debate on the conditioning of pre-emption appeared between those who say pre-emption is an in-kind right and those who say that it is a personal right.

Some consider it as in-kind right because it results from the right of pre-empted Real estate property, which has consequences many effects and results such as the competent court to rule on the pre-emption lawsuit, which belongs the pre-empted Real Estate property in question, to its cycle of specialisation.

Others consider that pre-emption is a personal right stuck to the person using this pre-emption. The reason is that the latter is connected to him, which means that the pre-emptor does not use an in-kind lawsuit, but a personal right attached to him, which is his right to become buyer by preference⁽⁷⁾.

After that, they conclude by saying that this personal right can neither be passed by inheritance nor transferred. Creditors of pre-emptor cannot use it in his name, consequently, there are not meant by the personal right as opposed to the in-kind right.

Al-Sanhuri sees that the pre-emption is neither an in-kind right nor a personal right. Moreover, it is not considered a right at all. To prove this, only that it is one of the reasons of property acquisition, it is similar to possession, both of which are neither in-kind right nor personal right, but they are legal facts, and they are the sources of rights and they cannot be described as in-kind right nor personal right⁽⁸⁾.

The fair opinion is that pre-emption is the reason to acquire the right. the pre-emptor acquires the property of in-kind right of the Real-estate⁽⁹⁾ if he meets the conditions.

It is a limitation on the freedom of disposing by one hand, and an authorization attached to the pre-emptor to use it as a defence against neighbourhood disadvantages or to participate in the property subject to pre-emption.

As a result, it is considered as annulled his use of the authorization, its transfer or lease to another person, in the lack of a reason for this to happen, which is rejected by the nature of pre-emption itself⁽¹⁰⁾.

By considering pre-emption as a power and not a right, the creditor of the pre-emptor will not enable to ask for pre-emption through indirect lawsuit it institutes in the name of his indebted person. It cannot be transferred to a third party on the pain of its loss and the cancellation of its use⁽¹¹⁾.

This option is more suitable regarding the administrative pre-emption considering that using and resorting to it by the state is an extraordinary mode of acquisition of Real estate's through advantages of public authority in order to realize public interest and benefit⁽¹²⁾.

It is described by the capacity disposed of by the text, and it is neither an in-kind right nor personal right notably that can be used only on Real estates and it was instituted to prevent likely possible disadvantages due to the connection with the sold properties, in addition to its economic characteristics and advantages in joining together a divided property. It is possible that pre-emption was used for a different goal from its original purpose, which gave rise and multiplied litigations about it due to the danger of its use and the introduction of its lawsuit.

1-1-2-Characteristics of administrative pre-emption (its particular characteristics the civil pre-emption):

The main characteristics of administrative pre-emption, compared with civil pre-emption, are:

- its linkage will pre-emptor, because the beneficiaries of the administrative pre-emption are corporations (the state, local communities)⁽¹³⁾;
- the beneficiaries of civil action do not need to provide justifications to his will to subrogate the original buyer, where the administration, in case of a decision to use pre-emption, is obliged to justify it⁽¹⁴⁾,
- the use of pre-emption will be optional in case of civil pre-emption, however, decree number 83 – 344 Bearing freedom of transactions made the intervention of the state compulsory in the administrative pre-emption, which means that the state does not have it as optional to subrogate or not the buyer, but it is obliged to intervene automatically to buy the property from the foreigner, to ensure the transfer of the property from the foreigner to the Algerian citizen⁽¹⁵⁾,
- the state's justifying of its position is submitted to the control of the magistrate, who can control, in case of necessity, the legitimacy of the made decision⁽¹⁶⁾,
- the civil pre-emption aims to achieve the individual interest avoiding and preventing the division of the property and the entrance of the foreigner to the same family, while the administrative pre-emption is aimed to control property transactions to avoid any unusual increase in prices and speculation in the property market,

1-2- Fields of use of administrative pre-emption:

The field of use of administrative pre-emption right by the state can be defined by agricultural lands owned as private property, as well as agricultural lands belonging to the public ownerships. The Algerian legislator gave huge importance to the terrorism sector & terrorist sites, and created pre-emption right on it according to law and regulating texts, as part of the state's efforts to realize property effective investment serving the national economy and encouraging investment.

1-2-1- Use of administrative pre-emption by the state on agricultural lands owned as private properties:

The establishment of administrative pre-emption by the state on agricultural lands owned as private property is aimed at opening the way for young farmers to land ownership, re-establish farmers whose property was expropriated, as well as the investor lessor in case of the sale of the land exploited⁽¹⁷⁾ by in order to extend and enhance agricultural farms, and to avoid the risk of city extension, sharing and portioning off.

To lay the foundations of the state's right of pre-emption, the Algerian legislator created a public organism in charge of land orientation according to provisions of article 62 of the land orientation act, which provided for what follows: the public organism in charge of land orientation uses the right of pre-emption provided for by article 4 of the law number 87 – 19 dated December 8, 1987⁽¹⁸⁾, this public organism is the national office of agricultural lands created by the executive decree number 96 – 78⁽¹⁹⁾.

The national office of agricultural lands the sides the sanctions punishing the norm exportation of agricultural land, which can be the porting of the land under exportation at the expenses of the owner, the possessor, or putting it up to rent or sale⁽²⁰⁾.

In this respect, we find that the state put into application a level mechanism to control the fear application of texts of the loan number 87 – 19 related to awarding the right of permanent

use to the beneficiaries of agricultural lands belonging to the public ownership, which is the executive decree number 90 – 51 dated February 6, 1990 determining the modes of application of the article 28 of the above law⁽²¹⁾.

The ministry of agriculture intervenes through local directions to control conditions of transfer of use right by the beneficiaries. The law, even if it authorized the transfer of the use right, it conditioned it by the gathering of conditions provided for by articles 9 and 10 of the loan number 87 – 19, if not, the state will intervene and use the right of acquisition through pre-emption.

If the application of these conditions⁽²²⁾ appears to be difficult, this fact led to think of the review of the mode of agricultural land exportation through the proposition of a draft law on the exportation of agricultural lands through sale or renting. However, political disputes on the subject of agricultural lands prevented its proposal to the parliament. This issue was finally ruled out by the speech of the president of the Republic Abdul-Aziz BOUTEFLIKA to the governors on May 2000 in which he said that agricultural lands belong to the state and will neither be rented nor sold but will be granted through concession⁽²³⁾.

1-2-2- The use by the state of administrative pre-emption and agricultural lands belonging to national private ownerships, urbanized lands:

article 20 of the law of land orientation defined the urbanized & building lands as land occupied by a group of constructions in its spaces of prospects and by the content of its equipment and activities even if it is not endowed with all equipment or not built.

As regards article 21 of the same law, it defines the capable-to-be-urbanized lands as any plot of land intended to be built in a given delay through tools of development and building.

By returning to the text of article 71 of the law. Land orientation, we find that the Algerian legislator created the right of pre-emption for local communities to preserve the public interest and benefit and meet the needs, without the use of procedures of expropriation.

In this respect, one highlights that the right of pre-emption in its procedures and effects is easier and less complicated than the expropriation, since the right of pre-emption the property title of built or building lands with less Air Force in terms of money and public expenses, by one hand. On the other hand, the legislator ranked the preferential treatment of the state and local communities in the use of the pre-emption right in the way that they become in a higher degree than that of pre-emptors quoted in article 795 of the civil act.

The day of the use of administrative pre-emption in city land market remains to reinforce and diversify the local policy of housing in the way that the local communities will be able to acquire land in the most expensive neighbourhoods, intending it for the building of social houses for families in need, create land reserves in order to keep on extending the reception of economic programs and activities, realizing social equipment, fighting against the deterioration of urban tissue and, developing tourist and leisure places. Thus, the administration has to justify its decision to use the right of pre-emption in order to prevent the cancellation of its decision by administrative Justice as illegitimate⁽²⁴⁾.

1-2-3- The use of pre-emption by the state in tourist sites:

The use by the state of pre-emption in tourist sites came to adapt to current developments. The law number 03 – 03 dated February 17, 2003 bearing regions of extension and tourist sites was adopted in order to execute a plan on tourist development. If the state does not acquire the land through pre-emption, it will acquire it through expropriation⁽²⁵⁾.

by returning to the text of the above law number 03 – 03, and precisely its article 21, one finds that it provides for the use of pre-emption right by the state inside the source of extension and tourist sites through the national agency of tourism development on all properties and constructions realized according to this law, and which is subject to paid or not paid voluntarily property transfer⁽²⁶⁾.

As regards the determining of the property value subject to pre-emption, article 17 of the above law provides for:

“The price of the property subject to acquirement or expropriation by the services of the state’s ownerships is calculated on the date of the publication of the decision of the classification of the tourist zone.”

It would be noted that the role of the national agency of tourism development in the use of pre-emption has not been activated and the end of the year 2006, when was adopted an executive decree bearing the number 06 – 385 dated October 28, 2006 determining the modes of use of pre-emption rights by the national agency of tourism development inside zones of settlement and tourist regions⁽²⁷⁾.

1-2-4- The use of pre-emption by the state according to the provisions of the order number 01 – 09:

in the absence of the right of the Algerian state in using pre-emption, the fact that prevented it from conserving the factory of cement in the Township of Sig, province of Mascara, when the Egyptian operator sold it to a foreign operator. However, similar scenario was afforded by the government as regards the Egyptian operator ORASCOM TELECOM Algeria when the international press release information on the sale of this Egyptian company of its subsidiary to the foreign operator, through adopted laws for application-related as whole with investment and transfer by companies to other foreign parties as long as these companies are submitted to the Algerian law, such as the law number 01 – 03 dated August 20, 2001 related with investment and its development, as well as provisions of the order number 01 – 09 dated July 22, 2009 bearing complimentary Finance law of the year 2009, and the use of pre-emption here is in accordance with registration act⁽²⁸⁾.

2- Legal system of administrative pre-emption and its effects:

After we talked in the first chapter on the concept of administrative pre-emption, its characteristics and the field of its use by the states, we will talk in the second chapter about conditions of applying administrative pre-emption, necessary procedures to its use as well as its effects.

2-1- Conditions of application of administrative pre-emption:

Since there is a linkage between pre-empted property and pre-emptor, and by returning to provisions of civil act, the law number 87 – 19 and the law number 90 – 25, one cannot use the right of administrative pre-emption and less under two conditions:

First Condition: the condition related to the existence of the Pre-emptor

Second Condition: the condition related to the property

2-1-1- the condition related to the existence of the Pre-emptor:

If article 795 of the civil act determines the nature persons enabled to use pre-emption, the special legislation (90/25) added to the text of article 795 of the civil act persons and other organisms able to use pre-emption right.

Thus, the state and local communities have the right to use pre-emption on urbanized or building lands as we said before, consequently, they will have the priority above all the grades coated in article 795 of the Algerian civil act, according to article 71 of the law number 90 – 25 of the law on land orientation.

As regards article 180 of the registration act, it makes an addition to the right of the state in using pre-emption regarding all the real estate, as it is confirmed by article 16 of the executive decree number 91 – 454 determining conditions of private and public properties administration belonging to the state and the management, as well as local communities in the use of administrative pre-emption under respect of legal delays provided for by the above article 118⁽²⁹⁾.

It can also use automatic pre-emption on foreigners’ disposing of their properties, the fact that was quoted above.

By returning to the text of article 118 of the registration act⁽³⁰⁾, one finds that the state uses pre-emption in favour of the public treasury. It provides that the administration of registration can use, in favour of the treasury, the right of pre-emption on properties, property rights, stores, customers, renting right or profiting of the renting promise on the entire or part of a

property, if it considers that the sale price is not enough. It will use this right through paying this price in addition to 10% for rights for owners, in addition to the lawsuit introduced in front of the commission provided for in articles 102 and 106 of this act during the delay of one year starting from the date of the deed's registration, or the declaration. The decision of the use of pre-emption is notified.... In the field of the above properties."

In addition, the Algerian legislature enabled the state to use pre-emption on agricultural lands belonging to privates, since by reading articles from 48 to 52 of the law on land orientation, one finds that it confirmed for the state this right, accepting the case of non-text partition of agricultural lands, and non-use of the lands for the purpose they were granted for. Due to its importance and economic and social weight, the public organism can propose to acquire these lands, with the possibility of using the right of pre-emption⁽³¹⁾.

Pre-emption can be used in the last stage that follows the use of or previous procedures in vain. It accompanies the putting-up-for-sale of the agricultural land which is not exploited effectively if it is fertile or very fertile. This comes following the proving of the non-exploitation of agricultural lands in the minutes drawn up by the special commission which notify the national office of agricultural lands in order to launch legal procedures in use in this field⁽³²⁾.

2-1-2- Conditions related to the property subject to acquirement by pre-emption:

The conditions required in the property subject to acquirement by pre-emption right lead us to distinguish between conditions related to agriculture & city property.

First: Conditions required in the agricultural land:

In this case, one has to distinguish as regards agricultural exploitation between built and non-built lands.

a- Non-Built Lands: One means by non-built lands all lands with new constructions intended to agricultural activity whatever is its type or nature. To be possible for the state to use the right of pre-emption, one has to exclude:

- all the lands agricultural type of which has changed before disposing of them, even if they are still exploited in agriculture, usually, these lands are situated in the periphery of urban zones. They can be used for development and urbanization because they are lands that can be used for construction in the medium or long term.
- All the lands used or reserved as tree-planted areas,
- all the lands that are attached directly to non-agricultural property, such as family gardens and orchards,
- all the lands reserved for mining or quarries;

b- Built lands: One means by built lands any area on which is built the construction or establishment for housing or its dependencies such as garages and stores, and any construction reserved to serve the property belonging to a collective farm. Consequently, if the firm is put up for sale, in this case, there is no need to distinguish between what is built and what is not, since the sale concerns the land and its constructions. This means that pre-emption is used on the entire farm. As for the case of constructions independent from the land, one can use pre-emption on the entire farm.

In case the independent constructions from the land are put up for sale, pre-emption can be used on equipment and instructions for sale. One excludes instructions used as houses, unless they are put up for sale alone in this case, one can use pre-emption to acquire them⁽³³⁾.

Second- Conditions required in city property:

It is rare to find non-built land in city areas. In most of cases they are constructed or depending to a construction. Due to the big demand on city lands and the small offer, using pre-emption right becomes important since it is used on all city lands without exception, and in the rental that precedes pre-emptors quoted in the text of the article 795 of the civil act, and this as part of the execution of urban tools in order to meet the needs of the public interest without applying the likely other extraordinary legal procedure which is expropriation for public interest.

Consequently, one can call it special pre-emption closer to the procedure of public property expropriation⁽³⁴⁾.

The reason and demand of city lands remain uneven in all regions due to urban tools. The use of pre-emption right enables to define areas that has to be submitted to it, and consequently, it excludes urban areas from others.

So, urban power centres of strategic location remain the most in need for the use of pre-emption to be acquired due to the vitality of its social and economic activity, as well as areas located at the periphery of the cities, which are considered as sensitive areas that constituted the line of contact between two worlds: the urban and rural worlds. It attracts the interest of price speculators who opt for the investment of buying them then expecting the expected urban expansion⁽³⁵⁾.

2-2 Procedures necessary to use the administrative pre-emption and its effects:

In this chapter, we will try to touch on the mode of following the necessary procedures to use pre-emption by the state, and the legal effects resulting from the use of this right in the lack of legal texts that explain that clearly. So, despite inserting this right in special legal texts such as the law on land orientation, one did not specify the mode of using the administrative pre-emption, consequently, we must always return to the general rules.

2-2-1- Procedures of the use of administrative pre-emption:

By returning to the general rules provided for by the civil act, State's acquirement by pre-emption is not excluded from these rules.

First: The declaration of intention to acquirement by pre-emption in fixed delay⁽³⁶⁾:

by returning to the text of article 52 of the law 90 – 25 Bearing land orientation, one finds that the national office of agricultural lands created by the executive decree number 78 – 96 dated February 24, 1996, is the entitled organism to which refers both of the buyer and the seller on whether the agricultural property is exploited. in this case, one has to respect the procedure which is the examination of the effective non-exploitation of agricultural lands, and that the procedure of description application is applied through regulation⁽³⁷⁾.

On this basis, the buyer and the seller of the property have to submit a declaration on their intention to contract, before contracting the transaction in the official form, to the national office of agricultural lands, if the property is agricultural, or to the competent local agency of urban property management and regulation if the property subject to the transaction is urban⁽³⁸⁾.

By the issuance of inter-ministerial instruction of the ministries of finances and agricultural and rural development dated July 15, 2002 related to the transfer of the permanent right of use granted to the beneficiaries as part of the law number 87 – 19, the latter showed some procedures for the use of pre-emption right by the state, since it committed notaries public, before the drawing up of the transfer deed, to inform the manager of state properties of the province to enable him use the right of pre-emption in favour of the state. It gave the latter a delay of one month starting from the date of notification reception from the Notary Public related to the acquirement by pre-emption or authorizing the transfer⁽³⁹⁾.

Second: Fixing the price:

The Notary Public who draws up and notify the declaration has to include in this notification information and fundamental elements related to the sale, notably the identity of the parties, who are the buyer and the seller, describing precisely the property rights that are to be sold⁽⁴⁰⁾, the agreed price for the sale of the property, or the declared price in the deed, and what follows of fees⁽⁴¹⁾.

In case the above procedures are not observed, one will be in front of two cases as regards the use of pre-emption by the public organism:

- **The first case:** It is the case of rejection of using pre-emption right by the organism, which results in the accomplishment and achievement of the original deed. One has to note here that the decision of answering by reject has to respect the granted legal delays,

- **The second case:** it is the case of accepting the acquirement through pre-emption by the organism as it is agreed in the deed. Consequently, the deed can be concluded in the official form, or the acquirement through pre-emption is accepted with the possibility of changing the agreed price between the buyer and the seller. This will be considered as a coming-out of the rules of pre-emption provided for in the civil act. in the last case, one can imagine one of the two hypotheses:

1. either the seller accepts the offer, and the parties' will is materialized in the official form,
2. or the buyer rejects the offer, and in this hypothesis, the organism can opt for justice to determine the price of the property put up to sale⁽⁴²⁾,

The sanction resulting from violating provisions of pre-emption by the contracting parties is a cancellation in the way that it becomes without effect as for the public organism according to article 56 of the law number 90 – 25 stipulating that any transaction concluded in violation of provisions of the above article 55 is cancelled and without effect. In this case, one can approve the property transfer which this transaction realizes in favour of the competent public organism through the payment of a fair price, this regarding the seller and the buyer. But as regards the decision issued by the public organism in charge of the use of pre-emption, it is considered an administrative decision, and the non-respect of legal procedures is sanctioned by the cancellation according to administrative justice rules⁽⁴³⁾.

2-2-2- Effects of acquirement through administrative pre-emption:

If among effects of acquirement through pre-emption in the civil act is the commitment of the seller to transfer the sold property ownership, if the ruling grants it to him, and this transfer is materialized by registration, also the seller is committed to delivering the property subject to pre-emption to the pre-emptor, if the property is in the possession of the seller and is not delivered to the buyer⁽⁴⁴⁾, on the other hand, it results from the establishment and use of administrative pre-emption right the transfer of the ownership of the right of use to the state⁽⁴⁵⁾, which subrogated the buyer in his rights and obligations provided for in the law number 87/19. The state becomes the full owner of the property, and any violation of obligations and rights, violation of pre-emption provisions, is punished by the convenient sanction. In this respect, one distinguishes between two cases:

- First: Case of sanctions resulting from the non-respect by the buyer, the seller and the Notary Public of procedures of pre-emption use:

If the original parties of the deed do not observe procedures provided for according to the legislation in force, as we noted above⁽⁴⁶⁾, the transaction will be cancelled in favour of the legal organism entitled to use the administrative pre-emption, since the latter has the right to demand the cancellation of the transaction and subrogated the buyer with retroactive effect, through paying a fair price according to provisions of article 56 of the law on land orientation number 90 – 25. The nature of this legal procedure is restitution that is distinguished from pre-emption being a later procedure that follows the conclusion of the contract, and the transfer of property to the buyer⁽⁴⁷⁾.

The legal civil responsibility also results from the work of the Notary Public if he omits the procedure resulting from the authenticity of the deed. His responsibility here is towards the parties of the contracting relationship, and regarding the public organism⁽⁴⁸⁾.

- Second: Sanctions resulting from violation by the public organism:

One distinguishes between whether the violation made is in the procedure or basically.

1- Violation in the procedure: Organism's non-respect of the legal procedure is liable to the cancellation of its decision according to the rules of the administrative litigations act⁽⁴⁹⁾,

2- violation basically: If the intervention of the public organism is aimed at buying lands, redistributing them or buying them, and are not to monopolizing them, the non-respect of the reason for which pre-emption is introduced permits the interested parties of the sale deed to apply for compensation of damages caused to them due to the non-conclusion of the contract.

Conclusion:

Through our study of the subject of the State's rights in using pre-emption, one concludes the following results:

the Algerian legislature, even if he wishes through pre-emption right provided for in the special laws to realize a strategy serving the property, and more precisely to preserve the agricultural orientation of lands, fighting speculation in real estate market, oppressing greed and arbitrary embezzlement in favour of expanding urban zones, or to create areas intended to industrial or tourist activities, or to construct social houses, and its concentration on supporting agricultural forms is nothing but a confirmation to our say, in spite of the disappointing results due to allergies and in the field of Bailey officiating from agricultural lands, and granting them to persons who have no relation with agricultural. However, and in this framework, and despite legal texts provided for in special laws, it lacks efficiency since it remains without practical materialization. This is due to the non-provoking of disputes in this respect.

The lack of justice rulings rendered in this field reflects our orientation. The legislature stipulation of the State's right of acquirement through pre-emption came with deficiencies since he did not specify and clarify the procedures of its use precisely to enable the transfer of property.

Non-effective activation of the national office of agricultural land to perform its duties according to the law.

Non-sparking of the point of justice and its role in the use of pre-emption, as it is the case of pre-emption in the registration act and the right of pre-emption according to the decree 93 – 03 bearing organization of land activity, since it did not provide for procedures in front of justice as it did with pre-emption according to the general basics provided for in the civil act.

So, and as a solution as regards the above problem, we suggest a fundamental recommendation requiring to be followed, which is:

the necessity of intervention of the legislature through removing all ambiguity and legal vacuum breaking the use of pre-emption in terms of its obligations and the procedures organizing it, to serve the property and the public interest through ensuring the balance between private and public interests and to prevent economic damage.

Endnotes:

1-Al-Jawhari, 1974, Al-Sihah in the Language, First Edition, vol. I, pp 674, 675.

2-Muhieddin Abi Al-Fayadh Mr. Mohammed Mortada Al-Hassani Al-Wasiti Al-Zubibi Al-Hanafi, 1386 AH, 1966, Taj Al-Arous, Volume 6, Libya Publishing and Distribution House, Benghazi, Dar Sader, Beirut, p 400. See also: Abi al-Fadl Gamal al-Din ibn Makram bin Mansour of African-Egyptian, 1415, 1995, the tongue of the Arabs, Volume 8, I, Dar Sader, Beirut, p 184.

3-«La préemption peut être définie une faculté, conférée à une personne par la loi ou un acte juridique volontaire, d'acquérir un bien par préférence à toute autre». (Voir: VERGE Emmanuel, 1954, RIPERT Georges et Suzanne DALLIGNY, "Préemption", inEncyclopédie Dalloz, Tome IV, Paris, pp 1-5).

-What is noted in this definition is that it differs from the definition of preemption in the Arabic term, even though the term "La pré-emption" is the term synonymous with the Arabic term "Al-chouf'aa. The definition focuses on the fact that the preamble is based on "bien", a broad term that focuses on real estate and movable to the extent The two concepts agree in terms of reason, and differ in terms of nature and application.

4-It is also proven that the Prophet (peace and blessings of Allaah be upon him) approved the pre-emption, As narrated in the correct bin Abdullah may Allah be pleased with him

About him Aucune donnée renvoyée (Dépassement du temps imparti). as saying: "The Messenger of Allaah (peace and blessings of Allaah be upon him)

In all that is not divided, and if the border is signed, and the roads are disbursed, there is no division (See Ahmad bin Ali bin Hajar al-Askalani, Fath al-Bari, in Sahih Saheeh al-Bukhari, c. 4, Dar al-Maarifah, Beirut, Lebanon, p 436). (See also: Al-Hafez Ibn Hajar al-Askalani, 1981, Al-Maram's Guide to Judgments(See also: Abu Bakr Jabir al-Jazairi, The Platform of the Muslim, 1, Dar al-Baath, Constantine, Algeria, p 379.)

- 5-Mohammed Abu Zahra, 1988, *The Royal and Theory of Contract in Islamic Law*, Dar Al-Fikr Al-Arabi, Cairo, p 150.
- 6-Ben Rokaya Youssef, *Explanation of Agricultural Investors*, National Educational Works, Algeria, 2001, p 187.
- 7-Hassan Kira, summarized in *Civil Law provisions, original in-kind rights*, Knowledge Establishment, I 3, 1994, p 513.
- 8-Abd Al-Razzak Ahmed Al-Sanhoury, 1980, *Al-Waseet in explaining the Civil Law, the reasons for the acquisition of property with the original in-kind property rights (right of usufruct and easement)*, Revival of Arab Heritage, Beirut, C 9, p 447.
- See also Anwar Tolba, 2001, *Mediator in Civil Law*, Modern University Office, C 5, p 342.
- 9-See, in particular, 1945, the jurisprudents of pre-emption as a right in the eyes, or a personal right: Zuhdi Yakan, Preamble, library published in Beirut, pp 49-49.
- 10-(Appeal No. 2474 for the year 54, 17/1/1989, y 40, p 174). See Hisham Abdul Hamid Al Jumaili, 2017 edition, *Encyclopedia of the Civil Civil Procedure in Civil Cases in light of the latest opinions and judgments of the Court of Cassation. Demand for benefits - Reducing the value of economic housing - Reconciliation - Expulsion from agricultural land - Agrarian Reform*, Editions of the Judiciary Club, p 12.
- 11-Al-Shawarabi Abdul-Hamid, 1979, *Al-Shifaa and Al-Qasma*, second edition, Dar Al-Nasr Publishing and Distribution, p14.
- The Egyptian Court of Cassation ruled that, "Preemption is not a restriction on the freedom of contract and a close license to the person of the sheikh to pay for the harm of the neighborhood, or to participate in his property that intercedes, and then nullify his dealings in this license or the same or give it to others (See Mustafa Majdi Harja, 1993, *Preemption in the Light of the Latest Opinions and Rulings of Cassation and Legal Formations*, University Publications House, Faculty of Law, Alexandria, p 12,13).
- 12-Maryam Boraba, 2011-2012, *Administrative Prejudice under the Law of Real Estate Directive 90-25*, Master Thesis, Supervision: Mohammadi Soliman, University of Algiers, p 11.
- 13-See article 795 of the Algerian Civil Code and article 52 of Law No. 90/25 of 18/12/1990, including the amended real estate directive supplemented by Order No. 26/09/1995.
- 14-Maryam Boraba, op. Cit, p 14.
- 15-Dated 21 May 1983, amending certain provisions of Decree No. 64-15 of 20 January 1964.
- 16-Smain Shama, 2003, *The Algerian Legal System for Real Estate Guidance - descriptive and analytical study*, Dar Houma, p 242.
- 17-Ahmed Khaldi, 2008, *Preemption between Islamic Law and the Algerian Civil Law in the light of the jurisprudence of the Supreme Court and the State Council*, Dar Houma, second edition, p 104.
- 18-Including the control of the exploitation of agricultural land belonging to national property and the determination of the rights and duties of producers (Article 50).
- 19-Of 24/04/1996, Official Gazette No. 15, which includes the establishment of the National Bureau of Agricultural Lands.
- 20-Boraba Maryam, op. Cit, p 35.
- 21-See Article 28 of Law No. 87/19 on how to control the exploitation of agricultural land belonging to national property and determine the rights of producers.
- 22-See Decree No. 97/490 of 20/12/1997, which specifies the conditions for the division of agricultural lands.
- 23-Ahmed Khaldi, 2008, op. Cit., Second edition, pp 95, 96.
- 24-Ibid., p 105.
- 25- Ahmed Khaldi, 2013, *Preemption between Islamic Law and Algerian Civil Law in the light of the jurisprudence of the Supreme Court and the Council of State*, Dar Houma, 3rd ed, pp 186, 187.
- 26- See Article 21 of Law No. 03/03 of 17/02/2003 containing tourist areas and tourist sites.
- 27- The Algerian legislator established the National Agency for the Development of Tourism in 1998 under Executive Decree No. 98/70 of 21 February 1998, in accordance with the provisions of Order No. 66/62 of 26/03/1966 concerning tourist areas and places. It is noted that the time difference between the establishment of the Agency and the date of the issuance of the executive decree of its powers on 28/10/2006 under No. 06/385 of 08 years, which in my opinion affects the practice of administrative preemption, and reflects the scarcity and absence of judgments and jurisprudence against civil preemption. See Ahmed Khaldi, 2013, *Previous*, Third Edition, p 192.

- 28- See: Order No. 76/105 dated 09/12/1976, including the Amended and Supplementary Registration Act (GR 81: 1).
- 29- Order No. 76/105 dated 09/12/1976, including the Amended and Supplementary Registration Act (GR 81).
- 30- See the decision of the Council of State dated 24/06/2002, Resolution No. 7152, State Council Magazine, No. 5, 2004, p. 127. (Decision concerning the exercise of the right of preemption in favor of the public treasury, Subject).
- 31- See Article 52 of Law 90/25 of 18/12/1990, which includes the Real Estate Directive (RR 49).
- 32- Article 90 of Executive Decree No. 97/484 of 97/12/1997 containing the composition of the special body, as well as the procedures for proving the non-exploitation of agricultural lands (JR83).
- 33- Smain Shama, op. Cit., P 247.
- 34- Ahmed Doughish, 2013, Right of Precedence in Algerian Legislation, Ibid. 3, pp 182, 183.
- 35- Smain Shama, op. Cit, P 249.
- 36- Abdel Moneim Farag Al-Sada, Original Rights in the Original - A Study in Lebanese Law and the Egyptian Law, Dar Al-Nahda Al-Arabiya for Printing and Publishing, p 435.
- 37- See Article 50 of the Law of 18/11/1990 including the Real Estate Directive (RR 49).
- 38- Samin Shama, op. Cit, P 251.
- 39- Ahmed Khalidi, 2008, op. Cit., Second edition, p 97
- 40- See Article 800 of the Algerian Civil Code.
- 41- See Article 799 of the Algerian Civil Code.
- 42- Ahmed Khalidi, 2008, op. Cit., Second edition, p 100.
- 43- Smain Shama, op. Cit, p 254.
- 44- Mr. Abdul Samad Mohammed Yusuf, the preemption between the requirements of Sharia and the problems of reality with a thesis to solve these problems in accordance with the provisions of Sharia and the law, the first edition 2018, the library of legal loyalty, Alexandria, p 316.
- 45- This is according to Ben Rukaya Ben Youssef, op. Cit., P. 189, so that if one of the beneficiaries sells its common share and assumes that it is a quarter, the state becomes a full owner of the quarter and owns the neck within the remaining 4/3.
- 46- Judgment by rejecting a claim to exercise the right of first refusal to inform the appellants in the pre-emption as required by article 108 of the Civil Code under the invalidity of the invalidity in case file No. 194391 of 31/05/2000. (See: The Judgment of the Real Estate Chamber, C1, Documents Section, 2004, p 233).
- 47- Smain Shama, op. Cit., p 253.
- 48- LEENQAR BERKAHRM Soumia, 2004, disputes the state's agricultural property - in the field of ownership and management, I 1, the National Bureau of Educational Works, p 60.
- 49- Smain Shama, op. Cit., p 254.

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- 3- Ahmed Khalidi, 2013, Preemption between the Islamic Sharia and the Algerian Civil Law in light of the jurisprudence of the Supreme Court and the State Council, 3, Dar Houma.
- 4- Anwar Tolba, 2001, Mediator in Civil Law, C5, Modern University Office.
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- 8- Hassan Kira, 1994, summarized in Civil Law provisions, original in-kind rights, i3, Knowledge Establishment.
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 - 24- Journal of the State Council, No, 5, 2004.
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 - 28- 29. Law No. 90/25 of 18/12/1990 amended and supplemented, corresponding to: 26/09/1995, including the Real Estate Directive, (RR 49).
 - 29- Law No. 03/03 of 16 Dhu al-Hijjah 1423, corresponding to: 17/02/2003, including tourist areas and tourist sites, (JR: 11).
 - 30- Order No. 75/85 of 20 Ramadan in 1395, corresponding to: 26 September 1975, which contains the amended and supplemented Civil Code (JR 31).
 - 31- Order No. 76/105 of 09/12/1976, including the Amended and Supplementary Registration Act, (RR 81).
 - 32- Decree No. 83-344 of 21 May 1983, amending the provisions of Decree No. 64-15 of 20 January 1964, which includes the freedom of transactions, 1983 (JR: 21).
 - 33- Decree No. 97/490 of 20/12/1997, specifying the conditions for the division of agricultural lands, (JR 84).