

The Problematic Structure of Management of Co-Owned Properties in Turkish Law and Pursuance of Solutions

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By

Eylem Apaydin

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P U B L I S H I N G

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PREFACE

This book is an edited version of the author's PhD thesis and basically the result of four years of studying at the University of Leicester.

This book provides a critical evaluation of the statutory framework for the co-ownership regulations in Turkish law and it acquaints the Turkish jurists with the existence of trust of land of English law. It is posited upon the argument that solutions to the problems observed in the administration and enjoyment of co-owned properties in Turkish law may be overcome by the introduction of a new institution, which is inspired by the trust mechanism of English law. This entails the existing Turkish regulation for the management of the co-owned properties outdated, unreasonably complex, and extremely artificial with some assumptions.

After successfully establishing that the Turkish system is currently inadequate to provide an efficient system, this book provides the indications for a solution. Having been aware of the limitations of the Turkish legal system and the restricted possibility of the direct reception of trust, this book examines to what extent the current institutions in Turkish law would replace the functions of trust in the context of co-ownership. This examination results in searching for a new system as it is concluded that any of the trust-like devices in the current Turkish law could not effectively and comprehensively serve the purposes that English trust does.

Therefore, this book suggests that a new mechanism, inspired by the English trust of land, would provide the required mechanisms for an efficient managerial system for co-owned properties. Rather than asserting to solely focus on a comprehensive new system, this book discusses the possible solutions and urges further research about the matter. Hence, the so-called alien system, trust of land, and its capability to provide an alternative but efficient and productive solution to the managerial problems of the co-owned properties, would be made familiar with the Turkish jurists.

—Dr.Eylem Apaydin

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CHAPTER ONE

THE NATURE OF THE PROBLEM, THE METHOD AND THE SCOPE

A. Introduction; the Nature of the Problem

1. Aim

“Co-ownership is the term used to describe the form of ownership in which two or more persons are simultaneously entitled in possession to an interest or interests in the same assets”¹ That is how Gray & Gray define co-ownership. Simply, there must be four components in co-ownership: ownership, property, two or more persons, and simultaneity of the interests. Hence, co-ownership simply is that “*two or more people own a property simultaneously.*”

Throughout this thesis, it will be shown how this simple structure can cause serious problems, and how different legal systems try to regulate this concept to provide the optimum benefit for the co-owners.

In general, the customary type of ownership of a property is sole ownership that is a property being owned by a single person or entity.² However, as a consequence of legal regulations, and for economic and social reasons it is not unusual that some properties are owned by two or more persons. Such circumstances have forced law makers to regulate co-ownership, where a property is simultaneously owned by two or more persons. In sole ownership of a property, this property is owned, managed and used by the sole owner. The sole owner can use, rent, sell, mortgage

¹ Gray, K. & Gray, S. F. *Elements of Land Law* (5th edn Oxford University Press, New York, 2009) 913

² MacKenzie, J. & Phillips, M., *Textbook on Land Law* (12th edn Oxford University Press, New York, 2008) 295 “at one time the normal pattern of land ownership in Britain was that the estate in land, unless it was a large property subject to a complex settlement, was vested in one person as sole beneficial owner.”

and pledge his/her property independently without getting the approval of a third party.

What happens if a property is owned by two or more persons at the same time? Indeed, is it possible? It is observed that all western legal systems allow people to own a property together at the same time.³ Co-ownership is a recognized way of holding interests in a property by more than one person together at the same time under both Turkish and English law. In these systems the right to manage and use is divided between the co-owners where the property is subject to co-ownership. Even the phrase of 'division of rights and obligations' implies the possibility of disputes between the co-owners where there are two or more persons and ownership of a single property, which, in many cases, is designed for the use of one person. Hence, it is not hypothetical to claim that co-ownership itself is a naturally problematic structure. Accordingly, while recognizing co-ownership,⁴ these legal systems have introduced management systems to handle these problems. In English law, all co-owned lands are held subject to trust of land,⁵ and trustees of this trust of land are empowered to manage co-owned property as absolute owners. It is a simple and effective system.⁶ On the other hand, the Turkish system has adopted a very complicated approach. First, it recognizes two types of co-ownership and provides two sets of rules for each type. Moreover, in one of these types of co-ownership, it categorises the administrative tasks for the decision making process in the management of co-owned properties, into three categories and requires different quorums for each category.⁷ As will be shown in this thesis, the current Turkish co-ownership regulation is not able to provide an efficient system for the management of co-owned properties.

The primary aim of this thesis is to identify remedies to the problems arising from the inadequacies of the Turkish legal system vis-à-vis the management and use of co-owned properties by drawing a comparison

³ See <<http://www.britannica.com/EBchecked/topic/122807/co-ownership>> (visited in May 2007)

⁴ In English law, there are two types of co-ownership; joint tenancy and tenancy in common. In Turkish law also there are two types of co-ownership; co-ownership by shares and co-ownership in common.

⁵ Trusts of Land and Appointment of Trustees Act 1996 (TLATA) s.1

⁶ This assertion is about the management of co-owned properties. On the other hand, English law has its own co-ownership problem about the acquisition of interest in a property. However, this is not the focus of this thesis as it is especially centred on the managerial problems.

⁷ Turkish Civil Code (TCC) Articles 688-703

with the English regulation of co-ownership. This thesis proposes that a new system be introduced into Turkish law in an attempt to regulate the management and use of co-owned properties, with reference to the English experience via the trust of land, which has managed to minimise the disputes arising from co-ownership.

2. Empirical Evidence and Statistics

Before explaining the elements and consequences of the Turkish co-ownership regulation, it is worth noting some co-ownership statistics. Statistical data proves that co-ownership and related problems are two of the most important judicial matters that the civil courts have to deal with in Turkey. In accordance with the government statistics provided by the Ministry of Justice, in 2004, there were 22,423 dissolutions of co-ownership cases and 41,252 plaintiffs and 142,180 defendants were involved. The average number of co-owners in that year was slightly above 8 co-owners.⁸ 22,869 dissolution of co-ownership suits were filed in 2005.⁹ These statistics show that these 22,869 actions were brought by the 44,044 plaintiffs against 136,533 defendants. In each co-ownership case an average of 8 co-owners were involved.¹⁰ However, some co-ownership cases include a couple of co-owners, whilst others may include tens or even hundreds of co-owners. More recent figures from 2007 show 20,713 dissolutions of co-co-ownership suits were filed in 2007 including 37,460 plaintiffs and 136,220 defendants.¹¹ The average number of co-owners was 8.6 in 2007. In 2006, 19,459 dissolutions of co-co-ownership suits were filed in 2006, which includes 35,306 plaintiffs and 130,530 defendants. The average number of co-owners in 2006 is 8.5.¹²

⁸ The website of Turkish Ministry of Justice at: <http://www.adli-sicil.gov.tr/istatistikler/1996/hukuk_pdf/hukuk_web/2004ahld.HTM> (visited on 10.05.2007)

⁹ The website of Turkish Ministry of Justice <<http://www.adli-sicil.gov.tr/istatistikler/huk6.htm>> (visited on 10.05.2007).

¹⁰ The website of Turkish Ministry of Justice <http://www.adli-sicil.gov.tr/istatistikler/1996/hukuk_pdf/hukuk_web/2005ahld.HTM> (visited on 10.05.2007). It is not possible to get the exact figures to determine what percentages of cases include co-ownership disputes. However, termination of co-ownership cases constitutes distinctively the highest portion of the property cases.

¹¹ The website of Turkish Ministry of Justice <http://www.adli-sicil.gov.tr/ISTATISTIKLER/1996/hukuk_pdf/hukuk_web/HUKUKMAHAÇILANHASIMLITÜRK07W.pdf> (visited in June 2009)

¹² The website of Turkish Ministry of Justice

As seen, with the approximately 9 co-owners involved in co-ownership relationship became difficult and the co-owners were not able to continue their relationship. Moreover, whilst almost 200,000 people argued about the dissolution of co-ownership, there is no statistical data showing the current number of properties subject to co-ownership. However, it is not unrealistic to suggest that a large number of people are involved in co-ownership relationships in Turkey.

The statistics confirm that each year more than 180,000 people in Turkey are involved in termination of a co-ownership law suit by applications for partition or sale of the property, either between the co-owners or public auction. These figures establish that co-ownership is a serious legal problem in Turkey. They also support the argument of this thesis that the Turkish regulation of co-ownership is inadequate in terms of management and use of co-owned properties to provide for the effective continuation of co-ownership.

On the other hand, the judicial statistics in England do not specifically mention or indicate the average number of co-owners of a land participating in legal actions. Nonetheless, it may be helpful to demonstrate some figures, which may be related to co-ownership and trust of land. Initially, the number of cases about disputes regarding the trust property at the Chancery Division of High Court in England is 13 in 2008 where the total number of cases is 3779.¹³ Even the number of continuous probate actions and inheritance (provision for dependants) are added, the cases including disputes related to a trust will be 199, about 5% of the total cases. There are 464 applications for orders appointing new trustees in 2008 in accordance with Trustees Act 1925 and TLATA 1996 in Court of Protection. This is just over 2% of the total applications (22,583) made to Court of Protection in 2008.¹⁴ These figures help to conclude that disputes about trust of land and land co-ownership do not constitute the same level of work at the courts in England.

3. Shortcomings of the Turkish Co-ownership Regulation

As the above statistics show that the disputes arisen from co-ownership constitutes a remarkable amount of workload of the courts in Turkey.

<http://www.adli-sicil.gov.tr/ISTATISTIKLER/1996/hukuk_pdf/hukuk_web/2006/acilan.HTM> (visited in June 2009)

¹³ <http://www.official-documents.gov.uk/document/cm76/7697/7697.pdf> (visited in March 2010) p.37

¹⁴ <http://www.official-documents.gov.uk/document/cm76/7697/7697.pdf> (visited in March 2010) p.169

There appears to be six primary reasons for this high amount of legal actions. It can be listed as a) not elaborate land co-ownership regulation b) unlimited numbers of co-owners c) statutorily compulsory co-ownership cases d) inheritance rules e) complexity and incompetence of the management system f) not providing alternative dispute resolutions.

Firstly, The Turkish Civil Code (hereinafter TCC) has provided two different set of rule to govern the sole ownership of real properties¹⁵ and the sole ownership of chattels¹⁶ Whereas, Turkish law makers have not held land co-ownership and chattel co-ownership to different rules.¹⁷ It is observed that Turkish Civil Code provides one common set of rules concerning co-ownership of both real properties and chattels. It is interesting that the law-makers regard land ownership as a specific matter, which cannot be held subject to the same rules as the chattels. However, they have held the chattel co-ownership and land co-ownership subject to the same rules. The Turkish Civil Code, Articles 688-703, has preferred to introduce a unified set of rules on co-ownership, which cover chattel co-ownership and real property co-ownership at the same time. It did not particularly devote a section to cover the land co-ownership. In addition to these common rules, the Code provides some specific rules for each type of co-ownership separately where appropriate. However, many times the Code is inadequate in setting the provisions to meet the specific requirements of the real estate co-ownership. For instance, TCC Art. 693/I provides the same rule on use of a co-owned property whether it is a land or a chattel, but it is obvious that land and its use has aspects differing from the chattels, especially regarding the use of co-owned property. On the other hand, English law provides a dedicated Act regulating the management of co-owned lands itself. Even this approach shows how important English law regards the land co-ownership. As will be concluded later on in this thesis, Turkish law also should introduce a new regulation to cover the management of co-owned land.

Secondly, Turkish law does not limit the number of co-owners of a co-owned property, who have a right to participate in management of the property. The number of co-owners can theoretically range from two to infinity. This structure not surprisingly leads to administrative problems in co-ownership in Turkish law, especially concerning the complex management system.

As can be seen by the aforementioned statistics, co-ownership cases in Turkey include an average of 8 co-owners. There are two main reasons for

¹⁵ TCC Articles 704-761

¹⁶ TCC Articles 762-778

¹⁷ TCC Articles 688-703

this high number of co-owners in a co-ownership relationship in Turkish law. Firstly, in accordance with TCC Art. 688/III, a share of a co-owned property, which is subject to co-ownership by shares, can be sold to the other co-owners and third parties. In line with Art.688/III, a co-owner can sell his/her entire share, and moreover he/she can sell a portion of it. This power of the co-owners may theoretically lead to a co-ownership by shares with many co-owners. A real life example¹⁸ shows that a share in a co-owned property, which has been owned by 12 co-owners, can be sold to another 12 persons with different proportions.

Secondly, this problem is compounded by the compulsory co-ownership situations, which have been imposed by the statutory regulation in specific circumstances. The most important of these circumstances is “inheritance partnership”.¹⁹ The Turkish Civil Code Article 640/II states that “The heirs are *co-owners in common* of the property forming part of the estate and deal with it jointly, subject to the rights of representation and administration conferred by agreement or by law.” Article 640/II has a vital effect on co-ownership. As such, this article is the source of many co-ownership disputes in Turkish law. Imagine the effect of a rule which convene that the death of each person who owned a real property would result in a land co-ownership case.²⁰

On the other hand, effects of this article are worsened with the provisions on the compulsory inheritance shares by TCC Art. 506. The compulsory shares of the successors in Turkish inheritance law in turn inevitably increase the number of the co-owners in co-ownership cases. After listing the legal heirs of a deceased person,²¹ TCC Article 506²² guarantees a portion of the estate as the rights of offspring, father and mother, brother and sister and surviving spouse. According to this, a) the reserved portion and legal inheritance right of offspring is 1/2 b) the reserved portion of inheritance for father and mother is 1/4 c) The legal inheritance right for every brother and sister is 1/8 d) the surviving spouse

¹⁸ As mentioned in the legal discussion forum at:

<http://www.hukuk.gen.tr/sorular/cevaplar.asp?q_id=1690&soran=gedikli> (visited on 12.06.2007) A person investigates if he can sell his 1/12 share in a co-owned property, which he has recently bought with another 11 persons. (visited on 12.06.2007)

¹⁹ The other circumstances are mentioned in the second chapter of this thesis.

²⁰ TCC Art.640

²¹ TCC Articles 495-501

²² The reserved portion in the law of succession is hereby reduced by the new TCC 2002, in order to extend the freedom to dispose of property left by the deceased.

shares inheritance with children or mother and father, the reserved portion is all of the legal inheritance whilst in all other cases it is 3/4.

A person in Turkish law is free to make testamentary dispositions in preparation of a will within the limits set by the Civil Code. Consider the scenario that two friends purchased a piece of land with equal shares for investment purposes and became co-owners of the property. After a year, one of them sold his share to other two persons whilst the other original co-owner had not used his/her right of pre-emption to purchase this share.²³ Moreover, the other co-owner, who had a wife and four children, dies and makes a will leaving his share (1/2) in the property to his two beloved friends. By virtue of Article 506, all of the children and the wife, even though nothing was expressly left to them in the will, would have a reserved inheritance portion in the property. The deceased's share would be appropriated by these two friends, with the widow and four children in co-ownership in common without shares even though each of them had an inheritance portion.²⁴ When the partition of the succession or conversion of co-ownership in common into co-ownership by shares takes place, each of the children would have 9.75 per cent, the widow would have 25 per cent, and each of the friends will have 18.75 per cent of the deceased's share, which is 1/2 in co-owned property. Accordingly, the property is now owned by the two persons who bought shares, the four children, the widow and the two friends of the deceased co-owner. The total number of co-owners is 9 in this case. The number of the co-owners has increased dramatically by two simple legal affairs. This scenario can easily be taken further. Now, each of these co-owners is empowered to participate in the management of co-owned property and entitled to use it as well. This example demonstrates the extent of the problem in Turkish law.

By virtue of Art.640/II, every property which left to successors by a will or intestacy is owned by the heirs in co-ownership in common *ipso jure*. Hence, these heirs are required to act unanimously concerning the management of the properties included in the deceased's estate until a partition of the succession takes place or co-ownership in common is converted to co-ownership by shares.²⁵ In 2005 statistics,²⁶ 348,078

²³ Each co-owner by share has a legal pre-emption right to buy the share where it is sold to a third person. TCC Art.732

²⁴ In accordance with TCC Art.640/II

²⁵ Once co-ownership in common is established, a successor can claim co-ownership in common in inherited properties to be converted into co-ownership by shares (TCC Art.644/I)

²⁶ Statistics by Ministry of Justice <<http://www.adli-sicil.gov.tr/istatistikler/huk6.htm>> (visited on 12.06.2007) It is not possible to get the exact figures on how

persons made an application to the courts to get a certificate of inheritance; this constitutes 23.8 per cent of the total legal suits that were taken to the civil court in that year. Although it is not possible to get the exact figures on how many of these cases included land, it is not unrealistic to assume that many of them would include one.

The situation gets worse where a co-owned property is owned by co-owners in co-ownership by shares and co-ownership in common at the same time. This is possible under the current Turkish legislation. For instance, where a share in a property, which is subject to co-ownership by shares, is left to the deceased's heirs, this share is owned by co-ownership in common. All the heirs are required to unanimously make decisions regarding the share. However, the whole property would still be subject to the management rules of co-ownership by shares. Hence, a detailed discussion of the management rules governing co-ownership under Turkish law is provided in the second chapter of this thesis.

The main problem in Turkish law as regards co-ownership is the management system of co-owned properties. Initially, this thesis argues that the rules on the management and use of co-owned properties in Turkish regulation are complex, burdensome and inadequate to provide an efficient management system. TCC regulates two kinds of co-ownership; *payli mulkiyet* (co-ownership by shares) and *elbirligi halinde mulkiyet* (co-ownership in common).²⁷ The primary difference between these two types of co-ownerships is that under the former each co-owner has an undivided share in the property, but under the rules for co-ownership in common, co-owners do not hold distinct shares. The detailed information on the statutory rules on co-ownership in Turkish law will be given in the second chapter of this thesis, which also includes a discussion of English co-ownership rules as a comparison.

The other shortcoming of TCC is that it introduces different rules on management and use of co-owned properties according to the type of co-ownership in particular depending upon whether there is co-ownership by shares or co-ownership in common. TCC also provides for different majorities of the number of co-owners and shares in order to take a decision concerning a property which is subject to co-ownership by shares.²⁸ The Code provides a list of administrative works and divides them into three categories: a) ordinary management tasks b) important management tasks and c) fundamental management tasks. However, it is

many of these cases include a real property but it is not unrealistic to assume that most of them will include one.

²⁷ TCC Articles 688-703

²⁸ TCC Articles 689-692

impossible to make an exhaustive list of administrative tasks in the Code. Accordingly where a dispute arises between the co-owners as to which category a task should be allocated, they are required to make an application to the court. Under co-ownership in common, in order to take a decision regarding co-owned property, the Code requires all co-owners' agreement on the matter.²⁹ If any of them objects, no decision can be taken.

At first glance, apart from the complexity of the management rules, the system appears workable in theory as some duties can be performed as long as more than half of the co-owners agree and the agreeing co-owners hold more than half of the shares in the property. Some of the duties can even be conducted by any of the co-owners. However, in practice, as the number of the co-owners is not limited, the fact that there are many co-owners who can take a decision, the management and use of the property can be a very cumbersome process. Indeed, the potentially unlimited number of co-owners, who can own a property together, is the core of the managerial problems of the Turkish legal system.

The statutory rules governing co-ownership have some social and economic consequences. It is obvious that the disagreements between the co-owners can lead to violent assaults between themselves. Some real life examples can be given here. For instance Mehmet Çankaya (73), one of two brothers, who previously argued on partition of a co-owned property, killed his brother Şükretin Çankaya (66) with a shotgun.³⁰ Ismail and Idris Polat brothers had a fight about the use of 60msq of land and they subsequently were taken into hospital due to injuries caused by use of a digging stick.³¹ Another example; Macit Isik, son of Huseyin Isik, shot with the intent to kill his uncle Yilmaz Isik and his cousins Yilmaz (22), Erol (16), and Ayse (18) due to a disagreement over co-owned land.³² There are thousands of similar incidents in Turkey between the heirs and co-owners.

Due to disagreements between the co-owners, many properties become unused or idle and thus do not have any function in the economy. Mahmut Ovur, a columnist of Sabah newspaper, criticises that C Motels are abandoned or left to deteriorate due to the quarrel between the co-owners,

²⁹ TCC Art. 702/II

³⁰ <http://www.kayserigundem.com/haber_detaylari.asp?id=626> (visited on 12.06.2007)

³¹ <<http://www.kilispostasi.com/modules.php?name=News&file=article&sid=887>> (visited on 14.06.2007)

³² <<http://www.8sutun.com/node/20752/print>> (visited on 14.06.2007).

who are successors of a deceased.³³ He states that 150.000msq of land and these motels, which are located in one of the most beautiful areas of Istanbul, are not in use and the State does not do anything to return these properties to productive use and service of Istanbulers. Indeed, there are many properties like there throughout Turkey and under the current legislation the State is unable to do anything as the property rights of the people are protected by the Turkish Constitution.

4. Current Research on Co-ownership: Termination and Swiss Law

Having inspected the current literature on co-ownership rules in Turkish law, it is evident that the researchers focus on two main aspects; termination of co-ownership and limiting comparative research with Swiss law.

The discussion so far has explained how the Turkish regulation for the management and use of co-owned properties is complicated and far from providing an efficient managerial system. This situation has stimulated academics to focus on the research on the termination of co-ownership rather than the management and use of co-owned properties.³⁴ It seems easier promoting the termination of the co-ownership than developing mechanisms to facilitate the management of a property. As a result, there has been limited research on how to optimise the management and use of co-owned properties; instead, academics have focused on the explanation of the statutory rules. The monographs³⁵ on co-ownership focus on the explanation of the statutory rules provided by TCC. There is no evidence

³³ Mahmut Over <<http://arsiv.sabah.com.tr/2006/03/26/yaz1336-10-128.html>> (visited on 14.06.2007)

³⁴ For instance see: Özgür, Y., *Musterek Mülkiyetin Sona Ermesi: İzale-i Suyuu Konuya İlişkin Yargı Kararları İle* (Kazancı Yayınları, İstanbul, 1995); Tunaboğlu, M., *Paylaşma (Ortaklığın Giderilmesi) Davası* (Seckin Yayınevi, Ankara, 2005); Tunaboğlu, M., *Paylaşma ve Paydaslıktan Çıkarma Davaları* (Adil Yayınevi, Ankara, 2004); Erdoğan, C., *Ortaklığın Giderilmesi (İzale-i Suyuu) Davaları* (Seckin Yayınevi, Ankara, 1999); Oğuz, T., *Musterek Mülkiyette Taksim Engelleri* (Alfa Yayınevi, İstanbul, 1995)

³⁵ Yavuz, N., *Payli Mülkiyet Yönetimi (Birden Çok Parsel Üzerinde Kurulan Binaların Kullanımından Doğan Uyuşmazlıklar)* (Kartal Yayınevi, Ankara, 2006); Keser, Y. *Türk Medeni Kanunu Hükümlerine Göre Payli Mülkiyette Yönetim* (Ankara, Bilge Yayınevi, 2006); Arpacı, A., *Musterek Mülkiyette Yararlanma ve Yönetim* (Kazancı Ticaret A.Ş., İstanbul, 1990)

that foreign laws have been examined, apart from Swiss law,³⁶ to improve the current co-ownership system in Turkish law. Even though Arpacı mentions the inadequacy of the current system many times, he makes no attempt to suggest a completely new system but rather he has searched for solutions within the existing system.³⁷ For example, he states:

the number of the disputes as regards the operation of co-ownership is really high. Moreover, the regulation of TCC on co-ownership is inadequate. Therefore, we viewed that examination of the subjects of management and use in co-ownership in a monograph is inevitable... It is within the aim of this work to make suggestions (*de lege ferenda*) on the matters that we could not find the proper solutions in the current regulation. While doing that we will make comparisons with the foreign laws (Swiss and German laws) as well as our old law.³⁸

As explained above, the Turkish jurist focused on finding the solutions within the system itself or by trying to examine the Swiss (The Source Code of the Turkish Civil Code) and German laws, which all followed the Roman law. At the discussion of the property law rules of new Turkish Civil Code 2002 in the Turkish Parliament as regards co-ownership rules, the Minister of Justice of the time, Professor Hikmet Sami Turk, stated that “the co-ownership rules of Swiss Civil Code were changed radically in 1965. In this new Turkish Civil Code, co-ownership rules have been updated to meet today’s conditions considering the changes in Switzerland.”³⁹ The reasoning of the new TCC Art.688 stresses:⁴⁰

³⁶ The original Turkish Civil Code was a translated version of Swiss Civil Code. The French language version of Swiss Civil Code was, with little amendments, translated into Turkish and enacted as Turkish Civil Code in 1926. The new Turkish Civil Code 2002 was based on the previous Turkish Civil Code. Hence, traditionally, the Turkish jurists have a tendency to follow the Swiss law about civil matters.

³⁷ Arpacı, n.35 above, 5 Moreover, in the page 56 of the same book, Arpacı states that “the statutory regulation on the right of use of the co-owners in co-ownership is inadequate at some points.”

³⁸ Ibid 5-6

³⁹ Minutes of Grand National Assembly of Turkey (TBMM) of 15.11.2001. The parliament website:

<http://www.tbmm.gov.tr/develop/owa/tutanak_b_sd.birlesim_baslangic?P4=6388&P5=B&page1=30&page2=30> (visited on 20.05.2007)

⁴⁰ The reasoning of the New TCC see

<http://www.belgenet.com/yasa/medenikanun/gerekce.html> (visited on 20.02.2010)

Swiss Civil Code Art.647-650 relating to the co-ownership by shares type of the co-ownership was considerably changed with the Act dated 19 December 1963 and these amendments came into force in 1 January 1965. By taking these amendments into consideration, the headings, sub-headings and content of the article is aligned with today's requirements.

This statement has two functions. Firstly, it proves the approach of the Turkish law maker, which follows the changes in Swiss law and enacts these changes into Turkish law. Secondly, it implies the existence of similar problems in Swiss law.⁴¹ Indeed, examination of Turkish co-ownership rules is the examination of the Swiss Civil Code rules. Consequently, as Swiss law has been properly investigated by the Turkish jurists and currently it has also the very similar problems with Turkish law, the examination of co-ownership with specific references to Swiss law has been excluded from this study. Nonetheless, the scarce of the sources of Swiss law in English has a role in this exclusion. Hence, the matter will be studied with references to Turkish and English law.⁴²

It is obvious that apart from the aforementioned ones, co-ownership regulations of other legal systems are still untouched by Turkish jurists and law makers. It stipulates the research on other legal systems on the matter.

This thesis tries to identify the necessary mechanism which are required in order to enable co-ownership to continue to meet the co-owners' needs. This can only be possible via an effective management system which is easy to understand, simple to operate, and capable of resolving disputes between the co-owners and it is evident that Swiss law does not offer any better solution than Turkish law currently does.

⁴¹ Basics of co-ownership in Swiss law can be found in http://www.baer-karrer.ch/upload/publications/4_3_5.pdf (visited on 21.02.2010) p.12.

⁴² For the comparison of the interpretations of co-ownership rules between Turkish and Swiss laws see Ozcelik, B., *Payli Mulkiyette Yonetim ve Yararlanma Duzeni* (unpublished thesis available at the Law School Library of Ankara University, Ankara, 2005) See p.42 for the comparison of TCC Art. 691/II and Swiss Civil Code Art.647/II. See p.77 for the interpretation of TCC Art.689, which is explained by reference to Swiss law. See p.91, the author states that TCC Art.695 is formulated in accordance with Swiss Civil Code's 1965 amendments. See p.103-109 for the discussion on *agreement between co-owners* and the comparison of TCC Art.695/II and Swiss Civil Code Art.647/I.

5. Why English law?

As previously mentioned, this thesis adopts a different approach on co-ownership to that adopted by other Turkish jurists and focuses on the continuation of co-ownership rather than the termination of it by providing the essential devices for the management and use of co-owned properties. Hence, a wider view of the foreign legal systems has been taken, and it is believed that the English regulation of co-ownership may offer or at least inspire solutions to the problems of Turkish law. First, the Turkish system provides two different management schemes for each type of co-ownership. On the other hand, English law, even though it also accommodates two types of co-ownership, provides one single set of rules concerning the management of the property. This approach has significantly simplified the administration of co-owned properties. As will be concluded later, this thesis proposes that the Turkish system should also introduce a single management scheme to cover the both types of co-ownership.

Second, by limiting the number of legal co-owners, who are empowered to manage the property, the management system excludes many (beneficial) co-owners' participation in the decision making process as regards co-owned properties in English law. However, ignoring whatever the number of co-owners, the Turkish regulation empowers the co-owners to manage the property. As will be explained later, the Turkish system should adopt a new mechanism to limit the number of co-owners enabled to manage the property.

These two fundamental preferences have inspired me to examine the English co-ownership system, which has been characterised by trust of land and governed by the Trusts of Land and Appointment of Trustees Act 1996 (hereinafter TLATA).

Examining co-ownership in the UK a correlation is observed between owner occupation and co-ownership. In the UK, there has been an increase in owner occupation, which has in turn led to a rise in co-ownership cases. Moreover, in terms of the rise of co-ownership, more couples have started to buy homes together.⁴³ In the UK, in 1925, the concerns of land law were different. The majority of people were living in privately rented accommodation. Owner- occupation was rare. The new legislation was introduced in this context. Today, nearly 70 per cent of households are

⁴³ For the figures see Office for National Statistic at: <<http://www.statistics.gov.uk/cci/nugget.asp?id=1105&Pos=2&ColRank=2&Rank=224>> (published on 22.03.2005) (visited on 10.12.2006 and last accessed in June, 2009)

owner-occupied in the UK, and the private rental occupation is about 15 per cent of the whole.⁴⁴

Before 1997, virtually all concurrent interests in land in the UK used to occur behind a trust for sale. Owner occupation and the increase of co-ownership led to discussions regarding the satisfactoriness of this mechanism. In the trust for sale, co-ownership was deemed to be a temporary situation and co-owned properties were regarded as an investment which was to be sold by trustees. However, today, the purpose of most of co-ownership of properties is in order to satisfy owners' accommodation needs. The transformation in the concept of co-ownership from an investment method into a means of owner accommodation made the use of trust for sale inadequate, since the sale of the property was trust for sale's ultimate purpose. This new concept of wider and multi-purpose use of co-ownership called for a new type of trust incorporating management rules on co-owned property. Consequently, in 1996, the trust for sale was abolished and the trust of land was introduced to govern the issue.⁴⁵

With regard to the Turkish context, it can be observed that the purchase of a house is quite difficult. Three main reasons can be given for this. Firstly, the income of people does not generally allow them to buy a house. For instance, in Istanbul, where a recently appointed school teacher earns about £6,000 per annum, a standard three bedroom house costs about £60,000.⁴⁶ These figures reveal that it is not always possible for people to save enough money to buy a house. Secondly, the interest rates of bank loans are rather high and the terms of the loans are relatively short. The typical interest rate for a house loan is currently 20 per cent per annum and the maximum term is 15 years. Indeed, these rates and terms have been reduced in recent years. Up to about three years ago, the interest rates of bank loans were more than 40 per cent per annum and the longest term was 10 years. A recent survey shows that the percentage of the home-

⁴⁴ In quarter 2 2009, 15.5 million dwellings in the UK were owner occupied. This was an increase of 1.3 million from 16.2 million in Q2 1997. See Office for National Statistics at:

<<http://www.statistics.gov.uk/cci/nugget.asp?id=1105&Pos=2&ColRank=2&Rank=224>> (visited on 15.2.2010)

⁴⁵ The Trusts of Land and Trustees Act 1996

⁴⁶ The website of Turyab estate agency in Turkey at:

<http://www.emlakaktif.com/cgi-bin/liste/emlak_liste.pl> (visited in November 2005)

owners who took a loan to buy a house is less than 4 per cent.⁴⁷ Moreover, the current interest rates are part of a constantly fluctuating structure, reflecting the unstable economy. Therefore, an average working person cannot normally afford to buy a house.⁴⁸ As a result, in Turkey, most of the houses are owned by land owners, or self employed people, or the people with higher salaries and in many cases, the source of ownership is through inheritance.

However, in spite of the above facts, statistical data reveals that owner-occupation is surprisingly high in Turkey. According to a governmental survey undertaken in 2000, nearly 65 per cent of households are owner occupied, whereas about 30 per cent are in private rental occupation.⁴⁹ This appears to reveal conflicting evidence considering the previously given socio-economic facts. I believe that co-ownership has a substantial effect on this unexpectedly high owner-occupation rate in Turkey. There are three reasons for this view. First of all, it is doubtless the case that inheritance is a major source of home ownership because as explained above, in accordance with TCC Art. 640/II the heirs of a deceased acquire their legacy by way of co-ownership under Turkish law. This is to the compulsory portions of legal heirs mentioned in TCC Art. 506 because if the legacy includes an immovable property, it will be owned by all heirs in co-ownership. Secondly, it is an established practice in Turkey to buy co-owned properties. This customary practice is the result of low-income which forces people to merge their assets to purchase a property mostly for investment purposes. Thirdly, due to the insufficiency of housing loans,

⁴⁷ Aksiyon Journal <<http://www.aksiyon.com.tr/detay.php?id=22419>> (visited in November 2005)

⁴⁸ There is a type of company and union called “Kooperatif” in Turkish system. This company is established by people who want to own a house with a regular contribution. The company collects contributions from its members and construct buildings which will then be allocated to its members. However, contribution rates are relatively high for an average working person. Besides, it is a fact that most of these companies are fraudulent and end up in courts. (For more information see: Kesli, A. T., “Kooperatif Uyelerinden Yonetim Kurulu Kararina Dayanilarak Alinan Lehtar Kismi Bos Emre Yazili Senetlerin Hukuki Durumu” at: <<http://www.jura.uni-sb.de/turkish/AKesli1.html>>) (visited on 04.12.2006). Therefore, people are not so keen to join these kinds of companies.

⁴⁹ There are 15,070,093 households in Turkey. Of those households, 10,290,843 are occupied by the owners and 4,334,432 are privately rented accommodations. For more information about these statistics see: <http://www.tuik.gov.tr/PrelstatistikTablo.do?istab_id=231> (visited on 04.12.2006) Unfortunately, there is no information on what percentage of those houses are co-occupied.

people tend to borrow money from their relatives, which may sometimes be paid back as a share in the purchased property.

As mentioned above, about 30 per cent of the houses are occupied as privately rented accommodation which is relatively higher than that in England, where private rental occupation is only about 13 per cent.⁵⁰ However, it is likely that once the economy is stabilised, the rate of owner-occupation in Turkey will increase. Moreover, the Mortgage Act 5582 was passed in the Turkish Parliament and came into force on 6th of March 2007. This is expected to provide people with more opportunities to obtain loans and it is anticipated that the number of owner-occupied houses will increase accordingly.⁵¹ The English experience shows that a rise of owner-occupation is likely to trigger a rise in co-ownership.⁵² The rise of owner-occupied houses would inevitably increase the incidence of co-ownership in Turkey as well. This quantitative rise will turn the issue into a more critical one, because the current legal system already lacks efficient legal devices to regulate the management and use of co-owned properties. As will be identified within this thesis, the introduction of a new TCC in 2002 has not generated innovative and effective solutions to the problems arising from co-ownership.⁵³ The lack of a comprehensive project to tackle the issue has inspired me to seek a radical solution by reference to English law.

The major reason for seeking a solution to the problem under Turkish law through English law, which employs a simpler and more efficient system based on trust of land, lies in its competence in dealing with similar managerial problems to the ones encountered in Turkey. Unfortunately, in

⁵⁰ Communities and Local Government Housing Statistics 2008, at: <<http://www.communities.gov.uk/publications/corporate/statistics/housingstatistics2008>> (visited in August 2009)

⁵¹ In the first three months of the enactment, 354,088 people, who previously took housing loans, have switched to mortgages. <<http://emlak.milliyet.com.tr/Haber.aspx?HaberNo=2404>> (visited on 12.06.2007)

⁵² On the other hand, co-ownership regulations would also ease the home ownership. For more information, see: Driscoll, J. and Target, L., "A Stairway to Home Ownership" (2006) *Estates Gazette* Retrieved on 06.09.2009 from 'accessmylibrary' at:

<http://www.accessmylibrary.com/coms2/summary_0286-13841930_ITM>

⁵³ Even though the new TCC includes some amendments regarding the co-ownership rules, it is not its primary aim to do so. The aim was to amend the whole Code to reflect the new era's requirements. The new TCC, which regulates the persons law, family law, property law and inheritance law, has introduced new rules on these areas, besides simplifying the language and clarifying the existing rules.

Turkey, the ultimate solution to the disagreements and problems in co-ownership is either to apply to court or to claim partition. Given that partition is not available in all cases, the sole recourse, which is less desirable, is to go to court. Therefore, resolution methods should be promoted by regulations, instead of applying to courts, which English law has almost achieved. Yet, in a civil law country, this can only be done through very comprehensive legislation, which would address all the possible scenarios and relationships regarding co-ownership. In my opinion, this is not a realistic approach, as not all types of potential disputes can be listed in a piece of legislation. Therefore, I suggest the introduction of a “trust-like” mechanism, inspired by the trust of land, into Turkish law.

Some civil law countries have started to introduce the concept of a legal “trust” into their legal system, which is one of the most important and distinctive products of English common law. Wider use of the trust system in Europe⁵⁴ and other civil law countries is a further incentive to explore “trust-like” solutions to cope with the problems encountered in co-ownership in Turkish law. As Zweigert& Kötz stated:

The trust stems from a brilliantly simple notion: interests in a piece of property are split between a “trustee”, who has powers of administration and disposition, and others, often successive in time, who have a defined right to part of the proceeds of the property... The trust thus satisfies a

⁵⁴ Signatory states of the Hague Convention on the Law Applicable to Trusts and on Their Recognition considers the trust, “as developed in courts of equity in common law jurisdictions and adopted with some modifications in other jurisdictions, is a unique legal institution” and desires “to establish common provisions on the law applicable to trusts and to deal with the most important issues concerning the recognition of trusts.” The website of Hague Conference on Private International Law at:

<http://www.hcch.net/index_en.php?act=conventions.text&cid=59>

(visited on 05.12.2006) This Convention specifies the law applicable to trusts and governs their recognition (Art.1) and it harmonizes the applicable rules to trust within the signatory states. The convention provides the legal structure of trust which is recognized by the signatory states and determines the governing law of trust with a cross border element. Turkey is not a signatory state yet. However, Switzerland signed the convention on April 3 2007 and ratified and acceded to it on April 26 2007. The convention entered into force in Switzerland on July 1 2007. This demonstrates that this convention may be applicable in Turkey too as the original Turkish Civil Code was translated from Swiss Civil Code and they share the same civil law logic. Being a party to this convention may introduce the trust concept into Turkish law and Turkish jurists.

great many needs well known to European lawyers who deal with the aid of whole panoply of extremely heterogeneous legal institutions.⁵⁵

I believe that as a specific version of trust, the trust of land may have a great potential to produce solutions to the problems encountered in the Turkish co-ownership system.

6. Philosophy behind Land Co-ownership in Turkish and English Laws

Before examining comparatively the rules on co-ownership regulation in Turkish and English law, it is essential to discuss the principal values attached to the land ownership in Turkey and England and their effects on co-ownership regulation. The explanation will be restricted to land co-ownership and its functions in a society affected by the values attached to it by people and via legislation, rather than entering into a theoretical discussion. This will be accompanied by a historical overview of co-ownership, since changes in the concept of co-ownership have affected the regulations.

While examining the English co-ownership rules, one meets the terms of “equity”, “uses”, “trust for sale”, and “trust of land”. These are foundations of English co-ownership. This terminology does not, on the other hand, form a comprehensible context for a civilian lawyer. While looking into the Turkish regulation, one must be familiar with historic Roman Law and German Law, Mejlle (Ottoman Civil Code), and Swiss Civil Code. The striking difference, in my observation, between the current English and Turkish law regulations co-ownership is that while English law regards co-ownership as an economic unit, Turkish law values it as a humanistic relationship of people with a property. On the other hand, this thesis, as in favour of the English approach, tries to persuade Turkish law-makers to consider the economic functions of co-ownership and introduce them into the system.

As mentioned earlier, it is essential to explain the concepts of “equity” and “trust”. Briefly, until 1873 (Judicature Act 1873), there were two court systems in England, the courts of law and the courts of equity. Legal rights are those that were recognised in the courts of law, equitable rights were enforced by the courts of Chancery.⁵⁶ Now, the single court system accommodates the both legal and equitable rights as property rights.

⁵⁵ Zweigert, K. & Kötz, H., (translated by Tony Weir), *An Introduction to Comparative Law* (3rd rev. edn Clarendon Press, Oxford, 1998), 37-38

⁵⁶ Cooke, E., *Land Law* (Oxford University Press, New York, 2006) 23

Management and use of co-owned properties are strongly related to this separation of rights as management of a co-owned property is deemed as a legal right and use of a co-owned property is regarded as an equitable right. The story tells that in the Middle Ages, a knight going away on a crusade hands over his personal possessions to his friend to keep them safe. However, he just cannot hand over his land. So he transfers his land to a friend who in his absence, will keep and manage it for him. When the knight comes back, his friend refuses the return of the land to the knight. The King's court could not decide on the return of the land as the friend legally holds the title. By the delegation of some judicial functions to the Chancellor and his courts (chancery) by the King in the fourteenth century, the Lord Chancellor started deciding that the friend should return the land to the knight. Hence, it happened to have two ownerships in the land. The one, legal ownership, belongs to the friend and the second, equitable ownership, belongs to the knight and knight holds the land for "his use".⁵⁷ Moreover, the restrictions on ability to pass one's land by will (minor's ownership and friars' problem) could be evaded by making the desired agreement behind a trust, known as "use" because it involved land being transferred to somebody "for the use of another person".⁵⁸ Law of Property Act 1925 has regulated "the trust for sale" as a way of holding the title in the property where legal and equitable ownership was split. The beneficiaries used and enjoyed the property whereas the trustees manage the property and were under a duty to sell the land as soon as possible. Finally, TLATA 1996 abolished trust for sale and introduced "trust of land" and all the co-owned lands are held to subject to it.

Another topic to be clarified here is what led the changes in trust of land from trust for sale. The fundamental reason for the reform of 1925 legislation was the change of concerns regarding the co-owned properties. 'Most obviously, many couples who purchased land as their family home would be nonplussed to be told that they held it on trust to sell it.'⁵⁹ Gray and Gray explain the error in trust for sale as:

The pervasive assumption was that the exact nature of the investment of trust funds was of little consequence to the trust for sale beneficiaries and that by virtue of an equitable "doctrine of conversion" their interests could always be viewed, in anticipatory mode, as mere interests in personalty (ie potential sale money) rather than as entitlements in land.⁶⁰

⁵⁷ Ibid 23-24

⁵⁸ Ibid

⁵⁹ Smith, R.J., *Plural Ownership* (Oxford University Press, New York, 2005) 110

⁶⁰ Gray & Gray, n.1 above, 968

Hence, trust for sale was abolished and trust of land was introduced to govern the co-owned properties. The duty sell the property was no longer in place and the specific section in TLATA was designed to govern the right of occupation.

When examining co-ownership regulations in English law, it is apparent that there are four main elements. The first one is that the main purpose of holding the properties under trust is to value them as investment assets. Historically, the use of a trust for sale was to hold the property under trust until it was sold. It has been stated that in origin the trust for sale developed as a mechanism whereby, after death, the testator could ensure that his property was sold and the proceeds divided up in accordance with his wishes.⁶¹ Sydenham and Sydenham agree and state ‘the trust for sale was not initially for the purpose of keeping land within the family. It was used where it was intended that the land should be sold, perhaps where the proceeds were to be split between the children, or where the land had been bought as an investment.’⁶² Gray and Gray conclude that “the trust for sale placed its pre-eminent focus on the exchange value, as distinct from the use value, of land.”⁶³ Secondly, to keep the value of co-owned property high, the trust mechanism is designed to increase the marketability of the property. The 1925 legislation made land held in trust freely marketable.⁶⁴ Hence, the legal tenancy in common was abolished and the number of legal co-owners is limited to four. Thirdly, as a result of above concerns, the regulation keeps a balance between the owners and purchasers. As a consequence of this concern, if the purchaser pays the purchase money for a co-owned property two trustees, that will suffice the requirement for the transfer. This is known as overreaching. Fourthly, it could be inferred that the trust of land is deemed as an economic unit as the statute specifically entitles trustees to purchase new land. Finally, as following in the footsteps of “uses”, the trust of land also functions to protect the minors’ properties as minors cannot hold the legal title until they are at least 18. Hence, the property is managed by the trustees until they are entitled to hold the legal title.

In addition to these four elements, the above given statistics have revealed that the continuing trend in the rise of home ownership has included an increase in the number of co-ownership. The 1996 regulation

⁶¹ Whitehouse, C., & Hassall, N., *The Trust of Land and Appointment of Trustees Act 1996 A Practical Guide* (Butterworths, London, 1996) 2

⁶² Sydenham, A. & Sydenham, C., *Trust of Land- The New Law* (Jordans, Bristol, 1996) 3

⁶³ Gray & Gray, n.1 above, 967

⁶⁴ Whitehouse & Hassall, n.61 above, 7