

Reforming the Preference Right under the Pre-emption Right Regulatory Provisions

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Abstract

The role of the Jordanian legislator in regulating both the rights of pre-emption and preferences in the legislation in force in Jordan in the Real Estate Law of 2019 is of great significance. Appropriating the descriptive-analytical research method, this article examines the procedures for reforming the preference right under the pre-emption right regulatory provisions. The results indicate a great deal of similarity between the legal provisions regulating and preference in various substantive and procedural provisions. The findings also show that both legal provisions regulating and preference share the fact that they apply to real estate, not movable property. Given the said results, several key recommendations are suitably incorporated into the paper.

Keywords: Legislator, preference right, pre-emption right, reformations, regulatory provisions.

Introduction

In the complex landscape of corporate governance and securities regulation, the pre-emption right is a key mechanism designed to protect the interests of shareholders and preserve their relative ownership. This right, which gives existing shareholders the opportunity to purchase additional shares ahead of new investors, aims to mitigate dilution and preserve shareholder rights. However, as market dynamics evolve and institutional structures become increasingly sophisticated, the traditional framework governing pre-emption rights requires re-evaluation and reform. The pre-emption right, a central element of broader pre-emption regulation provisions, allows shareholders to purchase shares on preferential terms compared to other investors. While this right is integral to protecting shareholder interests, its application and enforcement have come under scrutiny in recent years. Critics argue that current provisions may not adequately address the needs of contemporary shareholders or the realities of contemporary financial markets.

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This paper seeks to explore the necessity and consequences of pre-emption right reform in the context of pre-emption regulations. By examining the historical development, current challenges, and potential reforms of these provisions, this study aims to provide a comprehensive analysis of how these regulatory frameworks can be adapted to better serve shareholders and ensure fairer market practices. Through a detailed review of legislative changes, comparative analysis with international practices, and stakeholder perspectives, this research will provide insights into the potential benefits and drawbacks of the proposed reforms, ultimately contributing to the on-going debate on strengthening corporate governance and protecting shareholders. The Jordanian legislator has organized the right of preference in the legislation in force in Jordan, as it was organized by the Jordanian Civil Code of 1976 and the Real Estate Ownership Law of 2019. The right of preference was initially introduced in the repealed Floors and Apartments Ownership Law of 1968. It is worth noting that the repealed Floors and Apartments Ownership Law of 1968 amended the issue of whether there was prolongation in the legislation and dispersion in organizing the legal provisions of two rights that have a common philosophy in multiple legislations and texts without considering the possibility of unifying them in a way that achieves the best abbreviation on the one hand, and taking into account the positives of each and avoiding its negatives in this unification (Abdul Hafiz, 2023; Al-Aboudi, 2011; Al-Nusour, 2009).

Hence, it is of utmost importance to clarify the extent to which the provisions regulating the right of pre-emption and preference can be unified by analyzing their provisions and knowing what this may lead to in terms of enhancing the positives and avoiding the negatives in their provisions (Al-Fentis, et al., 2020).

Literature Review

Research has documented the significance of preference and pre-emption rights in the daily lifestyle. Al-Rumaih (2022) clarified the ruling on the application of pre-emption in real estate units in contemporary reality according to the images in reality.

Moreover, Al-Amoush (2016) addressed the subject of the actions of the buyer "the new partner" in the pre-empted share, and the extent of the impact of these actions on the provisions of establishing the pre-emption building. According to Fesio (2014), given the detailed introduction and literature review, the research problem is reflected in answering the following Evolution and Rationale of Pre-emption Rights.

Pre-emption rights have been a cornerstone of corporate governance and shareholder protection since their inception. Historically, these rights were introduced to prevent the dilution of existing shareholders' equity and maintain their proportional ownership (Black, 1986). The primary rationale behind pre-emption rights is to allow current shareholders the opportunity to purchase additional shares before the company offers them to new investors, thereby preserving their relative stake in the company (Smith, 1994). Preference rights, a subset of pre-emption rights, provide existing shareholders with the ability to purchase shares on preferential terms, often at a discount (John & Kose, 2011). This preferential treatment aims to further safeguard the interests of current shareholders against dilution and incentivize continued investment in the company. However, the effectiveness and fairness of these rights have been questioned, particularly in the context of evolving market conditions and the increasing complexity of financial instruments (Harris & Raviv, 1991).

Challenges and Criticisms

Several studies have highlighted the limitations of existing pre-emption right frameworks. For instance, while pre-emption rights protect shareholders from dilution, they can also constrain a company's ability to raise capital efficiently. This is particularly problematic for companies in high-growth sectors that require rapid access to funding. That the rigidity of pre-emption rights may hinder a company's strategic flexibility and its ability to respond to market opportunities. In recent years, the debate around preference rights has intensified. Identify that while preference rights are designed to benefit shareholders, they can sometimes lead to inefficiencies. For example, the discount on new shares offered to existing shareholders may not always align with the company's valuation, potentially leading to conflicts between shareholder interests and the company's financial health. Comparative studies reveal varying approaches to pre-emption and preference rights across jurisdictions. For instance, the United Kingdom and the European Union have well-established frameworks that provide shareholders with robust pre-emption rights (Lee, 2012). Recent literature suggests several avenues for reforming pre-emption and preference rights to better align with contemporary market dynamics. One proposal is to introduce more flexible mechanisms that allow companies to adapt their capital-raising strategies without undermining shareholder protections (Davis & Hill, 2020). Additionally, some researchers advocate for a tiered approach to preference rights, where preferential terms could be tailored based on shareholder type and investment horizon (Johnson, 2018). These proposals aim to strike a balance between protecting

shareholder interests and enabling companies to operate efficiently in a rapidly evolving financial landscape

Research Questions

1. What are the required conditions to reform .and preference?
2. What are the objective conditions required by the share's buyer under .and preference?
3. What are the actions that .and preference fall under?
4. What are the impairments and nullifications of the right of preference and is it possible to reform it within the right of pre-emption?

Methodology

The information relevant to the research topic will be analyzed. The descriptive analytical research method was adopted to describe, discuss and analyze the possibility of reforming the right of preference under the provisions of the regulation of the right of preference. It was adopted because it is the appropriate method. Scientific method consistent with the nature of the study in terms of presenting information related to significance of the preference and pre-emption rights in the daily lifestyle. Also, the descriptive-analytical approach is utilized based on analyzing the legal texts related to the research problem by referring to jurisprudence books and court rulings.

Discussion and Analysis

The discussion of the present research paper is divided into two parts: the first part discusses the organization of the basic conditions of preference.

Balancing Shareholder Protection and Market Efficiency the on-going debate surrounding pre-emption and preference rights reveals a complex interplay between shareholder protection and market efficiency. Historically, pre-emption rights were designed to prevent shareholder dilution and ensure proportional ownership. However, the rigidity inherent in traditional pre-emption frameworks can inhibit a company's ability to seize timely investment opportunities, particularly in fast-paced and high-growth sectors. Therefore, reforming these provisions is crucial to balancing the need for shareholder protection with the imperative of maintaining market efficiency. The criticisms outlined in the literature highlight several limitations of the current pre-emption and preference right frameworks. They often create inefficiencies. Moreover, existing frameworks may disproportionately benefit large, institutional shareholders at the

expense of smaller, individual investors. This disparity can undermine the foundational principle of pre-emption rights, which is to ensure fair treatment for all shareholders. The potential for such imbalances suggests that a more nuanced approach to preference rights is needed one that considers the diverse needs of different shareholder groups while still protecting their interests. Reform Proposals and Their Implications Recent reform proposals suggest several promising avenues for addressing the limitations of current pre-emption and preference right frameworks. Such reforms could enhance the alignment between shareholder interests and corporate goals, reducing inefficiencies and fostering a more dynamic capital-raising environment.

Regulating the basic conditions for preference

The possibility of unifying and reforming the basic conditions for preference in the right of pre-emption requires dividing this section into two parts.

i. Re-regulating the basic conditions for the parties to and preference

Expounding the possibility of reforming the provisions regulating the conditions required by the parties to and preference and unifying them necessitates examining the conditions required by both the pre-emptor in the right of pre-emption and what the right holder of preference expresses.

First: Conditions required by the pre-emptor or the person entitled to preference are, as follows:

A. He must be among the categories legally permitted to exercise the right of pre-emption or preference.

Article (1151) of the Civil Code states “established for the partner in the same sale, the mixed right in the sale and the adjacent neighbor”. However, looking at the position of the Jordanian legislator in Article (A/14) of the Real Estate Law (13/2019), stipulating "the right of pre-emption shall only be exercised by the partner in the property.

Importantly, it is also noted that the legislator did not take into consideration the amount of the partner’s share that is entitled to exercise in the common property. Any partner in a common property may exercise regardless of the amount of his share in the common property, even if it does not represent more than 1% of the amount of shares (Obeidat, 2020). Or a building, exclusively. This also does not extend to others from the partners in the common sections or other neighboring apartments and others (Al-Alawaneh, 2021).

Moreover, given the previous text, it can be said that both rights share the same provisions, as both rights are exercised exclusively by the partner in the common property, which confirms that it is consistent with the possibility of unifying both rights, as they share the same category in exercising both of them, which are the partners in the property (Al-Obaidi, 1999).

B. The right holder must have the capacity to act One of the most important effects of both and preferences is that the partner owns his partner's share for the same price and expenses incurred by the buyer. Therefore, this would make both of these rights acts of disposal and not acts of management, since what the partner does by virtue of each of these two rights is to purchase his partner's share (Al-Sanhouri, 2000).

This right can also be exercised by the legal representative, where if the right holder is incomplete or incompetent, this right is exercised on his behalf by either the guardian or the trustee (Obeidat, 2020).

C. The pre-emptor shall not be prohibited from owning the property subject to the right

The following group of people is prohibited from exercising in the property:

1. Those that are legally authorized to sell the share of one or more persons may not, by virtue of this authorization or mandate, purchase the share for themselves (Nabeel, 1997) by exercising this right, such as selling the share by proxy, and exercising this right as partners in the property (Article (548) of the Civil Code of 1976).
2. Brokers or experts who have been entrusted with selling a certain share, as they are not entitled to buy these properties in their own name or even under a pseudonym, accordance with Article (549) Civil Code. (Zidan, 2001).
3. Judges, lawyers and employees of the Enforcement Department, as this prohibition does not include these categories if they are partners in the property because as long as the purchase is by auction, it is not prohibited for them. (Obeidat, 2020)

D. Right holder has a reason to exercise it at the time of its issuance, provided that this reason is present

The sold share is owned. In the first exerciser of right pre-emption must be a partner in the property (14/A) Real Estate (Al-Qalab, 1993), provided that his

ownership of this property does not cease before his right of pre-emption is proven (Court of Cassation Decision No. 700 of 2013).

Conflict of partners in the right of preference.

Which makes us follow this ruling in the right of preference, and make it apply to both rights if they are unified (Al-Shatnawi, 2018). Accordingly, prevent unjustified repetition. It will also facilitate the process of reorganizing their provisions and merging them into one right, which is the right of pre-emption.

Second: Basic objective conditions for the share's buyer under .or preference

1. Exercising the right whether the buyer is a partner or a third party

The Jordanian legislator did not prohibit the exercise of the right of pre-emption in the Civil Code or in the Real Estate Law if the buyer of the sold share is one of the partners in the common property (Al-Shatnawi, 2018). Regarding the right of preference, the legislator explicitly stipulated in Article (124/A) of the Real Estate Law that this right may not be exercised if the buyer is a third party (Al-Masarweh, 2021).

Except in the case of the buyer being non-partners similar to what was stated in the text of the right of preference because it is consistent with the wisdom of both right (Al-Shatnawi, 2018).

2. Practicing the right of pre-emption and preference in case the buyer is a spouse, ascendant, branch, or relative.

According to Article (14/2) of Real Estate Law of (13/2019, pre-emption does not apply in any of the following cases:

- a. If the sale is to the ancestors and descendants in general, without a specific degree.
- b. If the sale is between spouses.
- c. If the sale is between relatives up to the fourth degree.

The sale is between in-laws of the second degree, which is not stipulated in the right of preference (Al-Momani, 1984).

Re-regulating the conditions that must be met in the places of transactions subject to .and preference

First: Transactions that fall within the right of pre-emption and preference

Contract is informal or void, such as a sale without completing the formal element and registering it with the competent official department (Al-Qalab, 1993).

With regard to unregistered properties in the Registration Department, Article (40) of the Real Estate Law states “A transaction made by a deed on a property located in an area where settlement has not been announced or is exempt from settlement shall be considered valid if a period of (15) fifteen years has passed since the transaction was actually made from the date of the transaction” (Obeidat, 2020). By analyzing this text, we find that disposing of a common share in a property that has not been settled or is exempted from it requires the fulfillment of three conditions:

1. The sale contract must be based on a written document, not an oral one.
2. The buyer must actually dispose of the property, such as using and exploiting it.

This auction is available to individuals, including the partners themselves, to participate in this auction and pay the highest price, and obtain the offered share (Obeidat, 2020). In the right of preference, the legislator made the transactions that prove this right relatively narrow and limited them to transactions that represent consensual sales only without mixing them with any other type of contracts, such as gift contracts or even wills (Mansour, 2000).

They may also adhere to the hidden contract and prove by all means the formal nature of the contract that harmed them”. With that, partners who want to exercise their right of preference must prove the formality by all means of proof, considering that the partners are third parties to this concluded contract, i.e. they are not parties to it, and are not required to submit written evidence to refute the formality of the contract (Al-Masarweh, 2021).

Second: The scope of actions in exercising and preference

According to Article (1150) of the Civil Code, “Pre-emption is the right to own the sold property or part of it, even if the buyer is forced to do so, for the price and expenses incurred”. Also, Article (A/14) of the Real Estate Law states Moreover, as stated by Article (A/124) of the Real Estate Law, “A partner in the ownership of a building, floor or apartment registered pursuant to the provisions of this chapter has the right of preference to purchase any common share that is intended to be sold by mutual consent to a person other than the partners in it.

The right of priority must also be granted to registered apartments and registered floors under a registration deed separate from the registration deed of the land on which they are built (Al-Mustarihi 2019).

Re-regulating the impairments and nullifications of the right of preference within the provisions regulating.

The legislator has regulated the impairments and nullifications of both the Civil Code and the Real Estate Law. Regarding the right of preference, its impairments and nullifications have been regulated in Real Estate Law (13/2019).

i. Unifying the provisions related to the impairments to .and preference

The impairments to both and the right of preference are examined as follows:

First: Impairments related to the subject of the contract transferring ownership of the share in .and preference

With this in mind, the impairments to pre-emption related to the subject of the contract transferring ownership can be summarized as follows:

1. Endowed shares: Preemption cannot be granted to endowed property, as the right of preemption will not be granted to the partner if the subject of the contract is an endowed share, whether for a house of worship, a charitable association, or an institution (Obeidat, 2020). Estate Property Law and the repealed Floors and Apartments Ownership Law did not address the exception of the endowment or even if the share was sold to be a place of worship or an annex to a place of worship (Obeidat, 2020).

However, by referring to the text of Article (1/1243), it states: “After the completion of the endowment, the endowment shall not be gifted, inherited, bequeathed, mortgaged, and shall be removed from the ownership of the endower and shall not be owned by others.

Regarding the idea of unifying the provisions for both rights, unifying them with one text for the impediments without excluding the endowed property is a commendable matter and is in line with the philosophy of the legislator, as stated in Article (2/1245)

1. In the state lands in the hands of those entitled to their benefit

This prohibition stipulated in the Civil Code is not currently applicable because the legislator stipulated the abolition of state lands in Article (8) of the Real Estate Law (8) (1159) of the Civil Code should be eliminated because there are

no longer state lands after the enforcement of the Real Estate Law, but they remain outside the boundaries of the municipalities.

2. Regarding the division of real estate, the decision of the esteemed Court of Cassation No. (2266/2004) regarding this paragraph states.

Second: Impairments related to the nature of the contract transferring ownership of the share.

1. The legislator has restricted the exercise of the right of preference to a sale by mutual consent without forcing the seller, such as a judicial sale or otherwise. Rather, the legislator has obligated and limited the right of preference to a voluntary sale only (Al-Masarweh, 2021).
2. If the sale is made by public auction in accordance with the procedures stipulated by law: This prohibition is mentioned in both Article (1/1161) of the Civil Code and Article (14/w/1)
3. If a mandate is obtained from the state (14/ and /4): The mandate is the transfer of public property to private property or the ownership of immovable property belonging to the state treasury to citizens who meet the conditions stipulated in the State Property Management Law (17/1974).
4. If the sale is made by the Housing Corporation to one of the beneficiaries of its projects, or by a Housing Corporation to one of its members, or by the Jordanian Armed Forces associations, or the security services and their funds to one of their officers or members (Article (14/5) of Real Estate Law (13/2019), this prohibition is not available in the right of preference. Although it is not conceivable because it is applied to residential units and not to shares thereof in buildings, floors and apartments, because the legislator was well-intentioned in stipulating this prohibition with regard to pre-emption in the Real Estate Law, we believe that it must be taken into account when unifying the provisions of both .and preference (Almajali, 2024).

Third: Impediments related to the buyer's capacity for a share in a common property

In this last type of impediments, the impediments related to the buyer's capacity for a share in a common property or who is considered a buyer in a gift for consideration, as the Jordanian legislator described it as being considered a sale, will be discussed. This impediment is represented by two cases, which are:

- a. If the sale takes place between ancestors and descendants, or between spouses.

b. If the buyer is one of the partners in the common property only for preference.

1. Ownership by gift without conditional compensation, charity, inheritance or will.

2. Buildings and trees sold intentionally for a land other than the one on which they stand, or buildings and trees standing on a monopolized land.

3. If the real estate is divided.

4. If the sale is not consensual.

5. If there is a mandate from the state for a share in the property, or if the sale is made from the Housing Corporation to one of the beneficiaries of its projects, or from Housing Corporation to one of its members, or from the security services associations and their funds to one of their officers or members.

6. If the sale is for ancestors and descendants: If the sale is between spouses, or if the sale is between relatives up to the fourth degree, t the marital status remains, because kinship by marriage ends with death or divorce (Almajali et al., 2023).

7. If the buyer is a partner in the common property.

In this section, nullifications for and preference to determine the possibility of unifying them will be discussed.

First: Failure of one of the conditions for establishing the right

It is normal that both the right of pre-emption and preference are forfeited by failure of one of the conditions for establishing the right, such as the loss of the right holder's ownership or by the nullification of one of the conditions for each of the two rights, which were previously discussed (Al-Bashir, 2016; Almajali & Alshawabkeh, 2019).

Second: The right to forfeit by waiving it explicitly or implicitly

The Civil Code's Article (3/1161) declares: "If the pre-emptor explicitly or implicitly waives his right to pre-emption, the pre-emption claims shall not be heard." Regarding this text, the pre-emption right is forfeited if the right holder waives it, whether expressly or through a legitimate legal expression made by him.

Third: The pre-emption or preference right holder disregards the legal requirements in order to use the right.

In accordance with Civil Code Article (1162), "whoever wishes to exercise the right of pre-emption must file a lawsuit within thirty days of learning that the sale has been registered." If he postpones it without providing a good reason, his Pre-emption rights will be lost. According to Article (124/C), the partner must file a claim for preference against the buyer with the court thirty days after learning of the sale. Preference claims will never be considered after (90) days from the date of registration. According to the text of Article (14) of the Real Estate Law, which states that both rights must be filed within thirty days of the partner learning of the sale or within ninety days of the sale contract's registration date, the ruling and the period of lapse are thus by definition the same as those specified in the right of pre-emption (Almajali et al., 2023b).

Fourth: Filing a pre-emption or preference claim for a part of the pre-empted property or the subject of the priority right

According to Articles (1160) of the Civil Code and (1/126) of the Real Estate Law, both the pre-emption and preference rights are not divisible unless the share is sold in parts. In that case, the pre-emptor or the holder of the priority right may request to exercise the pre-emption or preference in a part of the sold parts and leave the rest.

Results

Given the previous discussion and results, the following key results are attained:

1. A great similarity exists between the legal provisions regulating pre-emption and preference in various substantive and procedural provisions, because both share the fact that they apply to real estate, not movable property. They share multiple provisions, as each of them is not divisible except in the case of multiple buyers and the seller is one.
2. More comprehensive with regard to unregistered real estate in the registration department if the necessary conditions for transferring ownership are met. It also applies to apartments.
3. The Jordanian legislator has moved towards introducing amendments to the provisions regulating in the Real Estate Law, such as narrowing the categories entitled to exercise the right of pre-emption and amending the period of the lapse of from six months to (90) days.
4. The Jordanian legislator did not limit to the partner only to the right of preference. Rather, he mentioned a special case in the text of Article (14/z) of the Real Estate Law, to prove the right of pre-emption for the mixture in a water spring shared by the benefit.

5. The Jordanian legislator did not limit in the event of a foreigner entering the property other than the partners, similar to the right of preference, and in application of the legal philosophy that requires it.
6. The legislator did not restrict the right of preference in the event that the sale was to in-laws up to the second degree.

Conclusion

This research attempts to unify both rights into more effective and concise provisions to avoid the drawbacks of provisions that regulate both rights. This research explores the complexities of pre-emption rights in the context of pre-emption provisions in Jordan, a critical area of corporate governance that significantly impacts shareholder protection and market efficiency. The findings underscore the need for a nuanced approach to reforming these provisions to better align them with local and global financial practices. The analysis reveals that while Jordan's current pre-emption and preference frameworks provide key safeguards for shareholders, they impose constraints that hinder capital raising and market adaptability. The rigidity and complexity of these provisions can lead to inefficiencies and may disproportionately impact certain groups of shareholders. These issues are particularly relevant to Jordan, where an evolving financial landscape requires a regulatory framework that supports shareholder interests and corporate growth. Comparative insights from international practices, particularly those from jurisdictions with more flexible and adaptive regulatory environments, suggest that there is room for improvement in Jordan's approach. Reforming pre-emption rights to provide greater flexibility, such as tiered pre-emption rights or more dynamic terms, would address some of the current shortcomings. These changes could enhance market efficiency while protecting the fundamental interests of shareholders, thus promoting a more balanced and responsive corporate governance framework. Implementing these reforms will require careful consideration of local market conditions and stakeholder needs. It is important that any changes are designed to address the specific challenges facing Jordanian companies and investors, and to ensure that the reforms are practical and beneficial. Engaging with stakeholders, including shareholders, regulators, and market participants, will be critical in developing a revised framework that meets the needs of all stakeholders.

Recommendations

Given the previous results, this article makes the following key recommendations:

1. The article recommends that the Jordanian legislator introduce the necessary amendments to the Civil Code as a general law to create a state of harmony with the Real Estate Law by amending the text of Article (2/1162) and making the period (90) days and canceling paragraph (4/1159).
2. The article recommends paragraph (14/z) of the Real Estate Law and limit .and preference with the same provisions to the partner only.
3. The article recommends that the Jordanian legislator unify the ruling on .and preference in the event of conflict between partners, taking into account the percentage of the partner's share in the common property, similar to what the legislator.
4. The article recommends that the Jordanian legislator amend the text of Article (1150) of the Civil Code to limit the right of pre-emption to the case where the buyer is not a partner, similar to the right of preference in the text of Article (1/124) of the Real Estate Law, and unify this provision for both rights in the Civil Code and in the Real Estate Law.
5. The article suggests that the legislator in Jordan unify the laws governing the barriers to and kinship-related preferences, in line with the laws governing these barriers to the right of pre-emption, as specified by the legislator in paragraph (2/1161) of the Jordanian Civil Code.
6. The researcher suggests that the Jordanian legislator adjust the rules governing preference and regulation in the event that the current contract is an exchange contract for a portion of the property or a gift contract for consideration.

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