

The Evolution of Real Estate Property in Moroccan Law: A New Paradigm

Badr Guelida

School of law, Ibn Zohr University, Morocco

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ABSTRACT

Real property right has witnessed tremendous transformations over time due to social, political, and economic conditions that societies have known. Since the French revolution in 1789, property right has been considered as a growth lever, especially for policy makers and social scholars. A new theory states that property right has changed since World War II, both in character and content. The interaction of real property with social and economic conditions has impacted the structure of this right, namely the right to dispose "abusus". Contrary to its traditional characteristics, real property might, at the present time, be flexible and temporary. In Morocco, property right is sacred. Article 35 of the Moroccan constitution stipulates that the right to property is guaranteed. Unfortunately, in reality the implementation of this constitutional disposition is not always straightforward. It is usually hindered by the existence of multiple legal texts governing real estate property. The main objective of the present paper is to analyze the new real estate property right's theory in light of the economic changes. We will tackle different aspects of the current fundamental transformation of the law of private property in Morocco, evaluating it from a distributive justice perspective.

1. Introduction

Real estate property rights affect efficiency of resources' use (Cole & Grossman, 2002). This claim is supported by von Benda-Beckmann et al. (2006) who emphasize that: "Property is always multifunctional (...). It is a major factor in constituting the identity of individuals and groups (...). Property regimes, in short, cannot easily be captured in a one-dimensional political, economic, or legal model."

Real property right has witnessed tremendous transformations over time due to social, political, and economic conditions that societies have known. Since the French revolution in 1789, property right has been regarded as a growth lever especially for policy makers and social scholars. A new theory states that property right has changed since the World War II, both in character and content. The interaction of the real property with social and economic conditions has impacted the structure of this right, namely the right of disposal "abusus".

*Corresponding author E-mail address: b.guelida@uiz.ac.ma

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In Morocco, property right is sacred. Article 35 of the Moroccan constitution stipulates that the right to property is guaranteed. Unfortunately, the implementation of this constitutional disposition is not always straightforward. It is usually hindered by the existence of multiple legal texts governing real estate property. Property right is important, not only for individuals, but also for the economy. In other words, property right is fundamental to both economic growth and social integrity. Given the importance of property right in the socio-economic sphere, property has a legal meaning, which is, in some circumstances, ambiguous, and thus hard to define.

One interesting question can be raised in this regard: Would the evolution of real estate private property right lead to a new ownership paradigm in response to the economic and social upheavals affecting the Moroccan society? To answer this question, we will analyze the new real estate property right's theory in light of the economic changes in Morocco. We will also tackle different aspects of the evolution of the law governing private property in Morocco.

1.1. Research Method

This study adopts the historical and the analytical methods. The former helps unravel legal structure of the real estate property in the past. It often provides guideposts showing how real estate property has developed and evolved over the years. The analytical method will help us analyse and highlight the idea that real private ownership development is a response to the surrounding economic changes. We aim to provide a critical analysis that will enhance knowledge about the evolution of real estate property legislation in Morocco in view of the economic upheavals affecting the Moroccan society.

2. Real Property from the Historical Perspective

The evolution of real estate property in the Moroccan legislation has gone through different stages. The term evolution is highly important as it refers to a process of regular change. We shall explore in this section the evolution of real estate property over different time periods.

2.1. Real Private Property Prior 1912

In this section we will sketch the evolution of real estate private property before the Islamic era and within the Islamic domination starting from the 8th century.

2.1.1. The Pre-Islamic Period

The existence of real property in Morocco dates back to antiquity. Tribal and ethnic groups possessed collective real properties (Gsell, 1913). According to Guillaume (1962), collective real properties were possessed by tribal groups, but not all tribes had access to collective properties. Private real estate properties concern only movable objects such as materials.

The pre-Islamic era in Morocco was characterized by what Berque (1958) calls "the ecological law". In other words, ethnic groups were governed by the natural conditions in the areas they were occupying (Riffi, 2017). Further, the continual movement of these tribes was not a positive factor for individuals to own private properties (Riffi, 2017). This situation stood in contradiction with the necessary suitable conditions which would help those individuals to own lands privately such as customs and laws.

2.1.2. The Islamic Period

Within Islam, real estate property had witnessed tremendous transformations. The structure of ownership distinguishes "bare ownership" from "usufruct" (Cahen, 2014). In other words, most

properties are possessed by the Muslim community “*umma*” during the Islamic expansions and were under direct control of the “*Khalifa*” or “*Sultan*”. Tribes are guaranteed usufructs. They paid taxes; either “*zakat*” if they were Muslims or “*kharaj*” if they were non-Muslims (Riffi, 2017). Note that “*zakat*” refers to the community Wealth Tax; a means of compulsory redistribution of wealth in a way that reduces differences between classes and groups, thus preventing the many social disorders. “*kharaj*” on its part is a special Islāmic fiscal imposition that was demanded from recent converts to Islām in the 7th and 8th centuries.

Private ownership was rare under the Islamic domination. In fact, individuals could not own private estate with all rights that are guaranteed to a real owner, namely bare ownership and usufructs. Further, private properties called “*Melk*” were prohibited in Morocco during this period, while they were eligible in Arabia. Meanwhile, Moroccan traders were not interested in owning land as they gained much more in trade (Lombard, 2017).

2.2. Real Private Property during the Colonial Era

The treaty of Fez 1912 (March 30, 1912) is the treaty according to which Morocco became a French protectorate. In return, the French guaranteed that the status of the Sultan and his successors be preserved. The treaty was considered the legal basis for the regulation of real property in Morocco. Article 2 of the law of June, 2nd, 1915 states that “Ownership is the right to enjoy and dispose of things in the most absolute manner, provided they are not used in a way prohibited by statutes or regulations”. This article is inspired from article 544 of the French Civil Code of 1804, described by Buckland (1963) as “a modern formulation of the Roman law principle of dominium.”

According to Riffi (2017), the above-mentioned law was meant to guarantee similar rights as in the French Civil Law. In other words, the new legislation reflected the civilian conception of real estate property. Indeed, “the owner may deal with the property as they please, but this was subject to enactments of positive law” (Matthews, 2013). The French owners who contributed to the social and economic development of Morocco in the beginning of the 20th century, had a perpetual and exclusive right. It is what Matthews (2013) refers to as an “absolutist view of property”. The law also guaranteed the owner three types of rights, expressed in the Latin words *usus, fructus, abusus*: (i) the right to use the thing, (ii) the right to take its fruits, and (iii) the right to destroy or alienate it, respectively. As far as private property right is concerned, two types exist: (i) registered property with a specific legal structure, governed by the law of June 2nd, 1915 (as it is modified by the law 07-14, November, 22nd, 2011) and (ii) the real estate properties called “*Melk*”, the arabic term of ownership, which are governed by the Muslim law and the Maliki rite.

In addition to the private property right discussed above, the Moroccan legal system includes other types of real estate properties such as: dominion (State) properties, condominium, collective real properties, forest real estate, endowment properties and Guish real properties. The latter refer to the properties which were granted by the Sultan Moulay Ismail to the tribes which took part in the war by the side of the military. Members of those tribes have only the right to use (usufruct).

2.3. Real Private Property during the Post-Colonial Era

The post-colonial era was marked by the strengthening of the status of real estate private properties constitutionally and legally. Specifically, the social and economic factors started to impact, if not limit the use of real estate property rights.

2.3.1. The Moroccan Constitutions

Since the first constitution of 1962, real estate property has been considered as a sacred right and is protected by law. In the same vein, Article 15 of the Constitution of 1992 clearly states that “real estate property is guaranteed...”. Nevertheless, it should not serve private interests only but meet social needs as well. Therefore, the Moroccan constitutions since 1962 state that the law can limit the extent of real estate private properties as well as their exercise if the social conditions and development of the country necessitate it.

In addition to the eventual impact of social factors in limiting real estate private properties, the 1996 constitution brought about a new element, namely, the economic aspect considering it as a crucial factor. The latter may also limit the use of private real estate properties in case of economic necessity. By way of illustration, Article 35 of the actual Constitution (2011) confirms this fact by stating that “... The law can limit the extent of it and the exercise of it if the exigencies of economic and social development of the country necessitate it”. As such, the actual Constitution consolidates the economic conception of property right.

2.3.2. The Moroccan Legal Texts Governing Real Property

Since the 1960's, property right had witnessed a substantial reinforcement through the elaboration of different legal texts, namely:

- The code of agriculture investment of 1969 (the appropriation of collective lands);
- The law No 07-81 on expropriation;
- The law No 12-90 related to urbanism;
- The law No 01-07 on Residential Real Estate Tourism for Promotion (RRETP);
- The law 44-00 concerning condominium.
- The Law No 14-07 relating to land titling.
- The Moroccan Real Rights Code (Law No 39-08) preserves the fundamental principle of real property rights.

The aim of the legislator is to reinforce the local legal structure adapting the law to the social, economic, and political contexts. Given that real property was considered since the beginning of the 20th century as a locomotive to the social and economic development of Morocco, the law served the government to encourage investors to invest in different domains.

3. Findings on the Economic Impact on Ownership Structure

The real estate sector in Morocco attracts various investors, by virtue of the excellent investment opportunities it offers and the huge financial returns it generates; thus, it has become one of the most developed sectors not only in Morocco but throughout the world (Alobaidi, 2021). Ownership right transformation is a response not only to social evolution but to the economic one as well. Besley (1995) and Alston et al. (1996) highlight the impact of real property evolution on investment. Specifically, the move from the communal or tribal systems toward the modern individualistic perception of private property fostered investment in land; hence, contributing to economic development. This state of affairs lends support to the conclusions of the studies conducted by North and Thomas (1973) and Rosenberg and Birdzell (1986), stating that private property rights enhance growth and economic development.

As a result, new schemes have emerged, leading to various ownership transformations. The latter gave rise to two new real estate schemes: (i) the Residential Real Estate Tourism for Promotion (RRETP) and (ii) the real estate time-sharing.

3.1. Residential Real Estate Tourism for Promotion (RRETP)

It goes without saying that real estate in tourism constitutes an important industry for the national revenue. It undeniably has a positive impact on the economy. In Morocco RRETP is governed by the law No 01-07. According to article 2 of the RRETP law, three major actors come into play: the management company, the purchaser and the promotion company.

The law 01-07 stipulates that 70% of the RRETP units must be rent to a management company for a 9-year duration. Consequently, the owners can only use the estate for a limited time, i.e., 2 months a year. Following these restrictions, the owner's right of disposal is, therefore, restricted as they can neither sell nor use the estate during the remainder of the year.

The RRETP case involves a complex bundle of relations, which differ considerably in their character and effect (Waldron, 1985). The bundle could be defined as the content of rights the owner has on the estate. But, if the owner is obliged to rent it for 9 years, their content right would be redistributed.

Table 1.

Owner's right in RRETP

Type of right	Situation
Right of disposal	Limited (2 months /year)
Right of enjoyment	Personal
Right to use	Limited
Right to seek partition	-
Alienability	Free (inter vivos by deed or testimony)

3.2. Real Estate Time-Share

Real estate time-share is an original concept involving different contractual patterns. This mechanism is based on a simple idea: to distribute the use of the same real estate among many beneficiaries in a successive and renewable manner (Guelida, 2020). Upchurch & Lashley (2006) define timeshare as "a term that combines the words *time* and *share*, is simply that—the act of sharing vacation time at a luxurious resort facility in a geographical location of choice". Peirce and Mann (1983) precise that "Time-sharing generally involves the division of ownership of a condominium unit into a number of fixed time periods during which each purchaser has the exclusive right to use and to occupy that unit". Thus, we will focus on the fee simple legal forme, also known as time span estate, which convoys an intrest real property includes all of the rights inherent in the ownership of real property, such as the right to sell, lease, devise, or bequeath the interest. These forms of real estate timesharing have a direct impact on the ownership structure.

A recent study has revealed that 89.5% of purchasers in the US have chosen the fee-simple legal form in the time-share industry. In other words, "each unit is occupied by the purchaser for the period they desire to be in possession" (Engle, 1980). Practically, the purchaser has a specific right to use and occupy the unit during a specific period of time of the year for an unlimited number of years. The unit is possessed simultionasly by an unlimited number of owners rather than being possessed by one owner only in normal structures. This is what Engle (1980) calls the unit association. In essence, the time span estate makes all owners tenant in common in fee simple absolute.

In Morocco, condominium may be used for the legal structure for time-share. According to Engle (1980) "with each tenant in common having title to the undivided interest specified in his deed. The undivided right to possession and use of the whole property in its entirety is the one unit among tenants in common". In practice, the right of the co-owner is undivided.

Table 2.

Owner's right in fee simple time-share

Type of right	Situation
Right of disposal	Limited (1 week /year)
Right of enjoyment	Personal
Right to use	Limited
Right to seek partition	Waived
Alienability	Free (inter vivos by deed or testimony)

Table 3 draws a comparison between real estate time-sharing and RRETP in terms of ownership structure to show the similarities and differences between the two.

Table 3.

Comparison between real estate time-sharing and RRETP

Characteristics	Real Estate Time-sharing	RRETP
Abusus	Limited	Limited
"Usus" or right to use	One week or more/year	Two months/ year
Contract duration	Not specified	Not specified
Ownership structure	Modified	Modified
Temporal restrictions	Yes	Yes

4. Conclusion

Throughout history, various models and laws have emerged to govern and set the limits of the real property. Indeed, the evolution of real property was manifested in the limits that the Moroccan legislator imposed to serve both social and economic interests. The economic approach of real property was the subject of heated debates during the second decade of the twentieth century (Cole & Grossman, 2002).

The modern approach of real property is described as the famous "bundle of rights". In other words, property right constitutes a set of rights vis-à-vis the others (Johnson, 2007). However, the viability of the bundle of rights in real estate property is debatable among scholars. The definition of real property as an "Absolut dominium" describing it as the exclusive right of possessing, enjoying, and disposing of a thing is outdated. Recall that real estate property is affected by economic development. New schemes have emerged such as real estate Timesharing, in which time is economically valuable. Hohfeld (2013), stresses that the new conception of real property reflects a fundamental relationship between people rather than a direct relation to thing.

Restricting the right to real property in favor of public interest is in harmony with the general principals of the Moroccan constitution. In other words, the legal rules governing real property are not a matter of neutral deductive analysis; rather, they are a reflection determined by governmental policy forced by a conflict between competing interests (Johnson, 2007).

Social restrictions result from the need to protect the public interest with regard to environment, urbanism, and natural resources (Sayın et al., 2017). Thus, the social dimension of the Moroccan property law can be observed in the rules stipulating one to use and enjoy his/her property in a balanced manner with social needs (Sayın et al., 2017). Similarly, social limits consist in refraining owners from causing harm to neighbors and society, including acts such as pollution and public nuisance. Another facet of the social restrictions may take the shape of government interventions through expropriation procedure.

To recapitulate, in this paper we have tracked the evolution of real estate property right in the Moroccan law. We have shown that throughout its evolution the real estate property used to

serve mainly social purposes, and currently it is increasingly serving economic interests as well. Thus, the concept of real property ownership is a flexible one and subject to continuous evolution.

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