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Real Estate Property Rights' Evolution: The Case of the Moroccan Law

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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 1797, property right was regarded as a growth lever specially for policy makers and social scholars. A new theory states that property right has changed since the World War 2 in character and content. The interaction of the real property with social and economic conditions has impacted the structure of this right, namely "usus". Compared to its traditional characteristics, property might be flexible and temporary. In Morocco, the 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 this presentation will be first to analyze the new real estate property right's theory, considering that the emergence of a new real property right will be in response to economic changes. This paper will tackle different aspects of the current fundamental transformation of the law of private property in Morocco, evaluating it from a distributive justice and a comparative perspective with other legal systems, specifically the common law.

Keywords: property, real rights, economy

1. Introduction

Real estate property rights affect efficiency of resources 'use (Cole & Grossman, 2002). This claim is supported by Franz von Benda Beckmann, Keebet von Benda-Beckmann and Melanie G. Wiber (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 1797, 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 2 both in character and content. The interaction of the real property with social and economic

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conditions has impacted the structure of this right, namely the right of disposal “abuses”. Compared to its traditional characteristics, property might be flexible and temporary.

In Morocco, the 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. 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?

This paper aims at analyzing the new real estate property right’s theory, considering that the emergence of a new real property right will be in response to economic changes. This piece of research also tackles different aspects of the current fundamental transformation of the law of private property in Morocco, evaluating it from a distributive justice and a comparative perspective with other legal systems, particularly the common law.

1.1 Research method

This study employs 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 to analyze the new real estate property right’s theory, considering that the emergence of a new real property right will be in response to economic changes. We aim to provide a critical analysis that will enhance knowledge about the evolution of real estate property legislation in Morocco with regard to the economic upheavals affecting the Moroccan society.

2. Real Property from the Historical Perspective

We shall tackle in this section the evolution of real estate property through 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.

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 tribes’ groups, but not all tribes had access to collective properties. Private real estate properties concern only movable objects such as materials.

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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 was in contradiction with the necessary suitable conditions which would help those individuals to own lands privately such as customs and laws.

The Islamic period

Within Islam, real estate property was subject to tremendous transformations. Indeed, 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*”¹ if they were Muslims or “*kharaj*”² if they were non-Muslims (Riffi, 2017).

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 of time, while they were eligible in Arabia. Further, Moroccan traders were not interested in owning land as they gained much more in trade (Lombard, 2017).

2.2 Real private property within the colonial era:

The treaty of Fez 1912³ was considered a real factor to regulate real property in Morocco. Article 2 of the law of June 2ed 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; this is what Buckland (1963) describes as “*a modern formulation of the Roman law principle of dominium.*”

According to Riffi (2017), the new text 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) defines as an “absolutist view of property”.

¹ *Zakat* is 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.

² *Kharaj* a special Islāmic fiscal imposition that was demanded from recent converts to Islām in the 7th and 8th centuries.

³ the Treaty of Fez (March 30, 1912), by which Morocco became a French protectorate. In return, the French guaranteed that the status of the sultan and his successors would be maintained.

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The law guaranteed the owner three types of rights, expressed in the Latin words *usus*, *fructus*, *abusus*: the right to use the thing, the right to take its fruits, and the right to destroy or alienate it. As a result, the Moroccan legal system⁴ includes two types of private properties: registered property with a specific legal structure, governed by the law of June 2nd, 1915 and the real estate properties called “*Melk*”⁵, which remain governed by the Muslim law and the Maliki rite.

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.

The Moroccan Constitutions

Since the first constitution in 1962, real estate property has been considered as a sacred right and is protected by the law. For example: article 15 of the Constitution of 1992 states that “*real estate property is guaranteed...*”. Real estate private properties should serve not only private interests but social exigencies as well. This is why the Moroccan constitutions since 1962 state that the law can limit the extent of it and the exercise of it if the social conditions and development of the country necessitate it.

However, since the constitution of 1996, the economic aspect is regarded as a serious factor which may limit the use of private real estate properties in case of economic necessity. As an 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*”. Thus, the actual Constitution consolidates the economic conception of property right.

The Moroccan law texts:

The 1960’s had witnessed a substantial reinforcement of the property right through the elaboration of different legal texts:

- 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 relative to Residential Real Estate Tourism for Promotion (RRETP);
- The law 44-00 relative to condominium;
- The Law No 14-07 relating to land titling;

⁴ The Moroccan legal system includes different types of real estate properties such as: The Makhzaniean (State) Properties, the *Guish* real properties, the collective real properties, the forest real estate, the endowment properties and the condominium.

⁵ The arabic term of ownership.

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- The Moroccan Real Rights Code (Law No 39-08) preserves the fundamental principle of real property rights.

3. Findings on the Economic Impact on Ownership Structure

The real estate sector in Morocco is a prime factor in attracting investors, given the excellent investment opportunities and large financial returns it provides, and has thus become one of the most developed not only in the country but in the world as well (Al-Obeidi, 2021). The emergence of a new real estate property right will be in response to economic changes. Ownership transformations may be illustrated in the Residential Real Estate Tourism for Promotion (RRETP) and the real estate time-sharing.

3.1 Residential real estate tourism for promotion (RRETP)

It goes without saying that real estate in tourism is considered as an important industry for the national revenue. Thus, it 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 is 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-share⁶

Real estate time-share is an original concept which reflects different contractual patterns. This mechanism is therefore based on a simple idea: to distribute the use of the same real estate among a large number of 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.” Thus, we will focus on the fee simple legal forme, called also time span estate, as it has a direct impact on the ownership structure.

⁶ Up to now, the real estate time-share is not regulated in Morocco.

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A recent study showed 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 simultaneously by an unlimited number of owners rather than being possessed by only one owner in normal structures. This is what Engle (1980) calls the unit association. In essence, the time span estate makes all owners tenants 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)

A comparison (table 3) is made to show the similarities and differences between real estate time-sharing and RRETP in terms of ownership structure.

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

Source: (TNR 10pt., italics)

4. Conclusion

To recapitulate, in this paper we have tracked the evolution of real estate property right in the Moroccan law. We have noticed that throughout its evolution the real estate property used to serve mainly social purposes, and currently it is increasingly serving economic interests as well.

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