Easements and compensation

in light of legislation and case law

The subject of easements and the principle of compensation or non-compensation relating to it set out a highly sensitive theme. The individuals are attached to their land heritage and the issues related to real estate ownership are numerous and various. Consequently, this issue is the subject of enormous litigation.

Actions for annulment for abuse of power or compensation in connection with easements established by law are constantly increasing in administrative courts; although/though people in Morocco do not challenge the administrative decision for mainly sociological reasons.

Easement which seems to infringe property rights generates a negative perception among property owners. Taking into account / Bearing in mind, the divergences between public and private interests.

In attempt to approach this theme, it is proposed to articulate this subject around two main axes: the first aims to define the concept and typology of easements, the second deals with the question of compensation for easement damage.

I- Easement: concept and typology:

Everyone has the right to property and no one shall be arbitrarily deprived of it in accordance with Article 17 of the United Nations Universal Declaration of Human Rights. Similarly, article 15 of the revised Moroccan Constitution of 1996 stipulates that the right to property and freedom to undertake remains guaranteed. The law may limit/restrict its scope and disposal if the requirements of the Nation's economic and social development dictate its necessity[1].

Thus, the right of ownership gives its holder the freedom to enjoy and dispose of the property. This right is absolute in accordance with the law. It is not possible to damage property except for reasons of public interest. The easement thus constitutes a restriction under the law or regulations on the exercise of the right of ownership.

For this purpose, an easement can be defined, in land law, as a charge imposed on a parcel for the use and the benefit of another ownership. It derives either from the natural situation of the premises, or from obligations imposed by law, or from agreements between the owners[2].

Legislation relating to urban planning, land and expropriation in the public interest are the main legal references that establish easements.

According to different criteria, a distinction can be made between legal or contractual easements. These can belong to private law having as their object private interests, or to public law which are intended to satisfy the general interest. Another type of easements are resulting from the natural situation of the site such as the case of water drainage.

In this respect, we propose a classification of easements by referring to the texts that govern them. Three categories can be highlighted in this regard: urban planning, land and special texts easements.

- *Urban planning easements*: Intrinsically, urban planning legislation includes a number of rules and provisions limiting the right of ownership and use of the land. These easements are vast. They can prohibit or only frame a land use (height limitation, fixing the minimum building plot, conditions of establishment...).

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[1]Dahir No. 1.96.157 of 23 Jumada I 1417 (October 1996) promulgating the text of the revised constitution; Official Gazette No. 4420 bis of 10 October 1996, p. 643

[2] Articles No. 108 and 109 of the Dahir of 19 Rajab 1333 (2 June 1915) establishing the legislation applicable to registered buildings, BO of 7 June 1915.

- See also articles 640 et seq. of the French Civil Code

Laws n°12-90 relating to urban planning, 25-90 relating to allotments and housing groups as well as the dahir of 25 June 1960 relating to the development of rural agglomerations constitute the main urban planning texts. They contain rules and standards reflecting spatial planning concerns. The expected purpose is to provide a framework for the different forms of urban and rural land use in order to avoid spatial dysfunctions.

The above-mentioned Act 12-90 defines urban planning instruments: the urban development master plan, the zoning plan, the development plan and the alignment order constituting a hierarchical whole.

The purpose of the urban development master plan, for example, is to set the general use of the land by locating areas subject to easements such as non- aedificandi areas where no construction can be raised, non-altius tolendi where no height elevation is permitted[3].

The zoning and development plans establish different easements, indicating the locations reserved to the infrastructure and public facilities. They lay down the rules applicable to construction[4]. Generally speaking, in this law, easement is established for the sake of hygiene, traffic, aesthetics, safety and public health[5].

With regard to Act 25-90, on allotments and housing groups, this is an operational urban planning tool which lists the types of obligations that may be imposed on the developer, namely:

- respect of easements intended to guarantee public safety, hygiene, traffic and aesthetics;
- the rectification of the allotment boundaries, if any;
- the reserve of sites to implement facilities;
- the maintenance of existing plantations[6].

As for the dahir relating to the development of rural agglomerations, it outlines the areas in which all construction is prohibited, the spaces reserved for public squares, open spaces, plantations, facilities and installations of social life[7].

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[3]See Article 4 of Law 12-90 on urban planning, Official Gazette 4159 of 15 July 1992, p. 313.
[4]See articles 13 and 19 of Act 12-90 on urban planning.
[5]Idem.
[6]Article 30 of Act 25-90 on allotments, subdivisions and housing groups, Official Gazette No. 4159 of 15 July 1992, p. 307
[7]Article No. 8 of Dahir No. 1.60.063 of 30 Hijja 1379 (25 June 1960) on the development of rural agglomerations, BO. July 8, 1960, p. 1380

In addition, the competent authority may impose, as part of the subdivision, easements concerning roads or traffic or prescribe the execution of certain capital works[8].

- *Land easements:* Act No. 18.00 on co-ownership of 3 October 2002, the dahir on rural land consolidation of 30 June 1962 and the dahir establishing the legislation applicable to registered buildings and areas of 02 June 1915 are the main texts that have dealt with land easements[9].

As stipulated in the last dahir, the easement can be derived from:

- the location of the site, such as the general principle of free natural water flow on the lower bottoms;
- the law, as it is the case with the provisions relating to common ownership (wall, common pit). Hence, the respect of neighbourhood relations and right of way;
- the owners' agreements.

By way of illustration, it can be said that the right of way involves an easement consisting in ensuring access to the public road recognized for the benefit of the owner of a land locked property. Whether it is an agricultural, industrial or commercial exploitation or a land likely to accommodate a construction operation.

It should be noted that easements can be extinguished when things are in such a state that they can no longer be used[10].

- *Easements established by special texts*: Multiple are easements that are created by the legislator in order to protect, manage and operate the public domain. Such is the case of easements related to various networks (electricity, telephone,...). Others are enacted for reasons of decency and tranquility, such as the protection zones around cemeteries.

It is obvious that this type of easement is in the common interest and applies to private land bordering on it. In this context, we can mention, for information only:

- easements linked to military sites and installations governed by the Dahir of 07 August 1934 establishing zones in which all construction is prohibited and all agricultural activities are prohibited.

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[8] Article 10 of the same reference

[9] Articles n° 108 and following of the dahir of 02 June 1915 relating to registered buildings.

[10] Op. cit., art. 153.

- the easements relating to aeronautical and air navigation zones governed by the dahir of 26 April 1938 stopping fringes around these installations where no construction or raising is permitted in order to ensure visibility and avoid any risk for aircraft[11].

- The isolation easements around the cemeteries. Here we are talking about three zones of 30, 70 and 200m respectively. In the first, no wells may be dug or any construction raised. In the other two, the construction and drilling of wells are subject to restrictive measures, according to the Dahir of 29 April 1938[12].

- Easements taken from / with reference to Act No. 22-80 of 25 December 1980[13] on the conservation of historical monuments and sites, inscriptions, works of art and antiques, which, after their inscription or classification according to a regulatory procedure, are subject to protective measures.

  Thus, the issuance of the permit to build or to parcel out, by the competent authority, on neighbouring landholdings is subject to the opinion of the government authority in charge of cultural affairs.

- Easements relating to various networks; in this category, it is necessary to highlight those relating to the installation of electricity[14] networks, and to refer to the easements concerning the installation of electricity lines, with reference to the Dahir of 01 July 1914 relating to the public domain.

A fortiori, property being an inviolable right, no one can be deprived of it, except when public necessity, legally established, obviously requires it, and under the condition of a fair and prior compensation[15].

II- The question of compensation related to easements and jurisprudential framework:

While compensation for damages caused by easements taken to preserve the public domain do not cause major problems because the terms and conditions of such compensation are set by the same texts, compensation for urban planning easements raises many difficulties and disputes.

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[11]Mohammed Kasri, Les servitudes réglementaires en matière d'urbanisme, REMALD n° 54-55 des mois janvier-April 2004, p.51.

[12] Official Gazette No. 1332 of 6-5-1938, p. 612.

[13] Official Gazette No. 3564 of 18-2-1983, p. 73.

[14]Dahirs of 24 October 1962 and 14 September 1977 supplemented by that of 1963, Mohammed Kasri, same reference, p.52.

[15] Article 17 of the Universal Declaration of Human Rights.

Can it be argued that the easement of urban planning is characterized by the principle of non-compensation unless there is an exception?

In this sense, article 31 of Act 25-90 specifies that easements established for the sake of hygiene, traffic and aesthetics do not give rise to any right to compensation.

Only the reserves of additional space and roads give rise to this right when the reserved area exceeds a certain rate in relation to the total area of the allotment.

For example, when this rate exceeds 45% in the case of lots from the allotment concerned, with areas between 100 and 200m². If necessary, the compensation due to the developer shall be fixed amicably or by court order.

Similarly, under article 84 of Act 12-90, easements established in terms of safety, hygiene and aesthetics do not involve any compensation unless it results from these easements:

- an infringement of acquired rights,
- a modification of the previous state of the premises determining direct, material and certain damage.

The said indemnity shall be fixed either amicably or by legal means. In addition, it should be noted that the development plan is a regulatory urban planning document that generates enforceable legal effects. To this end, the approval of the said plan constitutes a declaration of public utility for roads, spaces reserved for public facilities, green spaces and other easements.

It goes without saying that a reading of the above-mentioned provisions leads to the recognition that the legal framework in force has opted for broad concepts such as safety, aesthetics, health, etc., which can be used in a discretionary manner. Obviously, it is easy to apply these concepts to various measures.

In addition, case law has tried to delimit interpretations of the law. In this respect, it is worth highlighting the conclusions of some judgments that are considered interesting:

- the building permit issued without compliance with an assent is null and void. This conclusion is to be deduced from the judgment of the Oujda administrative Court[16], which considered the building permit in an aedificandi zone relating to the easement of a military barracks to be obsolete even if the petitioner obtained it from the president of the municipal council concerned.

[16]Judgment of the Oujda Administrative Court No. 36/96 of 13 March 1996, case No. 10/95.

The administrative judge of Fez considered that the allotment permit issued by the President of the Taza Municipal Council on land bordering a classified historical monument, without having obtained the assent of the Department of Cultural Affairs, is null and void in accordance with Law 22-80.

- The State is not subject to criminal law[17], but is civilly liable for damages it causes as a result of irregular material acts.

The acts of the State are supposed to respect the principle of legality by obeying the regulatory procedure for expropriation in the common interest in accordance with Act 7-81 of May 5, 1982.

The administrative judge of Rabat, as a judge of the summary proceedings, considered that the work under taken by the administration on other people's land without observing the procedure in force is an abuse of power[18].

- The work carried out by the public administration outside the law can not be demolished and obviously gives the right to compensation, in order to preserve public funds. The administrative judge followed this logic in the case of an appeal against the municipality, which carried out a procedure without having observed the regulatory procedure[19].

- The assent of the Urban Agency may not be given to an administrative decision that may be the subject of an action for annulment on grounds of misuse of power. However, in some cases, the judge may hold this public institution liable for compensation for damage in connection with the use of its prerogatives.

The administrative judge of Fez issued a judgment awarding compensation to a rightful claimant against the Urban and Safeguarding Agency of Fez[20].

These are concrete cases of litigation against the public administration, which is required to ensure the common interest by complying with the regulatory procedures in force. In this case the laws on town planning and expropriation, failing which the damage resulting from the administrative action is assessed and evaluated by the judge, who often engages the

[17] Article 10 of the Criminal Code.
[18]Decision of the Rabat Administrative Court n°83/95 dated 20 December 1995.
[19]Decision of the Administrative Court of Oujda No. 122/96 of 24 July 1996, case No. 86/96.
[20]Decision of the Administrative Court of Fez n°114 dated 27 February 2001, file n° 33/99, According to Abdesslam Toufik, La faute du service public en matière d'urbanisme, report of the study day sheld on 2 and 3 in Oujda November 2001, p.379.

responsibility of the State, even if sovereign, by imposing compensation proceedings on it in favour of the rights holders.

In short, this theme of easements and compensation deserves multiple investigations in the legal and social field. It raises a wide range of questions relating to the rule of law in urban planning, the purposes of urbanism and management and the principles of land equity.

It is unacceptable that an urban planning document should be a source of enrichment for some and impoverishment for others according to unfair issues. Pending effective measures of land justice, the rationalisation of the procedure for drawing up urban planning documents and compliance with the rule of law, easement, particularly in urban planning, continues to give rise to major difficulties and numerous disputes concerning claims for compensation and annulment for abuse of power.

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