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, taken into account the attachment of individuals to their land heritage and the multiple issues related to real estate ownership. As a result, this issue is the subject of enormous litigation.

Actions for annulment for abuse of power or compensation in connection with servitudes established by law are constantly increasing in administrative courts, although the people in Morocco do not challenge the administrative decision as much for mainly sociological reasons.

A priori, servitude that seems to infringe property rights generates a negative perception among property owners in view of the divergences most often revealed between public and private interests.

In an attempt to approach this theme, it is proposed to articulate this subject around two main axes; the first aims to delimit the concept and typology of easements, the second deals with the question of compensation relating to compensation for damage in relation to a given easement.

I- Servitude: delimitation of the concept and typology:

Everyone has the right to property and no one shall be arbitrarily deprived of his property 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 its scope and exercise if the requirements of the Nation's economic and social development dictate its necessity[1].

Thus, the right of ownership confers on its holder the freedom to enjoy and dispose of things in this case land ownership, in the most absolute manner, in accordance with the law. It is not

[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

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 building for the use and utility of a building belonging to another owner. 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 under private law having as their object private interests, public law easements intended to satisfy the general interest and those 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. The right of way of the urban planning easement is very clear, which can prohibit a land use in a given area, as it can only frame it (height limitation, fixing the minimum building plot, conditions of establishment...)

Laws n°12-90 relating to urban planning, 25-90 relating to allotments, parcels 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 which 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, inter alia, to set the general use of the land by locating areas subject to easements such as non-

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[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

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 for the installation of infrastructure and superstructure equipment and laying down the rules applicable to construction[4]. Generally speaking, in this law, servitude is established in the interest of hygiene, traffic, aesthetics, safety and public health[5].

With regard to Act 25-90, on subdivisions, parcels and housing groups; This, as an operational urban planning tool, listed the types of obligations that may be imposed on the developer, namely:

- respect for easements intended to guarantee public safety, hygiene, traffic and aesthetics;
- the rectification of the allotment boundaries, if any;
- the reserve of sites to house socio-community and local 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]. 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 consolidation of 30 June 1962 and the dahir establishing the legislation applicable to registered buildings of 02 June 1915 are the main texts that have dealt with land easements[9].

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

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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
[8] Article 10 of the same reference
[9] Articles n° 108 and following of the dahir of 02 June 1915 relating to registered buildings.

- the location of the site, such as the general principle of free natural water flow on the lower bottoms;

- the law, as is the case with the provisions relating to common ownership (wall, common pit), respect for privacy in neighbourhood relations, right of way;
- the owners' agreements.

By way of illustration, it can be said that the right of way involves a very widespread 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 general 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.
- 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].

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

[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.

- Easements arising from 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 by the competent authority of the permit to build, subdivide or divide on riparian buildings 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 and related installations under 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].

[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.

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

While compensation for damages caused by easements taken to preserve the public domain introduced by special texts do not pose 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. 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 in the interests 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 in question, 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, pursuant to that Act and the related decree, do not involve any compensation unless it results from these easements:

- an infringement of acquired rights,
- a modification of the previous inventory of fixtures 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, bearing in mind that it is easy to apply these concepts to various and varied 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[16] Administrative Court, which considered the building permit in a non-building zone relating to the servitude of a military barracks to be obsolete even if the petitioner obtained it from the president of the municipal council concerned in Sidi Driss El Ghadi.

The administrative judge of Fez considered that the subdivision 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 public interest in accordance with Act 7-81 of May 5, 1982.

The administrative judge of Rabat, in his capacity as 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 vitiated by 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 exercise of its powers.

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

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 brought against the public administration, which is required to ensure the public 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 responsibility of the State, however sovereign, by imposing compensation proceedings on it in favour of the rights holders.

In short, this theme of servitudes 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 urban planning 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 in the direction of land justice, the rationalisation of the procedure for drawing up urban planning documents and compliance with the rule of law, servitude, 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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[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.