



# The Conceptual Framework of Legal Sidewalk Space

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**Abstract-** The sidewalk space is considered as one of the original real rights, which is featured with formalin y due to its listing in the Real Estate Registration Department. The owner of a sidewalk space is granted the privilege of exploiting, using and disposing of the part that is exclusively above the foot pavement without affecting the flow of pedestrians and public benefit. This right is confined to the owner of the property that is adjacent to the sidewalk for the purpose of building on its space according to specific terms and conditions. The utilization of sidewalk spaces shall add beauty and urban development to the city. Moreover, they shall provide more space for investment, bringing financial income and employing manpower in construction.

**Keywords:** Conceptual Framework, Legal Sidewalk Space, Real Estate.

## I. INTRODUCTION

The sidewalk space, as an original real right, includes the space that is over the footpath, and it can be owned by the possessor of the neighboring building. He can build on it, and others can use of it as per certain terms and conditions.

In order to come up with a definition to the sidewalk space right, one should be aware of its meaning and interpretation according jurisprudence, law' and Sharia. Moreover, we need to identify its scope, and its legal nature, which is shrouded with a lot of ambiguity whet her it is real or personal right.

We should also refer to the common features that a sidewalk space shares with other real rights as well as the very special characteristics, which distinguish it from others. In the first section of the current research, we shall deal with the sidewalk space as a real right and identify its scope, whereas in the second section, we shall investigate its nature and features.

### 1. Sidewalk Space as a Real Right & its Scope

As we have stated a Bose, we shall focus in this section on the definition of sidewalk space as a real right and its scope.

#### 1.1 Detonation of Sidewalk Space as an Original Real Right

This term has been defined by interpreters as well as jurists. For example, in one of these definitions, the right in a sidewalk space is defined as a limited legal domination, which aims to achieve direct self-interest (Al-Ahmed, 201 7). On the other hand, some interpreters have defined "space" as "the arena which comes above the real estate to the extent that is beneficial within the borders of the property, whether the extension is in a dependent or original form (Al- Dahhan& Abdul Qadir, 2 9).

The height of the space therefore can be determined as per the utility criterion, i.e. within the limits that the user can make use of the space, and if he exceeds those beneficial limits, the owner of the space has no authority on him. It is argued that the space belongs to the land on which it is located, and that the part belongs to the whole (Hijazi, 1970). There is no doubt indeed that the one who on one the land shall own the space with it. However, a person can own the space originally and apart from the ownership of the land. This issue is confirmed by the text of Article N o. 1049/03 of the Iraqi Civil Law', which stipulates that" purchasing the surface of the land shall be separate from what is above and below it". Accordingly, the ownership of the sidewalk space can be isolated from the sidewalk itself, which is part of the street that is possessed by the municipality, and the latter can give its ownership, i.e. the sidewalk space to the person who owns the adjacent real estate to make use of it without violating public order.

But what do we mean by the term" sidewalk"? To answer this question, we shall refer to Article No. 01, Paragraph No. 0 l of the amended "Roads & Buildings Regulation, No. 44 of 1935". It identifies the sidewalk as being part of the public road (the street), which is allocated for the use of pedestrians. It

should be noted that the term "public roads" refers to all types of streets, roads, squares and sidewalks within the boundaries of the municipality or the Capital Secretariat.

The sidewalk space on the other hand is defined as "the real right which belongs to the municipality that can give its possession to the owner of the adjacent real estate, and the purchaser is authorized to construct buildings on the sidewalk space and connect them with his property as per the conditions determined by the Municipal Council.

Extrapolating this definition will lead us to confirm the fact that the right of a sidewalk space is an original real right. This definition, however, is criticized for ignoring essential points. First of all, it does not refer to enlisting this right in the "Real Estate Registration Department". Secondly, the definition does not state that in addition to the owner of the adjacent real estate, other people could make use of the sidewalk space. Finally, it does not identify clear boundaries to the sidewalk space. It should have been more appropriate to assign it to the vertical part of the space that comes at the sidewalk exclusively.

Others have defined the sidewalk space as "a contract according to which the Capital Secretariat or the Municipality offers the ownership of this space to the proprietor of the adjacent real estate after being enlisted in the "Real Estate Registration Department" (Majeed, 1979).

According to the aforementioned definition, which assumes that the sidewalk space is a contract could be taken into consideration, simply, because the contract is one of the reasons that results in obtaining the right of the sidewalk space. Article No. 22 I of the Real Estate Registration Law stipulates that "the process of selling the right of covering up the sidewalk space by the Municipality to the owner of the adjacent real estate shall be recorded in the Real Estate Registration Department and connect it to the real estate in question".

In a similar context, Article No. 6 I of the Municipal Administration Law states that the municipality has the right to sell the space located above the sidewalk of the street for the purpose of constructing one floor or more, and this right shall be registered by the name of the buyer in the Real Estate Registration Department according to instructions provided by the Minister (Amended Municipal Administration Law. No. 165 of 1964). We may easily note however that the wording of the text of this article is incomplete and ambiguous as it includes the sale of the sidewalk space to someone without specifying the identity of this person though this space can be bought only by the possessor of the adjacent real estate.

It is considerable to note that the Iraqi legislator has not attempted to define the right of the sidewalk space, and that is something positive because definitions are not part of the legislator's responsibilities. Such task shall be left to jurists, interpreters and other writers who are specialized in law. The legislator just stipulates in Article No. 1049/2 that the possession of a land shall include what is above and what is below to the extent that is beneficial (Iraqi Civil Law No. 40 of 1951 and its amendments).

Islamic jurisprudence posits that the right of space is the right of height when it is intended to construct a building on top of another. Height therefore refers to the space that comes above something. In other words, it is the space that is located above the roof (Qal-Achi, 1408).

It has also been given the name "wing", which refers to the wood that is planted in the wall and comes out into the space above the street without reaching the opposite wall (Al-Hatmi, 1983). It has been called a shed as well. The shed here is a kind of cover between two walls and the road between them allowing exit on both ways, and it is high to the extent that it does not bother people and force them to bend their heads when they pass through under the shed. It is also stipulated that people may carry loads on their heads and move on smoothly without being annoyed by this shed (Al-Shirbini, 1997).

Islamic jurisprudence has come up with different opinions about the right of space. Both the Maliki and Hanbali, for example, believe that a person can sell and make use of the space that comes above his land to the extent of his need provided that it is identified, based on the rule which says that "the rule of the space is the rule of what is under. Donated space is donated. Possessed space is possessed. Open space is open, and the space of the dead is for the dead" (Al-Qurafi, 1994).

As for the Hanafis and Shafis, they have both adopted the rule which says that "whoever possesses the ground floor, he shall own what is under of the earth, and what is above of the space" (Al-Shafi'i, 1413), confirming the owner's right to benefit from the space without selling it, as the space is not money and it cannot be saved.

Based on the aforementioned, we could define the sidewalk space as one of the original real rights, which requires to be enlisted in the Real Estate Registration Department so as to acquire the authority of using this vertical part of the space by offering its possession to the owner of the adjacent real estate, or to make use of it by others without affecting the public benefit and order as per terms and conditions determined by law.

## 1.2 Scope of Sidewalk Space

We shall deal with the scope of sidewalk space as an original real right through three aspects: people who have the right to own the space, Type of real estates on which the space is identified, and extent of this scope.

### 1.2.1 People having the right to own the sidewalk space

This right is determined by the Capital Secretariat or the Municipality, and it is the owner of a real estate adjacent to the sidewalk who has the right to own the related space, and build on it without causing any damages to public facilities. The right of owning the sidewalk space therefore is confined to the person who possesses the adjacent real estate and the authority that owns the sidewalk space (Majid, 1979).

### 1.2.2 Type of real estates on which the space is identified

The right of the sidewalk space is limited to the State-owned real estates, and enlisted in the Real Estate Registration Department because the sidewalk and the space above it are considered as part of the street. Article No. 97 of the amended Public Municipal Administration Law' N o. 1 65 of 1964 confirms that the sidewalk space is owned by the municipality departments only, and it is permissible to separate the upper from the lower as per the text of Article N o. 1049/3 of the Iraqi Civils Law'. "It is permitted to separate the possession of the land surface from the ownership of what is upper or lower". Accordingly, the right of the sidewalk space can be used independently apart from its land. Furthermore, the sidewalk space has been confined to real estates located in commercial areas only, and as stipulated in Article No. 03 of the "Regulations for Building in Commercial Areas" that are issued by the Department of Urban Planning in its official letter No. 41 131 on 1 6" September 1989, confirming that selling and constructing the sidewalk spaces shall be determined by the Municipal Council with or without pillars.

#### 1.2.2 Scope Sidewalk Space

As for the scope of a sidewalk space, the Iraqi Law' has identified its height within the limits of benefit and as stipulated in Article No. 1 D49/2 of the Iraqi Civil Law, which says that "the possession of a land shall include what is above and what is below' to the extent that is beneficial". Consequently, the owner has no authority on the process of transcending the limits of benefit, and he cannot object to any action taken without having a serious interest in it. He does not own of the space but the part he uses, and others can perform any actions and the possessor cannot claim against that (Ahmed & Hussain, 2008).

However, the height of the sidewalk space as an original real right has also been identified according to the system of roads and buildings and as determined in Article No. 25, which states that "this space shall be away from the road surface within four meters as an average, and it is possible when necessary to assign a height more than that for the purpose of consistency". In other words, the right of the sidewalk space has been limited to certain heights and dimensions through the text of Article No. 62, amended as per the legislation No. 1 6 of 1938, Article 03 of it, which stipulates that "if the municipality decides the possibility of using the space located above the sidewalks of roads that are not less than 1 2 meters wide in the first and second areas for the purpose of constructing a second floor or higher than that, the areas that shall be roofed of the already stated sidewalks are calculated and the price per square meter is estimated by the municipal council, and these areas are sold to the real estate owners who are willing to use the space in question provided that the roofing and constructing are implemented as per the terms and conditions identified. . . . .", that is the scope of the construction on the sidewalk space is determined as per the width of the street. It shall be between meters and a half for the streets that are twelve meters wide, and three meters for the streets that are fifteen meters wide, and four meters for the streets and squares with the scope of 25 meters and more.

As for the viewpoint of Islamic Jurisprudence, the identification of this space is a matter of dispute. The Hanafis (Al-Shimrani, 2016), for example, claim that whoever owns the land, he shall own its space, and he can use it for building as high as he wants. Their claim is based on the rule which says that "the one who possesses a place, he shall possess it up to the sky" Whereas the Malik is (Abdul Rahman, 1346 HR) have identified the right of the sidewalk space in different way, claiming that the rule of the space is the rule of what is under. In other words, the space shall be owned to the limit of need and benefit.

The Hanbalis (Al-Uthaimin, 1422 HR), on the other hand, assume that the space belongs to the owner of its land up to the lower sky. However, the Shafi'is (Al-Shirbini, 1997) has determined the height of the space according to the following rule: "Whoever owns a land among the living, he shall own its strata up to the seventh land."

We may now conclude that the right of the sidewalk space is under the authorization of the capital secretariat or the municipality as well as the owner of the adjacent real estate. That is for the persons. As

for the type of the real estates, it has been limited to the real estates that are owned by the State exclusively and located within the commercial areas and enlisted in the Real Estate Registration Department by the name of the municipality. As for the scope, the height of the space is determined as per the need and benefit and according to the width of the road that is adjacent to the sidewalk.

We suggest therefore that the right of the sidewalk space shall be limited in scope and as given in the following proposed text: "The right of using the sidewalk space with the required and determined width as per regulations is confined to real estate's located in commercial areas and owned by the Capital Secretariat or the Municipality and the on near of the adjacent property".

### **The Legal Nature of the Sidewalk Space as a Real Right and its Features**

In this section, we shall deal with two main issues: the first is related to the legal nature of the sidewalk space as a real right, whereas the second shall focus on the features of this space.

#### **1.3 The Legal Nature of the Sidewalk Space as an Original Real Right**

The nature of the sidewalk space right is determined through the following inquiry: is the right of the sidewalk space real or personal? In other words, is this right public owned by the State, or private possessed by individuals?

To come up with a suitable answer to this inquiry, we shall clarify the viewpoint of jurisprudence and the law that concerns the sidewalk space right. For instance, Article No. 221/ I of the Iraqi Registration Law No. 43 of 1971 states that "selling the right of roofing the sidewalk space by the municipality to the owner of a property adjacent to that sidewalk shall be based on an official letter issued by the former, and provided that both the sidewalk and the adjacent property are enlisted in the Real Estate Registration Department" let it be quite obvious that the Iraqi legislator has stipulated the registration of the sidewalk space in the Real Estate Registration Department, and as confirmed by Article No. 222, which states that "the right to roof the sidewalk space shall be registered in the name of the buyer before or after constructing the building, and it shall be kept away from the sidewalk land as according to the rules of separating the floors, and meanwhile connected to the adjacent property". Furthermore, Article No. 223 confirms that "the sidewalk space cannot be roofed before it is purchased as per the provisions of the law". The texts stated above impose the condition of registering this right at the related department, which could be taken as an evidence that the right of a sidewalk space is a real one. It is remarkable to note that these texts have been mentioned in Chapter Two of the Real Estate Registration Law No. 43 of 1971, entitled as "Legal Actions of Original Real Rights". However, we may raise here the following question: does this contradict the text of Article No. 68 of the Iraqi Civil Law? This article has identified the real rights exclusively and not as an example, and the right of the sidewalk space is not included.

To answer the question raised above, we could say that the identification of real rights in Article No. 68 does not contradict with considering the right of the sidewalk space as an original real one. Simply, because it has all the characteristics of the other real rights. Accordingly, we do recommend that Article No. 68 of the Iraqi Civil Law shall be amended by adding the right of the sidewalk space to the other real rights, and the text of the article shall read as follows: "The original real rights are the rights of ownership, the rights of disposal, the rights of property, the rights of benefit, use, housing and flattening, the access right, the rights of endowment, the long lease right, and the right of sidewalk space".

As for the nature of this right and whether it is considered as public or private funds, some jurists (Majeed, 1979) believe that the right of the sidewalk space is part of the State's funds that are allocated for public benefit. Besides, the sidewalk is part of the street and texts belong to the Capital Secretariat or the Municipality, and they are registered as per Article No. 97 of the Municipal Administration Law No. 165 of 1964.

Another inquiry is raised about how to dispose of the State's funds that are earmarked for public benefit. In answering this question, we may refer to Article No. 72 of the Iraqi Civil Law, which states that "public funds lose their status as being public when this allocation comes to an end either by law or by act or that the purpose for such assignment is deactivated.

We may come up with the fact that the State's funds are of two types, public and private, and they are public as long as they are allocated for public benefit. When this allocation comes to an end, these funds will change into State's private funds. This is quite obvious in the current research through the actions taken by the State represented by the capital secretariat or the municipality, when selling the right of the sidewalk space to the owner of the adjacent real estate.

In addition to being subject to the terms and conditions of the private law (Kan'an, 2005) as well as the provisions of the civil law and the related disputes, the State's private funds are not different

from the private funds of normal individuals as they both fall under the jurisdiction of ordinary judiciary, and this is what we could conclude from Article No. 6 I of the Municipal Administration Law' No. 165 of 1964, Article No. 62 of the System of Roads and Buildings No. 44 of 1935, and Articles No. 1, 2, 3, 4 and 5 of the instructions of how to sell the sidewalk space.

Since the State owns the streets and sidewalks, land and space as a public property, it is considered therefore a real one though it refers to something immaterial. The space above the sidewalk, indeed, is a real estate property through addition, and it is possible to separate what is above from what is below, i.e. separating the space from the sidewalk. In addition, some jurists (Haider, 1959) argue that permitting possession above sidewalks is implemented as per agreement, and therefore it does not contradict public benefit and order.

Thus, the right of the sidewalk space is a real one with dual nature due to being public property owned by the municipality, assigned for public benefit and flow of pedestrians, and meanwhile this space can be possessed by the owner of the adjacent real estate to make use of it by constructing and installing media propaganda sign towards without affecting public benefit or violating public order.

#### **1.4 Features the Sidewalk Space as an Original Real Right**

The right of the sidewalk space is characterized with general and private features. The latter are the ones that the space shares other real rights, whereas the former are the characteristics, which solely describe the sidewalk space right. We shall deal with both features as follows:

##### **1.4.1. General Features of the Sidewalk Space Right**

The right of the sidewalk space is characterized with a number of general features. They are as follows:

- a. An original real right: the sidewalk space is considered as an original real right, which grants its owner an authority without the need for mediation by others (Ali, No Date) because the real right creates a direct link between the right and its owner and this link does exist even after the ownership is given to others. Besides, it has the right to dominate regardless of who owns it and that is what distinguishes the real from the personal right. It has also the right to make use of the benefits without being rivaled or opposed by others. This exclusivity in advancement and preference when compared to other creditors is a feature that is unique to real right. On the contrary, a personal right does not have such feature, and the debt is divided as if bet when rivals. It is remarkable to note that real rights are associated with real estates as well as portables. However, the right of the sidewalk space is attached to real rights only because this right is part of the ownership of the land, which includes what is above and below. Therefore, we may determine that this right cannot be associated with portables (Abu-Sonnd, 2002).
- b. The right of the sidewalk space entitles its owner to the three authorities: the right of the sidewalk space enables the owner whether it is the capital secretariat or the municipality to use, exploit or dispose of this space in any way, but within the permissible limits.
- c. Exclusiveness of the sidewalk space right: it is exclusive because it is confined to its owner who has the right to make use of all its features. Meanwhile, he has the right to prevent the others from sharing in the benefits obtained out of these features even if no harm results from this act (Al-Sadda, 1982). Besides, the owner could remove any exceeding on his property (Abid, 2018) through the application of Article No. 104h of the Iraqi Civil Law'. In other words, the land owner also possesses the space above this land, and he can use it for building or for growing tall plants that go up or even extends wires through this space. At the same time, he has the right to prevent others from using the space that comes above his land, such as building a wall bending over his space, or growing trees that their branches go over his land or extending wires. The owner can prevent such exceeding even if does not lead to any kind of harm (Al-Bakri, No Date).
- d. The right of a sidewalk space is a permanent right: the right of the sidewalk space is featured as permanent, and it can never be a temporary one or related to the existence of the adjacent real estate. There is no limited period for this right even if the ownership of the sidewalk space is transferred to others because this right remains with the original owner despite change of possession. This right does not come to an end unless it is destroyed (Adel, 2019).
- e. A right with limited scope: the right of the sidewalk space is limited to the scope of the capital secretariat / municipality and exclusively to the owner of the adjacent real estate who aims to use the sidewalk space for building or more. Besides, the real estates that are related to this right are owned by the State and enlisted at the Real Estate Registration Department by the name of the Capital Secretariat or the Municipality, and its scope is identified as per the System of Roads

& Buildings No. 44 of 1935, in Article No. 25, and also in Article No. 03 of the System No. 06 for the year 1938, which has identified the width to be roofed of the sidewalk space according to the width of the road.

#### 1.4.2. Exclusive Features of the Sidewalk Space Right

The right of a sidewalk space has some features that are exclusive to this right and they can be summarized as follows:

- f. If not used, this right does not come to an end: whether it is used or not, the right of the sidewalk space never expires, i.e. unlike other rights, it is not subject for any kind of extinguishment. The owner of the sidewalk space is free whether to use this space or not. In addition, the right of the sidewalk space cannot be timed for a specific period, and this right shall remain with the new owner (the one who possesses an adjacent real estate) forever. In other words, it cannot be returned to the original owner in case of not using it, and thus the new proprietor will be under the mercy of the original possessor (Al-Saddar, 1982).
- g. The right of the sidewalk space is a formal right: Article No. 22 I of the Real Estate Registration Law' No. 43 of 1971 stipulates that "if sold, the right to roof the sidewalk space shall be registered to the owner of the property that is adjacent to the related sidewalk. Therefore, this right shall be registered in the Real Estate Registration Department otherwise it cannot be considered as valid as per Article No. 2/3 of the Real Estate Registration Law', which states that "the real estate sale shall be enlisted in the Real Estate Registration Department, and the sidewalk space therefore cannot be sold without being registered in the relevant department", and the registration of the sidewalk space is based on an official letter issued by the authority that owns this space and in accordance with the Instructions of Real Estate No. 02 of 1972, and such enlisting does not need an approval.
- h. **The right of a sidewalk space is unorganized:** this right is an original real right though it has not been mentioned in the text of Article No. 68 of the Iraqi Civil Law'. Accordingly, this right is considered as part of the land ownership, which incorporates what is above and what is under that land to a beneficial extent. In other words, the sidewalk is part of the street, and if the street belongs to the Municipality, its space therefore is part of it.

It is quite obvious that the Iraqi legislator has ignored regulating this right, which, as we have already stated, is one of the original real rights. However, the legislator has referred to this right in a number of laws, regulations and instructions, such as the Real Estate Registration Law' No. 43 of 1971, the Municipal Administration Law No. 165 of 1964, the Amended System of Roads and Buildings No. 44 of 1935, instructions of how to sell the sidewalk space No. 01 of 1964, and many scattered texts, some are still active and others have already been cancelled.

Finally, it is remarkable to note that Islamic Jurisprudence, in its four schools, has also regulated the right of the sidewalk space, confirming the permissibility of utilizing and benefitting of this space, referring meanwhile to the extent of height that could be used.

At the end of this research, we have come up with a number of conclusions and recommendations. They are enlisted below.

## II. CONCLUSIONS

We have concluded that

- a. The right of the sidewalk space is an original real right, which requires to be enlisted in the Real Estate Registration Department, and thus authorizing its owner to use, exploit and dispose of a specific vertical height of the space located above the sidewalk by giving its possession to the person who owns the adjacent real estate, or to some other person to gain advantage from it without affecting public benefit and order as per regulations determined by law'.
- b. The right of the sidewalk space is limited in scope, i.e., it is confined to specific owners as well as certain types of real estates. As for the owners, they are represented by the Capital Secretariat / Municipality and the person who owns the adjacent property. The space shall be possessed by the State as a second part of the limited scope. Finally, this scope is identified as per the need and the width of the road that the sidewalk is part of it.

### III. RECOMMENDATIONS

We recommend the following:

- a. The Iraqi legislator is required to regulate various aspects of this right like the other original real rights through the amendment of Article 68 of the Iraqi Civil Law' by adding the right of the sidewalk space to the other original real rights.
- b. We also recommend that the Iraqi legislator shall identify the scope of the right of the sidewalk space by adopting the following text:

"The right of the sidewalk space shall be identified within the commercial areas, owned by the State in the name of the Capital Secretariat / Municipality and the owner of the adjacent real estate, and to be determined as per the width of the road and any other necessities required."

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