

Second essay lecture: Protection of the Creditor through Conventional Mortgage¹

Abstract:

Granting credit requires the provision of guarantees, as the general guarantee cannot be relied upon as a mechanism to protect the creditor against the risk of non-payment. This is due to the debtor's freedom to dispose of all their assets, as well as the possibility that such assets may be insufficient to cover all debts. Hence, guarantees have emerged—particularly real securities—as a means of ensuring creditor protection against the risks associated with the general guarantee on the one hand, and credit risks on the other.

Among these guarantees, the most significant is the mortgage, which consists of the debtor providing one or more immovable properties they own as security.

Keywords: Guarantees; Mortgage; Conventional Mortgage; Right of Preference; Right of Follow-up.

العربية	English
الرهن الرسمي	Conventional Mortgage / Legal Mortgage
الرهن الاتفاقي	Conventional Mortgage
الرهن القضائي	Judicial Mortgage
الدائن المرتهن	Mortgagee (Creditor)
المدين الراهن	Mortgagor (Debtor)
الكفيل العيني	Real Guarantor / Third-party Mortgagor
حق التقدم	Right of Priority / Preference Right
حق التتبع	Right of Follow-up / Right of Pursuit
التنفيذ على العقار	Enforcement on Immovable Property
البيع بالمزاد العلني	Public Auction Sale
الحجز العقاري	Real Estate Seizure / Attachment
سند تنفيذي	Enforceable Title
ضمان	Security / Guarantee
ضمان عيني	Real Security
ضمان شخصي	Personal Guarantee
القيد / التسجيل العقاري	Registration / Land Registration
الشهر العقاري	Publicity (Land Registration System)
المحافظة العقارية	Land Registry Office
التصرف القانوني	Legal Act / Legal Disposition
التصرف المادي	Material Act
البيع	Sale
الهبة	Donation / Gift
الإيجار	Lease

¹ - Khaldi, Tameur, **Protection of the Creditor through Conventional Legal Mortgage**, *Dhiaa Journal for Legal Studies*, Vol. 1, No. 1, 2019, pp. 133–150.

المقايضة	Exchange (Barter)
شروط البيع	Terms and Conditions of Sale
نزع الملكية	Foreclosure / Expropriation
التخلي	Relinquishment / Abandonment of Possession
التطهير	Purge / Redemption of Mortgage
قيد الرهن	Mortgage Registration
الائتمان	Credit
الدين المضمون	Secured Debt
الدين المستقبلي	Future Debt
الدين الاحتمالي	Contingent Debt
الضمان العام	General Guarantee / General Security
حق الملكية	Right of Ownership
العقار المرهون	Mortgaged Property / Encumbered Property

Introduction:

A mortgage is considered one of the most important means of credit, as it reconciles the interests of both the mortgagor (debtor) and the mortgagee (creditor), despite their potentially conflicting nature. It also provides protection to third parties, representing a solid security mechanism for the creditor. Through it, the creditor is enabled to sell the mortgaged property and recover their claim from its price with priority in the event of non-payment.

Given the importance of this type of security, the legislator has given it considerable attention, placing it at the forefront in relation to other forms such as mortgages and preferential rights. It has also been distinguished by numerous and strict legal provisions and procedures, through the requirement of both formal and substantive conditions. Some of these conditions are general and applicable to all contracts, including mortgages, while others are specific to this type of security. In doing so, the legislator seeks to balance the interests of both parties to the mortgage contract. The mortgagor retains all rights granted under ownership, while the mortgagee, in the event that the debtor fails to fulfill their obligations, may enforce the mortgage on the secured property to recover their claim with priority, following lengthy procedures related to seizure and public auction sale.

These conditions and procedures differ between a conventional mortgage and a judicial mortgage. The former derives from the contract and the agreement of the parties, whereas the latter originates from a judicial ruling and the authority of the judge.

Research Problem:

What is a conventional mortgage? What are its effects on the parties to the relationship, particularly the creditor as the provider of credit? And to what extent is it effective in ensuring protection for the mortgagee?

Study Plan:

To address this issue, the study is divided into two sections. The first deals with the conceptual framework of the conventional mortgage, including its definition and conditions

in two subsections. The second examines its effects on the creditor, the debtor, and third parties, followed by an evaluation of this type of security.

Significance of the Study:

Although this topic is not new, and the legal framework has not undergone substantial changes affecting this type of security—except in matters relating to mortgages—it remains of great importance due to its practical role in securing credit transactions and protecting creditors; legal framework², and that the books addressing such topics are few and often outdated for the aforementioned reasons. Nevertheless, we have attempted to examine this subject from the perspective of the extent to which it achieves protection for the mortgagee creditor against credit risks, while also addressing the crisis that has affected this type of security in particular. This is mainly because laws—especially Algerian legislation—still provide greater protection to the **mortgagor (debtor)**, **باعتباره الطرف الضعيف في العقد**, while limiting the protection afforded to the mortgagee creditor, who should, in principle, enjoy stronger protection as the provider of credit and the party exposed to numerous and diverse risks related both to credit and to the guarantee itself.

Methodology of the Study:

This study relies on the descriptive method to present the conceptual framework of this type of mortgage, and on the analytical method to examine its effects on both parties to the contract—the mortgagor and the mortgagee—and to assess its effectiveness in ensuring protection for the latter. The comparative method is also used where appropriate.

Section One: The Conceptual Framework of the Conventional Mortgage

In this section, we address the definition of a mortgage and explain how it is concluded by clarifying its conditions.

First Subsection: Definition of Mortgage

The Algerian legislator defined the mortgage under Article 882 of the Algerian Civil Code as: “A contract by which the creditor acquires a real right over immovable property for the payment of a debt, whereby the creditor has the right to be paid, in priority over subsequent creditors in rank, from the price of that property, in whosever hands it may be.”

From this definition, it is evident that the legislator emphasized the contractual aspect over the real right arising from it. However, it would have been more appropriate to define it as a

² - Article 96 of Law No. 02-11 of December 24, 2002, containing the Finance Law for 2003, Official Gazette, No. 86, 2002, as amended by Article 56 of Law No. 05-16 of December 31, 2005, containing the Finance Law for 2006, Official Gazette, No. 85, 2005. Also the Executive Decree No. 06-132 of April 3, 2006, relating to mortgages established for banks, financial institutions, and other entities, Official Gazette, No. 21, issued on April 5, 2006.

right, since the right is the principal element, while the contract is merely the means of its creation. Thus, the legislator defined it by its means rather than by its purpose³.

As for the doctrinal (juristic) definition, it is based on the idea that the mortgage is a real accessory right established by virtue of a formal contract, created as security for a debt over immovable property owned by the debtor or a third party. It entitles the creditor to be paid in priority from the monetary value of that property over ordinary creditors and those ranked after them, and to follow the property in whatever hands it may be⁴.

If we were to summarize the characteristics of a mortgage in one sentence, we would say that it is a real right accessory to a debt, established over immovable property, indivisible, created by virtue of a formal mortgage contract as one of the security contracts; it is unilateral and for consideration⁵.

Second Subsection: Formation of the Mortgage

This mortgage arises from an agreement between the mortgagee creditor and the mortgagor debtor to secure the fulfillment of a debt. This can only be achieved in accordance with formal and substantive conditions.

First Branch: Formal Conditions

A mortgage is a formal contract, which must be executed in an official form by a competent public officer, namely a notary. The requirement of formality here is for validity (formation), not merely for proof. As for the secured debt, it remains subject to the general rules concerning its creation and proof.

This formality serves the interests of the mortgagor debtor, the mortgagee creditor, and the broader economic interest. For the mortgagor, it serves as a warning of the seriousness of the act they are about to undertake, given the risk of losing the mortgaged property. Thus, both the real guarantor and the mortgagor are made aware of the gravity of such contracts. For the mortgagee creditor, the contract constitutes an enforceable title, sparing them from lengthy litigation procedures. From an economic perspective, it allows the state to exercise control over the real estate market, reduce unlawful speculation, and ensure the collection of public treasury revenues.

³ - Chawki Benassi, *Provisions of the Mortgage Contract in Algerian Civil Law: A Comparative Study with Islamic Jurisprudence and Positive Laws (French and Egyptian)*, Dar Houma for Printing and Publishing, Algeria, 2009, p. 68.

⁴ - Ibid., p. 51.

⁵ - Jean Paul Branland, *Droit du crédit*, 4th edition, Imprimerie Quercy, France, 1997, p. 1997.

According to Article 883 of the Civil Code, a mortgage is valid only if concluded through an official contract. Failure to comply with this requirement results in the absolute nullity of the mortgage contract⁶.

Accordingly, any interested party may invoke this nullity, and the court may raise it on its own motion⁷. However, formality alone is not sufficient unless it is followed by the registration procedure (*inscription*). This is the procedure established by the legislator to ensure publicity of all transactions affecting immovable property, including mortgages. Through this, the mortgage becomes enforceable against third parties. This procedure is carried out at the Land Registry Office within whose jurisdiction the mortgaged property is located.

It is in the creditor's interest to complete this procedure promptly in order to secure an advanced rank upon registration, as this grants them the **right of priority**⁸.

If the effect of registration is delayed—for instance, due to the creditor's failure to carry it out in a timely manner—this leads to the suspension of the mortgage's effect, rendering it unenforceable against third parties⁹. Moreover, if the registration is not renewed within ten (10) years from the date it was made, it lapses¹⁰.

Second Branch: Substantive Conditions

Here, we focus on the specific substantive conditions that must be fulfilled by the mortgagor (debtor), the mortgagee (creditor), as well as those relating to the secured debt and the mortgaged property.

⁶ - Supreme Court decision, Commercial Chamber, Case No. 103656, issued on 09-11-1994, *Judges' Bulletin*, No. 51, p. 7:

“It is required that contracts relating to immovable property be drawn up in an official form; otherwise, they are subject to nullity.”

⁷ - Supreme Court decision dated April 22, 1990, Case No. 66941, *Judicial Review*, No. 2, 1991.

⁸ - Zahia Houria Si Youssef, *Al-Wafi fi 'Aqd al-Rahn al-Rasmi fi al-Qanun al-Madani al-Jaza'iri*, Dar Houma for Printing and Publishing, Algeria, 2015, p. 103. Also see Article 908 of the Algerian Civil Code:

“The rank of the mortgage is determined from the time of its registration, even if the secured debt is conditional, future, or contingent.”

⁹ - Article 904, paragraph 1 of the Algerian Civil Code.

¹⁰ - Article 96 of Decree No. 63-76 of March 25, 1975, establishing the Land Registry, Official Gazette, No. 30, issued on April 13, 1973.

First: The Mortgagor (Debtor)

According to Article 884, paragraph 2 of the Civil Code, the mortgagor must be the owner of the mortgaged property and must have the legal capacity to dispose of it. Since the mortgage contract is an act involving both benefit and risk, the capacity to dispose is required.

Algerian law stipulates that the guardian or trustee must obtain authorization from the judge for all dispositions relating to the immovable property of minors, including mortgages.

As for the real guarantor (*third-party mortgagor*), if they act gratuitously, full legal capacity is required since the mortgage in this case is considered an act of donation. However, if the real guarantor is not acting gratuitously but receives consideration, then capacity to dispose is sufficient¹¹.

The mortgagor must be the owner of the mortgaged property, whether they are the principal debtor or a real guarantor. By implication, if the mortgagor is not the owner of the mortgaged property, the mortgage is absolutely null and void, as ownership is a fundamental condition for its validity.

Second: The Mortgagee (Creditor)

The presence of the mortgagee creditor is required for the conclusion of the mortgage contract, along with the identification of the title of the debt and its determination in terms of amount, conditions, details, and specification. This is known as the principle of specification of the secured debt¹².

Third: Specification of the Mortgaged Property

Article 886 of the Algerian Civil Code provides that:

“A mortgage may not be established over immovable property unless otherwise provided by law¹³. The property must be eligible for legal transactions and sale by public auction, and must be precisely identified in terms of its nature and location. This identification must be included in the mortgage contract or in a subsequent official instrument; otherwise, the mortgage shall be void.”

¹¹ - Mohamed Hassine, *Al-Wajiz fi al-Ta'minat al-'Ainiyya fi al-Qanun al-Madani al-Jaza'iri*, National Publishing Institution, Algeria, 1988, p. 123.

¹² - Article 891 of the Algerian Civil Code:

“A mortgage may be created to secure a conditional debt, a future debt, or a contingent debt. It may also secure an open credit or a current account, provided that the amount of the secured debt or its maximum limit is specified in the mortgage contract.”

¹³ - Certain movable assets may also be subject to mortgage, as they do not fall under the rule that possession of movables constitutes title. These include mortgages over ships and aircraft, as regulated under Articles 55 to 71 of the Algerian Maritime Code.

From the above, it can be concluded that the immovable property must be eligible for legal transactions and sale by public auction. Therefore, it is not permissible to mortgage endowed property (*waqf*), public property, or easement rights.

The first category cannot be traded or sold by public auction; the second is excluded from legal transactions by virtue of the law; and the third cannot be sold independently from the property to which it is attached.

All of this aims to enable the creditor to enforce the mortgage on the property and sell it by public auction in the event that the debtor is unable to repay. The mortgaged property must also be precisely identified. This rule establishes the principle of specificity of the mortgage, meaning that the mortgage must be established on a specific immovable property rather than on all the debtor's assets. The purpose of this is to protect the interests of the mortgagor. Therefore, the identification must be precise in terms of the nature of the property, its location, the municipality in which it is situated, as well as the section and plot number.

It is also required that the property be in existence¹⁴; however, there is no objection to mortgaging future property, provided that it can be precisely identified in the contract.

Moreover, a mortgage over immovable property does not cover only the property itself but also all its appurtenances and accessories, such as easement rights, immovables by destination, and all improvements and constructions that benefit the owner¹⁵.

Section Two: Effects of the Mortgage

A mortgage achieves a balance of interests in that the mortgagor does not lose ownership of the property and retains all the powers of ownership, nor do they lose possession of it. As for the mortgagee, the mortgage provides a strong security without imposing on them the burden of managing the property, while at the same time granting them an enforceable title¹⁶.

As for third parties, their interest is ensured through the specificity and publicity (registration) of the mortgage, which enables them to know precisely the debt secured by the property and thus to deal with the mortgagor with full awareness.

First Branch: Effects of the Mortgage with Respect to the Mortgagor (Debtor)

A conventional mortgage grants rights in favor of the mortgagor (debtor), ranging from the right to dispose of the mortgaged property to the right to exploit it. It also imposes obligations

¹⁴ - Article 92 of the Algerian Civil Code.

¹⁵ - Article 887 of the Algerian Civil Code.

¹⁶ - Regarding enforceable titles, see Article 600 of the Algerian Code of Civil and Administrative Procedures.

upon them, including the obligation to preserve the integrity of the mortgage and to guarantee the loss or destruction of the mortgaged property.

First: Rights of the Mortgagor (Debtor)

The mortgagor may dispose of the mortgaged property, whether through material (physical) or legal acts, provided that such acts do not harm the interests of the mortgagee creditor.

If the act is material, it must not diminish the value of the mortgage, as the mortgagor is bound to preserve it. As for legal acts, the mortgagor may sell, donate, exchange, or lease the mortgaged property, and may even mortgage it again, provided that such actions do not prejudice the mortgagee. These acts do not harm the creditor if they occur after the registration of the mortgage, since the property passes to third parties encumbered with the mortgage. However, if such acts occur before registration, they are considered detrimental to the creditor's rights.

Due to these risks, creditors—especially banks and financial institutions—often stipulate in the mortgage contract that the mortgagor may not dispose of the mortgaged property in any manner¹⁷.

The mortgagor also has the right to use and exploit the mortgaged property and to collect its fruits until a notice of seizure for foreclosure is registered. They may lease the property and collect rent, subject to certain conditions¹⁸. Such acts are considered acts of administration that the mortgagor is entitled to perform.

Second: Obligations of the Mortgagor (Debtor)

The obligation of the mortgagor to preserve the integrity of the mortgage is a natural consequence of its establishment; one who creates a mortgage cannot subsequently diminish its value. This obligation has both a negative and a positive aspect.

The negative aspect—being the more apparent—consists in the mortgagor refraining from any material or legal act that could affect the integrity of the mortgage or harm the rights of the mortgagee creditor.

The positive aspect consists in the mortgagor's duty to intervene in order to defend against claims brought by third parties that could affect the mortgaged property and, consequently, the rights of the creditor may conflict with the rights of the creditor; therefore, the latter is entitled to object to any acts that may affect the integrity of the mortgage¹⁹.

¹⁷ - Radia Amekrane, *Bank Guarantees in the Field of Credit*, Master's Thesis in Contracts and Liability, Faculty of Law, University of Algiers, 2001, p. 127.

¹⁸ - Articles 896 and 897 of the Algerian Civil Code.

¹⁹ - Article 898 of the Algerian Civil Code:

“The mortgagor is obliged to preserve the integrity of the mortgage, and the mortgagee

If the mortgaged property is destroyed, whether due to the act of the mortgagor or a third party, the creditor has the option either to request sufficient security or to immediately recover their debt. In such a case, the mortgage is transferred, with its rank preserved, to the right arising from the compensation amount or insurance indemnity²⁰.

Thus, any act by the mortgagor that could harm the interests of the mortgagee must be avoided; otherwise, it constitutes a breach of the obligation to preserve the integrity of the mortgage. This results in the loss of the benefit of the term, and consequently, the debt becomes immediately due, due to the weakening of the security²¹.

Section Two: Effects of the Mortgage with Respect to the Mortgagee Creditor

Before the debt becomes due, the mortgagee creditor has only the right to monitor any actions that may affect or diminish their security. If such actions occur, they may take the necessary precautionary measures to preserve the mortgaged property.

However, once the debt becomes due and the mortgagor fails to fulfill their obligations, the mortgagee may proceed with enforcement against the property, following the legal procedures relating to real estate seizure and public auction²². They may also enforce against all of the debtor's assets (general security) if the value of the mortgaged property is insufficient to satisfy the debt.

However, the creditor has no right to appropriate the mortgaged property upon non-payment. The purpose of invalidating such a clause is to protect the mortgagor from exploitation by the mortgagee. Nevertheless, once the debt becomes due and the debtor fails to pay, the parties may agree that the mortgagee shall acquire ownership of the mortgaged property in exchange for the debt²³. If the mortgagor is a person other than the debtor (a real guarantor), the mortgagee creditor may not enforce against his assets except to the extent of the property that

creditor may object to any act or omission that would significantly diminish the security. In cases of urgency, the creditor may take necessary precautionary measures..."

²⁰ - Creditors—especially banks and financial institutions—usually require the debtor to insure the mortgaged property against various risks, thereby preserving the creditor's chances of recovering their rights from the insurance company.

²¹ - Article 211 of the Algerian Civil Code.

²² - Article 902, paragraph 1 of the Algerian Civil Code.

²³ - Article 903 of the Algerian Civil Code.

has been mortgaged. In this case, the real guarantor does not have the right to invoke the benefit of discussion (*plea of discussion*), unless there is an agreement providing otherwise²⁴.

It is in the creditor's interest not to accept such a condition, in order to maintain strong security and retain the option, upon enforcement, over the mortgaged property. This strengthens the position of the mortgagee creditor in recovering his rights, as he would effectively have two debtors—the principal debtor and the real guarantor—without the latter being able to raise any defenses against the creditor.

Third Branch: Effects of the Mortgage with Respect to Third Parties

A mortgage is created by the contract itself, but registration is required for it to be enforceable against third parties. This grants the creditor the right of priority and the right of follow-up. Third parties, in turn, have legal remedies such as purging (*purge*) or abandonment (*abandonment of the property*).

First: Right of Priority (Preference Right)

It is the right of the mortgagee creditor to be paid in preference to ordinary creditors and subsequent mortgage creditors according to the date of registration. The scope of this priority includes all rights due to the mortgagee creditor, namely the principal debt, interest, and expenses²⁵.

The right of priority is exercised upon seizure of the mortgaged property and its sale by public auction. This occurs only after the debtor has been formally notified and ordered to pay. If payment is not made, the judicial officer draws up an official report of non-payment, followed by real estate seizure proceedings initiated through a petition submitted to the president of the court within whose jurisdiction the mortgaged property is located.

The enforcement officer notifies the debtor of the seizure order, and the land registry officer must register the seizure order. If the seized debtor fails to pay within 30 days from the date of formal notification of the seizure, After the seizure procedure, the judicial officer prepares the conditions of sale (*terms and specifications of sale*) and deposits them with the registry office of the court within whose jurisdiction the mortgaged property is located, which is the subject of the seizure²⁶.

Following the seizure and the sale of the mortgaged property by public auction, the creditor has the right to recover his claim from the proceeds of the sale with priority over other

²⁴ - Article 901 of the Algerian Civil Code.

²⁵ - Article 907 of the Algerian Civil Code

²⁶ - Regarding the issuance, registration, notification of seizure, and terms of sale, see Articles 721 to 737 of the Algerian Code of Civil and Administrative Procedure.

creditors, provided that his mortgage has been registered first and that he has not waived this rank²⁷.

Second: Right of Follow-up (Right of Pursuit)

It is the right of the mortgagee creditor to recover the mortgaged property from the hands of any third party who has taken possession of it, as it constitutes security for the repayment of the debt. The right of pursuit means that if ownership of the mortgaged property is transferred to a third party for any reason, the mortgagee may exercise the privilege granted by the mortgage, namely to follow the property wherever it goes and enforce it in whosoever's possession it is found. In other words, the creditor has the right to enforce against the property in the hands of whoever has acquired ownership²⁸.

To exercise the right of pursuit, the debt must have fallen due, or there must be other causes leading to the acceleration of maturity. It is also required that the mortgage be enforceable against third parties, meaning it must have been registered before the transfer of ownership to the acquirer. If the mortgage is not registered before the transfer, the property passes to the new holder free of any mortgage. It is also required that the possessor be the owner of the mortgaged property, not merely a holder in fact²⁹.

Third: Purging (Redemption)

Purging is the process of freeing the mortgaged property from the rights encumbering it. It consists of a set of rules and procedures that allow the holder of the mortgaged property to eliminate the right of pursuit that may be exercised by mortgage creditors, by offering a price to acquire ownership of the property.

The right to purge belongs to any holder of the mortgaged property who has published his title of ownership. However, This procedure may be accepted or rejected by the creditors. In the latter case, the mortgaged property is sold by public auction³⁰.

Fourth: Relinquishment (Abandonment of Possession)

It refers to the abandonment of physical possession of the immovable property and placing it under the control of a judicial receiver appointed by the court, while foreclosure proceedings are carried out against the possessor. This is intended to avoid legal proceedings being taken directly against him, so he relinquishes the property³¹.

²⁷ - Article 910, paragraph 1 of the Algerian Civil Code.

²⁸ - Article 911 of the Algerian Civil Code

²⁹ - Article 911, paragraph 2 of the Algerian Civil Code.

³⁰ - Article 918 of the Algerian Civil Code.

³¹ - Radia Amekrane, op. cit., p. 135.

Relinquishment is established in the interest of the possessor; however, there are cases in which this right is forfeited, particularly if the possessor is obliged to settle debts³².

As for the procedure of relinquishment, it consists of the submission of a declaration by the possessor to the registry office of the competent court. He must request that this be noted in the margin of the foreclosure registration and must notify the creditors. The foreclosure procedures must then be initiated within five days from the date of the declaration.

If the mortgaged property is sold for a price exceeding the amount of the debt, the surplus belongs to the possessor as the owner of the property³³.

Section Four: Evaluation of the Effectiveness of the Conventional Mortgage through its Effects

A conventional mortgage is of great importance, as it provides the creditor with tangible assets in the form of immovable property that can be enforced upon in case the debtor is unable to fulfill their obligations. It is therefore considered a solid and real security mechanism that protects the creditor from credit risks.

However, in many cases, this type of mortgage is not fully effective in facing such risks, particularly the risk of non-payment. This becomes evident through³⁴:

- The numerous and lengthy procedures, whether in registration and its renewal, real estate seizure procedures, or public auction sale procedures.
- These procedures are not compatible with credit operations, which are characterized by speed and flexibility.

There is an imbalance in the protection of interests between the mortgagee creditor and the mortgagor debtor, as legal rules appear to grant greater protection to the debtor, who is considered the weaker party. In reality, priority should be given to protecting the credit holder³⁵. The mortgagor has the possibility to dispose of the mortgaged property in any form of legal transaction—sale, donation, lease, or even mortgaging it multiple times. This may harm the interests of the mortgagee creditor, as the mortgagor enjoys wide freedom in disposing of the property, whether materially or legally, which poses a risk to both credit and security.

³² - Article 914, paragraph 3 of the Algerian Civil Code.

³³ - Article 922 of the Algerian Civil Code.

³⁴ - Article 928 of the Algerian Civil Code.

³⁵ - Ali Abdel Hadi Al-Obeidi, *Al-Wajiz fi Sharh al-Qanun al-Madani – al-Huquq al-'Ainiyya al-Taba'iyya*, Dar Al-Thaqafa, Amman, 2005, p. 120.

Therefore, it becomes necessary to restrict this prerogative in a manner that does not conflict with the essence of ownership rights, while at the same time protecting the rights of the mortgagee creditor. For this reason, courts have recognized the validity of the “prohibition of disposal” clause, especially due to its widespread use in practice, to the extent that it is upheld as valid provided that it does not affect the substance of ownership. This approach has influenced various legislations, including Egyptian law.

Accordingly, the mortgagee may protect his security by stipulating a prohibition on disposal in the mortgage contract. The Algerian legislator has also accepted this condition. Thus, such a clause may be included in the mortgage contract, provided that it does not negatively affect ownership rights; its purpose is only temporary protection of the creditor and is based on a legitimate cause³⁶.

Furthermore, the property may be encumbered with other mortgages or preferential rights, which makes the creditor’s recovery of his debt from its value uncertain, as prior-ranking creditors may absorb the entire proceeds of the sale.

From the date the mortgage is created until the maturity of the debt, various changes may occur to the mortgaged property, such as a decline in its value, which may render it insufficient to cover the debt. The property may also be exposed to destruction. Thus, the security required at the time of enforcement may differ significantly from its value at the time of execution of the mortgage.

Even the mechanisms granted to the mortgagee creditor—namely the rights of priority and follow-up—may be confronted with certain conditions, procedures, and defenses available to third parties against the creditor, which limit their effectiveness.

The real guarantor (third-party mortgagor), in order to protect his rights, may stipulate a condition allowing him to invoke the benefit of discussion (*plea of discussion*), so that the creditor may not first proceed against him before pursuing the principal debtor.

Moreover, the right of priority granted by the mortgage is subject to exceptions. These include:

- A co-ownership mortgage, which takes precedence over the mortgage of a co-owner over his undivided share;
- The privileges of engineers, contractors, and judicial expenses, which take priority over the mortgagee creditor;
- The holder of a special allocation right, who takes precedence over the mortgage creditor;

³⁶ - Article 87 of Decree No. 76-63:

“The successor in title of the holder of a real property right, whose contract or judicial decision establishing his right has been published, may not rely on inter vivos contracts drawn up specifically to establish temporary non-disposal clauses and other restrictions on the right of disposal...”

- And a possessory mortgagee who, if he takes possession of the property and registers his mortgage, also takes priority over the conventional mortgage creditor.

Conclusion:

A conventional mortgage is a genuine security mechanism; however, there are several material and legal factors that limit its effectiveness and make it a security instrument that does not provide sufficient protection to the creditor.

It has even become used mainly as a means of pressure on the debtor in case of non-payment.

To enhance its effectiveness, we propose the following:

- Simplifying procedures and reducing legal time limits, whether at the stage of granting the security or enforcement, in order to align with the flexibility and speed required in credit operations.
- Balancing interests, if not prioritizing the interests of the mortgagee creditor over those of the debtor. While the legislator protects the debtor as the weaker party in the contract, the creditor also requires stronger protection due to the multiple risks affecting his credit.
- Allowing the legislator to explicitly permit the mortgagee creditor to stipulate in the mortgage contract a prohibition on any form of disposal of the mortgaged property by the debtor, and to ensure that such a clause is registered with the land registry, as is the case in Egyptian legislation.
- The combination of different types of guarantees when granting credit, by the creditor taking both personal and real securities, whether traditional or modern.
- The obligation of the mortgagee creditor to examine the debtor's personal and financial situation, as well as the status of their guarantors, before proceeding to grant credit.
- Being informed of the substantive and procedural aspects of granting credit, obtaining guarantees, and enforcing them when necessary.