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Research article

Convergence and divergence: the treatment of certain aspects of real property under the Civil Codes of Qatar and California

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ABSTRACT

This paper compares and contrasts the treatment of certain aspects of real property under the civil codes of Qatar and California, two jurisdictions with very different histories and cultures but somewhat less different economies and environments. Despite their different starting points, the two civil codes have created similar, albeit far from identical, structures to achieve similar goals. This article explores the premise that similar environments - physical, economic, or otherwise - exert, in the long run, a greater pressure on the development of the law governing real property than do history and culture. The real property regimes of Qatar and California converge in many aspects. The nature of the real property right, while couched in civil law terms in one and common law terms in the other, includes in each case the rights of exclusion, use, enjoyment, and alienability. The forms of ownership in each vary according to legal tradition, with Qatar using the simpler civil law forms while California indulges in the more Churrigueresque edifice of estates and future interests; nonetheless, both ultimately achieve more or less the same ends. The forms of co-ownership differ to some extent, while private limitations on property rights differ rather less. The differences in these areas can be traced to cultural differences and to differences inherited by the two legal systems in question, each itself a hybrid of sorts, from the common law and civil law traditions. The greatest points of divergence, however, spring from differences in environment. The different treatment of ownership of land by foreigners provides an example of considerable divergence. On the other hand, the concept of *waqf* in Islamic law, incorporated into the Qatar Civil Code, bears a greater resemblance to the Anglo-American concept of charitable trust (although the two may have arisen independently) than it does to anything in the civil law tradition. This article considers the relevant provisions of the two civil codes in order to identify and, where possible, explain such divergences and convergences, in the hopes of assisting attorneys and scholars versed in either.

Keywords: law, property, comparative law, Qatar Civil Code

<http://dx.doi.org/10.5339/irl.2015.7>

Submitted: 23 November 2014
Accepted: 11 May 2015
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INTRODUCTION

The law of real property, perhaps more than any other area of law, evolves to suit its environment. To the extent that property is the central right upon which other legal rights are based,¹ this adaptation to the environment is then reflected in other areas of law. However, the homogenizing forces of international commerce and political exchange operate on the law relating to movable goods, ideas, and intangible rights and obligations in a way that they do not operate on real property. Real property is the most local of all things governed by law; the concept of *lex rei sitae* is an inevitable consequence of the nature of real property. It is, by definition, fixed and immovable; the same authority will always govern it, barring changes in state or national boundaries. Convergence rather than divergence in real property law should thus occur only where legal systems share a political and cultural heritage, or where the convergence is necessary to satisfy the dictates of similar environments. Where the environmental dictates are sufficiently strong, convergence may occur even where different cultural and historical backgrounds would otherwise give rise to different normative expectations. This article looks at the treatment of property in two legal systems, those of California and Qatar. California and Qatar possess radically different cultures, with little shared history and differing legal traditions. This article attempts to develop the proposition that, to the extent there is convergence between the two bodies of real property law, it must result from the similarity of the physical and economic environment in the two jurisdictions, which differ far less than do the historical and cultural backgrounds.

Property is an economic right.² It may be true that “in the beginning all the world was America,”³ in the sense that Locke meant it rather than in the unfortunately Eurocentric, imperialist, and historically inaccurate way he said it. That is, a society has no need of a system of property law until and unless land has economic value. A society without agriculture, resource extraction industries, fixed living spaces, and fixed commercial establishments - Locke’s imagined “America,” quite different from the civilizations his contemporaries were destroying across the Atlantic⁴ - has no need of a system of title in land, and thus no reason to expend the energy to create and maintain it. The development of property law necessarily lags behind the development of property; just as a society without printing presses has little need of copyright law, a society without farms, mines, or towns has little need of real property law. Once a society begins to develop an economy in which the possession of a particular piece of land, and the ability to exclude others from it, become important, that society will need to develop a system for resolving the inevitable disputes and, where possible, for preventing those disputes from arising.

Some goals are shared by all systems of real property law; others are specific to that society’s economy, culture, and geography. In the former category, all societies in which real property has economic importance need a system of establishing title in land, a system of transferring that title, and a way of defining and imposing limits on the uses of land. In the latter category, societies located in areas of water scarcity will place a greater emphasis on riparian rights; those in which resource extraction is an important industry will place a greater emphasis on separation of surface and subsurface rights; highly urbanized societies will devote more attention to high-density forms of property, including apartments and condominiums, and to restrictions on property use. Despite the similarities noted above, there is divergence as well as convergence; however, divergences over such issues as the right of foreigners to own real property are probably attributable more to environmental factors than to cultural or historical ones.

Why choose Qatar and California for comparison, rather than, say, Greenland and Zimbabwe, or Japan and Ontario? First, there is a purely pragmatic reason - the author’s familiarity with one of the legal systems in question. Second, the three characteristics described above - water scarcity, extractive industries, and a high degree of urbanization - are shared by Qatar and by California,

¹See, e.g., Carol Rose, *Propter Honoris Respectum: Property as the Keystone Right?*, 71 Notre Dame L. Rev. 329 (1996).

²See, e.g., Carol Rose, *Crystals and Mud in Property Law*, 40 Stanford L. Rev. 577 (1988).

³JOHN LOCKE, SECOND TREATISE ON GOVERNMENT, “Of Property” §49 (1689).

⁴See, e.g., WILLIAM CRONON, CHANGES IN THE LAND: INDIANS, COLONISTS, AND THE ECOLOGY OF NEW ENGLAND (1983); Thomas W. Merrill, *The Property Strategy*, 160 U. PA. L. REV. 2061 (2012); Kenneth H. Bobroff, *Retelling Allotment: Indian Property Rights and the Myth of Common Ownership*, 54 VAND. L. REV. 1559 (2001). With regard to the ongoing problems arising from the treatment of Native American property rights and law, see Joseph Singer, *Legal Theory: Sovereignty and Property*, 86 Northwestern U.L. Rev. 1 (1991).

especially southern California. Many of Qatar's neighbors share these qualities as well, as does, say, Western Australia. However, in the case of Australia (to choose one example) matters would be confused by shared history, culture, and legal traditions. The tenth anniversary of Qatar's Civil Code provides an excellent opportunity to examine the development of an emerging legal system founded of different assumptions outacing similar challenges.

The comparison between the codes of Qatar and California is not a comparison between civil law and common law concepts, although that plays a part. Neither is a "pure" civil law or common law system, if such a thing can be said to exist anywhere in the world today. Rather, both are hybrids. As a result of California's colonial history, the California code incorporates property concepts derived from both the English common law and the Spanish civil law (the latter seen most dramatically in the law of community property), both generally applied in accordance with common law concepts of dispute resolution. The Qatar Civil Code⁵ has similarly complex roots, as seen in the incorporation by reference of *Shari'a* in some articles and the concepts of *waqf* and *hikr*, discussed below. There may be some traces of the common law as well, whether as a memetic relic of British colonialism or the more recent effect of Anglo-American influence in global legal thought.

It is not possible to cover all of the property law of one state, let alone two, in this brief article. Instead, this article will focus on the nature of real property, its acquisition, the forms of ownership, and the limitations on a property owner's rights. These four areas will be examined under the laws of Qatar and California, with occasional reference to general common law concepts. Some areas, such as the different ways in which real property may serve as security for debt, the role of real property in inheritance law, and the intricacies of landlord-tenant law, exceed the scope of the present project and will have to await a future article.

I. The nature of real property

Property is a relationship between persons (including juridical persons and governments) with regard to a thing, place, or idea.⁶ Although the concept of private property, especially in things, probably predates the emergence of governments (Locke to the contrary notwithstanding), in all modern societies the nature and scope of the property relationship are largely or entirely defined by the state. In states whose legal systems lie within the civil law tradition, this definition is the result of the refinement and adaptation of the civil code over centuries and even millennia, dating back through, *inter alia*, the *Siete Partidas*, the Code Napoleon and post-Napoleonic codifications, to the *Corpus Juris Civilis*⁷ and, at least in lineage if not in content, to the Twelve Tables and the Institutes of Gaius. The evolution of property law in the common law tradition has been more haphazard, owing much to the centuries of ideological conflict between a dynastically-minded, often barely literate, landowning aristocracy in post-conquest England and the emerging free-market sensibilities of the contemporary English judiciary.⁸ Modern common law jurisdictions,

⁵Law no. (22) of 2004 Regarding Promulgating the Civil Code 22/2004 [hereinafter "Qatar Civil Code."] Cites in this work are to the English translation available at <http://www.almeezan.qa/lawview.aspx?opt&lawid=2559&language=en>, except where an alternative translation has been suggested by Dr. Abdelnaser Zeyad Hayajneh of Qatar University.

⁶See BRUCE A. ACKERMAN, *PRIVATE PROPERTY AND THE CONSTITUTION* 26 (New Haven, CT: Yale Univ. Press, 1977). Law students in the United States are often introduced to this idea in *Armory v. Delamirie*, King's Bench, 1722, 1 Strange 505, and in *Pierson v. Post*, 3 Cai. R. 175, 2 Am. Dec. 264 (N.Y. 1805). The exact nature of this relationship and the persons, things, places, and ideas among which it may exist is the subject of considerable discussion, not to mention litigation; see, e.g., Gregory Alexander, *The Concept of Property in Private and Constitutional Law: The Ideology of the Scientific Turn in Legal Analysis*, 82 Colum. L. Rev. 1545 (1982); Gregory Alexander, *Property as Propriety*, 77 Neb. L. Rev. 667 (1998); Cheryl Harris, *Whiteness as Property*, 106 Harv. L. Rev. 1707 (1993); Anna di Robilant, *Property: A Bundle of Sticks or a Tree?*, 66 Vand. L. Rev. 869 (2013); Carol Rose, *Possession as the Origin of Property*, 52 U. Chi. L. Rev. 73 (1985); JEANNE L. SCHROEDER, *THE VESTAL AND THE FASCES: HEGEL, LACAN, PROPERTY, AND THE FEMININE* (Berkeley: U. of Calif. Press, 1998); Joseph Singer, *The Reliance Interest in Property*, 40 Stan. L. Rev. 611 (1988); Laura Underkuffler, *On Property: An Essay*, 100 Yale L.J. 127 (1990).

⁷Available online at <http://droitromain.upmf-grenoble.fr/Corpus/codjust.htm>, visited October 11, 2014 (in Latin). The Institutes of Justinian, today perhaps the most-studied part of the *Corpus Juris Civilis*, was originally intended as a text for beginning law students.

⁸See, e.g., M.R. Cohen, *Property and Sovereignty*, 13 Cornell L.Q. 8 (1927); John Hudson, *Land, Law, and Lordship in Anglo-Norman England* (Oxford: Oxford Univ. Press, 1997); John Henry Merryman, *Ownership and Estate*, 48 Tul. L. Rev. 916 (1974).

of which California is one, generally achieve the clarity of the civil law approach through the adoption of a civil code, while retaining common law concepts.

To lawyers in the common law tradition, property is not a single legal right but a bundle of rights.⁹ The civil law tradition takes a somewhat different approach; while acknowledging that the term “ownership” encompasses many aspects, the civil law tradition often assumes that these aspects are more connected and less separable than they are in the common law tradition.¹⁰ It may be helpful to examine the basic principles of property in Qatar and California in some detail, in order to trace the ways in which similar environments have produced convergent legal structures, despite the two jurisdictions’ very different starting points, histories, and cultures.

Qatar’s identification of the rights involved in ownership is set out in the Qatar Civil Code at Articles 837 and 838; the corresponding section of the California Civil Code is section 654. Under Qatar’s code, “[t]he exclusive owner of a thing shall, within such limits as provided by law, have the right to use, utilize, and dispose of such thing.”¹¹ In other words, the Qatar Civil Code has directly adopted the Roman concept of *dominium*, with its constituent elements *usus*, *fructus*, and *abusus* - use, fruits (or, as the Qatar Civil Code has it, utilization), and disposal.¹² California’s code provides more or less the same rights, stating, in similar terms, that “[t]he ownership of property is absolute when a single person has the absolute dominion over it, and may use it or dispose of it according to his pleasure, subject only to general laws”¹³ and that “[t]he ownership of a thing is the right of one or more persons to possess and use it to the exclusion of others.”¹⁴ The rights of exclusion (or possession), use, fruits (or utilization or enjoyment), and alienability (disposal) are thus present in and central to both systems.

Thus the two codes share compatible, if not identical, notions of the nature of property. This is an excellent start; but while this is an obvious convergence, it is also, in all likelihood, a fairly universal one. Without some basic agreement on what property is, commerce and interchange between legal systems would be difficult or impossible.

The particular form of property with which this article is concerned is property in land, or real property. Qatar’s code provides that:

1. Any asset of property that is fixed to the Earth and cannot be moved without destroying or altering it shall be deemed real property; otherwise it shall be deemed a movable asset.¹⁵

The California code takes a similar approach:

Real or immovable property consists of:

1. Land;
2. That which is affixed to land.¹⁶

Under the California code any rights “incidental or appurtenant to land” (such as the benefit of an easement appurtenant) are also real property;¹⁷ the Qatar code’s nearly identical provision is that “[e]very real right attached to immovable property shall be deemed real property.”¹⁸ Under both codes, some agricultural or other equipment may be treated as real property even if not actually attached to the land: In Qatar, “any movable asset placed in real property by the owner

⁹See, e.g., Merryman, *supra* note 9; Anna di Robilant, *Property: A Bundle of Sticks or a Tree?*, 66 Vanderbilt L. Rev. 869 (2013); cf. Thomas W. Merrill, *Property and the Right to Exclude*, 77 Nebraska L. Rev. 730 (1998); but see, e.g., J. E. Penner, *Potentiality, Actuality and Stick-Theory*, 8 Econ. J. Watch 274 (2011); J. E. Penner, *The “Bundle of Rights” Picture of Property*, 43 UCLA L. Rev. 711 (1996).

¹⁰See generally di Robilant, *supra* note 10. As a side note, both the “bundle of sticks/rights” and “tree” concepts have unfortunate connotations. A bundle of sticks - *fascies* - gives fascism its name. And, as di Robilant points out, *id.* at 895, “the proving ground for the tree concept was the debate over the new draft Italian Civil Code, which would be approved in 1942” - that is, in Mussolini’s Italy.

¹¹Qatar Civ. Code art. 837.

¹²See generally, e.g., Max Radin, *Handbook of Roman Law* 335–337 (St. Paul, MN: West, 1927).

¹³Cal. Civ. Code sec. 679. The right to dispose of property in both codes resembles, unsurprisingly, Art. 537 of the Code Napoleon (1804): “Les particuliers ont la libre disposition des biens qui leur appartiennent, sous les modifications établies par les lois.”

¹⁴Cal. Civ. Code sec. 654. This is the first of two sentences in Section 654; the second reads “In this Code, the thing of which there may be ownership is called property.”

¹⁵Qatar Civ. Code art. 59.

¹⁶Cal. Civ. Code sec. 658.

¹⁷Cal. Civ. Code sec. 658(3).

¹⁸Qatar Civ. Code art. 59(4).

thereof to serve or to be utilised¹⁹ for the service or exploitation of such real property shall be deemed immovable by reason of its intended use.”²⁰ Again, however, these convergences are, if not universal, at least widespread. The law of real property has its origins, to a large extent, in the need to use property for agriculture; all societies in which agriculture exists at all – that is, all societies except those of the far northern Arctic – can be expected to have evolved a fairly similar definition.

It is at the next stage that the convergence of the laws of Qatar and California becomes more apparent. California and Qatar both have economies in which extractive industries play a major role; as a result, both find it preferable to provide for the separability of surface and subsurface rights.²¹ In both jurisdictions, title to land extends above and below the surface, although both naturally stop short of declaring *cuius est solum, eius est usque ad coelum et ad inferos*.²² Throughout the world, the advent of air travel has long made the *ad coelum* part of this medieval formulation impractical; where extractive industries are important, the *ad inferos* part may be impractical as well. Qatar’s code provides that:

1. Title to the land shall include the surface of the ground and above or in the ground to such extent useful to enjoy such land upward and downward as applicable.
2. It may be stipulated by law or by agreement that the title to the surface of the ground is separate from the title to anything above or in the ground.²³

California grants a right limited in its upward extent by the needs of air travel, but theoretically extending *ad inferos*, in the absence of a separate assignment of subsurface rights:

Land is the material of the earth, whatever may be the ingredients of which it is composed, whether soil, rock, or other substance, and includes free or occupied space for an indefinite distance upwards as well as downwards, subject to limitations upon the use of airspace imposed, and rights in the use of airspace granted, by law.²⁴

As with Article 839(2) of Qatar’s code above, subsurface rights can also be held separately in California.²⁵

Title recording provides another example of convergence. In order to facilitate transactions involving real property and resolve disputes over title, most modern jurisdictions provide some form of recording of property interests, including title to easements and other non-possessory interests, whether through Torrens title,²⁶ recording act,²⁷ cadastre,²⁸ or some other means. Qatar, like California, relies on recording by private parties - a bottom-up approach, rather than the top-down approach of Torrens or cadastral assignment of title.²⁹ The Ministry of Justice accepts registration of instruments affecting title to real property.³⁰ While this convergence may owe

¹⁹The English translation uses UK rather than US spellings, and these have been preserved in the excerpted sections in this article.

²⁰Qatar Civ. Code art. 59(3).

²¹For more on the history and evolution of the ownership of subsurface rights in American law, see John G. Sprankling, *Owning the Center of the Earth*, 55 UCLA L. Rev. 979, 982-83 (2008). On Qatar’s state ownership of subsurface rights, see *infra* note 57.

²²Roughly, “whoever owns the soil owns it up to Heaven and down to Hell,” or, more prosaically, from the center of the Earth to the farthest reaches of the universe. See, e.g., 2 BLACKSTONE’S COMMENTARIES, Ch. 2, at 18:

Land hath also, in its legal signification, an indefinite extent, upwards as well as downwards. *Cuius est solum, ejus est usque ad coelum*, is the maxim of the law, upwards; therefore no man may erect any building, or the like, to overhang another’s land: and, downwards, whatever is in a direct line between the surface of any land, and the center of the earth, belongs to the owner of the surface; as is every day’s experience in the mining countries. So that the word “land” includes not only the face of the earth, but every thing under it, or over it. And therefore if a man grants all his lands, he grants thereby all his mines of metal and other fossils, his woods, his waters, and his houses, as well as his fields and meadows.

²³Qatar Civ. Code art. 839.

²⁴Cal. Civ. Code sec. 659.

²⁵See *id.* at secs. 883.110 et seq.

²⁶See, e.g., Transfer of Land Act 1958 (Vic.), esp. sec. 41 (“Certificate to be conclusive evidence of title”).

²⁷See, e.g., Cal. Civ. Code sec. 1214 (California’s race-notice recording statute), 1213.

²⁸See, e.g., Civil Code of Québec, LRQ, c C-1991, arts. 977, 3026-3045.

²⁹PattonBoggs LLP, *Qatar Law Q&A: Property Law Overview*, May 2012, <http://www.pattonboggs.com/QATAR-PropertyLaw.pdf> (visited October 9, 2014), citing Law No. (14) of 1964.

³⁰*Id.*

something to environmental factors, it would be a stretch to ascribe it entirely to economic convergence, rather than merely to coincidence.

II. The acquisition of real property

Title to real property can be acquired, in most places in the world, by purchase, gift, prescription, or inheritance, or by the government through the exercise of eminent domain. A possessory right short of title can also be acquired by lease.³¹ All of these modes of acquisition exist in Qatar, although, as will be discussed below, title can, for the most part, be acquired only by Qatari citizens. Sale and purchase of property are governed under Chapter One³² of the Contracts portion of the Qatar Civil Code, while barter is governed under Chapter Two³³ and gift is governed under Chapter Three.³⁴ None of these chapters contain elements that would surprise a lawyer from the common law tradition.

The same is partially true of the law of inheritance. The acquisition of property by inheritance³⁵ largely follows a civil law approach, although “[t]he provisions of the Islamic Shariah and the relevant laws shall apply to the heirs and the determination of their shares of the estate and the transfer of the assets of the estate to such heirs.”³⁶ Deathbed gifts are treated as testamentary acts rather than *inter vivos* transfers, and thus become part of the estate.³⁷ While this is more limited in scope than the clawback provisions in the inheritance laws of many civil law countries,³⁸ it may still surprise attorneys from common law jurisdictions. For example, throughout the United States deathbed gifts are used to avoid estate taxes, and so long as the gift is completed, (checks, for instance, must be cashed), the gift is not treated as a testamentary act transferring a part of the estate. In California, for instance, gifts *causa mortis* are revocable under certain circumstances.³⁹ If, for example, the giver’s will indicated an intent to revoke a gift *causa mortis*, that gift would become part of the estate instead; however, the default setting is that the property passing by the gift is not part of the estate.⁴⁰

Another convergence that is more universal than peculiar to Qatar and California can be found in the law regarding the state’s right to take private property. The Qatar Civil Code reserves or assigns the power of eminent domain to the state: “No person may be deprived of his property other than in such events as provided by law and in such manner as contained therein, in consideration of a fair indemnity.”⁴¹ The language used is reminiscent of the corresponding provision in the Fifth Amendment to the U.S. Constitution: “nor shall private property be taken for public use, without just compensation.”⁴²

Acquisition of property by prescription (or adverse possession), although not a universal element of property law, exists in the legal systems of Qatar and California (and all other U.S. states). The Qatar Civil Code seems to require, as in some U.S. states,⁴³ that the possession be in good faith,⁴⁴ although good faith is rebuttably presumed.⁴⁵ For property owned by the state, the Qatar Civil Code incorporates the common law maxim, *nullum tempus occurrit regi*.⁴⁶

³¹See generally, e.g., John G. Sprankling, *Understanding Property Law* (San Francisco: LexisNexis, 3d ed. 2012)

³²Qatar Civ. Code arts. 419–487.

³³*Id.* at arts. 488–491.

³⁴*Id.* at arts. 492–512.

³⁵See *id.* at arts. 973–1014.

³⁶*Id.* at art. 973. For a detailed examination of these provisions, see, e.g., DAVID S. POWERS, *STUDIES IN QUR’AN AND HADITH: THE FORMATION OF THE ISLAMIC LAW OF INHERITANCE* (Berkeley: University of California Press, 1986); Yasir Billoo, *Change And Authority in Islamic Law: The Islamic Law of Inheritance in Modern Muslim States*, 84 U. Det. Mercy L. Rev. 637 (2007); William A. Coggins, *Succession in Traditional Islamic Law*, 60 J. Mo. B. 180 (2004).

³⁷Qatar Civ. Code art. 1014.

³⁸For a comparative study of the revocability and inclusion in the estate of gifts *inter vivos*, see Aaron Schwabach, *Of Charities and Clawbacks: The European Union Proposal on Successions and Wills as a Threat to Charitable Giving*, 17 COLUM. J. EUR. L. 447 (2011); Aaron Schwabach, *The Specter of Civil Law Clawback Actions Haunting US and UK Charitable Giving*, PROBATE & PROPERTY MAGAZINE, May/June 2012, at 60.

³⁹See Cal. Civ. Code sec. 1148; *Stout v. McNab*, 157 Cal. 356 (Cal. 1910).

⁴⁰Cal. Civ. Code sec. 5704.

⁴¹Qatar Civ. Code art. 840.

⁴²U.S. Const. Am. 5.

⁴³See, e.g., *Clymer v. Shawd*, 2007 Iowa App. LEXIS 1080 (Iowa Ct. App. Oct. 12, 2007).

⁴⁴See Qatar Civ. Code art. 970.

⁴⁵See *id.* at arts. 945, 971.

⁴⁶HENRY OF BRACON, *DE LEGIBUS ET CONSUETUDINIBUS ANGLIAE* (~1235), available online at Harvard Law School Library, Bracton Online, *Bracton: De Legibus Et Consuetudinibus Angliæ*, <http://bracton.law.harvard.edu/>, visited Oct. 9, 2014.

1. All immovable or movable property of the state or public juristic persons allocated, either in fact or by law, for a public benefit shall be deemed to be public funds.
2. In all events, such public funds may not be disposed of, attached or acquired by prescription.⁴⁷

The California Civil Code contains a similar provision:

Occupancy for the period prescribed by the Code of Civil Procedure as sufficient to bar any action for the recovery of the property confers a title thereto, denominated a title by prescription, which is sufficient against all, but no possession by any person, firm or corporation no matter how long continued of any land, water, water right, easement, or other property whatsoever dedicated to a public use by a public utility, or dedicated to or owned by the state or any public entity, shall ever ripen into any title, interest or right against the owner thereof.⁴⁸

However, in some circumstances in California, land held by the state but not actually reserved for or dedicated to a specific public use may be adversely possessed.⁴⁹ The Qatar Civil Code seems to permit a similar interpretation, because immunity from prescription extends only to that land which is both “property of the state or public juristic persons” and “allocated ... for a public benefit[.]”⁵⁰

Divergence: acquisition of real property in Qatar by non-citizens

Divergence, as much as convergence, shows the effect of environment on the evolution of legal systems. Among the most dramatic points of divergence between Qatar and California in the law of real property is the law regarding property ownership by foreigners. As with the examples of convergence, this divergence appears to be the result of environmental factors rather than cultural or historical ones. California is a large state within a large country; both state and country have large populations, and most real estate transactions are domestic. It stands more or less at the opposite end of the spectrum of real estate protectionism from Qatar; the latter is a small country with a small population and a large number of people both inside and outside the country who would like to own property within the country.

The different situations of the two real estate markets have led to very different rules. While the U.S. real estate market is more or less completely open to non-U.S. buyers, Qatar’s is closed. Both approaches are economically rational: Allowing foreigners to purchase property increases the pool of prospective buyers, exerting an upward pressure on prices. When this pressure is relatively small, it benefits property owners without great harm to non-owners living within the nation’s borders. When, as in the case of Qatar, the external market is potentially larger than the internal market, the upward pressure on prices may be so great that some local buyers are priced out of the market. Similar, though not identical, concerns prompted Mexico, a large and populous country bordering an even larger and more populous one, to adopt similar restrictions on the purchase of real property by foreigners. Mexico’s 1917 constitution prohibits foreigners from acquiring direct ownership of lands or waters within one hundred kilometers from the borders or fifty kilometers from the shoreline.⁵¹ The constitutional provision was seen as necessary to national survival; the previous century had seen the loss of half of Mexico’s national territory to the United States, a process that began with North American settlers acquiring land in Mexico.

Qatar law prohibits non-Qataris from acquiring permanent ownership of land in most of the country.⁵² Foreigners may acquire usufructs of up to 99 years⁵³ and leases anywhere in the country,⁵⁴ and eighteen areas have been opened to foreign ownership, including The Pearl and the

⁴⁷Qatar Civ. Code art. 57.

⁴⁸Cal. Civ. Code sec. 1007.

⁴⁹*City of Santa Cruz v. Southern Pac. R. Co.*, 163 Cal. 538, 126 P. 362 (1912); *Henry Cowell Lime & Cement Co. v. State*, 114 P.2d 331, 18 Cal.2d 169 (1941); *Fresno Irr. Dist. v. Smith*, 136 P.2d 382, 58 Cal.App.2d 48 (1943).

⁵⁰Qatar Civ. Code art. 57.

⁵¹Mexico Const., Art. 27(l): “En una faja de cien kilómetros a lo largo de las fronteras y de cincuenta en las playas, por ningún motivo podrán los extranjeros adquirir el dominio directo sobre tierras y aguas.”

⁵²Law No. (5) of 1963.

⁵³Qatar Ministry of Municipality & Urban Planning, *Real Estate & Housing Units Registration Office for non Qataris*, n.d., <http://www.baladiya.gov.qa/cui/view.dox?id=638&siteID=2>, visited October 5, 2014; Law No. (17) of 2004; Cabinet Res. No. (6) of 2006. See also generally notes 78-84, *infra*, and accompanying text.

⁵⁴See PattonBoggs LLP, *supra* note 32.

West Bay Lagoon.⁵⁵ Citizens of the five Gulf Cooperation Council (GCC) countries other than Qatar (Bahrain, Kuwait, Oman, Saudi Arabia, and the United Arab Emirates) have greater opportunities than non-GCC foreign nationals to acquire real property in Qatar. Each GCC national is permitted to own as many as three residential properties.⁵⁶

While Qatar's restrictions on foreign ownership may not be essential to national survival, as Mexico's restrictions were once perceived as being, they are nonetheless essential to national economic and social well-being. The country's current prosperity notwithstanding, unrestricted foreign ownership could result in some of Qatar's citizens being effectively priced out of Qatar's most desirable real estate markets.⁵⁷

III. Forms of ownership of real property

While the functions performed by property law structures in Qatar and California are often convergent, the structures themselves are less so, showing the influence of different legal traditions. The forms of ownership of real property in Qatar differ somewhat from those with which lawyers in the common law tradition are likely to be familiar. Qatar's forms of ownership come from two sources outside the common law tradition: the civil law and Islamic legal traditions. The glorious complexity of Anglo-American estates and future interests, with their contingent remainders and executory interests, their possibilities of reverter and life estates *pur autre vie*, the Rule in Shelley's Case and the much-loved Rule Against Perpetuities⁵⁸ - these are all outgrowths of a peculiar set of circumstances on a single island in the North Atlantic centuries ago. Civil law estates and co-ownership are simpler. Although there is considerable variation among the various countries lumped together within the civil law tradition, in general property is either owned or leased; where property owned by one person is to be held by another for some period of time, other than as a lease of the property, there is a usufruct.⁵⁹ Qatar adds the Islamic concept of *waqf*, roughly analogous to the common law charitable trust, to these civil law concepts.

Freeholds, leaseholds, and analogous rights

While California has not preserved the full panoply of estates, future interests, and special rules of the common law, it still retains more complexity than a lawyer with roots in the civil law tradition might deem fully necessary. The gaudier excesses of the common law's golden age, such as the fee tail, have been done away with.⁶⁰ However, among the freeholds, California retains not only the fee simple absolute but also the defeasible fees and the life estate⁶¹ (including the life estate *pur autre vie*⁶²), and necessarily many of the concomitant future interests.⁶³ The civil law tradition avoids the complexities created by common law freeholds; the problems of the common law life estate are largely avoided by the not entirely analogous civil law usufruct.

The immobility of real property dictates that the law regarding real property is necessarily limited to the law of the jurisdiction in which the property is situated. However, the differences between the legal traditions seem unlikely to give rise to confusion, given the limitations on ownership of land in Qatar by foreigners and the unlikelihood that those foreigners from the common law

⁵⁵See Qatar Ministry of Municipality & Urban Planning, *supra* note 58; PattonBoggs LLP, *supra* note 32; Hukoomi: Qatar E-Government, *Real Estate and Property*, n.d., <http://portal.www.gov.qa>, visited October 5, 2014.

⁵⁶See PattonBoggs LLP, *supra* note 32.

⁵⁷In contrast, ownership of subsurface natural gas rights is essential to national survival. In Qatar, though, as in much of the world (although not the United States) all subsurface mineral rights are held by the state. See Law No. (3) of 2007 Regarding the Exploitation of Natural Resources and its Sources. These rights are managed by Qatar Petroleum under Decree Law No. (10) of 1974 Concerning the Establishment of Qatar Petroleum.

⁵⁸Note, though, that the Qatar Civil Code does prohibit contractual or testamentary restraints on alienation "unless based on lawful motive and limited to a reasonable period of time." Qatar Civ. Code art. 850(1). This "reasonable time," in contrast to the "life in being plus 21 years" of the Rule Against Perpetuities, is a life in being (without the additional 21 years): "reasonable time may be for as long as the lifetime of the disposer, or of the person disposed to, or of a third party."

⁵⁹See generally, e.g., ANTHONY HURNDALL, *PROPERTY in EUROPE: LAW and PRACTICE* (London: Bloomsbury, 1998); Christoph U. Schmid & Christian Hertel, *Real Property Law and Procedure in the European Union*, General Report, European University Institute (EUI) Florence/European Private Law Forum Deutsches Notarinstitut (DNotI) Würzburg (May 31, 2005).

⁶⁰Cal. Civ. Code secs. 763–764.

⁶¹*Id.* at secs. 761–762, 765.

⁶²*Id.* at sec. 766.

⁶³*Id.* at secs. 690–703, 767–769, 773, 778, 780.

tradition who do manage to acquire ownership of property in Qatar would want to acquire it in any form other than some analogue of the common law fee simple absolute.

The law regarding leaseholds in common law jurisdictions has come farther from its medieval roots than has the law of freeholds. Freehold property may change hands as rarely as once in a human lifetime, slowing the pace of evolution of the law; the turnover for leaseholds is much higher, and thus the law changes more rapidly. Although provisions regarding leases of both personal and real property are scattered throughout the codes of both California and Qatar, the essential rules are laid out in a single chapter of each. In Qatar the core of the law governing leased property is set out in eighty-eight articles,⁶⁴ and in California in fifty-nine sections.⁶⁵ In both jurisdictions the laws address the formation of a lease,⁶⁶ the duties of a landlord⁶⁷ (including the right of the tenant to quiet enjoyment⁶⁸ and the duty to provide habitable premises in a residential lease⁶⁹), the duties of a tenant,⁷⁰ and the termination of a lease,⁷¹ (including the effect of a holdover⁷²).

Usufruct

In the civil law tradition, the rough equivalent of the common law life estate is found in the usufruct. A usufruct allows the holder to enjoy both the use (*usus*) and the fruits (*fructus*) of the property, much like a life estate. However, a usufruct may be for a period shorter than a person's life; in Qatar a usufruct held by a foreigner is limited to 99 years in duration,⁷³ although any usufruct may terminate earlier on the death of the usufructuary.⁷⁴

Under the Qatar Civil Code, the "rights and obligations of a usufructuary shall be governed by the conditions imposed by the deed by which the usufruct is created" as well as by the Civil Code itself;⁷⁵ thus, conditions may be imposed under which the usufruct may terminate prematurely. As is typical of a civil law usufruct, "fruits of the property subject to the usufruct shall revert to the usufructuary in proportion to the period of his usufruct."⁷⁶ As with a life estate, there is a general duty not to commit waste,⁷⁷ and the usufructuary bears the burden of normal maintenance and repairs.⁷⁸ A usufruct abandoned for the prescriptive period (fifteen years) is terminated.⁷⁹

Co-ownership⁸⁰

California law contains perhaps more forms of concurrent ownership than it truly needs, fusing common law concepts (although not the tenancy by the entirety) with historic Spanish community property law. In California, real property can thus be owned in tenancy in common, in joint tenancy, in tenancy in partnership, or as community property.⁸¹ The forms of co-ownership in Qatar are partnership in common⁸² and family ownership.⁸³ Partnership in common, as described in the civil code, seems to have elements of both tenancy in common and tenancy in

⁶⁴Qatar Civ. Code arts. 582–669.

⁶⁵Cal. Civ. Code secs. 1940–1954.1, *but see also* Cal. Civ. Code secs. 1925–1935.

⁶⁶*See, e.g.,* Qatar Civ. Code arts. 583–589; *see also, e.g.,* Cal. Civ. Code secs. 1943–1944, 1945, 1946, 1946.1, 1950–1950.8.

⁶⁷Qatar Civ. Code arts. 590–606; *see also, e.g.,* Cal. Civ. Code secs. 1941.3, 1950.7.

⁶⁸Qatar Civ. Code arts. 593–597; Cal. Civ. Code secs. 1927, 1940.2.

⁶⁹Qatar Civ. Code art. 591; Cal. Civ. Code secs. 1941, 1941.3, 1942, 1942.1.

⁷⁰Qatar Civ. Code arts. 607–619; *see also, e.g.,* Cal. Civ. Code secs. 1928, 1941.3.

⁷¹Qatar Civ. Code arts. 625–637; Cal. Civ. Code secs. 789, 1931–331, 1935, 1946–1946.7, 1947.3, 1950.7, 1951.2, 1980–1993.09.

⁷²Qatar Civ. Code arts. 626–627; Cal. Civ. Code secs. 1944, 1946, 1946.1.

⁷³*See* PattonBoggs LLP, *supra* note 32.

⁷⁴Qatar Civ. Code art. 1023(1).

⁷⁵*Id.* at art. 1016.

⁷⁶*Id.* at art. 1017.

⁷⁷*Id.* at art. 1018; *see also* Qatar Civ. Code arts. 1020–1021, 1022(2).

⁷⁸Qatar Civ. Code art. 1019.

⁷⁹*Id.* at art. 1025; *see also* notes 36–38, *supra*, and accompanying text. The prescriptive period is lengthened to thirty-three years in the case of *waqf* property, including *hikr* where the *hikr* is itself *waqf*. *See* Qatar Civ. Code art. 1042.

⁸⁰Qatar Civ. Code arts. 873 et seq.

⁸¹Cal. Civ. Code sec. 682.

⁸²Qatar Civ. Code arts. 852–878.

⁸³*Id.* at arts. 879–883.

partnership as they are understood in California law.⁸⁴ Family ownership is of fairly limited duration (up to fifteen years)⁸⁵ and is subject to many of the same rules as partnership in common.⁸⁶ There does not appear to be any equivalent of the right of survivorship in the Qatar Civil Code, although the code does not seem to prevent purchasers of property from achieving the same result through a tontine clause (or *clause d'accroissement*).

Waqf and hikr

Waqf and *hikr*, even more than civil law concepts such as usufruct, are likely to be unfamiliar to most lawyers from the common law tradition. The fact that no English, law-Latin, or law-French word exists stands as evidence of the unfamiliarity of the concept. Despite that unfamiliarity, though, the concept of *waqf* may have played an important role in the development of the English concept of charitable trust, which it both resembles and predates. In a 1988 article, Monica M. Gaudiosi makes a convincing case that the 1264 statute of Merton College, Oxford sets up a *waqf*, which in turn became a model for later charitable trusts.⁸⁷ As a result, the concept of *waqf*, while at first appearing divergent, may actually be grasped more readily by lawyers from the common law tradition than from the civil law tradition, despite the Qatar Civil Code's otherwise largely civil law roots.⁸⁸

The *waqf* has two forms: the religious or charitable *waqf* and the family *waqf*. The family *waqf* may ultimately become a charitable *waqf* if the family line becomes extinct;⁸⁹ in this it resembles a fee tail with a remainder in the religious or charitable institution. Convergence can be seen in the roles of persons associated with the *waqf*: the trustor-analogue is a *waqif*, and the manager, or trustee-analogue, is a *mutawalli*. The plural of *waqf* is *awqaf*. *Waqf* property is subject to *hikr*, in essence a long-term lease of the *waqf* property⁹⁰ and a means of preserving some form of alienability of property held in the otherwise inalienable and ordinarily perpetual *waqf*.⁹¹

The Qatar Civil Code is especially concerned with the lease, both short term and long term, of *waqf* property.⁹² The trustee, rather than the beneficiary, has authority to lease the *waqf* property.⁹³ The trustee may not, of course, abuse this power, and "[w]here the creator of the *waqf* determines the term of lease, such determination shall apply and the trustee may not contradict such determination unless authorized to lease in the best interest of the *waqf*."⁹⁴ The creator of the *waqf*, or *waqif*, also retains some rights to found property on the *waqf* land⁹⁵ and to give or withhold consent to usufruct.⁹⁶ As noted above, the period for acquisition of title by prescription is considerably longer for *waqf* than for non-*waqf* property - thirty-three years as opposed to fifteen.⁹⁷

Hikr is "defined as a contract under which the tenant holds a right-in-kind in a *waqf* land that authorizes him to utilize the land by construction of a building, plantation or other installation in consideration of a particular fee."⁹⁸ *Hikr* requires court approval, and cannot be for a period longer

⁸⁴*Id.* at arts. 852-862.

⁸⁵*Id.* at art. 880(1).

⁸⁶*Id.* at art. 883.

⁸⁷Monica M. Gaudiosi, *The Influence of the Islamic Law of Waqf on the Development of the Trust in England: The Case of Merton College*, 136 U. PA. L. REV. 1231 (1988).

⁸⁸On the civil law tradition's sometimes uneasy relationship with trusts and related concepts, see, e.g., Pierre Lepaulle, *Civil Law Substitutes for Trusts*, 36 YALE L.J. 1126 (1927); Maurizio Lupoi, *The Civil Law Trust*, 32 VAND. J. TRANSNAT'L L. 967 (1999).

⁸⁹See *id.* See also, e.g., Mohammad Tahir Sabit Haji Mohammad, *Alternative Development Financing Instruments for Waqf Properties*, 4 MALAYSIAN J. REAL ESTATE 45 (2009); Andrew White, *Breathing New Life into the Contemporary Islamic Waqf: What Reforms Can Figh [sic; should be fiqh] Regarding Awqaf Adopt from the Common Law of Trusts without Violating Shari'ah?*, 41 REAL PROP. PROB. & TR. J. 497 (2006); Timur Kurana, *The Provision of Public Goods under Islamic Law: Origins, Impact, and Limitations of the Waqf System*, 35 LAW & SOC'Y REV. 841 (2001); David S. Powers, *The Islamic Family Endowment (Waqf)*, 32 VAND. J. TRANSNAT'L L. 1167 (1999).

⁹⁰See Qatar Civ. Code arts. 1029-1042.

⁹¹On the termination of *waqf*, see *id.* at art. 1039.

⁹²*Id.* at arts. 661-669.

⁹³*Id.* at arts. 661-662.

⁹⁴*Id.* at art. 665.

⁹⁵*Id.* at art. 906.

⁹⁶*Id.* at art. 923(2).

⁹⁷*Id.* at arts. 966-967.

⁹⁸*Id.* at art. 1029.

than sixty years.⁹⁹ Unlike usufruct in non-*waqf* property, however, the *hikr* does not terminate on the death of the tenant, unless “the tenant dies before any construction or plantation occurs”;¹⁰⁰ it is freely alienable, and may pass to the tenant’s heirs.¹⁰¹ The *hikr* tenant must pay rent at fair market value.¹⁰² Any structures or other fixtures placed by the tenant remain the tenant’s property, and thus freely alienable, rather than becoming part of the *waqf* property.¹⁰³ On termination of the *hikr*, the owner of the *waqf* has the option either to demand the removal of the fixtures or improvements or, upon payment to the tenant, to retain them.¹⁰⁴ The *hikr* may terminate prematurely if the underlying *waqf* is terminated or the property otherwise ceases to be *waqf* land, or if the tenant fails to pay rent for three consecutive years.¹⁰⁵

IV. Limitations on the rights of owners of real property

In closing, it may be interesting to take a preliminary look at the law of private limitations on property use, in the hopes that the topic can be explored more fully at a later date. The codes of both California and Qatar provide for such restrictions in addition to limitations imposed by law.¹⁰⁶ These show areas of convergence and divergence as well. In both codes, the available remedies are more or less co-extensive with easements, covenants and servitudes in the common law tradition, although in Qatar, the absence of a distinction between law and equity eliminates the need for a distinction between covenants and servitudes; instead, either damages or injunctive relief may be awarded, as appropriate.¹⁰⁷ The Qatar Civil Code incorporates the maxim *sic utere tuo ut alienum non laedas*: “The owner shall not abuse his right to such extent that may cause damage to a neighbouring property.”¹⁰⁸ A landowner “may force his neighbour to demarcate the boundaries of their adjacent properties,” with the costs being shared equally among them,¹⁰⁹ but may not require the neighbor to build a wall around his property.¹¹⁰ The law of easements parallels that in California; easements are created expressly¹¹¹ or by implication,¹¹² including implication by necessity, although in the latter case the dominant tenant must compensate the servient tenant.¹¹³

Qatar’s code provides for wider use of negative easements than does California’s, or than do common law jurisdictions generally. Both Qatar and California seem to be in the process of eliminating distinctions between various types of servitudes. Despite these similarities in overall trends, there are some occasional striking differences, as in the case of Qatar Civil Code Article 849: “No owner may have openings or holes in his wall overlooking the property of his neighbour other than within such limits as provided by law.”¹¹⁴ In California no such law exists, and easements are more likely to protect openings in walls than to prohibit them: “The right of receiving air, light, or heat from or over, or discharging the same upon or over land” is one of the proper subjects of an easement.¹¹⁵ It would be interesting, in a future article, to explore the cultural and environmental factors underlying this divergence.

⁹⁹*Id.* at arts. 1030, 1032.

¹⁰⁰*Id.* at art. 1039(2). Even then, the *hikr* may continue if “all of his heirs demand continuation of the *hikr* contract.” *Id.*

¹⁰¹*Id.* at art. 1035.

¹⁰²*Id.* at art. 1033.

¹⁰³*Id.* at art. 1036.

¹⁰⁴*Id.* at art. 1041.

¹⁰⁵*Id.* at arts. 1039(3), 1040. Under Article 1039(3), the *hikr* may outlast the *waqf* if the property ceases to be *waqf* land “due to the cancellation or shortening of the period of such *waqf* by its creator.”

¹⁰⁶See, e.g., Qatar Civ. Code art. 841 et seq.

¹⁰⁷*Id.* at art. 1046.

¹⁰⁸*Id.* at art. 841(1).

¹⁰⁹*Id.* at art. 843.

¹¹⁰*Id.* at art. 848.

¹¹¹*Id.* at art. 1044.

¹¹²*Id.* at art. 1045.

¹¹³*Id.* at art. 842. Easements by necessity were limited in California by *Murphy v. Burch*, 156 Cal. App. 4th 1434 (2007) (no easement by necessity where landlocked parcel was patent deeded to owner or predecessor in title by federal government).

¹¹⁴Qatar Civ. Code art. 849.

¹¹⁵Cal. Civ. Code sec. 801(8).

CONCLUSION

There is no need for the real property law of any jurisdiction to seek to resemble the law of other jurisdictions, in the manner of law relating to things less fixed to the surface of the earth, such as, say, copyright or air travel. There will never be a need for a global regime of international property law to match the global regimes of the Berne Convention¹¹⁶ or the International Civil Aviation Organization.¹¹⁷ Yet convergence exists and persists nonetheless. Few jurisdictions are as distant from each other, geographically, historically, and culturally, as Qatar and California; there is no reason to expect any similarity between their property law regimes, let alone the fairly close correspondence that actually exists. Specific laws may differ, but all lawyers expect such differences: One jurisdiction treats a particular piece of agricultural machinery as real property, while another does not; one requires compensation for an implied easement, another does not.

To the extent that two legal systems face similar problems with limited solutions, convergence is likely. Where the problems faced are different, the legal structures created to deal with those problems will diverge as well. The answer to specific legal questions will vary among jurisdictions and even, over time, within a single jurisdiction, as the polity changes its collective mind. The questions, however, remain the same, both across jurisdictions and over time. We have examined a few of those questions here: What is real property? How is real property acquired? What forms does ownership of real property take? What limits must or may be imposed on some property owners for the benefit of others? Even where the answers seem at first surprising or confusing, closer examination reveals enough common ground for a mutually beneficial understanding.

Acknowledgement

The author would like to thank the faculty and staff of Qatar University College of Law for inspiring this article, as well as my research assistant, Emily Ngo, and Dr. Abdelnaser Zeyad Hayajneh.

¹¹⁶Convention Concerning the Creation of an International Union for the Protection of Literary and Artistic Works (Berne Convention), Sept. 9, 1886, as last revised at Paris, July 24, 1971 (amended 1979), 25 U.S.T. 1341, 828 U.N.T.S. 221, and subsequent treaties.

¹¹⁷Convention Respecting International Civil Aviation (Chicago Convention), Dec. 7, 1944, in effect Apr. 4, 1947, 61 stat. 1180, 15 U.N.T.S. 185, and subsequent treaties.