

The Real Estate Register: From the Personal Registration System to the Real Registration System – Algeria, Tunisia, Morocco as Models



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Abstract

The countries of the world have adopted the real estate registration system as a successful means to instill security, trust, and reassurance in real estate transactions. However, the implementation of this system within each country is subject to its capabilities and policies. Hence, two systems for real estate registration emerged in practice: the personal registration system, which relies on the names of individuals such as the owner and those with property rights, and was the first to appear. However, due to its shortcomings in addressing real estate issues, a new system emerged through "Robert Torrens," which is the title registration system, adopted by most countries around the world, including the countries of North Africa.

The land title registration system is characterized by its focus on the property itself rather than on individuals, ensuring greater accuracy in the preservation of property rights and limiting disputes. This system has contributed to enhancing trust in real estate transactions, as it provides a clear and accurate record of property rights, facilitating the process of trading and protecting the rights of the parties involved.

Keywords

The real estate registry ;
Personal registration ;
Real registration ;
Land surveying;
Real estate unit.

الكلمات المفتاحية

السجل العقاري؛
الشهر الشخصي؛
المسح العقاري؛
الوحدة العقارية؛

السجل العقاري: من نظام الشهر الشخصي إلى نظام الشهر العيني – الجزائر، تونس، المغرب نموذجا. ملخص

لقد أخذت دول العالم بنظام الشهر العقاري كوسيلة ناجحة ليعث الأمن والثقة والاطمئنان في المعاملات العقارية، لكن تطبيق هذا النظام داخل كل دولة يخضع لإمكانياتها وسياساتها، لذا ظهر على الصعيد العملي نظامان للشهر العقاري: نظام الشهر الشخصي، الذي يعتمد على أسماء الأشخاص مثل المالك وأصحاب الحقوق العينية، وكان أول من ظهر. ومع ذلك، بسبب قصوره في حل المشكلات العقارية، برز نظام جديد على يد "روبرت تورنس"، وهو نظام الشهر العيني، الذي اعتمده معظم دول العالم، بما في ذلك دول شمال إفريقيا.

ويتميز نظام الشهر العيني بتركيزه على العقار نفسه بدلاً من الأشخاص، مما يضمن دقة أكبر في حفظ الحقوق العقارية ويحد من النزاعات. وقد ساهم هذا النظام في تعزيز الثقة في المعاملات العقارية، حيث يوفر سجلاً واضحاً ودقيقاً لحقوق الملكية، مما يسهل عملية التداول ويحفظ حقوق الأطراف المعنية.

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I- Introduction :

Humans have known the concept of ownership since ancient times, as well as the importance of real estate from social, political, and economic perspectives, which has led them to seek means that enable them to find effective ways to protect themselves. In practical terms, there are two systems for real estate preservation: the personal registration system and the real property registration system. The latter is based on registering real estate transactions pertaining to the property itself, which is the subject of the transaction. This system has found support in most legislations to achieve stability in real estate transactions due to the principles it is founded upon, including those in North African countries, particularly Algeria, Tunisia, and Morocco.

In light of the above, the main issue of the study is as follows: To what extent do real estate preservation systems contribute to achieving stability in real estate transactions and safeguarding rights in North African countries (Algeria, Tunisia, and Morocco)?

To answer the main problem, we divided the subject of our study into three axes. The first relates to the preventive role of criminal policy, and the second addresses the patterns of emerging crime and its departure from the traditional rules of criminal law, while the third requirement will be devoted to studying criminal. To answer the problem posed above, we will rely on both analytical and descriptive methods in line with the nature of the study, according to a dual plan consisting of two sections. In the first section, we will discuss real estate registration systems in two requirements. The first will address the personal registration system, while the second will cover the property registration system. As for the second section, we dedicate it to studying the evolution of real estate registration systems and tracing the roots of land surveying back into the depths of history in two requirements. In the first requirement, we will discuss real estate registration during ancient times and the Islamic era. In the second requirement, we will discuss the real estate registration system in the modern era and the adoption of Torrens principles. We will conclude the study with the most important findings and recommendations. responsibility for the act of another person.

II – Real Estate Registration Systems:

In practice, there are two systems for registration: the personal registration system, which is the oldest, and the property registration system that emerged later to remedy the defects of the first system. This chapter will address this matter, as we will discuss in the first section the personal registration system, and in the second section we will touch upon the property registration system.

II.1. The Personal Registration System:

The personal registration system is one that relies on the names of individuals in announcing real estate transactions. For this system to function, two registers must be established: one register organized alphabetically according to the names of individuals engaged in various real estate transactions, and another register organized chronologically for the submission of contracts intended for registration. In the first register, transactions are arranged alphabetically based on the names of the parties involved, with each letter of the alphabet allocated one or several pages of the register, depending on the importance of the name in terms of prevalence or rarity. Accordingly, in the first subsection we will discuss the characteristics of the personal registration system, and then highlight the defects of the personal registration system in the second subsection.¹.

II.1.1. Advantages of the Personal Registration System:

Like any independent system, the personal registration system is characterized by several features, the most important of which are:

- The basis upon which registration is founded: This system is based on the names of the individuals who execute transactions, as the property subject to the transaction and its specifications such as location, boundaries, and area are not considered.

- Legal effect: This registration system has no evidentiary force; the transactions intended for registration are not examined or verified for accuracy, but are registered as they are. Thus, if it becomes clear that the individual executing the transaction concerning the property, and in whose name the transaction is registered, was not the rightful owner, then this right does not transfer to the transferee despite the registration of the transaction, as the interested party has the right to invalidate this registration, since it does not rectify a void contract nor does it create an invalid contract². From this characteristic, we deduce two important elements: that a person only owns what they possess, meaning that an individual may sell property and then a third person emerges contesting the buyer's ownership of the property as the true owner, so the registration does not prevent recovery here³. In addition, a person cannot transfer to another rights greater than those they hold, indicating that the transaction transfers as it is; if it is defective, it remains so, and if it is valid, it remains established. Therefore, registration in this case does not safeguard the transaction, but the right remains consistent with the transaction created in terms of its existence or non-existence. Registration here, as stated by Professor MAZAUD, is merely a means of notifying others of transactions⁴.

II.1.2. Disadvantages of the Personal Registration System:

These defects can be viewed from two main aspects: the aspect of authority and the aspect of order, because a well-organized system is one that is orderly in its arrangement and decisive in its authority.

- In terms of order : We notice that registration here is done according to the names of individuals, which makes the interested party aware only of the person who acted with respect to the property, regardless of what has occurred regarding that property. For instance, one person may act concerning a property not owned by them, registering this act in their name, and then the true owner may also act concerning the same property, registering it in their name as well. This results in two separate acts in two distant locations under different names⁵.

In terms of authority: It does not provide absolute evidentiary power for the registered acts, as mentioned, since this allows for situations of overlap among rights holders due to dual registration. Moreover, it facilitates the acquisition of property rights and other rights through prescription, largely due to the lack of verification regarding the validity of the acts. This defect also contributes to the system's failure to support real estate credit, as it does not contribute to thorough reviews prior to registration on the one hand, nor does it assist in the transfer of ownership and real rights on the other. Here, the real right is established as valid as soon as the contract is completed and the form prescribed by law is adhered to⁶.

III- The Property Registration System:

The property registration system is the system that relies on the property itself in the registration of real estate transactions, meaning the property subject to the transaction itself. While the personal registration system allocates a page in the registry for each name, the property registration system does the opposite by allocating a page in the registry for each real estate or property.

Like any standalone system, the property registration system is based on principles upon which it relies, and it has advantages that enhance its strength in dominating the real estate arena, but it also has disadvantages that attempt to undermine its stability. We will try to touch on these three interrelated elements in three branches: in the first branch, we will discuss the principles of the property registration system; in the second branch, we will clarify the advantages of the property registration system; and in the third branch, we will address the disadvantages of the property registration system.

III.1. Foundations of the Real Registration System:

This system is based on several fundamental principles established to avoid the shortcomings of the previous system, the most important of which are⁷.

- Principle of Specification⁸: This refers to allocating a page, or what is known as a property card, for each property, in which all transactions occurring on this property are recorded. The totality of these property pages or cards constitutes the property registry from which jurists derived the name of the property registration system .⁹

- Principle of Absolute Registration: This means that all transactions related to the property, whether they establish, modify, or transfer ownership and other property rights, whether original or accessory, can only be invoked from the date they are registered in the property registry.

- Principle of Legality¹⁰ : This refers to the work done by the official tasked with the registration or recording process in the property registry (the property registrar), represented in the thorough review of all contracts submitted to him for the purpose of registration.

III.2. Importance of the Real Registration System:

The Property Registration System has numerous advantages, as it is later in emergence compared to the Personal Registration System ; it seeks to avoid the shortcomings of the latter and showcases several benefits. It works to : provide full legal protection for stakeholders as it relies on the property itself, thus excluding the impact of name similarities, ensuring its complete authority, and the non-applicability of statutory limitation against the rightful owner. It contributes to the stability of real estate ownership, relying on a thorough review of documents before registration, and rectifying any defects in the transaction if found. Additionally, through it, real estate ownership is transferred, implying that it exists not only for declaration purposes. This system reflects the true status of the property, allowing the easy knowing of the legal status of the property, facilitating the overview of the real estate portfolio, and simplifying the determination of the tax base in a sound and fair manner, which helps to increase the value of the property.

III.3. Disadvantages of the Real Registration System:

Despite the advantages we have enumerated that this system enjoys, and the optimal objectives it seeks to achieve, it is not devoid of certain flaws that continuously act as a stumbling block for countries, including:

High expenses: Implementing such a system requires a comprehensive inventory of all properties, resulting in significant financial burdens and costs, specialized personnel, in addition to a sufficient time period, which some countries, especially developing countries with limited income, cannot provide¹¹.

Sacrifice of the true owner: ownership is only transferred through registration, which enjoys and is fortified by the strength of absolute registration. If transactions are tainted with invalidity or nullity, it works to correct and purify them, sometimes at the expense of the rightful owner's rights.

Ownership Registration: As assigning a separate deed to each property, regardless of its size, big or small, makes its application in countries where properties are very small extremely difficult, especially when property is transferred by inheritance.

That does not guide us to what the person owns in terms of other properties or their rights on properties owned by others, in order to apply the law in situations that require that knowledge¹².

IV- The Evolution of Real Estate Registration Systems:

The roots of land surveying extend deep into ancient history, with some references tracing its beginnings back to 4111 BC when a Chaldean tablet was discovered in the Arabian desert of Babylon, providing a plan for measuring the dimensions of an area in one of the cities.¹³

In light of the above, this chapter will study the evolution of property registration systems in ancient times and the Islamic era through the first section, manifestations of the property registration system in modern times, and the adoption of Torrance principles.

IV.1. Property Registration during Ancient Times and the Islamic Era:

In ancient times, land was distributed among families and was only transferable with the consent of all family members. Each member had the right to object or refuse the transfer process, and the transfer was conducted openly in view and hearing of the entire tribe or family. Perhaps the most significant example mentioned is in the Book of Genesis, where "Abraham" wanted to bury his wife "Sarah," who died in exile in the village of "Hebron," belonging to the Canaanites. He addressed the children of Heth, requesting them to grant him a place to bury his dead, choosing the cave of "Ephron, son of Zohar." The latter responded in the hearing of the children of Heth and in front of all those entering the city, stating that he had granted him the field and the cave within it, on the condition that he is compensated with 411 shekels of silver¹⁴.

Accordingly, we will address the property registration system in ancient civilizations through the first sub-section, and in Islamic civilization through the second sub-section.

IV.1.1. The Real Estate Registration System in Ancient Civilizations:

The ancient Egyptians were also familiar with land surveying, in order to impose property tax and distribute it equally, according to the size and nature of each person's possessions and the amount of income these properties generated. On one hand, and on the other hand, it was an attempt to establish property rights after the periodic floods of the Nile River¹⁵. Some historians assert that the Greeks created plans that were transferred onto sheets of marble and copper. As for the Romans, they were concerned with the system of ownership where the transfer of ownership occurred through three methods: witness, fictitious lawsuits, and delivery¹⁶. The golden age of land surveying lies in this period because the Romans established many cities in the occupied provinces, and Roman land surveying was a magnificent tool for preparing the region and imposing taxes on agricultural lands, relying in its measurements on hypothetical metric units, based on the fertility of the land. Regarding North Africa¹⁷, surveying operations began with the fall of Carthage in 142 BC when the Roman occupation started. Romans, led by their king "Scipio Aemilianus," annexed the new lands and transformed them into Roman provinces¹⁸, exercising control over fertile lands and distributing lands to the distinguished Roman classes, and to the Berbers who became Romans. In Algeria, for example, mosaics and wooden panels representing a natural scene of properties emerged from Roman land surveying were discovered in the city of Tebessa. In Tunisian legislation, there are those who attributed the emergence of this system to the Phoenician era, with this period relying on a statistical system for real estate that closely resembles the land surveying system, as there were several boundary markers and stone tablets containing the names of properties and their owners.

IV.1.2. The Real Estate Preservation System in Islamic Civilization:

The Islamic system knew the process of real estate preservation, which aimed primarily at collecting real estate taxes. The Islamic states that succeeded each other in ruling the region of North Africa since the seventh century AD (around 286 AH), which corresponds to the time of Uqba ibn Nafi's second campaign and the opening of North Africa¹⁹. up to the Ottoman rule, which left its imprint on real estate ownership in Algeria by naming state properties "the Baylik" instead of the treasury, and naming the properties of the Deys or Beys in isolation instead of the estates. The diwans were created to account for state funds during the era of Umar ibn al-Khattab in the year 61 AH. Among them was the diwan in which lands were registered, and the first land surveyed and recorded in this diwan was "the Black Land of Iraq." This was a prelude to placing tax on it, and it was kept in the House of the Emirate. There was no public diwan collecting it and preserving it in the House of the Caliphate, which made it susceptible to destruction due to the numerous strife that emerged at that time. Historians also tell us that the Almohad state recognized this process as it established land surveying

and prepared a register of areas and regular income from taxes, which was among the important factors that allowed for economic provision. Taxes were no longer randomly determined by the governors but were distributed equally among all residents. In this regard, Professor Nasser al-Din Sa'idouni states: "Abd al-Mu'min ibn Ali al-Kumi, the first caliph of the Almohads, after his conquest of Ifriqiya and his recovery of Mahdia from the Normans in 554 AH (1159 AD)²⁰, initiated a general surveying of the lands of all Morocco to determine their types and verify what was due from them in taxes and dues." The Ottoman state progressed in registering lands, especially in its later days when it considered finding a system to regulate real estate ownership, which was the "defa" system.

IV.1.3. The Real Estate Registration System in the Modern Era:

After the abolition of feudalism, real estate in capitalist systems, like other commodities, became subject to the principle of supply and demand. Therefore, the interest of society necessitated the registration of all real estate transaction declarations, especially after the true value of real estate emerged as a source of wealth. As a result, a new property registration system appeared in Australia under the law 16-17-1858 known as the "PROPERTYREALTY Act" or the "Torrens Act," which is based on the land title registration system adopted by most countries in the world.

IV.1.3.1. The real estate system during foreign presence in the Arab countries:

The primary means by which the principles of the Torrens Contract spread in many Arab countries was colonialism. However, it is noteworthy that France did not solely adopt French law for its colonies regarding property regulation, but also borrowed from the Anglo-Saxon family the property registration system known as the Torrens system. In Morocco, the property system emerged prominently among the first legislative measures taken immediately after the protectorate. In the French protectorate area, the decree of August 16, 1912, concerning property registration was issued, while a similar decree was issued in the Spanish protectorate area on June 1, 1914. As for the international zone of Tangier, a decree was issued on February 12, 1924²¹.

In the Tunisian state, the French resident general in Tunisia, Mr. (CAMBON.P), was one of the staunch admirers of the principles of the Torrens title system. For this reason, a committee was formed to establish the Tunisian real estate law and adopt the principles of the land registry. This was solidified through various field trials, beginning with the directed property registration phase and then the mandatory property registration phase²². As for Algerian land, the colonizers issued a host of legislations aimed primarily at acquiring the land registry and providing constitutional legitimacy to the legislations that permit the expropriation of real estate from Algerians²³. Article 119 of the new French constitution of 1848 stated that: "Algerian lands and colonies are part of French territory and will be governed by special laws until a law is issued that allows for the most important laws related to real estate ownership to be included in the texts of the current constitution." Law 1822/14/66, known as the "Senatus Consultum" or the Law of State Notables or the Buzitoun Abdul Ghani Machikhi Law. Given the discontent of the population with previous laws, Emperor (Napoleon) sent a letter to Marshal "Malakoff du Duc" on 12/16/1822 regarding the establishment of real estate ownership in Algeria; this letter served as the origin from which the "Senatus Consultum" legislation was born, which stipulated the distribution of communal lands among villages after delineating the borders. A total of 276 tribes were divided into 252 villages. This law also transformed the right to exploit land into full ownership rights. To Frenchify Algerian properties and consider all other legislations and customs nullified in the presence of French legislation, Law 1872/17/62 - Warnier Project - generally stipulated that the transfer of ownership should occur through a contract²⁴.

Considering that crimes committed on social media by its users are intentional crimes, they are committed with criminal intent, and it is not conceivable that these crimes are committed accidentally, not to mention that the essence of crimes is to be intentional, and it is established that the legislator requires in these crimes the presence of general intent, and some crimes may require the presence of specific intent in addition to general intent, with each based on the elements of knowledge and will.

The recognition of real estate ownership occurs following investigations and inspections conducted by the investigation commissioner (Commissaire enquêteur). With the beginning of the twentieth century, the French administration began to aspire to regulate the real estate sector on engineering bases, leading to the issuance of several texts, including the law dated November 14, 1955²⁵, marking the true start of land surveying, which was practically applied experimentally in the Malakoff area of Bougadir at that time, pursuant to the order dated November 12, 1959. Through the study, it can be said that the colonial legislator primarily relied on the Tunisian real estate law dated July 1, 1885 in Algeria and Morocco while considering the particularities of each region and its political system. Additionally, the French policy in Tunisia differs from what occurred in Algeria; for the French government, the Tunisian real estate project must be productive and beneficial to French capitalists without costing the treasury, as France decided against spending in Tunisia²⁶. On the other hand, it seems that the idea of purification underlying the Torrens system, which is borrowed in the Tunisian real estate law, is purely an Algerian idea, as confirmed by "SOULMAGNON," who states, "Purification in Tunisian law is nothing but a purely Algerian idea."²⁷

IV.1.3.2. The Property Registration System After Independence:

The Maghreb countries, especially Algeria, Morocco, and Tunisia, witnessed numerous real estate legislations in the context of national independence, which aimed primarily at protecting property and directing it appropriately on one hand, and exploiting it rationally on the other²⁸. Initially, Algeria inherited the personal registration system from the French administration, which is still in use today in municipalities that were not included in the surveying process²⁹. However, to effectively manage real estate, the Algerian administration sought to establish the foundations of the land registration system, which traces its roots back to the laws enacted immediately after independence³⁰. Referring to those texts, we find the legislator's strong desire to adopt this system through the expressions derived from them³¹. Article 65 of the Agrarian Revolution Law states, for example, that: "Upon completion of the operations provided for by the Agrarian Revolution in a certain municipality, the surveying documents for that municipality shall be prepared based on a set of property cards... and by compiling the general survey record for the country in accordance with the conditions and methods that will be specified later."³² We also find Decree No. 26/72 dated 15/11/1972 regarding the establishment of private property rights which states in its Article 26 that: "Property certificates shall be replaced with property books once the general survey of the country's lands specified in Article 65 of Order 72/71 is conducted."³³ It is clear from this article that the essential component and active element for establishing the land registration system is the complete surveying and inventorying of lands, and the issuance of Law No. 74/75 regarding the establishment of the general land survey, the establishment of the real estate register, and the subsequent decrees confirm this. In the same context, Article 16 of the aforementioned law states.³⁴

The real estate registry is prepared continuously with the establishment of land surveys in a municipality. Due to the fact that the application of the system of land registration is carried out gradually according to the capabilities of each municipality, areas that have not been included in survey operations remain subject to the personal registration system. This is what Article 67 of the aforementioned Order on the principles of real estate preservation - Algeria, Tunisia, Morocco - 74/75 referred to. As for Tunisian legislation³⁵, the legislator has retained the property law established during the protection period, with some developments added in the area of land preservation, including the establishment of obligatory preservation systems, by virtue of Decree No. 22 of 1924. The Tunisian legislator also organized the updating of real estate contracts under Law No. 29 of 1996. Similarly, the Moroccan legislator after independence retained the system of land registration, initially aiming to generalize and unify the land preservation system across Moroccan territory, through a series of laws, including the Royal Decree No. 1.58.111 issued on May 21, 1958, as well as Royal Decree No. 1.21.414, along with Royal Decree No. 1.26.641, and finally Law 25 issued on February 7, 1926, which amended and supplemented the Royal Decree issued on August 16, 1912.

V- Conclusion:

The real estate registration system is an idea rooted deeply in history. As time has passed and societies evolved, this system has developed until it has become, in our present time, a well-structured system represented by the Torrens Title. The superiority of the land title registration system, which achieves stability in real estate ownership, has led most countries to resort to it and adopt its rules. Various legislations worldwide have borrowed the key principles and rules established by "Torrens" and have worked to shape them and incorporate what aligns with their policies to implement the registry system. Among the countries that have resorted to this are the North African countries.

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