



ENSURING “STABILITY OF THE REAL ESTATE LEGAL SITUATION” IN THE IRANIAN LAND RECORDING SYSTEM

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Abstract. The topic of recording real estate transactions and the documentation of the rights of all parties is a controversial topic under the Iranian recording system. One of the functions of the recording system is “assuring security” regarding the stability of real estate property transactions, which can affect the rights of third parties as well. “Security” in transactions requires establishing priority for recorded transactions and observing rights concerning unrecorded ones. This means that the developed form of the recording system must move from “static security” to “dynamic security” in order to protect public interests instead of private ones. In reviewing the Iranian legal system, the bases of “Dynamic Security” can be identified in various laws related to the recording of real estate transactions that legally recognize formal deeds and recorded rights. However, since these bases have not been theorized yet, there is not enough sanction to guarantee the enforcement of this theory. In addition, judicial procedure has issued a lot of sentences implying the acceptance of “Static Security”, so that private interests are considered much more important than public interests. The lack of any formal and legal “Dynamic Security” theory has even led legislators to adopt rules against this theory by granting the authority to judges to give effect to informal documents as well. All this has resulted in a lack of security and stability in the recording system, which has led to a lack of trust by all parties in trusting the information and the content of a registration book, because any kind of transaction can be nullified by a judicial decision. In applying a qualitative method and content analysis, it can be concluded that “Dynamic Security” can provide very useful tools for guaranteeing the security and stability of real estate transactions. Consequently, it is essential to theorize this security and consider it in the law and practical procedures relating to it.

Keywords: Land recording system, Dynamic theory, Static theory, Real estate transaction

Introduction

Iran is one of the most influential countries in the Middle East and its legal system has a great effect in the region. The first modern law concerning the recording of real estate transactions in Iran was ratified in 1911. Despite the fact that the real estate recording system in Iran has deep roots, a new form of the recording system has become a modern institution in the country (Mohammadi, 2004). This law was later annulled by the ratification of several laws. After several legal developments, the recording law was ratified in 1931, which is still enforceable, along with numerous reforms concerning different Articles.

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One of the most fundamental principles of the real property recording systems operating under the Iranian legal system is that of ensuring the stability and security of the parties involved in land transactions, along with protecting the rights of real property holders. This also involves any third parties that deal with the above-mentioned property holders, who must be able to trust the information concerning these real rights.

Therefore, the Iranian recording system should be considered as a method involved in ensuring the stability of legal situations regarding real estate property, and requires the establishment of independent principles, different from those concerning private law (Paixao et al., 2015). Therefore, it is expected that legislators ensure the rights of owners, transferees and collateral lenders (Gampert, 1896).

This paper explains and examines the history of the Iranian recording system, in order to show how this system has considered these requirements when adopting relevant laws, i.e. in 1911 and 1931, along with practicing them in the field and whether these principles and rules satisfy these requirements. Iranian jurisprudence has encountered many practical problems in ensuring the legal situations of real estate property because these principles have not been known well enough amongst judges and lawyers. The legislative system adopted some rules that nullify these requirements and principles, following the amendment of the former law of 1931.

The main problem is that these independent principles concerning the recording system have not been theorized yet in Iran. Therefore, the paper theorizes these principles.

This paper outlines and defines theory, which helps policy makers and practitioners take into account the legal situation in evaluating the stability and security of land.

1. The necessity of security in land transactions; Moving from static security to dynamic security

“Security” in real estate rights, particularly in land ownership rights, will only be achieved when there is no risk concerning the existence of other rights rather than ones registered. The main question is what does “Security” actually mean in the land recording system? This leads to the main issue, which is the security concept as it applies to the recording system, which is what is sought in determining what it actually means.

If security is considered in all its dimensions, the question arises as to whether these dimensions can be applied for all the relevant parties involved in transactions or not. Demogue believes that the security of an “Ownership right” has two different aspects that are constantly competing with one another, calling them “dynamic security” and “static security” (Demogue, 1911, p.72). The laws relating to “transactions and transferring the ownership right of real estate property” in private law and outside the principles of a recording system are based on the principles of static security, which protects the rights of real estate owners, if it is necessary, against the interest of buyers, heir parties and transferees. Indeed, the rights of a real estate owner have priority over the rights of an “apparent owner”. This is based on rules and principles such as “The impossibility of transferring the ownership of an object by someone who it does not belong to”, “The priority of former rights compared with latter ones or in a timely manner,” and so on. In fact, the principles of static security, in any case, seek to ensure the security of the real estate owner, regardless of any other needs regarding society and public interest, and this may lead to the destruction of the security involved in transactions and a lack of confidence in someone who, based on documentation, considers himself to be the owner.

The attempt to create a balance between static security with reasonable expectations of goodwill towards buyers has led to the creation of a “Doctrine of notice” in the common law system, which is a method for determining whether the rights of third parties can affect the ownership rights of a real estate owner or not.

The adoption of recording rules in the recording system transferred the concept of “static security” to the concept of “Dynamic security”. “Dynamic Security” is provided by legal rules that are able to provide reasonable expectations for those who have purchased goods in goodwill. This security will reduce or eliminate the risk of confrontation between the ownership rights of a buyer, previous unknown claims and defective ownership rights. It also will decrease transaction costs by limiting any investigation that the transferee (buyer) needs to do. The transition through

the old transaction system to the recording system is the equivalent of establishing “Dynamic security” in property rights, which is the basis of “trust and confidence” in the content of the registration offices. This is a prerequisite for having an active market. In fact, “dynamic security” is equivalent to “Transferee (buyer) safety”. This is due to the fact that it reduces transaction costs (by reducing or eliminating the need to search for the accuracy of the recorded information and the existence of unregistered rights related to the transaction) and risk for the buyer. However, an analysis of the results of “dynamic security” clearly indicates that the adoption of its principles is in the interests of the owner as well, because without it, the owner’s right of ownership may be destroyed, even several years after the transaction, if defects or mistakes concerning the ownership or former rights are identified. Systems like the “Recording system”, which improves “dynamic security”, have a tendency to reduce static security. As a result, relevant law should establish a balance between these two by setting specific and reasonable rules.

The key elements of an appropriate recording system must be designed to protect the transferee against any risks arising from transferring an incomplete or defective ownership right, dynamic losses or dynamic risks ... which have been established by the old law of “Transactions” and “Transfer of private ownership” and are outside the framework of the recording system. The essential technique that the system can use in order to deal with the above-mentioned risks is the concept of a “state-guaranteed ownership right” and the “legal certainty of recording”.

The recording system can actually eliminate risks and threats to the rights of registered ownership through the application of “positive” and “negative” functions. Acting in a positive manner, the recording system can ensure that the ownership right is exactly the same as that recorded in the registration office, and acting in a negative pre-emptive manner, this ensures that the ownership right is not affected by anything else that is not reflected by the registration offices. The combination of these positive and the negative effects provides Dynamic security for the registered owner and consequently, land transfer is feasible and practicable through the reduction in risk and transaction costs. (O’Connor, 2003, p. 85-89).

2. Ensuring security as the main function of the land recording system

Considering that nowadays there is a tendency to provide security for third parties who are willing to obtain information from the recording system, as well as the security of the registered owner regarding the stability and non-infringement of his rights, it seems that generating a theory is essential and the basis for the security of the legal status of real estate.

Since it is not easily possible to have a control mechanism that can eliminate or reduce human mistakes in the process of recording real estate rights in registration books, so that one cannot claim that all the information recorded in the registration offices is accurate and consistent with “legal reality”, a restorative principle is necessary in order to be able to trust the recorded information in registries, whether they comply with legal reality or not. According to this principle, the content of the register books overcomes the legal reality, and consequently, this information is an absolute and indisputable indication as to legal reality.

This principle is similar to the French “Apparent property” theory, in which some effects may rely on a fictitious or imagined right, which is fully compliant with the visible and apparent facts, even if it is not in accord with the legal facts and reality (Brochu, 1999). This theory, which is applicable in the transaction of ownership rights, allows an individual who appears to be the owner to be perceived as such by third parties as the real owner of the property. In fact, based on the theory of apparent property, the misconception of a legal situation, in some circumstances, leads to some of the effects of this appearance, and has been preferred over the legal reality. (The common mistake creates the right.) A famous example in this regard is about an “Apparent heir”, which it is possible when one is the only heir because he is the closest person to deceased, however, someone else is the real owner if he is unknown and closer to deceased compared with the first one, or a will is discovered to show that the deceased has given all his property to another. In the relationship between the real owner and the apparent owner, there is merely an ownership right that seems to have to be returned to the real owner. However, it is argued that: What happens to legal acts entrusted to by the apparent owner in the above-mentioned case?

On one hand, if the third party returns the property in goodwill, public credit will suffer great damage. No one can notify a third party of the danger threatening him. Under these circumstances, no one will dare to buy the real estate property from the heirs (Simler et Delebecque, 2009).

On the other hand, giving priority to the third party will affect and damage the ownership rights because “absolute validity” is one of the main features of the ownership right, so it should be possible to claim it against anyone, even one who has not been aware of it. In addition, a legal and logical proverb declares that “one cannot transfer rights that do not belong to him”. Therefore, the ownership right cannot be transferred by the apparent heir because he is not actually the owner.

To overcome this conflict, the judicial procedure of France has decided on the basis of public credibility in favour of the Successor in regard to the apparent inheritance. In a commentary opinion in July 1807, the continuity of the rule on “A common mistake creating the right” was accepted. In French law, the apparent theory has been accepted as a general and fundamental theory, and has been based on many civil law provisions, such as those found throughout 2008 and 2009 regarding the legal practices performed by apparent lawyers and legal agents (Simler et Delebecque, 2009).

Therefore, the effort to protect transferees (with good intentions) and maintain public order, trust and stability in transactions has resulted in apparent law affecting the legal reality and then, social justice prevailing over legal arguments in developed countries such as France. It is because of this that society will suffer more from a lack of trust and security, and its consequences will be much more severe and irreparable.

Indeed, the new law does not protect an ignorant or irresponsible real estate owner from a transferee with apparently good intentions. This is because the transferee has been deceived through a proper legal appearance, despite the fact that he has all the care and precision of a reasonable person in the community, and consequently, he has completed a transaction with someone who has not been the legal owner of the real estate. So the question arises regarding: Which legal argument can be relied upon, where the property can be taken back from the transferee? This is what occurs when it is difficult and sometimes impossible to determine the legal situation of a property and to know and make sure whether the apparent situation fully represents reality or not. For further illustration, when based on all circumstances and evidence, most people think the same about the legal situation of a real estate property, this allows them to believe that the apparent situation reflects the facts of the real legal situation, and therefore, it is not enough to just annul any legal acts may result from these facts. If this happens, the security of contracts and the circulation of assets and property will be eliminated. Real estate owners will ultimately suffer from this situation as well, because no one will dare to deal with them for the same reasons. Therefore, it is necessary to provide proof of ownership of the real estate owner, though this may not be sufficient enough if the property has been transferred to him from another person, and the ownership of the former owner should be relied upon to establish the true ownership of the property and so on. This is called the “devil's proof” or the “impossible proof (Saghari, 2006, p. 121-126).

The theory of “Apparent property”, which creates security in transactions, is the basis of every social system of ownership. The real estate recording system is a mechanism for assuring security in transactions, and ignoring this particular function of the system will result in chaos within a society. Creating security in the field of real estate requires that the social function of ownership and public interest take precedence over individual rights. In other words, it should serve to assure that security, which benefits society and public justice, should ignore private justice (Tabbah, 1947, p. 13). This means that although it is possible to own a property in accordance with private civil law, social justice and the necessity of security in transactions requires one to assume that the person who has been registered as the owner in the registration book, is the real owner. In fact, based on the apparent property theory, the false notion of the existence of a legal situation may result in some effects of this appearance prior to a recognition of the actual legal facts (Terré & Simler, 2014).

Since a registration system should ensure the security of third parties visiting register books to gather information, this theory often protects transferees with good faith from “vices and mistakes arising from the apparent situation, offered by the contents of the register books”. It also guarantees the legal validity of the registered information (Hunter, 1963). Moreover, it ensures the security of the registered owner in terms of the stability and indefeasibility of his rights. Adherence to this theory prioritizes the social function of ownership, as well as assurance of the security of transactions in society over individual rights (Tabbah, 1947). In fact, the need for security in real estate property transactions, along with providing social justice, necessitates that a party, registered in register books, should be protected and be considered as an owner, even though based on contract law principles, another party may be regarded as the real estate property’s owner.

3. Ensuring security in the Iranian Land Recording System

“Ensuring security” in the ownership of real estate can only be achieved when no one can claim any right other than what is reflected in the register books.

Therefore, it should be assumed that all the information contained in register books is correct and complete data about real estate rights, which allows all parties to obtain necessary information about the legal situation of real estate (Cursley & Davys, 2011). This is only possible when the system requires the registration of all real estate transactions (Arruñada & Garoupa, 2005; Brochu, 2001; Dixon, 2013; Gray & Gray, 2005). Through this mechanism, the security of the ownership right will be assured as one of the goals of the recording system (Cooke, 2004).

In addition, ensuring security requires that legislators give priority to registered rights over unregistered ones, and diminish all defects concerning the origin of all registered real estate rights (Dixon, 2013; Green & Cursley, 2004).

It is crucial to notice that this security will only be accomplished when a recording system provides an appropriate mechanism to compensate all parties who have lost their rights because of a mistake in the recording system (Miceli, Sirmans, & Turnbull, 1998).

In investigating the first Iranian law regarding the recording of real estate in 1911 and its consequent development in 1931, which is currently forcible, it has been shown that the Iranian legislation took ensuring the security of real estate into consideration. For example, Article 2 of the recording law in 1911 indicates that the security of real estate is one of the goals of this law. In the 1931 recording law, there are a lot of Articles concerning dynamic security, which establishes the necessary Infrastructure for ensuring security (Shahri, 2002). For example, Article 22 of the current Iranian law regarding real estate recording says that “once a real estate property is recorded in a register book in accordance with the law, the government considers the one in whose name the real estate property is registered or the one to whom the real estate property in question has been transferred to as the owner, where the conveyance has been recorded in a register book, or has inherited the real estate property under consideration from the recorded owner...”. In addition, Article 103 of the directive of the aforementioned law obliges that all relative information related to the real estate and real estate rights be recorded. Accordingly, Article 46 establishes the same obligation concerning transactions involving the related rights and guarantees it in Article 48 by nullifying those transactions.

Therefore, the Iranian recording system of 1931 is equipped with enough to build a strong basis for registering the accurate and complete information of real estate. Moreover, in other Articles, the registered information has priority over unregistered information and assumes it to be correct and non-infringement registered information, and as previously mentioned, it is one of the foundations of ensuring security in real estate. Accordingly, Article 24 of recording law states that “once a real estate property is recorded in accordance with all legal formalities, no claim of ownership for that real estate property is accepted from others and the ownership deed cannot be nullified and merely damages can be awarded” This indicates that although the registered real estate may be valid, a person who has suffered from this situation can apply for criminal prosecution, punishment and compensation.

Although a review of the above Articles shows that the Iranian legislation has provided for security in the recording system, this security is not yet complete, because it cannot protect people who have suffered from a mistake due to enforcement of the recording system. Indeed, the lack of an insurance mechanism in the Iranian recording system has resulted from ignoring one of the infrastructures provided for ensuring its security. In other words, one cannot find any regulation in Iranian law that obliges the government to compensate a damaged person. In the Iranian notary law ratified in 1975, notaries are obliged to provide guarantees to compensate for damages caused by their negligence, fault and violation (Article 68 of real estate property and deeds law, Article 22 of notary law, Article 17 of notary law and Article 9 of its executive regulations), but this is different from the guarantee that should be offered by the government.

The idea of ensuring security in the recording system, which was considered by the legislation of 1931, has been reflected very well in the practical procedure of early years since passing this law, so the judicial system did not accept any claim about nullifying recorded information. However, since the basis for ensuring security has not been theorized in the Iranian legal system, one can see how this goal has gradually diminished in practical procedure. As a result, sometimes the courts nullify an official ownership deed only because someone else or a third party presents an informal deed or claim with an unrecorded right and so on. This means that in spite of the goal of the recording system to assure security in real estate, in practice, the courts go beyond this and move against that aim by simply preferring informal deeds or unregistered transactions instead of formal and recorded ones. While as previously mentioned, the security of registered information should be assured in such a way that nothing should affect the rights of a person who has trusted the recording system and concluded a contract only by trusting the content of recording books. Security in transactions requires recognition of the rights of apparent transferees who transact under absolute, strict, official and legal rules.

That is why the legislation under Article 22 wisely recognized and identified the person who recorded the real estate in his name or another person as being the owner, whereas Article 46 and 48 do not recognize unrecorded transactions. As it can be seen in the above-mentioned Articles, this security has not been protected by sanctions, and consequently, the goal of security that can be justified by predictable, appropriate sanction and guarantees, has not been theorized. It has stayed unknown throughout the Iranian recording system and has led to disagreements between jurists and lawyers regarding the guarantee of unrecorded transactions. For example, the “law of permanent development program”, which was recently ratified in 2017 in the Sixth Development Plan Act, (Art.62), has confirmed the requirement for recording real estate and considers transactions *visa-a-vis* third parties as unreliable and invalid, which is a guarantee of “dynamic security”. However, unfortunately by the end of the Article, influenced by thoughts dominating the interpretation of such, judicial practices, as an exception to the rule, give authority to the courts to evaluate and recognize informal deeds and take precedence over formal deeds, which absolutely distorts the dynamic security of the recording system.

Conclusions

This paper shows that the main basis and fundamental theory of the Iranian recording system is “Ensuring Security” in real estate and its transactions, by which it means “Dynamic Security”. Transitioning from “Static security” to “Dynamic security” can protect the rights of third parties even if it is against the interests of the real estate owner, giving them a right to complain. Indeed, it gives priority to public interests over private ones. In spite of the above-mentioned fact, unfortunately, practical procedure in the courts has shown that judges have a tendency to apply “Static security”. This means that fundamental theory and rules have been forgotten in practice. Therefore, a judge may issue a sentence merely by applying the rules and principles of civil law, which has resulted in individual and private interests overriding public interests, and transactions along with the recording of real estate have become unsafe and insecure.

Finally the main result of the paper is to identify and recognize the basis of “Security theory” and theorize it, which will be absolutely helpful for legislators in order for them pay enough attention to the security of transactions when they are regulating rules, developing or amending them. It will also be useful for judges in following the same

practices in courts to provide stability and security in transactions involving recorded real estate. Therefore, in training judges in order to provide them with more knowledge about this theory when they are involved with relevant cases, is crucial to recognize and enforce “Dynamic security”.

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