

---

# THE EFFECT OF THE DECLARATORY SYSTEM OF PROPERTY RIGHTS OF THE PUBLIC RECORDS ABOUT THE LOAD PROCEDURE IN THE CIVIL COURTS OF THE PROVINCE OF AREQUIPA

## EL EFECTO DEL SISTEMA DECLARATIVO DE DERECHOS INMOBILIARIOS DE LOS REGISTROS PÚBLICOS SOBRE LA CARGA PROCESAL EN LOS JUZGADOS CIVILES DE LA PROVINCIA DE AREQUIPA

**Leonardo Alexander Condori Salcedo<sup>1</sup>, Claudia Valeria Ramos Mamani<sup>2</sup>, Yenifer Carol Urquiza Aguilar<sup>3</sup>, Francisco Javier Murillo Torrecilla<sup>4</sup>, Martín Sigifredo Career Cabrera<sup>5</sup>**

<sup>1</sup> *Estudiante de la Universidad Nacional de San Agustín de Arequipa, Facultad de Derecho, Av. Venezuela s/n - Pab. Principal Derecho 1º Piso Arequipa Perú.*

<sup>2</sup> *Estudiante de la Universidad Nacional de San Agustín de Arequipa, Facultad de Derecho, Av. Venezuela s/n - Pab. Principal Derecho 1º Piso Arequipa Perú.*

<sup>3</sup> *Estudiante de la Universidad Nacional de San Agustín de Arequipa, Facultad de Derecho, Av. Venezuela s/n - Pab. Principal Derecho 1º Piso Arequipa Perú.*

<sup>4</sup> *Docente de la Universidad Autónoma de Madrid, Facultad de Formación de Profesorado y Educación, c/Tomás y Valiente, 328049 Madrid España.*

<sup>5</sup> *Docente de la Universidad Nacional de San Agustín de Arequipa, Facultad de Derecho, Av. Venezuela s/n - Pab. Principal Derecho 1º Piso Arequipa Perú.*

*Email: ORCID 0000-0003-0619-1963, lcondorisa@unsa.edu.pe<sup>1</sup>, ORCID 0000-0003-1482-5217, cramosmama@unsa.edu.pe<sup>2</sup>, ORCID ORCID 0000-0003-1087-2411, yurquiza@unsa.edu.pe<sup>3</sup>, ORCID 0000-0002-8003-4133, javier.murillo@uam.es<sup>4</sup>, ORCID 0000-0002-7732-9635, mcarrerac@unsa.edu.pe<sup>5</sup>*

---

### ABSTRACT

The present article focuses on the specific analysis of the effects that the model has the Public Records of real Property is assumed by the administration of peru, that is to say, the system of a declaration of rights influence mainly French and that, with the passing of time, has resulted in a loss of general well-being to the extent that it causes an impairment of the trust on the work of the State to guarantee and promote the legal certainty that at the same time, undermines the legitimacy of the judicial work of the rights of property. That far from being guaranteed by the State, and one of their public administrations, that is, the National Superintendant of Public Records, is left at the mercy of the good faith of the citizens, and in default thereof, the Judiciary, settles on these causes. Therefore, while it is true, there is sufficient literature to warrant a copernican revolution on the registration system of peru, it is also true that one of the main sources of legislative activity are not discussions of pure law, but rather are political agendas that have to do with the story social; those that do walk the apparatus of law; which, for the case of this article, it will focus on the havoc that are generated by the system declaratory of rights in the civil courts of the province of Arequipa and as this increased the load procedure that generates distrust and loss of legitimacy of the citizens with regard to their government, both administrative and judicial.

**KEY WORDS:** declaratory System, the right furniture, public records, loading procedure, property.

### RESUMEN:

El presente artículo versa sobre el análisis específico de los efectos que tiene el modelo de Registros Públicos de Propiedad Inmueble asumido por el ordenamiento peruano, es decir, el sistema declarativo de derechos de influencia principalmente francesa y que, con el pasar del tiempo, viene generando una pérdida de bienestar general en la medida que provoca un menoscabo de la confianza sobre la labor del Estado de garantizar y promover la seguridad jurídica que al mismo tiempo, deteriora la legitimidad de la labor judicial de los derechos de propiedad. Que lejos de ser garantizados por el Estado mediante

una de sus administraciones públicas, esto es, la Superintendencia Nacional de los Registros Públicos, es dejado a merced de la buena fe de los ciudadanos y en su defecto, el Poder Judicial, dirime sobre estas causas. Por lo tanto, si bien es cierto, existe literatura suficiente para justificar un giro copernicano sobre el sistema registral peruano, también es cierto que, una de las principales fuentes de la actividad legislativa no son las discusiones de puro derecho sino más bien son las agendas políticas, que tienen que ver con el acontecer social; las que hacen andar el aparato legislativo; lo que, para el caso del presente artículo, se centrará en los estragos que genera el sistema declarativo de derechos en los juzgados civiles de la provincia de Arequipa y como esto aumentó la carga procesal que genera desconfianza y pérdida de legitimidad de los ciudadanos con respecto a sus autoridades tanto administrativas como judiciales.

**PALABRAS CLAVES:** Sistema declarativo, derecho mobiliario, registros públicos, carga procesal, propiedad.

## INTRODUCTION

This article of research funded by the National University of St Augustin of Arequipa-by-contract N° TP-13-2020. Concerns that the Public Record is not the prerogative of our region and we also could not say that he was born in the west, but there are clear signs that give account of its origin in Egypt, as in Rome, marking and two-stage registration: The Ptolemaic or nuanced by the civilization in Greek and the Roman Empire<sup>1</sup>. In the first of the cases the registry in addition to being used as a means of publishing rights to real estate; although it may seem like an anachronism; and, in addition, it was used as a record to raise taxes; it eventually fell into disuse because of its ineffectiveness giving birth to a file of acquisition or as it is today could be called a registry of property<sup>2</sup>. On the other hand, we have that in the roman law used a system for registration of advertising of all transactions for legitimacy to the traffic in real estate and at the same time restrict the transactions of high value assets, known as *res mancipi*<sup>3</sup>. In addition to these systems is the Registration System German, *mr.d*, and was born the so-called *Gewere*, important antecedent for the purposes of giving publicity to an act of legal relevance that granted ownership of a good; that is to say, he wore the thing as if trying to put a glove in respect of which the witnesses to the witness said act, stating they have seen such endowment, and therefore the property was made public.<sup>4</sup>

Leaving aside the classic systems of transfer of ownership, you can analyze the systems contemporaries of where appreciates that currently coexist in different latitudes, different Registration Systems, such as understand the nature of each one of them, or in respect of which it is the role of the State through its public administration, including with respect to, what is the legal strength enjoyed by the notaries, from these and many other criteria we can start by sorting the registration systems. So, for example, for the author, The Grasserie are four registration systems in the world, not for the author Moscatello who argues that only; positions that are at the same time at odds with the posture of Azpeitia who sums it up to two, n, however, for the purposes of this article we have in mind three types of registration systems: The System of Contract Unit; the System Transmissive double cause and the System of Separation of the Contract<sup>5</sup>.

---

<sup>1</sup> La Bariega, P. El Registro Público de Comercio: Una disquisición retrospectiva. *Boletín mexicano de derecho comparado*, 2006, 39(115), 147-191.

<sup>2</sup> Manzano, J. Cautelas legales sobre la transmisión de la propiedad en el derecho postclásico: las formalidades por el testimonio de los vecinos y la *insinuatio*. *Revue internationale des droits de l'antiquité*, 2010, (57), 487-519

<sup>3</sup> Quinde, K. Los principales mecanismos de protección de la propiedad inmueble para evitar los fraudes inmobiliarios por suplantación de identidad y falsificación de documentos. ¿ Son estos mecanismos eficientes?, 2019.

<sup>4</sup> Suárez, G. Régimen jurídico romano-visigodo del suelo (dominio-posesión-comunidad de bienes-superficie) y su encuentro feudal con *gewere* y *seisin* (s. V dC-S. XIII dC). *Revista de estudios histórico-jurídicos*, 2021, (43), 411-435.

<sup>5</sup> Vidal, R. *El sistema de transferencia de la propiedad inmueble en el derecho civil peruano*, 2018.

In the case of Peru, as in Mexico and Venezuela, the system adopted by the administration has been without a doubt the System of Contract Unit on its side Consensual or Spiritualist, is clearly inspired by the French; Italian and Portuguese. This System referred to is the one that prevails in the transmission of real estate properties in Perú. This can be seen for example in the article 949° of the Code Civil of the year 1984, also in the CC of the year 1936; in the same way it was treated in the articles 574° and 1306° CC 1852° and currently has maintained that thread declaratory system under the effect of the Civil Code in force in the year 1984 in the articles 949° and 947° to real estate and furniture respectively. However, the fact of maintaining a declaratory system in our registration system of real property has been generating conflicts of pure law, as well as others that affect, primarily, to the citizens and the Justice System in general<sup>6</sup>.

In that sense, whether it be that we understand the evolution of the phenomena legal and necessary facts born of the historical evolution of a given society in terms Savignianos or as a constant struggle from the perspective of Rudolf Von Iering, it is undeniable that all changed the law responds to a dialectical social that has sparked the disagreement of the members of the same. This is not the first text dedicated to perform a critique on the system spiritualist of the registration of rights to real estate in Peru, about Alfredo Bullard, from the perspective of the economic analysis of law argues that one of the fundamental pillars of the Freedom is the right of property, therefore, the economic transactions that are made on the properties should not only be safe but also that they should be done in the least amount of legal acts<sup>7</sup>

Have also spoken out against jurists peruvian Manuel de la Puente and Lavalle, who argues that the main problem with the legal system adopted by the DC current in the article 949° is that while it transfers the property to the dispense of the *traditio* maintains possession of the property in the seller which could lead to future inconveniences<sup>8</sup>, in the same line, to Felipe Osterling and Mario Castillo Freyre accepted as a system optimum of the title and the mode, because this mode of transferring property is needed; in addition to the conjunction of minds, a specific means to achieve the legal business, in this case, the recording in the public records<sup>9</sup>. Finally, in one of the most recognized studies of the registration system a peruvian professor Gunther Gonzales Barrón points out that the transaction of a property and the definition of its realization is due to a political mood in the measure in which the pass on the system spiritualist that gives the property without the need of the *traditio* one to book the transfer of the property to then regardless of the contract, give the property, that is, with the registration in the Public Registers<sup>10</sup>.

However, while there are pronouncements on the part of the academy to consider a change of system of registration, it is also true that beyond the arguments it is necessary to focus on the change of registration system from the perspective of the Theory of three-Dimensional on the Right, that is, the content of the right; the standard itself, you should aim to regulate what more appropriate as possible the interaction of the human life; their values and norms<sup>11</sup>. In that sense, the property in the ordering peruvian't find an adequate legal security for your reality, it is a detriment to the overall well-being, and thereby fails to comply with one of the three pillars of the theory of the right that is human life so that it is justified; based on this evidence, that the change of a registration system declarative one constitutive of rights is palpable and urgent, such as what has been described as the precursor to the political liberalism of John Locke the property is the main element of the society and, therefore, fundamental for the human life.

---

<sup>6</sup> Morales, E., & Sánchez, C. Modernización del sistema registra! peruano y venezolano: balance y perspectivas. *Derecho PUCP*, 1999, (52), 855-881.

<sup>7</sup> Bullard, A. *Sistemas de Transferencia de Propiedad*, En: *Derecho y Economía*, Palestra Editores, Lima, 2003. pp. 156

<sup>8</sup> De La Puente y Lavalle, Manuel. Perfeccionamiento de la transferencia de propiedad, En: *Scribas*, N°. 2, Arequipa, 1996, pp. 37-42.

<sup>9</sup> Osterling, F. y Castillo, M. La transferencia de Propiedad en el Perú, En: *Ius Et Praxis*, Universidad de Lima, N° 30, 1999, pp.163

<sup>10</sup> Barrón, G. *Tratado de derecho registral inmobiliario*. Ediciones Legales, 2010.

<sup>11</sup> Fernandez, C. Breves Reflexiones sobre el Objeto de Estudio y la finalidad del derecho. *Themis Revista de Derecho*, 2010, 60, 285-293.

## STRATEGY METHODOLOGY

The present study is characterized by design a non-experimental, because it does not manipulate the variable are investigated in their natural state (Arispe et al., 2020). Also is correlational, it seeks to identify and describe the relationship between the variables of the study to verify the hypothesis (Arispe et al., 2020). The operational definition of the variable 1 is: The effect of the declaratory system of property rights of the Public Records formed by the dimension declaratory system of law, which consists of 3 items and the dimension system of registration of rights to real estate, consisting of 3 items. Also, the second variable has the following operational definition: Load Procedural formed by the dimension of concentration of population, composed of 3 items and the dimension of concentration court composed of 4 items. In terms of the study population, this is formed by 3856 cases in the court provincial de Arequipa, r, compared to the sample for the present study, we used the probabilistic sample was drawn at random, which resulted in 836 cases as shown. After a rigorous analysis documentary on the theory that conceptualizes and characterized the variables of the study, with the aim of identifying their respective dimensions, we proceeded to the collection of quantitative data of the study sample. For this, we used the technique of the survey, taking as an instrument two questionnaires of opinion for both of you.

## LEGAL SYSTEM

According to the Royal Academy of the Spanish Language, is understood by the system to a set of principles or rules – in the highest sense, and not legal – in respect of a matter which by means of reason are intertwined with each other; likewise, it has a second meaning that defines system as a conglomerate of things related to each other that contribute to or are aimed at a certain goal<sup>12</sup>.

While it is true the word system is not a concept born in the right, if it is that, within the legal science, this concept denotes a fundamental pillar to reformulate the law, and in consequence all of the concepts within this form must be aligned to the cadence of his concept. In that sense, we can start by mentioning that a legal system or a legal system is a set of rules and principles that are intended to regulate the conduct of human beings, for example, for Kant the system or legal system as it is a science of law aims to regulate the behavior of each individual from the use of the practical reason that guides the actions of the people by a moral principle *a priori*, or conduct according to the moral<sup>13</sup>.

So also Kelsen and his Pure Theory of Law that unlike Kant raises a split between the right and the moral denoting a system of separate legal systems, social or religious to the extent that one of the main features of the legal systems are their mandates permissive, restriction of enablement and others that carry a characteristic that separates them from the rest, and that comes to be the coercion of the non-compliance of the fact that positivizado by the standard, so that, that would be your main distinction of the moral systems that can condemn the actions of their citizens from a personal level, whose impact has to do with the reputation or good customs, of the citizen and its environment, therefore, Kelsen describes a legal system governed by rules and customs when you are positivizadas and that, even, further, argues that the international legal system or the law of nations would be an order of moral rather than legal<sup>14</sup>.

You can say that there are several types of legal systems and to the same extent various definitions and legal system, as for example the legal system of the western culture; legal systems socialists, legal systems, religious – hebrero, muslim, and others – but all of them agree on different elements that have to do with a cluster of items with congruence between themselves as institutions; rules and principles, procedures, and processes that make up a state of positive law in a specific place and time. Of course, every nation or state has a legal system

---

<sup>12</sup> Real Academia Española, 2001.

<sup>13</sup> Kant, I. *Crítica de la razón práctica* (Vol. 1). Editorial Verbum, 2020.

<sup>14</sup> Kelsen, H. *Teoría pura del derecho*. Eudeba, 2020.

according to their social reality and its historical evolution<sup>15</sup>; the reader been of legal literature will be able to understand these lines in terms of Montesquieu in his famous book, *The Spirit of the Laws*<sup>16</sup>.

### Registration

The registry, it is a concept born from the Egyptian civilization and Roman, however, currently it is handled technical concepts and legal to define it. It can be considered a record as the space; whether it be physical or a virtual platform where perenniza in each one of these a fact or event. This, for third parties and the competent authorities are informed. This concept is so versatile for their use and their mainstreaming in the daily life comes to governing, for example, the adequacy of the language by the use of a particular group of people in a society<sup>17</sup>

### Registration System

The conception of registration law arises with the aim to shorten or simplify the rights on property, which in most cases is always complex; so that the one who holds the property can exhibit a good title, and with a high level of reliability that will ensure protection and the offer of his right in the property market, in any legal field, doing all kind of act of disposal, this is, contractual, judicial, or with the state through an administrative procedure; the reason why the holder of this right is conferred immunity against the attempt of third parties to appropriate what with that record belongs to you. In that same way, he seeks a better traffic their goods real estate at the same time provides guarantees for the people who carry out legal transactions with the said holder so that the legal system is benefited to provide its citizens effective mechanisms endowed with public faith that guarantee the rule of law and the social welfare in the Political Constitution of the Peruvian State is the supreme end of the State<sup>18</sup>

From another angle concept we can understand and distinguish a System of Registration of order of things or objects, born of the nature to the extent that the order of things, the proper law of nature, physical or biological, have no purpose whatsoever, but rather that they appear in the world by the principle of causality that exist or do not exist, happen, or do not. However, science is objective, in this case, the Science of Law, it does not follow that path, but that the Law itself as the study of the rules or the manufacture thereof are not present in nature since its creation is deliberate by the human being, therefore, we are facing a creation of the culture infused with the lived experience of the societies, who are born with reasons utilitarian, for the functions that best suit or for the purposes for which they were designed<sup>19</sup>. At this point, it fuses with the philosophical doctrine of Utilitarianism of Jeremy Bentham, who pretended that the purpose of the law was to ensure the mayoro wellness to the most amount of people taking then, a study and approach to economic Stuart Mill and that today has been a technical development from the concepts of the Maximum Pareto chart<sup>20</sup> that represents an application of public policies, among them the public records, to seek a state of things that will lead the citizen to do as much as you can of their life project.

Following the thread of the concept of registration of legal foregoing, you can ask two types of records in respect of two different planes, that is, the Being of the Registry, which holds that the advertisement contains

---

<sup>15</sup> Gonzáles, N. *Sistemas jurídicos contemporáneos*. 2010.

<sup>16</sup> de Secondat, C. *Espíritu de las leyes* (Vol. 1). Imprenta de Marcos Bueno, 1845

<sup>17</sup> Gregory, M., Carroll, S., & Rodriguez, L. *Lenguaje y situación: variedades del lenguaje y sus contextos sociales*. Fondo de Cultura Económica, 1986

<sup>18</sup> Gonzales, G. Bases Fundamentales del Derecho Registral. *Anuario Iberoamericano de Derecho Notarial*, 2016, 124-154.

<sup>19</sup> Carvalho, C. *Ficciones jurídicas en el derecho tributario*, Pacífico Editores, Lima, 2012, traducción de Carilín Lavado Herrera y Zain Cabrera Pepe, p. 65.

<sup>20</sup> Álvarez, Í. Utilitarismo y derechos humanos: la propuesta de John Stuart Mill. *Utilitarismo y derechos humanos*, 2009, 1-406.

or is defined within the registry, and at the same time, what is so because what characterizes the other records. On the other hand, we have the Reason for Logging; that is the purpose of the nature of the right, that comes to be your test function, the preservation of the rights that are published there, and, that, in addition to protect the claims and interests of third parties<sup>21</sup>

In general we can say that the Registration System is a legal institution which has as its purpose is to provide legal certainty of the rights published; providing all the advertising required for safeguarding the rights of the protected or not to disappoint the expectations of third parties, so it also serves to defend the rights acquired through legal businesses having an effect that is clear and direct in the consolidation of the transfers of the properties acquired or that are about to be Made<sup>22</sup>. In that same understanding<sup>23</sup>, you mentioned that the Registration System have as their purpose the protection and efficiency in addition to the traffic of real estate transactions, given that the expenses incurred to perform a cleanup of the property subject matter of the legal business tend to interrupt or to raise this type of transactions that could be solved with a proper system of registration<sup>24</sup>

Also, for Peña Bernaldo, the Registration System has positive effects not only for the individuals involved in the legal acts that emerged during the traffic of real estate, but gives a more holistic view about their effects within a State by mentioning that all of the registered rights facilitates the traffic and the credit territorial, which contributes to the development of the economy; that is, agriculture, export, construction and general industry, enabling the increase of the property and, therefore, from the owners to improve the economic indicators of the countries with the registration systems more robust in comparison with others<sup>25</sup>.

### **Registration System French**

The registration system of the born System Registry Peruvian real Estate is the French system, since the latter is known within the doctrine of the registry as of system of transcripts has to do with the transcription or make a copy of the act to register in the books that takes you to the registry office, which, with the purpose of providing legal security to the creditors or owners is that they first created a Registry of Mortgages. This system is known as the right of absolute ownership, in the measure that lawmakers can't force him to limitations, because the owner may dispose of its real property without a limit, or restrict any rights available to you.

So, it is understood that this type of system has as a main distinctive feature of the predominance of the title, that is to say, premium, above all, the will of the parties, that is, above the formalities, to create, terminate, modify and/or transmit rights over real estate properties, being knowledge only to the participants in the legal act, restricted to and by effect of the law some sort of publicity of the registry, and that is why this type of essence according to this Registration System that arises criticism. In that sense, you could say that the Registration System Francés is not directed to enforce the electronic items and the transactions generated in the public records, but is rather the opposite, and is invited to not appear the records of the transfer in the system registry.

In that sense, it is quite clear that in this system operates the classical measure of transmission by consensus, where the *res* that is the subject of sale is transferred in ownership to the acquirer by the simple agreement or the will of the contracting without that is set for this requirements, or as it is known: a mode. Therefore, they can appear three distinguishing features in this system: (i) If anything, the registration is compulsory the effects would be declarative of the rights becoming a necessity or formality of recording this right to have somehow opposability to third parties as also recognizes the Peruvian Civil Code; (ii) It creates an obligation by the effect of the act of attaching to the notary or public officials to seek this type of acts registration in the extent

---

<sup>21</sup> Heidegger, M. Lo que es algo, cómo es, lo llamamos su esencia, Arte y Poesía, FCE, México, 2014, p. 35.

<sup>22</sup> El Derecho Registral se debate hoy entre dos visiones antagónicas: Análisis Del “Realismo” Frente Al “Extremismo

<sup>23</sup> La Cruz, J. y Sancho, F. Derecho Inmobiliario Registral, Bosch, Barcelona 1984, pág. 11.

<sup>24</sup> La Cruz, J. y Sancho, F. Derecho Inmobiliario Registral, Bosch, Barcelona 1984, pág. 11.

<sup>25</sup> Peña, M. Derechos Reales. Derecho Hipotecario, CRPME, Madrid, 2º edición, Tomo II, 1999, pág. 439.

of its powers taking to do this to formulate legal wide base to ensure the greatest number of acts registration effective and (iii) In this type of registration system the holder of the rights to real estate is the subject of rights which go to the records, and it is around this subject, that the record stands, and ordered as a kind of ordering of the people and the system that it is not, by rights<sup>26</sup>

### Registration System German

The Registration System German is a very different analyzed and therefore other than the title registration system in peru, in the measure in which this is a Record Constitutive of Rights also known as the folio real that in addition to govern in Germany, it has also been adopted as the countries of Austria and Switzerland<sup>27</sup>.

This System Log has its particularity in the fact that the registration of real property with which this system is known as a folio real, that is to say, for each property is assigned a specific seat that contains in addition to the right of property *per se* and, therefore, contains the constitution of the right to represent the reality cadastral survey of the cities. That is to say, the information contained in this record represents and is constituted by the description, supported in planes that make up the cadastre mode despite the fact that the data that are registered in the files cadastral this record devoid of legal value in front of the law, to be considered for these maps and cadastral registers as an integral part of such registration, in what refers to its geo-location of the premises in addition to the extent of their boundaries is the literary content of this registration has evidentiary value in a court or judicial court, in the case of peru.

That is to say, the property has a legal reality with the account as a backup to the Registry, and additionally contains a physical reality; composed by location and measures, on that account, and supports the cadastre of the respective order. Therefore, you can understand that the data about the physical characteristics of the land in this register are also contained in the cadastre and in a manner contrary to the elements that contain the cadastre come to be the same that contains the Record; being banned from this Registration System that there is some kind of inconsistency between the data reflected from the land registry, and is listed in the registry which would cause a delay that would become inefficient the system registry.

Likewise, with the apparent level of responsibility that falls on this type of record establishing rights, is further manifested in a different way of organizing the rights, assigning the responsibilities and the hierarchy of their public administrations. En ordering German as well as in Switzerland, it is decentralized and not in Austria, this means that, in the two first-mentioned countries – Germany and Austria – the Log is in charge of the Ministry of Justice and the systems catastrarles are assigned to the local authorities. In Austria, it doesn't do so well, despite the fact that the Record is under the jurisdiction of the Ministry of Justice and the cadastral system is included and attached to Ministry of Economy, has a *big data* on your information centralized by storing the data in both the registry as the registry that can be accessed by the request of a party or searching by internet<sup>28</sup>

### System Registry Peruvian

The law peruvian unlike those mentioned above has marked a clear departure of the registration system civil law and has chosen one transfer eclectic or mixed transfer of immovable property by adopting a system of the uniqueness of the contract – where the importance of the consent – and taking the variation for the transfer or traffic of movable property, adopted the theory of the degree and mode. This can be seen with the utmost clarity of the analysis of the article 949° of the Code of Adjective which states that only the agreement of the

---

<sup>26</sup> Astudillo, M. *Derecho Registral de Bienes: Principios, evolución e importancia* (Bachelor's thesis, Universidad del Azuay), 2009.

<sup>27</sup> Barrón, G. H. G. (2012). El Derecho Registral se debate hoy entre dos visiones antagónicas: Análisis del “realismo” frente al “extremismo”. *Derecho y Cambio Social*, 9(27), 13.

<sup>28</sup> Cuenta, T. *Aplicación Del Sistema Registral Constitutivo Alemán En La Transferencia De Contrato De Compra Venta Inmobiliaria 2013-2014*, 2016.

parties grants ownership of an asset, in this case a property, the lender, regardless of any mode at the time of such transfer.

It is clear that this type of system declaratory of the right holds several errors, the inside of which we could say that the main two are: The first of these errors is which is the time that creates the above-mentioned obligation to dispose of, and which in fact does not constitute any obligation because if it does not lead to a provision evident and recognizable, even more, there is provision; attempting to remedy such occurrence with a legal fiction in that it is said that the benefit obligation arises and ends in that time, and that, therefore, the act of disposal, would not require of any provision of, or the deployment of any type of conduct that reflects the will of the parties<sup>29</sup>

Another evident weaknesses that have the mixed system of transfer peruvian is that it lacks a way, known as *modus acquirendi*, because, the national doctrine has assumed the theory of the title and the mode, in respect of which the same transfer of the domain of the *res* assumed by si same a title or a contract that would come to fill or clean the transfer of the domain, and therefore it would perform a kind of constitution of the right virtual and/or simulated. In that understanding, we can appreciate that the article 949° of the Code of Civil loses all of the above because it puts the emphasis on the single obligation, to resell, produces *ipso jure* the effect traslativo of the ownership of the property. What clearly has long been debated by various doctrinal and scholars trying to argue that there would be an incompatibility or estrangement with the so-called theory of the title and the mode by holding to the contrary that both are used, having as title the contract or the agreement, the mode would come to be constituted by the same assignment of rights. (Osterling, 1985)<sup>30</sup> and many others argue that it would be the same contract who would fulfill both roles, positions that are contrary to what the reality shows us in the measure that the biggest mistakes that presented the registration system adopted by the Peru not only has to do with the part of the doctrinal, dogmatic, and theory by which it is decanted into a legislator, but that is a problem of its practical use that evidence of a gap with the reality of the traffic of real estate properties in Peru (Ancajima, 2019)<sup>31</sup>.

### **Reality of the System Registry Peruvian**

The system registry peruvian is sustained by an old doctrine from the registration law French on the primacy of the will as an expression of sufficient cause to generate rights and obligations granted to these doctrines appearance and indisputable, and that for that same reason elusive to the critical immune to this thinking. Thus resonate various adages praying that “The Records contiene reality official”, “registration gives opposability” and many others who in reality have no place nor importance and that have been discussed for a long time but that, as well as put in the arena at the same time also disappear.

However, in our framework such that the statements are repeated over again and again and again. Many on the denominador “Old Registration Law” that would not need the registration and that it would focus on a questionable doctrine of ideology, in favor of large private interests who work in banking, finance, transnational companies that capitalized the property right to take land and to bury in various processes to those who do not have a legal arm as organiser and expensive. What expresses its firm objective of profit without regard for justice or a duty to be as long as they return the capital to its coffers, it is precisely these assumptions of where they are born mainly discussions about a change in the Registration System in Peru.

It is for this reason that the perspective of the discussion must change , and must focus on the real phenomena that occur in our society and which are the product of our culture and our idiosyncrasies, that could be, so to speak: The bad faith of the purchasers as a third party, misuse, possession or distortion, the acquisitive prescription of dominion with reasons fraudulent, errors or natural searched on the steps of the boundaries, the elements of fact that in many of the cases are discordant with the fact that it is published, all of these

---

<sup>29</sup> Cruz, G. La obligación de enajenar y el sistema de transferencia de la propiedad inmueble en el Perú. *Themis: revista de derecho*, 1994, no 30, p. 149-173.

<sup>30</sup> Osterling, F. Exposición de motivos y comentarios al Libro VI del Código Civil (Las obligaciones). *Revoredo de Debakey, Delia (comp.), Código Civil VI. Exposición de motivos y comentarios*. Lima: Artes Gráficas de la Industria Avanzada, 1985

<sup>31</sup> Woolcott, J. Ventajas de tener un registro constitutivo para la transferencia de propiedad, 2015.



potential errors can be presumed that the registry may grant a security-related and occasional because our society does not allow that to make sure beyond that; so that we must also be aware of the limitations that they have, in fact, any type of recording system in the world.

For that reason, it is not a system of registration of real estate perfect raised, much less argued that a registration system is, with precision, better than the other, without, or what has been established is a system registry realistic that takes into account the particular situations and complex characteristic of our customs and our way of doing business, legal, always seeking to take into account the object of transfer or of a transfer of ownership over the forms, to what best fits the system you consider the Title and the Mode. Because, it should be noted that the formalities tend to make users opt for the fraud, by the appearances to be able to pass a formality to another, also comes the bad faith, and therefore injustice. About it there is a book of Hernando de Soto title *The Other Path* where you realize that the bureaucratic apparatus of the state pushes to citizenship to the informality and the black markets, not because these people like to be in that situation, but they fit the standard of its conditions and so are at the margin of the law, to apply the rules according to their possibilities<sup>32</sup>, in this understanding have a registration system out of sync with reality will result in the evasion of the rule.

From the above it should be borne in mind that as well as there are social consequences in respect of a registration system that does not conform to the peruvian reality there is also evidence that these consequences, caused from the Legislative Power, affecting the Judiciary to the extent that all the flaws and the lack of guarantees of the Public Records Peruvian are resolved ultimately in the Judiciary, which generates costs to the citizen, it generates an expectation of entitlement that many times he looks disappointed as a judgment against or by the delay, causing a decay of the upstanding citizen in the justice system of this Country.

This can be seen with the utmost clarity in the statistical data that present this work to the extent that in the city of Arequipa, the perception of justice is quite low, and that people who are entangled in lawsuits that have to do with the right property refers not be supported in the first place by our registration system of real property, and in the second place, by the same Judiciary, as is the case in the civil courts of the city of Arequipa who support an over-load of records civilians who discuss subjects of property, and that before the entire load is not overwhelmed by passing to the managed and justiciable in a vicious circle from where they come out winners, those who can buy hearts and minds through their influences.

## RESULTS

Table 1 shows the results for testing the general hypothesis, at The 0.05 level of significance, we obtained a correlation coefficient of Spearman's Rho = 0.738\*\* to be interpreted as a positive relationship strong, with a  $\rho = 0.000$  ( $\rho < 0.05$ ); therefore, you agree that The declaratory system of property rights of the Public Records affecting the burden of procedure of the civil courts of the province of Arequipa

**Table 1** Correlation between el declaratory system of property rights of the Public Records (S. D. D. I. R. P.) and the load procedure (C. P.) of the civil courts of the province of Arequipa

Spearman's Rho		S. D. D. I. R. P.	C. P.
S. D. D. I. R. P.	correlation Coefficient	1,000	,738**
	Sig. (bilateral)	.	,000
	N	836	836
C. P.	correlation Coefficient	,738**	1,000
	Sig. (bilateral)	,000	.
	N	836	836

<sup>32</sup> De Soto, H., Ghersi, E., & Ghibellini, M. *El otro sendero*, 1987.

---

\*\* . The correlation is significant at the level of 0.01 (bilateral).

---

*Note.* Own elaboration (2022)

In Table 2 we show the results for testing the general hypothesis, at The 0.05 level of significance, we obtained a correlation coefficient of Spearman's Rho = 0.684\*\* to be interpreted as a positive relationship moderate, with a  $\rho = 0.000$  ( $\rho < 0.05$ ); therefore, you agree that el declaratory system of property rights of the Public Records affecting the demographic concentration of the loading procedure of the civil courts of the province of Arequipa.

This means that, in the civil courts of the province of Arequipa, the ravages generated and accumulated during all these years by the system declarative rights presents arguments concretors on their inefficiency when is check that the charging process is generated in the civil courts for reasons on the property that are on the rise due to a mismatch between the cadence of the traffic legal real estate and the way in which to grant the same, and that also transfers the costs of its failure to the citizens that represents clear evidence to support a change in the system registry peruvian real estate to be declarative to be constitutive.

**Table 2** Correlation between el declaratory system of property rights of the Public Records (S. D. D. I. R. P.) and the concentration of population of the load litigation (C. D. C. P.)

<b>Spearman's Rho</b>		<b>S. D. D. I. R. P.</b>	<b>C. P.</b>
	correlation Coefficient	1,000	,684**
<b>S. D. D. I. R. P.</b>	Sig. (bilateral)	.	,000
	N	836	836
	correlation Coefficient	,684**	1,000
<b>C. D. C. P.</b>	Sig. (bilateral)	,000	.
	N	836	836

\*\* . The correlation is significant at the level of 0.01 (bilateral).

---

*Note.* Own elaboration (2022)

In Table 3 we show the results for testing the general hypothesis, at The 0.05 level of significance, we obtained a correlation coefficient of Spearman's Rho = 0.719\*\* to be interpreted as a positive relationship strong, with a  $\rho = 0.000$  ( $\rho < 0.05$ ); therefore, it is evident that the declaratory system of property rights of the Public Records affecting the concentration court of the loading procedure of the civil courts of the province of Arequipa

**Table 3** Correlation between the declaratory system of property rights of the Public Records (S. D. D. I. R. P.) and the concentration court of the loading procedure (C. J. C. P.)

<b>Spearman's Rho</b>		<b>S. D. D. I. R. P.</b>	<b>C. J. C. P.</b>
	correlation Coefficient	1,000	,719**
<b>S. D. D. I. R. P.</b>	Sig. (bilateral)	.	,000
	N	836	836

	correlation Coefficient	,719**	1,000
<b>C. J. C. P.</b>	Sig. (bilateral)	,000	.
	N	836	836

\*\* . The correlation is significant at the level of 0.01 (bilateral).

*Note.* Own elaboration (2022)

As it has been developed in the present article the System Registry Peruvian real Estate is spiritual, that is to say, follows the French model, where the will of the parties is an element sufficient to transfer a property right, however, in the present article, and then write down the advantages and disadvantages of the registration systems declarative of right – Frances – and registration systems constitutive of rights – such as the German – in other words, just hold the title prescindíendose of the mode to be able to make a real estate property law.

However, the reality of the system registry peruvian is that the ordinary citizen must traverse the corridors of the Judiciary to discuss the right of property against third parties because it is an alarming fact that of the total new land that is enabled in Peru, 93% are informal<sup>33</sup> and, therefore, this informality is the result that citizens of good faith to acquire the right of property, but cannot dispose of (sell, transfer, test, among others) of them by double sales or triplis sales that are made on the same premises. This is an alarming reality has an impact on the citizens, affecting its economy and at the same time, the legitimacy of the rule of Law and confidence in the judicial system so that it warns of the statesman who work pages later.

It is for this reason that a proposal that would reverse the damage that causes the system registry current real estate in Peru would be that for the case of a transfer of property to apply the Theory of the Title and the Mode, that is to say, to acquire a right of ownership of immovable property not need the legal act resulted in a document that certifies that the legal business is conducted, but to the right of the property that is born of this contract take effect the legal system should make the deployment of its effects in a way that would come to be the registration in the Public Registers, achieving such a way that the principle of succession as well as the filter made by the registrar prevent fraudulent sale, and which in the worst cases, the buyer will not be able to claim ignorance, but more well-brought against him or negligence.

Note that there arises a Registration System as radical as the German, but that adds an additional requirement of validity to the transfer of the right of ownership of real estate that would come to be that the contract, in addition to the will of the parties, it should also consider that their right to be published in the Registry of Property of the SUNARP. That way, it would strengthen the legal certainty of the traffic of real estate properties, reduce transaction costs, citizens would receive a greater general well-being, and above all, we would improve our economic indicators.

## CONCLUSIONS

You can set that the consequences of having taken a Registration System of real Property declaratory of the right tend to citizens not to find legal certainty and thus tend to appeal to the civil courts for a judge who will deliver justice. Therefore, there is a proportional relationship between the legal uncertainty generated by the system declaratory of the rights of the real Property records in relation to the loading procedure of the civil courts of the city of Arequipa.

On the other hand, it is evident that where it generates more traffic legal properties, is where it generates the largest burden in the proceedings, so that, it is a symptom patent system registry peruvian shift the burden of the civil courts to the places where there is greater traffic of land which creates an imbalance of charge procedural generating a perception of injustice to the parties to the proceedings that litigate in this court for

<sup>33</sup> Soria, F. Infomalidad en el sector inmobiliario: ¿Cómo afecta a los proyectos de infraestructura y que hacer frente a ella? 2020.

reasons beyond their work must endure a greater amount of records as there is a fair redistribution of the records under demographic criteria.

Well, taking into account the results obtained, we have the System of transfer of real property in force in Peru leads to a particular consequence of the legal system national on real estate is located under a declaratory system of rights that causes a particular charge buildup procedure in civil matters, unlike their peers who even has given rise to two separate full casatorios mod the load affects not only the first level of justice of the Power of the Judiciary, but it is replicated in all of its instances.

## ACKNOWLEDGMENTS

We are grateful to the Mg. Yoselin Huapaya Capcha and the Abog. Diego Jet Palomino for your kind comments on an earlier version of the manuscript. The first author would like to thank the National University of St Augustin of Arequipa for the economic support through the contract number TP-13-2020-UNSA.

## REFERENCES

1. Álvarez, Í. *Utilitarismo y derechos humanos: la propuesta de John Stuart Mill. Utilitarismo y derechos humanos*, España, UNED, 2009, 1-406.
2. Barrón, G. H. G. (2012). El Derecho Registral se debate hoy entre dos visiones antagónicas: Análisis del “realismo” frente al “extremismo”. *Derecho y Cambio Social*, 9(27), 13.
3. Barrón, G. *Tratado de derecho registral inmobiliario*. Ediciones Legales, 2010.
4. Bullard, A. *Sistemas de Transferencia de Propiedad, En: Derecho y Economía, Palestra Editores*, Lima, 2003. pp. 156.
5. Carvalho, C. *Ficciones jurídicas en el derecho tributario*, Pacífico Editores, Lima, 2012, p. 65.
6. Cruz, F. *La obligación de enajenar y el sistema de transferencia de la propiedad inmueble en el Perú*. Themis: revista de derecho, 1994, no 30, p. 149-173.
7. Cuenta, T. *Aplicación Del Sistema Registral Constitutivo Alemán En La Transferencia De Contrato De Compra Venta Inmobiliaria 2013-2014*, Juliaca, Universidad Andina Néstor Cáceres Velásquez, 2016
8. De La Puente y Lavalle, M. *Perfeccionamiento de la transferencia de propiedad*, PUCP, 1996, pp. 37-42.
9. De Secondat, C. *Espíritu de las leyes* (Vol. 1). Imprenta de Marcos Bueno, 1845.
10. De Soto, H., Ghersi, E., & Ghibellini, M. *El otro sendero*. 1987.
11. Fernández, C. *Breves Reflexiones sobre el Objeto de Estudio y la finalidad del derecho*. Themis Revista de Derecho, 2010, 60, 285-293.
12. Gonzales, G. *Bases Fundamentales del Derecho Registral*. Anuario Iberoamericano de Derecho Notarial, 2016, 124-154.
13. González, N. *Sistemas jurídicos contemporáneos*. 1era Edición. Nostra Ediciones S.A, 2010.
14. Gregory, M., Carroll, S., & Rodríguez, L. *Lenguaje y situación: variedades del lenguaje y sus contextos sociales*. Fondo de Cultura Económica, 1986
15. Heidegger, M. *Lo que es algo, cómo es, lo llamamos su esencia*, Arte y Poesía, FCE, México, traducción de Samuel Ramos, 2014, p. 35
16. Kant, I. *Crítica de la razón práctica* (Vol. 1). Editorial Verbum, 2020.
17. Kelsen, H. *Teoría pura del derecho*. Eudeba, 2020.
18. La Bariega, P. *El Registro Público de Comercio: Una disquisición retrospectiva*. Boletín mexicano de derecho comparado, 2006, 39(115), 147-191.
19. La Cruz, J. y Sancho, F. *Derecho Inmobiliario Registral*, Bosch, Barcelona, 1984, p. 11.
20. Manzano, J. *Cautelas legales sobre la transmisión de la propiedad en el derecho postclásico: las formalidades por el testimonio de los vecinos y la insinuativo*. Revue internationale des droits de l'antiquité, 2010, (57), 487-519
21. Morales, E. & Sánchez, C. *Modernización del sistema registra peruano y venezolano: balance y perspectivas*. Derecho PUCP, 1999, (52), 855-881.
22. Osterling, F. *Exposición de motivos y comentarios al Libro VI del Código Civil (Las obligaciones)*. Revoredo de Debakey, Delia (comp.), *Código Civil VI. Exposición de motivos y comentarios*. Lima: Artes Gráficas de la Industria Avanzada, 1985.

23. Osterling, F. y Castillo, M. *La transferencia de Propiedad en el Perú*, En: Ius Et Praxis, Universidad de Lima, N° 30, 1999. pp.163
24. Peña, M. *Derechos Reales. Derecho Hipotecario, CRPME*, Madrid, 2º edición, Tomo II, 1999, pág. 439.
25. Quinde, K. *Los principales mecanismos de protección de la propiedad inmueble para evitar los fraudes inmobiliarios por suplantación de identidad y falsificación de documentos ¿Son estos mecanismos eficientes?*, 2019.
26. Real de la Lengua Española. *Diccionario de la Lengua Española*, 2001.
27. Soria, F. *Informalidad en el sector inmobiliario: ¿Cómo afecta a los proyectos de infraestructura y que hacer frente a ella?* 2020.
28. Suárez, G. *Régimen jurídico romano-visigodo del suelo (dominio-posesión-comunidad de bienes-superficie) y su encuentro feudal con gewere y seisin (s. V dC-S. XIII dC)*. Revista de estudios histórico-jurídicos, 2021, (43), 411-435.
29. Vidal, R. *El sistema de transferencia de la propiedad inmueble en el derecho civil peruano*, 2018.
30. Woolcott, J. *Ventajas de tener un registro constitutivo para la transferencia de propiedad*, 2015