

INTERNATIONAL JOURNAL OF  
DIGITAL AND DATA LAW

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REVUE INTERNATIONALE DE DROIT  
DES DONNÉES ET DU NUMÉRIQUE



 **IMODEV**  
LES ÉDITIONS

Vol. 9 - 2023

ISSN 2553-6893

International Journal of Digital and Data Law  
Revue internationale de droit des données et du numérique

Direction :  
Irène Bouhadana & William Gilles

ISSN : 2553-6893

**IMODEV**  
49 rue Brancion 75015 Paris – France  
[www.imodev.org](http://www.imodev.org)  
[ojs.imodev.org](http://ojs.imodev.org)

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**Irène Bouhadana**, docteur en droit, est maître de conférences en droit du numérique et droit des gouvernements ouverts à l'Université Paris 1 Panthéon-Sorbonne où elle dirige le master Droit des données, des administrations numériques et des gouvernements ouverts au sein de l'École de droit de la Sorbonne. Elle est membre de l'Institut de recherche juridique de la Sorbonne (IRJS). Elle est aussi fondatrice et Secrétaire générale de l'IMODEV. Enfin, associée de BeRecht Avocats, elle est avocate au barreau de Paris et médiatrice professionnelle agréée par le CNMA.

**William Gilles**, docteur en droit, est maître de conférences (HDR) en droit du numérique et en droit des gouvernements ouverts, habilité à diriger les recherches, à l'Université Paris 1 Panthéon-Sorbonne où il dirige le master Droit des données, des administrations numériques et des gouvernements ouverts. Il est membre de l'Institut de recherche juridique de la Sorbonne (IRJS). Il est aussi fondateur et Président de l'IMODEV. Fondateur et associé de BeRecht Avocats, il est avocat au barreau de Paris et médiateur professionnel agréé par le CNMA.

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## ABOUT US

The **International Journal of Digital and Data Law / Revue Internationale de droit des données et du numérique (RIDDN)** is an academic journal created and edited by Irène Bouhadana and William Gilles at IMODEV, the Institut du monde et du développement pour la bonne gouvernance publique.

**Irène Bouhadana**, PhD in Law, is an Associate professor in digital law and open government law at the University of Paris 1 Panthéon-Sorbonne, where she is the director of the master's degree in data law, digital administrations, and open governments at the Sorbonne Law School. She is a member of the Institut de recherche juridique de la Sorbonne (IRJS). She is also the founder and Secretary General of IMODEV. Partner at BeRecht Avocats, she is an attorney at law at the Paris Bar and a professional mediator accredited by the CNMA.

**William Gilles**, PhD in Law, is an Associate professor (HDR) in digital law and open government law at the University of Paris 1 Panthéon-Sorbonne, where he is the director of the master's degree in data law, digital administration and open government. He is a member of the Institut de recherche juridique de la Sorbonne (IRJS). He is also founder and President of IMODEV. Founder and partner at BeRecht Avocats, he is an attorney at law at the Paris Bar and a professional mediator accredited by the CNMA.

**IMODEV** is an international, independent, non-profit scientific organization created in 2009 that promotes good public governance in the context of the information and digital society. This network brings together experts and researchers from around the world who, through their work and actions, contribute to a better knowledge and understanding of the digital society at the local, national or international level by analyzing, on the one hand, the actions of public authorities in the context of the regulation of the data society and the digital economy and, on the other hand, the ways in which digital public policies are implemented within public administrations and open governments.

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- 1) the *International Journal of Open Governments/ la Revue Internationale des Gouvernements ouverts (RIGO)* [ISSN 2553-6869] ;
- 2) the *International Journal of Digital and Data Law / la Revue internationale de droit des données et du numérique (RIDDN)* [ISSN 2553-6893].

## **PUBLIC DIGITAL DEED AND THE TRANSFERENCE OF REAL ESTATE IN BRAZIL**

by **Ricardo HASSON SAYEG**, Professor at the Faculty of Law of the Pontifical Catholic University of São Paulo – PUC-SP, Member of the Superior Council of CAPES of the Ministry of Education, Attorney at Law at the Brazilian Bar Association, and

**Carla SAYEG**, Chief of Staff of the Rector of Oswaldo Cruz University, Former chief of staff of Councilman Eduardo Tuma at the City Council of São Paulo, CEO of HSLAW Law Firm.

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**T**he legal system must guarantee security in the digital transfer of property of real estate. The logic behind proving property, regarding movable goods is that property is presumed via possession, meaning that, whoever is possessing something is presumed to be its owner. However, when dealing with real estate, simple possession does not have a firm impact regarding a presumption of ownership, except for adverse possession. Therefore, historically, the acquisition of property regarding real estate is surrounded by solemnity, as in Brazil, the public deed is considered as the substance of the act of transference. However, due to the technological advancements, the use of a digital public deed of property has been admitted by Brazilian law and is valid for all intents and purposes.

### **§ 1 – THE BASIC OF TRANSFERENCE OF PROPERTY IN BRAZIL**

The right to private property is enshrined in the Brazilian Federal Constitution in article 5, where the fundamental rights and guarantees of the Brazilian citizen are found. Therefore, we have to explain first why this change is so important.

#### **A) The Idea of Transference of Private Property**

The right to private property corresponds to the most primitive of the external freedoms through the domination of things by the individual as a natural derivation of individual property.

Private property corresponds to one of the structural and basic perspectives of human rights, enshrined in Art. 17, I, of the Universal Declaration of the United Nations of San Francisco/1948.

There is not a single human being who does not have something in the individual sphere of his private property. Private property is interwoven to such an extent with the human being that it comes to be considered an extension of his own person.

Martin Cooper said he wanted the cell phone to become an extension of people's arms<sup>1</sup> and in a way achieved this result. Classically, just remember the personal garments or sword, shield, spear and bow and arrow of the warrior. That is what always present private property.

The right to private property is not a personal right exercised in the face of another person, but rather a real right exercised directly by the holder over the thing.

Finally, the right to private property is the right of domination, *dominium* as the Romans would say, and therefore opposable before third parties<sup>2</sup>.

So, the right to private property is a right of conquest and domination over something, so that, in a civilized environment, presupposes a legitimate title of ownership and is usually acquired by consensus, that is, by the contract of purchase and sale.

Conquered the property, with domain subjecting the thing, in civilized environment, the granting of the respective title of private property legitimizes the acquisition and exercise of the respective right over the object.

In the case of movable property, where the vehicle of exercise and domination is, in principle, the body itself, the possession of the movable property by the person presumes the existence of the title of property, in accordance with the classical rule of French law, provided for in the Napoleon's Code.

The logic of proof of ownership in the face of movable property is that the possession of the movable property presumes ownership, consequently the proof of acquisition of movable property is naturally simple, confirming the possession exercised. That is, what you carry with you is presumed to be yours.

## **B) Immovable Property – Real estate**

The logic of proof of ownership in the face of movable property is that the possession of the movable property presumes ownership, consequently the proof of acquisition of movable property is naturally simple, confirming the possession exercised. That is, what you carry with you is presumed to be yours.

As far as real estate is, in the case of immovable property, what are the root assets, of course, the holder of the private property is not able to carry his object with him. So, ownership doesn't necessarily presume real estate.

In fact, in the Brazilian civil system, property rights over real estate are acquired with real estate registration with a public deed. This is

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<sup>1</sup> T. ANJARWALLA, "Inventor of cell phone: We knew someday everybody would have one", CNN: 2010:

<http://edition.cnn.com/2010/TECH/mobile/07/09/cooper.cell.phone.inventor/index.html>

<sup>2</sup> J. C. MOREIRA ALVES, *Direito Romano*, 14. Ed., Rio de Janeiro: Forense, 2010, Chap. XXIII, pp. 293-334.



confirmed by the wording of art. 1227 of the Civil Code: “The rights in real estate constituted, or transmitted by acts between the living, are acquired only with the registration in the Registry of Real Estate of said securities (arts. 1245 to 1247) [...]”

Art. 1245, of the *same codex*, expressly provides that the property is transferred between living property by registering the translative title in the Real Estate Registry. As Vitor Frederico Kumpel and Carla Modina Ferrari teach, in their Notarial and Registral Treatise, about the aforementioned legal provision:

“Thus, in determining art. 1.245, of the Civil Code that the property of real estate, by acts between the living, is only transmitted ‘by registering the translative title in the Real Estate Registry’, acquires the real estate record the constitutive effect of property”.<sup>3</sup>

Thus, in view of this being a constituent element of ownership, the registration brings the presumption of representing the reality of the legal business corresponding to the transfer of ownership. As Pontes de Miranda teaches: “What you want with the register is that it translates, in the papers or in the books of the registry office, the truth about legal relations out there.”<sup>4</sup>

## §2 – THE CONCEPT OF PUBLIC FAITH

Thus, in view of its function of representing the reality of legal relations, the real estate record, represented by the respective public deed, is endowed with public faith.

### A) The Concept of Public Faith in Physical Transaction of Property

As Pontes de Miranda again teaches, Public Faith in this context has the following function: “Public Faith – The public faith of the registration of real estate ensures the validity of future transmissions”<sup>5</sup>

In addition, Orlando Gomes asserts that:

“The principle of public faith of the record translates the value of its proof. Brazilian law states that “it is presumed to belong to the real right to the person in whose name you have signed up, or transcribed”<sup>6</sup>.

In the same vein, Washington de Barros Monteiro, on the probant force, outlined that: “(II) – probant force, is founded on the public faith inherent in registration, because it presumes the law belongs

<sup>3</sup> V. F. KÜMPEL, & *al.*, *Notarial and Registral Treaty*, Vol. 5, Sao Paulo: Yk Publisher, 2017, p. 62.

<sup>4</sup> P. de MIRANDA, *Direito das Coisas: propriedade, aquisição da pro-priedade imobiliária*, atualizado por L. E. FACHIN, (coleção tratado de direito privado: parte especial: tomo 11), São Paulo: Editora Revista dos Tribunais, 2012 p. 309.

<sup>5</sup> *Ibidem*.

<sup>6</sup> Orlando GOMES, *Direito Reais*, 10<sup>a</sup> ed., Rio de Janeiro: Forense, 1988, p. 137.

to the real right to the person in whose name was transcribed therein.”<sup>7</sup>

This presumption, as Afranio de Carvalho preemptives, originated from a composition between the principles of legal certainty and trade security. Check it out:

“This composition of antagonistic interests, this formulation of coexistence, was found by the German Civil Code in the adoption of the two principles of material law, because there the relaxation of legal certainty by the security of trade can rest on a land record, through which the transmissions and charges of real estate operate in such a way that there tends to always be full correspondence between the real situation and the recorded situation. In this way, the problem virtually ceases to exist, since the acquirer always makes a regular acquisition to the true owner, no longer insecurity for any of them: security is common”.<sup>8</sup>

Caio Mario da Silva Pereira teaches that:

“Once the transcription has been made, or the entry of a title constituting any other right other than the property, the actual right is presumed to belong to the person in whose name he has been transcribed or entered (Civil Code, art. 859), and the property shall be considered acquired on the date of presentation of the title to registration [...]”<sup>9</sup>.

Which means that the title that granted the property and the domain of the property, as well as the other rights in rem, was issued and registered in the respective Real Estate Registration, in the competent Real Estate Registry, characterizing undoubtedly fair title of possession and property in good faith.

As Carlos Roberto Gonçalves teaches,

“the possession of the acquirer is presumed in good faith, because it is in a fair title. Indeed, the title normally skilled at transferring the domain, which is formally perfect, provokes in the acquirer the belief (*opinio domini*) that he became the owner.”<sup>10</sup>

Thus, the aforementioned jurist defines a fair title as that apt “to give rise to the belief that one is the owner” and, to do so, “must coat the external formalities and be registered with the real estate registry office”<sup>11</sup>.

<sup>7</sup> W. de BARROS MONTEIRO, *Curso de Direito Civil*, 13<sup>a</sup> ed., Vol. 3., São Paulo: Saraiva, 1974, p. 107.

<sup>8</sup> A. de CARVALHO, *Registro de imóveis: comentários ao Sistema de registro em face da lei n° 6.015 de 1973*, com as alterações da Lei 6216, 1975, Rio de Janeiro: Forense, 1976, p. 169.

<sup>9</sup> C. M. da SILVA PEREIRA, *Instituições de Direito Civil*, 3<sup>a</sup> ed. Vol. IV., Rio de Janeiro: Forense, 1978 p. 115.

<sup>10</sup> C. R. GONÇALVES, *Brazilian Civil Law*, 11th ed., Vol 5., São Paulo: Saraiva, 2016, p. 286.

<sup>11</sup> C. R. GONÇALVES, *Brazilian Civil Law*, 11th ed., Vol 5., São Paulo: Saraiva, 2016, p. 287.



And thus, the title of private real estate property, expression of the very primitive freedom of the human being, is surrounded by formality that, in principle, corresponds to a public deed representative of the acquisition contract that is tied to its chain of property, by which the previous owner makes the transfer to the subsequent owner, other than the other possibility of legal acquisition.

## **B) Public Faith in The Electronic Public Deed**

On the other hand, nowadays, it is impossible to think of the world without the Internet. It is an integral part of the homes of people around the world. To be connected to the World Wide Web has become a necessity of extreme importance. The Internet is also present in schools, colleges, businesses and various locations, enabling access to information and news from the world in just one click.

Which means, it is easy to affirm that the internet changed the world as

“it [is] a sophisticated multidisciplinary tool enabling individuals to create content, communicate with one another, and even escape reality. Today, we can send data from one end of the world to the other in a matter of seconds, make online presentations, live in parallel ‘game worlds,’ and use pictures, video, sound, and text to share our real lives, our genuine identity. Personal stories go public; local issues become global... The Internet has changed business, education, government, healthcare, and even the ways in which we interact with our loved ones — it has become one of the key drivers of social evolution”<sup>12</sup>.

Therefore, the virtual and artificial environment of the data is integrated with so much penetration in the Brazilian legal system that it has overcome the resistance of the physical formalization of the title of ownership of real estate coming to admit, according to the administrative rules of the National Justice Council and the General Internal Affairs of various Courts, organs of the Brazilian Judiciary, the digital public deed of transfer of private real estate property.

This is the tendency of other countries citing the notable example of Australia<sup>13</sup>, which created the electronic transference document,

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<sup>12</sup> Z. DENTZEL, “How the Internet Has Changed Everyday Life”, *Ch@nge: 19 Key Essays on How the Internet Is Changing Our Lives*, BBVA, Madrid, 2013, at: <https://www.bbvaopenmind.com/en/articles/internet-changed-everyday-life/>.

<sup>13</sup> AUSTRALIA, Land Registry Services, “Transfer (electronic)”, 2021: [https://rg-guidelines.nswlrs.com.au/e-dealings/elodgment/dealings\\_eligible\\_for\\_elodgment/transfer\\_electronic#:~:text=A%20Transfer%20instrument%20is%20used,all%20the%20registered%20proprietors%3B%20or](https://rg-guidelines.nswlrs.com.au/e-dealings/elodgment/dealings_eligible_for_elodgment/transfer_electronic#:~:text=A%20Transfer%20instrument%20is%20used,all%20the%20registered%20proprietors%3B%20or)

in accordance with the Real Property Amendment (Certificates of Title) Act 2021<sup>14</sup>.

In fact, Brazilian law guarantees this digital transfer of property ownership.

In Brazil, these public deeds, even of the electronic nature are treated as authentic and holders of public faith, in accordance with the law, regulated by the National Justice Council, CNJ via Provimento N° 89 de 18/12/2019<sup>15</sup>

Therefore, notary acts concluded by electronic means produce the effects provided for, in the legal system, when they comply with the necessary requirements for their validity, established by law.

To this end, the parties appearing to the electronic notarial act must accept the use of notarial videoconference, the use of certified electronic signatures, the signature of the notary of notes and, if applicable, reciprocal biometrics.

The identification, recognition and qualification of the parties, in a remote way, will be made by the presentation of the original electronic identity route and by the set of information to which the notary had access, and may use, in particular, the system of identification of the e-Notary, scanned documents, signature cards opened by other notaries, public or own biometric bases, as well as, at its discretion, other security instruments.

It is important to note that the storage of the capture of the facial image in the register of the parties allows the dismissal of the need of collection of the respective fingerprint when required.

The Public Notary of the district of the property or the domicile of the acquirer is incumbent, remotely and exclusively, to draw up the deeds electronically, through the e-Notary, with the realization of videoconference and digital signatures of the parties.

As a result, in Brazil, the Electronic Notary Acts System was established, e-Notary, available on the Internet by the Notarial College of Brazil – Federal Council, equipped with technological infrastructure necessary for electronic notarial action, with the objective of: *i.* “interconnecting notaries, allowing the practice of electronic notaries, the exchange of documents and the traffic of information and data”; *ii.* “improving technologies and processes to enable notarial service in electronic environment”; *iii.* “implementing, at the national level, a standardized system for the elaboration of electronic notary acts, enabling the request of acts, certificates and the realization of agreements with interested parties”; and *iii.* “implementing the Electronic Notarial License Plate – MNE”.

By the way, the e-Notary offers access to the data and information contained in its database for the competent law responsible for the

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<sup>14</sup> AUSTRALIA, Office of the Registrar General, “100% eConveyancing in NSW”, 2021: <https://www.registrargeneral.nsw.gov.au/property-and-conveyancing/eConveyancing/abolition-of-certificates-of-title>

<sup>15</sup> BRAZIL, Provimento N° 89 de 18/12/2019: <https://atos.cnj.jus.br/atos/detalhar/3131>

supervision of the extrajudicial activity, for the Internal Affairs of the States and the Federal District and for the National Internal Affairs of Justice.

Furthermore, notaries, in person or through the e-Notary, provide technological means for accessing exclusively statistical and generic information to the Direct Public Administration, being denied the sending and transfer of data, unless specific legal or judicial provision.

The Electronic Notary Acts System, e-Notary, is implemented and maintained by the Notarial College of Brazil – Federal Council, without burden or expenses for the National Council of Justice and other organs or entities of the Public Power.

For the implementation and management of the e-Notary system, the Notarial College of Brazil - Federal Council: *i.* “adopted the necessary operational measures, coordinating the implementation and operation of electronic notary acts, issuing electronic certificates”; *ii.* “established criteria and technical standards for the selection of banknote tabelionates authorized to issue electronic certificates for the drafting of electronic notary acts” and *iii.* “established standards, criteria and security procedures related to electronic signatures, digital certificates and issuance of electronic notary and other technological aspects related to its proper functioning”.

## CONCLUSION

Thus, recognizing the digital atmosphere, Brazil has adopted the digital public deed of transfer of property from immovable property the form and validity of which are fully admitted and predictively produce the regular trans asset legal effects of private property.

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