

The Exercise of National Agency for Tourist the Right of Emption Chafaa

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Reveived : 21/07/2025 ; Accepted : 21/12/2025 ; Published : 29/01/2026

Abstract:

The National Agency for the Développement of Tourisme has assigned the public institution of economic and commercial character to prepare, upgrade and purchase the tourist property provided that it is within the expansion areas and tourist sites to be resold to investors or granted by the Agency as a concession to them, And to exploit the rest of them all with the aim of contributing to the achievement of the sustainable développement that Algeria wishes to achieve.

Keywords: Areas of expansion . chafaa. Agency. Tourism Property.

Introduction:

Tourism is a vital sector, offering significant financial returns in less time and with less investment than the production and industrial sectors. Its ability to generate foreign currency has led many countries to adopt it as a primary source of national income, either to increase it or to improve their balance of payments.

Tourism impacts other sectors, including services, traditional crafts, trade, and culture. Its influence extends to the political and social spheres, as it reduces unemployment by creating jobs.

Therefore, investing in the tourism sector has become essential due to its vital role in achieving development. Given Algeria's abundant potential, including stunning natural landscapes and historical and archaeological sites that qualify it to become a global tourist destination, Algeria has adopted a national policy for regional planning and sustainable development to leverage all these resources. The aim is to drive national development and create a source of income to replace the hydrocarbon sector, whose prices are volatile in the global market and whose reserves are ultimately depleted. Consequently, several institutions and bodies were established to regulate tourism investment, including the National Tourism Council, the Algerian National Tourism Office, and the National Tourism Développement Agency, which regulates and manages tourism real estate. The agency also acquires tourism real estate through amicable agreements or by exercising its right of pre-emption.

In light of the above, the central question is: What is the National Tourism Development Agency, and how does the law regulate its exercise of the right of pre-emption?

To answer this question, the topic is divided into two sections:

First: The National Tourism Development Agency.

Second: The National Tourism Development Agency's use of the right of pre-emption.

First: The National Tourism Development Agency:

The National Tourism Development Agency has several tasks and roles to play in encouraging tourism investment at the national level. Before discussing these tasks and the agency's crucial role, it is necessary to understand them, which will be addressed below.

- 1) Establishment of the National Tourism Development Agency:** The National Tourism Development Agency was established in 1998, pursuant to Article 1 of Executive Decree 98/70, which stipulated the creation of a public institution with legal personality and financial autonomy called the "National Tourism Development Agency."¹

¹ Exécutive Decree No. 98/70 of 24 Shawwal 1418 AH, correspondant to 21 February 1989, establishing the National Tourisme Développement Agency and defining its statutes, Official Gazette No. 11.

Based on the above article, we conclude that the National Agency possesses:

a) Legal Personality:

The article explicitly recognizes the agency's legal personality, in addition to Article 49 of the Civil Code,¹ which corresponds to the natural personality inherent in human nature. Legal personality, as is well known, is a legal presumption.

There are two types of legal personality; The agency possesses both a public and a private legal personality. This legal personality grants the agency administrative independence and legal capacity within the limits stipulated in its founding decree. The agency has a specific domicile, as clarified in the first paragraph of Article 2 of Decree 98/70: "...its headquarters shall be in the Greater Algiers Province..." Furthermore, the agency has the right to litigate, represented by a natural person appointed by its founding decree, namely the Director General, who represents it before judicial authorities as both plaintiff and defendant.²

B) Financial Independence:

This means recognizing financial independence. The agency has the right to prepare its own budget by estimating revenues and expenditures and voting on it. It also approves all activities related to financial management procedures, as confirmed by Articles 21 to 23 of Executive Decree 98/70. Article 2 of Executive Decree 98/70 establishes the National Tourism Development Agency.

Under the supervision of the Ministry of Tourism, meaning it is subject to the oversight of the Minister of Tourism, as clarified in Article 27 of Executive Decree 89/70, the agency's headquarters can be relocated from Greater Algiers to any other location within the country by a decision issued by the supervising ministry.

The same article authorized the Ministry of Tourism to establish branches of the National Tourism Development Agency. These branches were subsequently established by a decision issued by the supervising ministry ten years after the issuance of Executive Decree 98/70, i.e., in 2008. Neither Decree 98/70³ nor the decision establishing these branches specifies their functions.⁴

✓ The Legal Nature of the Agency:

Public institutions, as is well known, are divided into: public institutions of an administrative nature or public institutions of an economic and commercial nature. Given the activities entrusted to the National Tourism Development Agency, it engages in commercial and industrial activities like private legal entities, such as acquiring land and developing it for resale or granting it as concessions to investors. This means that the agency is a public institution of an economic and commercial nature, as explicitly stated in Article 10/1 of Executive Decree 98/70, which states: "an institution of an industrial and commercial nature."

The second paragraph of Article 10 stipulates that the agency is subject to the legal rules applicable to administrations in their relations with the state. That is, it is a public institution subject to public law in its dealings with state institutions, as it is considered a public service according to Article 9 of Decree 98/70, which states: "The state shall provide the agency with all the resources that enable it to carry out its duties as a public service." However, the agency is considered a merchant in its transactions and relations with third parties. Any private legal entity should not be treated as a sovereign or authority, but rather as a private legal entity in its dealings.

¹ Exécutive Decree No. 98/70 of 24 Shawwal 1418 AH, corresponding to 21 February 1989, establishing the National Tourisme Développement Agency and defining its statutes, Official Gazette No. 11.

² Saleh Fouad, Principles of Algerian Administrative Law, Lebanese Book House – School Library, Lebanon, p. 54.

³ Fariha Hussein, Explantation of Administrative Law (A Comparative Study), Second Edition, Université Publications Office, 2010, p. 103.

⁴ These branches were embodied in seven annexes: the Northeast Annex, headquartered in Annaba; the North Central Annex, headquartered in Algiers; the Northwest Annex, headquartered in Oran; the Southeast Oasis Annex, headquartered in Ghardaia; the Southwest Annex, headquartered in Adrar; the Hoggar Annex, headquartered in Tamanrasset; and finally, the Tassili N'Ajjer Annex, headquartered in Illizi. A decree dated 22 Muharram 1429 AH, corresponding to 31 January 2008, established these annexes for the National Tourism Development Agency. (Official Gazette No. 19).

This means that the National Tourism Development Agency, being of an economic and commercial nature, is subject to dual legal rules. That is, the Agency acts as a merchant with private legal entities and is subject to private law in its transactions with them, while it is subject to public law in its relations with its counterparts in state institutions, as it is a public service.

2) Agency Management and Functions

a) Agency Management:

According to Article 11 of Executive Decree 98/70, the National Tourism Development Agency is managed by a Board of Directors chaired by the Minister of Tourism or their representative. The Board is composed of:

- A representative of the Minister of Finance.
- A representative of the Minister of Local Authorities.
- A representative of the Minister of Urban Planning.
- A representative of the Minister of Equipment and Urban Development.
- A representative of the Minister of Health and Population.
- A representative of the Minister of Culture.
- A representative of the Minister of Small and Medium Enterprises.
- Representative of the planning authority.
- Representative of the environmental authority.
- Director of the National Urban Development Agency.
- Director of the Investment Promotion, Support, and Monitoring Agency.

The members of the Board are appointed for a renewable three-year term, in accordance with Article 13 of Decree 98/70, by a decision of the supervising ministry based on a proposal submitted by its subordinate authorities. The Director General of the Board, appointed by the Minister of Tourism, attends Board meetings in an advisory capacity. The Board meets twice a year in ordinary session at the invitation of the Board Chair, who is either the Minister of Tourism or their representative. The provisions of Executive Decree 98/70 assign the Board of Directors of the Agency several tasks, which will be detailed below.

It is noteworthy that the Board of Directors is diverse, including a representative from each ministry related to tourism, to contribute to the development and expansion of tourism activities. The Agency serves as an instrument for implementing the national tourism development policy, as stipulated in Article 1 of the annex containing the terms and conditions for the public service obligations of the National Tourism Development Agency, as outlined in Decree 98/70.

B) Agency Tasks:

To enable the Agency to fulfill its tasks, Article 9 of Decree 98/70 mandates that the State provide the Agency with all the necessary resources to carry out its duties, which primarily consist of:

- ✓ Ensuring the protection and preservation of expansion areas.
- ✓ Acquiring the land necessary for the construction of tourism infrastructure and its associated facilities.
- ✓ Conducting studies and development plans for tourism, hotel, and thermal spa activities.
- ✓ Collaborating with relevant institutions and bodies to promote sites and expansion areas around mineral water sources.
- ✓ Coordinating with relevant institutions and bodies to ensure the rational management of sites and facilities of common interest, and proposing improvements, modernization, and expansion.
- ✓ It undertakes all activities related to the promotion and development of tourist expansion zones.
- ✓ It carries out all operations related to its mandate, whether financial, commercial, or industrial, and pertaining to real estate.

- ✓ It assists the Tourism Authority in developing and implementing the tourism development strategy.
- ✓ It establishes specific terms and conditions for each tourist expansion zone and site.
- ✓ It prepares approved lands suitable for tourism investment.
- ✓ It identifies new tourist expansion zones and sites and gives them the appropriate status.
- ✓ It applies the right of pre-emption to all properties located within tourist expansion zones and sites. To apply this right, the agency must follow a set of legal procedures, which will be discussed later. Second: The Agency's Use of the Right of Preemption:

The agency is a tool for preparing and promoting tourist property for resale or granting it as a concession to investors after acquisition. This can be done either through amicable agreement, expropriation for public benefit, or by the National Tourism Development Agency exercising its right of preemption. We will discuss the concept of preemption and then the procedures for the agency exercising this right.

1. The concept of pre-emption:

Preemption is considered an exceptional reason for acquiring property because it contradicts the principle that a contract is the law of the contracting parties, as stated in Article 106 of the Civil Code. This article emphasizes the principle of freedom of contract and mutual consent in concluding contracts. The use of the right of preemption restricts the owner's freedom to dispose of their real estate. Furthermore, preemption grants the preemptor the right to replace the buyer accepted by the seller, even against the buyer's will.¹

a) The Linguistic Meaning of Preemption: The word "preemption" (shufah) is derived from the Arabic word "shaf'a"² (to divide). Any addition, increase, or strengthening, as was also said about preemption: Adam was made an even number by his wife. It is also said: He was odd, then I made him even, meaning he was single, then another single one was added to him, so he became even, i.e., a pair.³

B) Preemption in legal terminology: It is the right of a partner to seize the share of his partner that was transferred from him from the one to whom it was transferred. It is defined as: the right of the preemptor to acquire the sold property by taking the place of the buyer in the sale of the property in exchange for the price that the buyer paid to the seller, and the buyer's consent is irrelevant.⁴

Preemption is considered a system devised by Islamic law to prevent harm that a partner may inflict on his partner as a result of selling his property to a third party, as it was said: The narrowest prisons are the most difficult to live in⁵.

Contradictory principles. Because of the justice and vigilance with which Islamic law protects the interests of its followers, this system was instituted.⁶

The legitimacy of preemption is established in the noble Sunnah of the Prophet, as narrated by Imam al-Bukhari on the authority of Jabir ibn Abdullah (may God be pleased with him), who said: "The Messenger of God (peace and blessings be upon him) ruled that preemption applies to everything divided between partners. However, if the boundaries are established between them, then there is no preemption."

¹ Abd al-Razzaq al-Sanhuri, *Al-Wasit fi Sharh al-Qanun al-Madani Asbab Kasb al-Milkiya ma'a al-Huquq al-'Ainiyya al-Asliya al-Muta'riqa 'an al-Milkiya* (Haqq al-Intifa' wa Haqq al-Irtifaz), Part Nine, no edition, Dar Ihya' al-Turath al-'Arabi, Beirut, Lebanon, p. 450.

² Ibn Manzur, *Lisan al-'Arab*, Vol. 8, Dar Sader, Beirut, pp. 183-184. Sheikh Ali al-Khafif, *Al-Milkiya fi al-Shari'a al-Islamiyya ma'a al-Muqaranah bi al-Shari'a al-Wad'iyya Ma'naha - Anwa'uha - Khawasiha - Qawa'iduha*, Dar al-Fikr al-'Arabi, Egypt, 1996, p. 265.

³ Wahba al-Zuhayli, *Al-Fiqh al-Maliki al-Muyassar*, vol. 2, revised and corrected edition, Dar al-Kalima al-Tayyiba, Damascus, 2010, p. 751.

⁴ Belhadj al-Arabi, *Real Rights in Algerian Civil Law in Light of the Latest Well-Known Judicial Rulings of the Supreme Court (A Comparative Study)*, Dar Houma for Printing, Publishing and Distribution, Algeria, 2016, p. 325..

⁵ Ibn Qudamah al-Maqdisi, *Al-Mughni*, complete edition in two volumes, vol. 1, Bayt al-Afkar al-Dawliya, Lebanon, 2004, p. 1193. Sheikh Ali al-Khafif, *Ownership in Islamic Law with a Comparison to Positive Laws: Its Meaning, Types, Characteristics, and Restrictions*, Dar al-Fikr al-Gharbi, Egypt, 1996, p. 265.

⁶ Ahmed Khaldi, *Preemption (Between Islamic Law and Algerian Civil Law in Light of the Jurisprudence of the Supreme Court and the Council of State)*, third edition, Dar Houma, Algeria, 2013, p. 23.

c) The legal definition of preemption: The Algerian legislator defined preemption in Article 794 of the Algerian Civil Code as "a right that allows substitution in the sale of real estate." From this definition, it can be concluded that preemption is a right exercised by the preemptor, who meets the conditions for preemption and may be a public or private person, to substitute for the preempted party or the buyer at the agreed price. Preemption does not apply to movable property, but rather to real estate, as explicitly stated in the article: "in the sale of real estate." This specification clarifies that, as a general rule, preemption does not apply to anything other than real estate. Therefore, we can say that preemption is a legal system established to protect the rights of those granted the right of preemption, known as the preemptor or the one exercising the right of preemption, whether they are private or public entities. This allows them to replace the buyer in a real estate sale contract. Among the entities legally recognized with the right of preemption is the National Tourism Development Agency.

Now, we will examine the legal texts authorizing the Agency to exercise the right of preemption on behalf of the State.

Legal Texts Regulating the Agency's Exercise of the Right of Preemption:

Referring to Article 4 of Ordinance 66/62, repealed by Law 03/03, we find that it stipulated the State's right of preemption for all ¹properties located within tourist areas and sites. However, this article does not apply until a decree is issued specifying the conditions for ²exercising the right of preemption, the consequences of exercising it, and how the price is determined. Following Order 66/62, 32 years later, Executive Decree No. 98/70 was issued, establishing the National Tourism Development Agency. Article 6 of this decree stipulated the right of pre-emption, assigning it to the agency to exercise on behalf of the state.

Approximately five years later, Article 21 of Law No. 03/03 addressed the agency's acquisition of real estate through the use of this right. Article 28 further specified that the right of pre-emption applies to all sales or leases of private property located in tourist areas and sites.

After a long wait, the decree referred to in Order 66/62 was finally issued, enabling the state to implement the right of pre-emption. This Executive Decree No. 06/385 of 2006, regulating the agency's exercise of pre-emption, was issued three years after the enactment of Law 03/03. It outlines the provisions of pre-emption in ten articles. It is noted that there is a significant time gap between the legal texts and the regulations governing them, which negatively impacts their application.³

2. Procedures for Exercising the Right of Preemption

Article 21 of Law 03/03 stipulates that the State, represented by an agency exercising the right of preemption, may transfer ownership of real estate and buildings voluntarily, whether for consideration or not, provided ⁴that these properties are located within:

- **Tourist expansion zones;** that is, areas characterized by natural, cultural, human, and creative features suitable for tourism, eligible for the establishment or development of tourist facilities, and which can be used to develop one or more profitable types of tourism.⁵

- **Tourist sites;** meaning any site that is distinguished by its tourist appeal due to its scenic views, or by the natural wonders or unique features it contains, or by structures built upon it that are recognized as having historical, artistic, legendary, or cultural significance, and whose authenticity must be valued and preserved from damage or destruction by nature or human

¹ Ahmad Mahmoud Khalil, Rulings on Preemption (Jurisprudence and Judiciary), Dar al-Ma'arif, Alexandria, p. 11.

² Order No. 66-62 dated 4 Dhu al-Hijjah 1380 AH, corresponding to 26 March 1966, concerning tourist areas and sites (now repealed).

³ Asma Tahnouni, "The Nature of Preemption Between Sharia and Legal Thought," *Journal of Jurisprudence and Law*, Issue 17, March 2014, p. 193.

⁴ Here we note that the article contradicts Article 794 of the Civil Code, which states, "Preemption is a right that allows substitution in the buyer's place in a sales contract..." This article stipulates that preemption is for financial consideration and applies exclusively to sales contracts.

⁵ Mustafawi Aida, "The Legal Regulation of Tourist Real Estate in Algeria," *Journal of Legal and Political Research and Studies*, *Journal of Law and Political Science*, Issue 6, November 2014, University of Blida 2, p. 153.

¹activity. Returning to Article 28 of Law 03/03, we find that it stipulates that the agency exercises its right of pre-emption not only in acquiring real estate, but also in leasing it, or transferring it from private owners located within expansion zones. This contradicts the right of pre-emption in private law, specifically in the Algerian Civil Code, which limits the right of pre-emption to sales contracts. This means that pre-emption is an exception applicable to leased and transferred properties.

Article 3 of Executive Decree 06/385 obliges the owner of a property or building constructed within the framework of a tourism development plan, if they decide to sell their property, to notify the Minister of Tourism according to a specific form issued by a decision of the Minister of Urban Planning, Environment, and Tourism in 2008. This is also stated in Article 28 of Law 03/03 to enable the agency to exercise its right of pre-emption. The aforementioned Minister is responsible for notifying the National Agency within (15) days from the date of²notification by the owner, as stipulated in Article 4 of Decree 06/385. In accordance with the text of Article 05, the Agency, after being notified by the Minister, must decide whether or not to acquire the property subject to pre-emption based on a technical study that it must conduct, which must include a description, content and evaluation of the properties concerned on behalf of the State. It must also determine the necessary material means to acquire the properties concerned by notification, all within the legal period specified as 03 months from the date of notifying the Minister.³

After conducting a technical study, the agency must decide whether to exercise its right of pre-emption over the property. In the latter case, the agency is obligated to inform the Minister before the expiry of the legal deadline and provide justification for its decision, as stipulated in Article 6 of Decree 06/385. The Minister of Tourism must then inform the owner of the agency's decision to exercise the right of pre-emption within 15 days following the expiry of the legal deadline granted to the agency to make its decision. Alternatively, if the agency does not respond and the deadline expires, it is implicitly understood that it has waived its right of pre-emption, as per Article 6/2.

The owner is entitled to proceed with the sale if four months have passed and the Minister of Tourism has not responded, according to Article 8 of Decree 06/385, as this implies that the agency has refused to exercise its right of pre-emption. Upon reviewing the provisions of Decree 06/385, we find no indication that the agency has priority over private individuals in cases of multiple pre-emption claims, or what the Civil Code refers to as "competing pre-emption claims." The Civil Code, in Article 796, regulates the order of these claims, but neither explicitly nor implicitly includes the agency among them. This raises the question of who has priority in the right of pre-emption over the property: the agency or a private individual?

• Property Valuation:

Following the agency's decision to acquire the property by exercising the right of pre-emption, an agreement is concluded between the agency and the property owner by mutual consent, in accordance with the provisions of Article 21 of Law 03/03, "...transfer of ownership voluntarily..." This is the same provision stipulated in Article 6 of Decree 98/70, "...subject to a voluntary disposition..." Therefore, the right of pre-emption exercised by the agency on behalf of the state is only valid with the consent of the property owner. Agreement on the price of the property subject to pre-emption is reached by mutual consent. If this proves impossible, the competent court must intervene to determine the acquisition price of the property subject to pre-emption, in accordance with the provisions of Article 9 of Decree 06/384.⁴

Furthermore, the State Property Directorate located within the province is responsible for determining the price of the property subject to pre-emption, pursuant to Instruction No. 0184 issued on March 10, 2011. This overlap in jurisdiction must be resolved by the legislator through a clear legal provision. Based on the above, the property owner cannot dispose of the property located within the expansion areas and tourist sites by sale or lease without notifying the Minister in charge of Tourism, so that the agency can exercise its right of pre-emption to expand the scope of the tourist property within the

¹ As defined in Article 2 of Law 03/03, these areas are specified by Executive Decree No. 10/131 of 14 Jumada I 1431 (corresponding to April 29, 2010), concerning the definition, authorization, and classification of expansion zones and tourist sites (Official Gazette No. 30), and Article 3 of Law 03/01 of 16 Dhu al-Hijjah 1423 (corresponding to February 17, 2003), relating to the sustainable development of tourism.

² A decision dated 10 Rabi' I 1429 (corresponding to March 18, 2008) establishes the model for prior authorization to sell property located within expansion zones and tourist sites (Official Gazette No. 25).

³ Mustafawi Aida, previous reference, p. 170.

⁴ Ahmed Khalidi, previous reference, p. 191.

legal deadlines. If it decides to exercise pre-emption, it informs the owner of its decision through the Minister in charge of Tourism. However, once 4 months have passed without any response from the Minister in charge of Tourism, it is understood that the agency has waived its right to exercise pre-emption, and thus the property owner has complete freedom to dispose of his property.

Conclusion:

In conclusion, we can say that Algeria, in adopting a policy of sustainable development for tourism activities and entering the international tourism market, has established several institutions and bodies whose primary mission is to promote Algeria's tourism image. Among these institutions is the National Tourism Development Agency, established in 1998, which has been given control of tourism real estate.

Given that tourist real estate is a vital element in the national and foreign tourism investment process, the agency was tasked with acquiring or leasing it using the state's right of pre-emption, which was first stipulated in the now-repealed Order 66/62. However, the state did not exercise this right due to the absence of regulations governing its exercise. After nearly 32 years, Executive Decree 98/70 established the National Tourism Development Agency and stipulated that the agency could exercise its right of pre-emption on behalf of the state to lease and acquire any real estate located within tourist zones and expansion areas. However, this provision remained largely unimplemented due to the delay in issuing the necessary regulations until 2006, when Decree 06/385 was issued. This decree outlined the procedures for the agency to exercise its right of pre-emption in 10 articles, without specifying the legal consequences of the agency's exercise of this right.

Therefore, we arrive at a set of recommendations, namely:

The legislator should avoid the time gap between Order 66/62, which includes the exercise of the right of pre-emption, Executive Decree 98/70, which entrusts the agency with exercising the right of pre-emption on behalf of the state, and Executive Decree 06/385, which outlines the procedures for exercising the right of pre-emption. This gap renders the legislative and regulatory provisions ineffective due to the imposed freeze, reducing them to mere words on paper and hindering the achievement of their intended objectives.

The legislator must clarify who has priority in exercising the right of pre-emption if the agency conflicts with the private legal entities stipulated in Article 796 of the Civil Code.

Furthermore, the valuation of the property subject to pre-emption is a matter of contention between the judiciary and the State Property Directorate when the parties cannot agree on the price.

Foot notes and approuve références :

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5. These branches were embodied in seven annexes: the Northeast Annex, headquartered in Annaba; the North Central Annex, headquartered in Algiers; the Northwest Annex, headquartered in Oran; the Southeast Oasis Annex, headquartered in Ghardaia; the Southwest Annex, headquartered in Adrar; the Hoggar Annex, headquartered in Tamanrasset; and finally, the Tassili N'Ajjer Annex, headquartered in Illizi. A decree dated 22 Muharram 1429 AH, corresponding to 31 January 2008, established these annexes for the National Tourism Development Agency. (Official Gazette No. 19).
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13. Order No. 66-62 dated 4 Dhu al-Hijjah 1380 AH, corresponding to 26 March 1966, concerning tourist areas and sites (now repealed).
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15. Here we note that the article contradicts Article 794 of the Civil Code, which states, "Preemption is a right that allows substitution in the buyer's place in a sales contract..." This article stipulates that preemption is for financial consideration and applies exclusively to sales contracts.
16. Mustafawi Aida, "The Legal Regulation of Tourist Real Estate in Algeria," *Journal of Legal and Political Research and Studies*, *Journal of Law and Political Science*, Issue 6, November 2014, University of Blida 2, p. 153.
17. As defined in Article 2 of Law 03/03, these areas are specified by Executive Decree No. 10/131 of 14 Jumada I 1431 (corresponding to April 29, 2010), concerning the definition, authorization, and classification of expansion zones and tourist sites (Official Gazette No. 30), and Article 3 of Law 03/01 of 16 Dhu al-Hijjah 1423 (corresponding to February 17, 2003), relating to the sustainable development of tourism.
18. A decision dated 10 Rabi' I 1429 (corresponding to March 18, 2008) establishes the model for prior authorization to sell property located within expansion zones and tourist sites (Official Gazette No. 25).
19. Mustafawi Aida, previous reference, p. 170.
20. Ahmed Khalidi, previous reference, p. 191.