

'Registering the World'

The Dublin Conference

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'On the occasion of the Tercentenary of Land Registration in Ireland'

Land Registration – A Health Check

John Manthorpe
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Here in Dublin we warmly congratulate our hosts and all their predecessors in the Property Registration Authority of Ireland. Over three difficult centuries a land register has been created which is now supporting such a vibrant and prospering country. This is a significant achievement and worthy of celebration. It is a good time to reflect on our international land registration story - and it is a good time to consider what we can do to shape a successful future.

This Paper offers a view on initiatives of the past that have led to the establishment of systems of secure land tenure in the developed world. It identifies some of the historic attempts to regularise land rights particularly in the 19th Century.

It looks at the present day initiatives of many fast developing systems of land registration and the notable progress but often difficult challenges in countries of every continent.

Finally the paper suggests how our national initiatives, but also our cooperative developments, can contribute in new ways to the essential purpose of land registration world-wide: to promote the social stability and the economic well being of all but especially the landless poor and disadvantaged.

Introduction

If it were possible to make an assessment of the health of land registration world wide the task would not be easy. What are the criteria against which such an assessment should be made ? And how would one attempt to make the assessment ? It is reasonable to say, as others have said before, that, demonstrably, only those societies with a settled system of land tenure and exchange will have achieved stability and economic progress. Yet, in some countries, where serious difficulties have arisen, land registration as an answer has been questioned. One critical factor is obvious - but easily overlooked. For land registration to be successful it must function within the rule of law. It must reflect and respect the tenure patterns of the country. It must be seen to be impartial and free from any conflict of interest. It must be open, accessible and inexpensive. It must operate in a society where human rights are respected. And not least it must be financed in such a way that the land register can be sustained as a vital element in the social and economic infrastructure of the country.

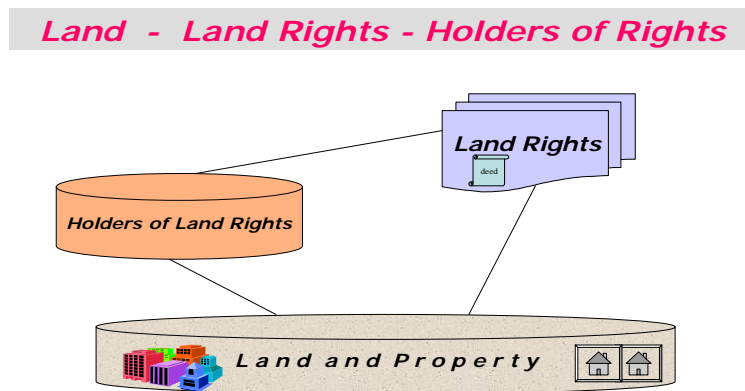
Embracing change

We will hear at this Conference of the developments taking place in many of our Land Registries and Cadastral and Mapping Agencies. We will learn of the restructuring of organizations; new business and management practices; new laws to facilitate greater access to information and to respond to a changing economic and social order. Not least we will hear of the dramatic possibilities offered by fast changing computing and communication technology. For the mature registration and mapping systems there is now a wide appreciation of what is possible in these spheres of activity. The learning process, fostered and accelerated through our European and international cooperation and our contacts helps this progress along. Yet for millions of people world-wide such developments are still far away. Establishing a trusted land register remains as the compelling yet elusive priority.

The essential task

Standing back from the systems to which we are close we see that the central and simple principle is formalizing under the law, publicly by registration, the relationship between land parcels, land rights and those with the benefit of those rights. This so that those rights will be 'good to the world' and so capable of forming not only the guaranteed assets and resources of the registered owner, but that the national land register could be said to be the underwritten record of the collective wealth of the country.

We take trouble in our legislation to ensure that the rights are codified and that the systems of rights transfer will work effectively. We ensure that third party rights are recorded so that all with a stake in the land parcel are protected under the law. The input to these processes is the constant flow of agreements, contracts, deeds and documents of transfer and mortgage freely made between people, banks, institutions and government itself – in any combination and at any time. Decisions are made, contracts are agreed, registration is effected. As if by instant magic the ever changing, legal relationship of land and people is constantly reflected in a public place. What would otherwise be hidden is synthesized into a common and understandable record open to all. Security, confidence, transparency, choice - all become the basis of open exchange and prosperity.



Having set the scene with that preamble I propose to look at the arrangements in some of the long standing systems across the world and to touch on some of the testing difficulties that confront countries still endeavouring to stabilize land rights.

Cadastral and Land Registers of Title and of Deeds

Vive la difference !

Registration of Deeds and Registration of Title are the predominant systems of land transfer and mortgage registration across the world. Some linked in to cadastral systems others associated with topographic mapping. Some dependent on notaries, other on lawyers and yet others dependent on neither. Some where the register is open to the public others where access is restricted. Some self financing others dependent on government funding. Some associated directly with records of land valuation and land use others independent often within different ministries. A kaleidoscope of structures and functions but all serving the same purpose.

In France the cadastral system has endured, as it has in many of the countries once under the command of Napoleon. Because of its success it has been adopted in many countries beyond the Napoleonic reach. The national cadastre will maintain the record of parcels, accurately surveyed. It will generate the unique cadastral parcel number. It will record land use and land values and it will, under statute, maintain these records. Changes to boundaries by landowners (and the creation of new cadastral parcel numbers) will only be done with the authority and participation of the cadastral office and surveyor.

In some jurisdictions (but not all) the Cadastre Office will be the authoritative body for maintaining the land register of real rights including ownership. In many others the maintenance of a national land register will be under the control of a separate public body or Agency often in a separate Ministry. The Land Registry will inform the Cadastre of changes in ownership, the cadastral authority will inform the Land Registry of any new parcel creation.

In systems of Registration of Title government, through the Land Registrar, will guarantee the title after examination. In systems of Registration of Deeds responsibility for providing the security of title is shared between the Notary and the Registry of Deeds. The Notary is responsible for preparing the valid document of transfer between seller and buyer and depositing a copy with the Registrar of Deeds. It is the responsibility of the Registrar of Deeds to so manage the filing of deeds that they can be readily located physically (or electronically) so that on future transactions those concerned can quickly and with certainty verify the status of the title.

I mention these various approaches to illustrate that whilst structures, systems and laws may differ the underlying objectives are the same – good public records of land rights, of land valuation, of land use - all based on systems of national mapping. What today we call land administration.

England and the Austro-Hungarian and Prussian empires

In 1893 Charles Fortescue Brickdale, later to become Chief Land Registrar for England and Wales in 1901, undertook a tour of Europe to examine systems of land registration. The system introduced in England and Wales in 1862 was in difficulty. Its failure was due largely to an unrealistic insistence on a degree of accuracy in boundaries and title examination which was generating problems rather than curing them. The system was voluntary only and there was hostility from large land owners who were reluctant to have their ownerships examined and made public. There was opposition too from lawyers who feared that their livelihoods might be at risk. Both groups were influential in Parliament. But he found the answer. It is, I think, instructive to set out what he considered to be the superior position in what was then the Empires of Austro-Hungary and Prussia. What he saw influenced the later successful developments in England and Wales which he masterminded and many of the changes since adopted elsewhere in the world. I quote from a lecture he gave in 1913:

"The methods of land transfer used in these two great nations were, until the later years of the last century, subject to a great variety of different laws in different parts, but now each of the two Empires has succeeded in establishing a single uniform system applying to the whole of its extent, That system in both cases is registration of title and, taken as a whole, these two countries form the largest and most important practical example of its method and effect of which we have any detailed information. The population affected by the system is 95 million. The general conditions also combine in many ways to render this Central European system the most useful and general model for study and imitation. Here, and here only, is registration of title in really universal and exclusive operation; here, and here only, is it applied to conditions – urban, rustic, social, economic - comprising practically every feature of importance to be met in an advanced society; here, and here only, it is seen affecting a community thoroughly up-to-date in all its present day needs and activities "

The system continues today, in modern form but with the principles intact across the new jurisdictions that have evolved from the old empires.

Australia

Across the globe in South Australia another visionary, Robert R Torrens, with practical sense and persuasive persistence developed a system of registration of title in the mid 19th Century which spread through the rest of Australasia and to many other regions of the world – notably to the western provinces of Canada. It underpinned the development and growth of the new settlements. Brickdale quotes a member of the Legislative Council of New South Wales writing to Sir Robert:

'The working men of New South Wales are almost all becoming landed proprietors but hardly one of them would ever attend a sale of land if it were not announced in the advertisement that the title was that of Torrens Act'

And another enthusiast, a lawyer Mr R. C. Baker, told the London Chamber of Commerce in 1885:

'Under the Torrens system transfers are completed, I may almost say, in a few minutes with a minimum of cost to both parties. I have not only heard of instances, I have known them in my own office, where transfers or mortgages have been completed in less than a quarter of an hour ... the people of South Australia look upon the Act as 'the greatest boon that has been given them.'

Torrens' systems provided the Government backed guarantee on title on which land ownership and its development could flourish. It still does that job today. We can look forward to another celebration next year. 2008 is the 150th Anniversary of Torrens Real Property Act becoming law in South Australia.

United States of America

But what of the position of the United States of America ? In 1893, to mark the 400th Anniversary of the 'discovery' of the New World by Christopher Columbus, the 'World's Colombian' Exposition' opened – a national celebration to match the earlier great exhibitions in Paris and in London. Congress awarded the fair to Chicago. It touched on all aspects of life in the new country. It was just 28 years since the American Civil War. 20 million people visited the Fair. Part of the Chicago Exposition was the 'World's Real Property Congress' – perhaps the first such international meeting ever of professionals and practitioners in what we now call land administration.

Delegates from around the world attended – and maybe here was a defining moment for the future of land and property rights systems in the USA. For central to the many debates were the possibilities offered by Torrens titles. The Australian delegates spoke of its great success and value in their developing territory. For those with other views Mr. A. M. Pence of Chicago *“had been chosen to champion the cause of all those who oppose the Torrens system”*. The final resolution of the Congress is of great interest given all that has later transpired in the majority of the States of the USA. Congress resolved:

“ That it is the sense of the delegates of the World’s Real Estate Congress that they should do what lies in their power to call the attention of their various State Legislatures to the benefits of the Torrens system and recommend its adoption, so modified as to suit to our State Constitution and laws”

Well, despite the great success of the Fair tragedies marked the aftermath. Smallpox spread throughout Chicago, the Mayor was assassinated and, after the Fair had ended, fire swept through the fairgrounds - and, one might add with some irony, the United States chose Title Insurance. Despite the resolution of the World Real Property Congress, it was to be Title Insurance rather than Torrens titles that prevailed. It is Title Insurance that has dominated the property and mortgage markets ever since throughout most of the States of the Union.

We have to ponder on the present reality that Title Insurance Companies have been strong and financially successful and that a property market functions in the States – the most developed market economy in the world. Yet it remains a legitimate question whether the citizens of the USA are really getting the best deal that is possible from their real property systems. As we all know once a system or an institution is deeply embedded in our societies and governmental structures change is difficult, particularly where the status quo remains the aim of an influential lobby. The adage *“If it ain’t broke don’t mend it”* also reflects much common sense. There are powerful interests which want to protect the status quo - not least the Title Insurance Companies but also the Real Estate Brokers and Mortgage companies. These participants in the property market receive significant payments from the Insurance Companies for referrals. Payments which contribute to the high level of premium paid by home buyers.

Yet this present state of affairs is under review. Last year the US House Committee on Financial Services heard evidence on behalf of the Consumer Federation of America. The witness J Robert Hunter delivered his evidence also on behalf of the Center for Economic Justice, the US Consumer Union and the US Public Interest Research Group – and others. His evidence was balanced, clear and constituted a strong criticism of the Title Insurance systems which, through five companies, dominate transactions in property.

He concluded his evidence as follows:

Mr Chairman, we appreciate your undertaking this important effort to help consumers who have, for too long, been burdened with excessive title insurance charges. Congress should consider strong measures to overcome the extreme financial incentives for those in the title insurance business to engage in reverse competition, including such price increasing activities as excessive commissions, lucrative “re-insurance” arrangements, free or below cost services and other kickbacks.

Congress must find ways to remove or substantially remove this perverse financial incentive. Two ways to do so are:

1. Move away from old- fashioned and inefficient title insurance legal systems toward a Torrens system similar to that used in many parts of the world. Take a good look at the Iowa system as one example of a more efficient system.

2. Make lenders pay for their own title insurance, eliminating the opportunity for kickbacks on title insurance sold in America

I have questioned the system of Title Insurance in the United States. And I plead guilty in doing this not from any first-hand experience but from what I have understood from those I have met and from what I have read. It is not that it does not work but it seems to be an inferior system offering less protection and at greater expense than the land registration systems in other countries. It flourishes in a captive market because buyers enter the property market very infrequently and are inexperienced in the ways of the market. They are preoccupied with other priorities at the time of a house purchase. Although it provides financial recompense if title is later to be found to be invalid this is usually only to the value of the purchase price at the time the property was bought. It does not protect the owner's possession of a property bought in good faith. Nor does it provide the 'machinery' of land transfer as do the land registration/cadastral systems elsewhere. Deeds still have to be deposited in County Registry offices. These offices are often small, unmechanised and subject to inconsistent practices across the States.

Eastern Europe

From Estonia in the north to Albania in the south and not least in the Russian Federation to the East remarkable progress has been made in re-establishing registered private land rights, systems of land valuation and property and mortgage markets.

This progress is being achieved despite the real issues of restitution where the rights of former dispossessed owners (and their descendants) have to be adjudicated. This has been both a financial and a social problem. But it has been addressed despite the real difficulties that exist.

It is just 14 years since the United Nations Economic Commission for Europe, through MOLA (the forerunner of WPLA) took a lead in providing practical advice and support to 'kickstart' the changes required. Loans and Grants from the World Bank, from USAid, the European Union and other donors have assisted in the regeneration of systems that had long been dormant. Not least practical advice, financial help and technical support has come from many countries active in providing external consultancy – many of whom are represented here. The liaison and the contacts between specialists and administrators in European land administration has been one of the most beneficial results of the story of the last fourteen years.

What is of interest is how the need to start afresh in some countries has made it possible to develop effective new computer based systems, under modern legislation unencumbered by some of the difficulties of the old manual systems of many of the long established arrangements in Western Europe.

What is particularly encouraging is that so many of the countries are now masters of their own destiny. The management, specialist and technical know-how has developed steadily over the last fifteen years and offers practical examples to other countries of the world seeking to move forward from positions of difficulty and uncertainty.

There are still real difficulties; there are many competing claims on national revenues. Building a land register is a long term investment. The return is the security of tenure for citizens and business and the consequent confidence generated for internal and external financial investment in land and property. Convincing politicians and policy makers that land registration is a priority area for social and economic development will remain an important task for international and national institutions.

China

Perhaps the most significant event of this year is what has happened in China. In 2002 a Bill was published to provide protection of rights for private property. Its supporters said it would protect the material interests of millions of working people and entrepreneurs in the private sector. It would encourage people to create wealth. Critics of the Bill argued that it was in conflict with the Chinese Constitution. This stipulates that *'socialist public property is sacred and inviolable'*. Professor Gong Xiantian from the Peking University Law School attacked the Bill as veering towards the *'fallacies of capitalist civil codes, the globalization of capitalism and neo-liberalism in economics'*. The debate concerning the Bill evolved from an economic issue to a full scale political and ideological row. The Deputy Chairman of the National People's Congress (China's legislature) said that China's people *'urgently require effective protection of their own lawful property accumulated through hard work'*.

The National Peoples Congress voted on 16 March this year to pass the new law (99.1% of the 2889 legislators supporting the Bill). So 1.3 billion people (a fifth of the world population) join the family of nations whose economies recognize the importance of protecting private land rights - a historic development which it seems certain will underpin China's development as the fastest growing economy in the world.

Developing countries

For all the progress in Eastern Europe, and the settled systems in Western Europe, in North America, in Asia and in Australasia there are still real difficulties elsewhere in the world. Where real poverty, drought, famine, HIV/Aids, insurgency, conflict and political and administrative failure exist it would be hard to proclaim that simply introducing secure land rights is the answer. Yet the need for secure land rights can never be ignored as part of the reconstruction of any society climbing out of endemic difficulties. Conor Foley, working in Africa earlier this year, states *'Dig beneath any major conflict in Africa, from Rwanda to Darfur, and you will find a land rights issue'*. The message has to be to keep alert and alive to what is possible in assisting third world countries find a path to economic and social betterment. Such specialist assistance to other countries in difficulty has been provided by the positive aid programmes of European, American, Australian, Canadian and other land registries, cadastral offices and institutions.

Two particular examples of the breakdown of law and order and in land registry systems in the last year are in Columbia and Sudan. These are symptomatic examples of the unstable conditions for settling land rights:

In Columbia

The present government administration in Columbia is under challenge from human rights groups for policies which will allow illegal militias to retain stolen lands. It is reported that millions of hectares of prime rural land were stolen from Colombian peasants with thousands massacred in the process. The rural Land Registry is a mess, Land Registrars have been murdered and real estate records have disappeared or been burnt. The leader of the dispossessed peasants, following her visit to the Federal Ombudsman's Office was murdered later that day as she left her home. Such are the terrible problems as reported by the International Herald Tribune earlier this year. The Colombian Support Network reports that the recently formed 'Victims Movement' seeks reparation for those who have suffered violence and who have been dispossessed of their land. It looks to establish an 'Alternative Land Registry' to search for information concerning the magnitude of the dispossession.

In Sudan

The United Nations Mission in Sudan, last year, expressed “deep concern” over the forced removal of 12000 displaced persons from Darfur who had fled famine in the 1980s and settled in Gezira State. It was reported that heavily armed police tear gassed civilians and razed their homes relocating them to a new location (with just two water points). The intention is to transform their former home into a ‘Dreamland’ complex with shopping centres, villas, pools and a golf course. An economic boom driven by a Sudanese oil has led to the belief that such developments will bring in overseas investment. A director of a British Real Estate Company is quoted as saying “*We (the British) set up a land registry but did not give them the tools to use it.*”

There is a great irony here. The land registration system in Sudan was at one time one of the most progressive systems in Africa. It was designed and administered by the remarkable S Rowton Simpson. He had been the Colonial Administrator and Registrar General in the Sudan in the 1940s. Probably no one had done more for Sudan’s peaceful development and land distribution during the years of its colonial administration. It was from here that his enthusiasm for land registration was born. As author of the classic work ‘*Land Law and Registration*’, first published in 1976, he has educated and influenced many who have followed him and studied his masterly analysis of the development of land rights systems around the world.

The present desperate state of affairs in his beloved Sudan reminds us that however effective a land registration system may be it can be of limited value if it is not backed by the rule of law in a jurisdiction that respects Human Rights.

Finding solutions

If we were to attempt to find answers to these desperate problems there is one large and dangerous trap into which many of us might fall. And that is an easy assumption that the systems and solutions of our own countries provide the only answers for countries struggling to build viable economies and social structures where resources are limited. Those countries where traditions and cultures are not those of the urban, western (and eastern) market driven societies require different solutions. This is particularly so where there is a long tradition of indigenous forms of customary or communal tenure (such as in much of Africa). It is so where informal settlements are an established feature of cities and towns (such as in parts of Central and South America and many other corners of the globe).

What still holds good is that security of tenure and recording of land rights in a public and trusted place is required. But the nature of land holdings do not all fit neatly into the model of the individual privately owned land parcel. Many are family, tribal or village holdings where the produce of the land are shared. The security the community needs is that they can be sure their communal land holding is theirs to improve and enjoy without challenge and will remain within their tribe or family for the generations that follow.

This requires an application of the principles of land registration but in new ways. It requires also a recognition that in some cases the rights to use land (but not own it) also requires equal certainty. A form of registration for that ‘use right’ is required. So devising systems of registration needs to reflect the subtleties of indigenous land holdings if the traditional forms of rural life are to be maintained and improved. It will call for a mixed system with different kinds of registrable holding. Map based yes, within a legal framework yes, visible and public yes, but established through consultation agreement and research in new innovative ways.

For the informal settlements, the favelas and shanty towns, much will depend on the willingness of individual governments to bring the land and the occupancies into a recognized formal – or even semi-formal - system protected by the law. Settling informally might be said to be how all communities and societies have started but the economic and welfare problems of most informal

settlements require an integrated policy of which a land register is an important but not the only part. Certainty, in a legal framework, will be the basis of building modest but marketable assets of value for the occupiers. I was privileged to hear Paul van der Molen make a presentation on the occasion of his award of the prestigious Michael Barrett Award at the Headquarters of the RICS in London just a year ago. His Background Paper to his evening lecture sets out with great insight and clarity the issues that need to be addressed in order to assist those countries where the greatest help is needed.

Flexible Land Title System

One imaginative proposal is that for a *Flexible Land Tenure System* for Namibia described by Soren Fauerholm Christensen of the Danish National Survey and Cadastre. The proposal envisages a tier of three levels of registered title; *Starter Title* which would relate to a block of land, *Landhold* which would relate to the use of an *unspecified* single plot within the registered block but not provide full ownership, and *Freehold* which would provide full marketable title to a specified plot. Landhold titles could mature to Freehold with time. The objective is to introduce an inexpensive but recognized system which would inject some certainty and confidence into informal urban land holdings. The legislation is yet to be enacted but there is hope that if it is the system will begin to ease the land problems in Namibia.

Conclusion

As land administration specialists we will direct our energies to the continual improvement of our own national systems. This will be our priority. This will be our aim. Yet now, in a real and potent way, the well being of our citizens is inescapably influenced by the events beyond our national boundaries. No society can be sure of continued economic success and security unless the causes of poverty, conflict and administrative failure elsewhere can be overcome.

Many countries represented here in Dublin are active in assisting other nations develop their land registration systems. Together we have a large critical mass of international experience. Offering assistance to those in greater need must remain a high priority. Not, I suggest, as a commercial arm of our organizations but as part of the global effort to improve the lives of the poor and disadvantaged in the World. The Commission for the Legal Empowerment of the Poor, which functions under the United Nations Development Program in Washington, is trying to do just that but it may yet fail if it cannot call on the very best of experts to assist its work to make it possible.

I hope that we can take from this historic Conference in Dublin a determination to continue to look beyond our own national developments, important as they are, and make available our skills and expertise where they are most needed. If we can do that then *'Registering the World'* will become a reality.

John Manthorpe

*Land Registration Consultant and
former Chief Land Registrar for England and Wales*

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Email: landman@dircon.co.uk