

Registering a Special Administrative Region

Land Registration in Hong Kong

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No statement as to what the inhabitants of Hong Kong island thought when they came under British control in 1841 is known to me, but, faced with the imminent imposition of British rule in 1898 the gentry leaders of the area now known as the New Territories made the following declaration: "Under English law a poll tax will be collected; houses will be numbered and a charge made for them; fishing and woodcutting will be prohibited; women and girls will be outraged; births and deaths will be registered; cattle and pigs will be destroyed; police stations will be built, which will ruin the fung shui. In short, the evils that will arise will be so great that no one can bear to think of them."ⁱ With the exception of the poll tax all those things did come to pass (though not all with the sanction of English law) but the consequence was not the anticipated evil ⁱⁱ.

Among the factors that contributed to a happier outcome I would note the following:-

- With regard to land registration, the law applied in Hong Kong was effectively the Irish Land Registration Act, with some minor modification made in Van Dieman's land (now Tasmania) rather than English registration law. The public inspection of the registers allowed under this law helped establish trust and confidence in its operation.
- The law respected traditional Chinese customs and practices regarding land, accommodating rather than conflicting with the concepts of the people brought under it. One of the interesting peculiarities of Hong Kong today is that Qing Dynasty customary land law may still be relevant to consideration of dealings with

certain land in the New Territories even though it was abolished in mainland China in 1911.

- By registering the persons in actual occupation of the land as owners, a social revolution was quietly brought about. Residents were given certainty and security in their ownership of land and were freed from the impositions of 'tax-lords' and other exactions of local strong menⁱⁱⁱ.
- The residents of the New Territories had been able to observe the system of land registration in operation in Hong Kong and Kowloon for 50 years before it was applied to them^{iv} and may have sensed that the views of their local leaders were not entirely unclouded by exaggeration.

On that last point, it should be said that there were particular episodes that may have caused individuals to question the impartiality and equity of colonial rule^v. But, the general principle announced at the beginning and with which, over time, the administration conformed, was that the property and freedoms of the local population would be respected. The first British proclamation to those living in Hong Kong in 1841 stated that: "The inhabitants are hereby promised protection...against all enemies; and they are further secured in the free exercise of their religious rites, ceremonies and social customs, and in the enjoyment of their lawful private property and interests"^{vi}. Similar commitments were given on the acquisition of the New Territories and are a core part of the Basic Law, the constitutional arrangements under which the whole of Hong Kong returned to Chinese sovereignty in 1997.

Within a year of the commencement of registration work in the New Territories, one of the officers responsible noted: "in one case the registered owner died within a few weeks after the registration... and the next of kin, on understanding that such was the law of the Colony, applied to the Supreme Court in its Probate Jurisdiction for letters of administration, and paid the administration duty without any demur or question, although wills, probates, and letters of administration of intestate estates are terms unknown in China outside of Hong Kong."^{vii}

While the reaction to land registration was favourable, the fact that what was implemented was simply an extension of the system of deeds registration rather than the introduction of registration of title was a disappointment to those who had planned the arrangements for the New Territories. Hong Kong's Land Registration Ordinance of 1843 had put in place a deeds registration system since

no better model was then available. In the 1870's Hong Kong played a part in a strange retrogression of registration law. The then Governor, an Irish Baronet Sir John Pope-Hennessy, knew that his father-in-law, Hugh Low, an administrator in the Straights Settlement, had introduced title registration to Labuan in 1847 (a decade before Sir Robert Torren's reforms in Australia). Pleased with Hong Kong's deeds system Sir John prevailed upon Low to rescind the Labuan title register in favour of a deeds register^{viii}. By 1898, however, Hong Kong's administrators were well aware of the benefits of the Australian Torren's system and of the reforms being prepared in England under Brickdale's direction. They intended to bring in title registration for the New Territories.

This intent came to nothing when it was found that the existing Chinese land records could not be relied on as the basis for granting title. Since the major reason for the British obtaining the lease of the New Territories at the time was to pre-empt feared designs of the French and the Russians, rather than for any expected economic benefit, the administration demurred at the costs and time needed to prepare a full title register. Extension of the existing deeds registration system was seen as a simple and acceptable expedient that might be improved upon in due course. Over a century later title registration has still not been introduced, although the intent to proceed has been given some substance by the enactment of a Land Titles Ordinance in 2004.

The reasons for this long delay in moving to title registration are various. Contentment with the existing arrangements has been a major factor. As Rowton Simpson noted in the 1970's: "there is no bigger obstacle to the introduction of registration of title than the existence of an effective register which appears to be satisfactory and which, naturally, there is reluctance to change."^{ix}

Alongside that, until the 1970s there was no good reason even to consider change. Property ownership was very narrowly based prior to the 1950's. At that time it was estimated that less than 4% of households owned their homes. The volume of work for conveyancing solicitors and the land registry was correspondingly limited^x. Home ownership grew steadily in the 1950s and 1960s but took off in the 1970s due both to private sector investment and to a change in public housing policy towards subsidizing home ownership rather than rented housing. Today about 54% of households own their own property and that percentage is expected to rise further. The volume of business for the registry and the demand for simplicity and security in dealings with land have both risen proportionately.

Computerization of the register has kept abreast of demands for improvement to the technical efficiency of the registration and search process. But, the effect of this efficiency improvement for the cause of conversion to title registration has been to reduce complaint and thus reduce the constituency calling for registration reform.

In many places, title registration has been introduced or given impetus as part of a wider programme of political action. In Australia title registration formed part of the platform of the "Responsible Government" movement. The 1925 Act in the UK was part of the programme of land and housing reform designed to provide "homes fit for heroes" after World War I. In Eastern Europe it has found a place as part of the re-establishment of liberal economic and political structures after the demise of communism. Those of us pressing for registration reform in Hong Kong have not found a wider public policy on whose coattails it may be carried through. An effort to present it as a measure to help Hong Kong get ready for the reversion to Chinese sovereignty in 1997 failed to get any traction. The legislation was seen as making change rather than ensuring the continuity of the rule of law on which the public mind was then focused^{xi}.

When the legislation was re-introduced in 2002 it was given a fair hearing but in the absence of any firm body of support for the bill as presented it was very difficult to manage the demands for changes from particular interests. After nearly two years of legislative scrutiny a heavily amended bill was enacted but commencement was made conditional on the Government carrying out a further review of the legislation, addressing a wide range of questions raised during the scrutiny and reporting back to the Legislature to obtain confirmation that the new system could be introduced.

Over the past three years we have been working through that review process. In parallel, we have been trying to build political understanding and support for the reform. Several measures are being taken on this front, other than continuing explanation to and lobbying of legislators. They include:-

- proposing to replace the enacted legislation with a version rewritten in much clearer more straightforward terms. This removes a long standing complaint that the drafting of the legislation was much too complex and technical for lawyers and public. A working draft of the rewritten legislation was circulated in 2006 and has been well received. We intend to issue a further

draft early next year incorporating substantive amendments to the law proposed in the course of the review exercise.

- Engaging the law society and other partners now on the expected forms and detailed operating procedures for the new system so as to build understanding for the new arrangements and to develop a sense of partnership in working for the change.
- Preparing for use of various media to help create wider public awareness and understanding of the change in advance of submission of the final legislation for consideration by the legislature.
- Demonstrating responsiveness to public demands for improvements in service quality as well as initiative in addressing the business needs of law firms and banks. Our aim here is to build and maintain a reputation for reliability and capability that may help to engender confidence in our capacity to manage the change to title registration successfully.

Subject to the exigencies of the Government's other legislative priorities I am now expecting to be able to introduce the final legislation at the end of 2008, after the elections that are due next summer. Assuming all goes well in the Legislature, we should be able to commence title registration for sales of new land by early 2011 and will then have 12 years to prepare for the conversion of all existing land and property on the land register to the title register. So, looking forward, three and a quarter centuries after the enactment in Ireland, and 180 years after finding root in Hong Kong, deeds registration will become just a part of Hong Kong's history rather than a matter of daily use. I have no doubt, though, that the success of the conversion to a title register in Hong Kong will owe much to the soundness and adaptability of the Irish Registration Act of 1707, in honour of which we are gathered here today.

Annex to Registering a Special Administrative Region

Land Registration in Hong Kong

Extracts from the Lockhart Report of 1900, illustrating the challenges of registration in the New Territories.

The New Territories comprise mainland and islands that cover ten times the area of Hong Kong Island and, in 1898, contained nearly 600 villages and townships and an estimated population of 100,000.

Lockhart noted:

“Although the system of land registration adopted by the Chinese Government is apparently simple, the difficulties that have been experienced in connection with it show it to be of the most unsatisfactory nature, especially as not much reliance can be placed upon the accuracy of any title deeds registered under it.”

Particular problems noted included:-

“the land at Ch’eung Sha Wan, including the foreshore and the sea in front, is claimed under four distinct titles vested in four different families. Two of the titles to the same land are derived direct from the Viceroy and Governor of Canton under recited Imperial Orders. The two other titles...conclude by Vesting Orders made at trials before the San On Magistrates, one Magistrate deciding that the land belonged to the Tang Clan and another Magistrate deciding that the same land belonged to the Chiu Clan.”

“A typical case of another class is that of some farm lands adjoining Deep Bay. About ten acres (English) had in course of time been added to the farm by the silting process of the sea and the detritus brought down by the Canton River. This natural accretion was claimed by the owners of the farm, but was sold by the San On Magistrate as waste land belonging to the Government for Taels 600 (\$833) to a friend, who, it is alleged, formed a syndicate consisting of himself, the Magistrate, the Major-General, and, under cover of the sale and by means of the soldiers at their command, took forcible possession of the whole farm, which was worth \$60,000.”

“Some land is held under a title by capture, where the clans fought, and the losing clan gave up a field as the price of the cessation of hostilities.”

“Patches of fields situated in different districts are often contained in a single deed, and in one case a deed has been brought in for registration which purports to be a sale of land in 24 distinct villages. It is not rare to find two or three registered deeds produced in proof of ownership of the same lots. The Chinese Authorities kept no register of titles, and under their system of registry, fraudulent sales could be registered with impunity until litigation ensued, when, after a lapse of years, a vesting order in the rightful possessor could be issued by the District Magistrate”.

“Owners or occupiers report their land in *maus* or Chinese acres, but as it has not been the general custom in the districts to calculate the area of land by *maus*, but rather by the amount of grain required to sow a field, they also report the area of their land in this manner, two and a half *tau* of grain being equivalent to one *mau* (0.1515 English acre). But even this *tau* varies in different localities. The *Kun Tau*, or Chinese official standard measure of 10 *shing*, is adopted at Taipo, in the Sheung Ü District, and at Shataukok. The *Ts'ong Tau*, or grain measure of 11 *shing*, is used throughout the Ün Long District. The *Ts'in Tau* of 8 *shing* is employed in the Ts'un Wan and some other Districts. The areas reported can only be regarded as approximate for the present, and no exact data can be obtained until the survey of the territory has been completed.”

The survey noted above was carried out from 1900 by a team from the Indian survey office.

Other more general observations included:

“The principle followed in dividing the territory into districts and sub-districts was to adhere as closely as possible to the divisions recognised by the Chinese inhabitants for many years.”

“One great difficulty has been suspicion on the part of the inhabitants of the intentions of the Government. The people seemed to fear that the Government intended to take their land away from them, and, in order to effect this object, wished to find out the owners by inducing them to register all their lands.”

“A further source of delay has arisen from the fact that much of the land under cultivation has never been reported to, or registered by, the Chinese Government.”

There was good reason not to report land under cultivation. Apart from evading tax, recorded occupation of land was an essential prerequisite for a family being able to enter its members for the examinations for the imperial civil service. The families that already had registered land therefore had incentive to try to prevent newcomers to the area from being recorded by the local magistrates, so as to cut down possible competition for securing lucrative official positions.

“The consideration money mentioned in the deeds is hardly ever accurate, being usually stated much below the actual sum paid, so that the *ad valorem* duty payable on obtaining a red deed may be the minimum. In one case in which a sum of \$4,000 was paid, the amount entered in the deed was only \$475.”

“Another cause of difficulty and delay has been the ignorance of the landlords regarding their own land. For generations landowners have been content to collect their rents without ever having taken the trouble to enquire into the land itself, which has been left entirely under the control of the tenants. These tenants have changed from time to time; sub-leased the land; sold the right of cultivation or mortgaged that right, without consulting the landowners, who were quite satisfied so long as the rent was regularly paid. It has often happened that some crafty tenant has asked his landlord to reduce his rent, giving as an excuse that it was impossible to make the land pay unless the rent were reduced, and that if the reduction were not agreed to the tenant must give up the land. The landlord, who has inherited the land without knowing any particulars regarding it, is practically at the mercy of his tenant, and is constrained to comply since it is impossible for him to take over possession of land which in many cases is far removed from his own village or district. Besides, tenants generally form a “ring”, agreeing among themselves that no other person shall be allowed to take over cultivation from the tenant in occupation. It is easy to see how such farming rings are able to boycott the landlords. In fact, it is not an unusual proceeding for tenants, taking advantage of the ignorance of their landlords, to make an absolute sale of a part of the land, the part retained being sufficient to pay the rent.”

Endnotes

ⁱ The translated quotation comes from a proclamation put out after an assembly of Clan leaders at Ha Tsuen, encouraging resistance to British takeover of the administration after news of the 99 year lease on the New Territories became public.

ⁱⁱ A police station was built in 1899 on the hill above the main villages of the clans that had led the opposition to the British. In 2005 it closed and has now been refurbished and reopened as a museum dedicated to the history and culture of the clans of the New Territories.

ⁱⁱⁱ The Lockhart Report on the New Territories settlement provides extensive evidence on the problems with land in the New Territories. The full text is in the Hong Kong Government Blue Book for 1900. The supplementary annex to this paper contains extracts relating to the registration of land.

^{iv} By the late 1870s more property in Hong Kong was owned by Chinese than by British and other foreign merchants and residents. Local lawyers, trained in England and able to mediate between the colonial authorities and the local community were also appearing. In the 1880s, Sun Yat-sen was asking the question why it was that Hong Kong had prospered so greatly while China remained mired in poverty? While his own thinking does not appear to focus on security of property as a major difference, others in the republican movement did pay attention to reform of land registration and land law, influenced by their experience in Hong Kong and overseas. It was clearly on the minds of the leaders of the revolutionary government in Wuchang after the uprising there in October 1911 that led to the demise of the Qing government.

^v The quality of the early administration in Hong Kong earned it the name of ‘scandal city’ in the London papers. In an effort to improve the quality of legal services, in 1858 an ‘Amalgamation Ordinance’ was enacted, merging the professions of attorney and barrister and raising the entry qualifications. Four years later, taking advantage of an absence of the Governor and Chief Secretary, the Attorney General moved to repeal this Ordinance. He was opposed. One member of the Legislative Council “drew a very revolting picture of a class of men who formerly flourished in Hongkong when people were compelled to go to attorneys. He deprecated opening doors for the return of such possibilities...No complaints of extortionate charges were now heard of, although formerly such complaints were of daily occurrence. A gentleman in the Colony, who had given more conveyancing business to lawyers than any other man, was ready to produce a number of documents transferring property that were quite worthless. These had been the work of the former attorneys.” The motion was finally carried after “The Chief Justice, in a speech of some length, combated what he called the inference, drawn from a former condition of affairs, that it was impossible for a man, however well-trained and well-conducted, to come to Hongkong as an attorney without becoming, soon after his arrival, a scamp or a drunkard. He expressed his surprise at such a position being assumed by any reasoning man”. Quotations are from proceedings of the Legislative Council 1862, cited by Norton-Kyshe ‘The History of the Laws and Courts of Hong Kong’, 1898.

^{vi} Capt. Elliott, Proclamation of 1 May 1841, repeated in Gazette notice on 15 May 1841. Note similarity to Dutch definition of good government as ‘freedom of conscience and security of possession’, the latter part of which influenced debate about registration reform in England after 1688 and contributed to the various Land Registration Acts of Queen Anne, of which the Irish Act was perhaps the most successful.

^{vii} Appendix to Lockhart Report on the New Territories settlement, HK Government Blue Books, 1900.

^{viii} Title Registration was reintroduced under the Malaysian National Land Code in 1963. Pope-Hennessy’s unfortunate effect on land registration was not his only eccentricity. He obstructed development of a sewage system for the rapidly growing city of Hong Kong, convinced of the merits of earth closets (or perhaps under the influence of backhanders from the merchants who ran a lucrative business buying up night soil) and assaulted his Attorney-general on suspicion that he had made improper

advances towards Pope-Hennessey's wife. The gentleman in question may have been doubly outraged over the assault for it would appear that he had intended such advances but had been outstripped to his objective by the Major-General commanding the garrison. He beat off the Governor with an umbrella. In Pope-Hennessey's favour it should be noted that he welcomed representatives of the Chinese community into Hong Kong's Legislative Council and reformed a harsh penal code.

^{ix} S.Rowton Simpson 'Land Law and Registration', CUP 1976. 10.18 (1). See also 6.7

^x In 1948 less than 4,000 instruments were registered, a significant increase over the 63 deeds registered in 1853 but trivial in comparison with the nearly 4,000 deeds a day being lodged in July 2007.

^{xi} The then Registrar, Noel Gleeson, wrote that the Land Titles Bill "will introduce a new system whereby the ownership of lands and buildings is established and ascertained beyond doubt under a local law of Hong Kong which, in its turn, will be recognized after June 1997 by the Basic Law. In this way, continuity and certainty of ownership are secured..." (Foreword to 'Registration of Titles in Hong Kong' by Willoughby and Wilkinson, Butterworths, 1995). The argument was employed in the initial public presentations but was not sustained. Partly it was lost amid the objection at the time that the legislation would affect the livelihood of the legal profession, partly it could not be maintained in the face of reluctance to consider change in advance of 1997.