



Responsible Land Governance: Towards an Evidence Based Approach

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ADVANTAGES AND DISADVANTAGES OF A MERGER ORGANIZATION: THE CASE OF THE KADASTER-NETHERLANDS

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Abstract

The Dutch merger of Cadastre and Land Registers is strongly based on Dutch culture and history. The original aim of merging was to achieve economies by preventing duplications and to ease the sorting out of information. Especially during the years of manual registrations this purpose seems to be achieved. In present time these types of advantages are less serious. Without merging the same type of economies can be achieved by electronic connecting of registers. Main drawback is the hybrid juridical system. The system of one servant for two masters with different demands contributed to misunderstandings, inadequate security demands for ICT systems, hampered the exchange of data with other registers and increased the financial vulnerability. In future new technical developments could very well result in a change of the merger. At the horizon appears one Institution with the meaning of a Land Register and a department for outsourcing of surveying.

Key Words: Boundary, Cadastre, Land Register, Merge, Netherlands.

1. INTRODUCTION

In a paper for the World Bank conference of 2016 de Vries, Laarakker and Wouters raised two questions involving the merge of Cadastres and Land Registries. What forms of integration can be referred to as mergers? How do these forms contribute to a fundamental change in organisational quality? Before answering these questions for the Netherlands it seems useful to define the two merged institutions. In the Netherlands Land Registers² are the registers for the recording of deeds involving titles and mortgages to property rights of land. The Civil Code provides protection to third persons relying on these registers³. This protection is not provided to information from the Cadastre. The Dutch Cadastre is a registration of presumed entitled persons and of presumed boundaries of involved plots of land. Data from the Cadastre are used by governmental organizations for the start of public processes, such as taxes assessments but can be overruled by information from the Land Register. In the Netherlands the two registrations were introduced separately but over the years partly integrated without changing the legal differences. For example the mandatory adding of cadastral numbers to deeds in the Land Registers contributed to merging but did not make the cadastral boundary legally decisive. Parts of the Dutch Cadastre and Land Register were merged gradually but juridical merging was repeatedly rejected. A description of the Dutch history of Cadastre and Land Registers gives a rather complete impression of the different forms of merging and the reasons to implement or reject these forms. The question involving improved organizational quality is more difficult to answer. Merging had advantages but also serious disadvantages. This paper describes the history the advantages the disadvantages and the future developments.

2. IMPLEMENTING OF THE LAND REGISTER AND THE CADASTRE

In the year 1812, during the annexation by the French emperor Napoleon, Land Registries were introduced in the Netherlands. The legal system was the French deeds system that in theory still exists. Napoleon had plans to introduce a Cadastre, but before he could do so he lost the battle of Waterloo. The new Dutch king took over and introduced a Cadastre just for levying property taxes. He was in a hurry because he wanted to catch up with the industrial revolution and needed money for new investments. So he introduced a Cadastre in a very economic way. Possessors were registered as supposed owners and visible fences and ditches were surveyed as the cadastral boundaries. Property taxes were based on two

² In Dutch called Openbare Registers

³ art.3:23 Civil Code

objective standards. The region where the parcel was located and the numbers of square meters of the parcel. Objections from taxable persons who assumed their parcel should be larger were not admissible because they had no interest in paying more taxes. Administrative law governed the Cadastre and pursuant to this type of law objections were not admissible in case of a lack of interest. Owners who assumed their parcel should be larger could start a separate lawsuit for a declaration of ownership by the civil law Court. Pursuant to civil law these declarations could be recorded in the Land Register. Taxable persons, who considered arguing that the number of square meters of a Cadastre parcel was lesser could raise objections but were reluctant to submit false claims. A neighbour could use these claims in a lawsuit for a declaration of ownership and acquire a title to the land of the objector. This illustrates the importance of the juridical difference. Civil law has to comply with strict requirements for the protection of fundamental human rights. Administrative law allowed less cumbersome procedures. The efficient approach⁴ of the first Dutch king resulted in few objections and two separated registers. The different registrations had their own system to get access to the registers. Both used different systems for identifying plots of land. The land registry used descriptions of physical boundaries in the deed. The Cadastre used cadastral indexes on maps. It seems an example of the “fit for purpose approach”. Pursuant to the key principles of this approach: “Flexible recordation rather than only one register is to be preferred”⁵.

3 GRADUAL MERGING OF PARTS OF THE REGISTRATIONS

After the completing of the Cadastre, step by step integrating of parts of the Land Register and Cadastre started. First step was referring in the Cadastre registration to file numbers of deeds in the Land Register. A second step was mentioning cadastral indexes in a deed in the Land Register. This was optional in the beginning but eventually it became mandatory. The fourth step involved the name lists. Originally Cadastre and land Registers had their own name lists. The name list of the Land Register referred to names in deeds in the Land Register. The name list of the Cadastre referred to the names of taxable persons. Both were replaced by one name list that provided access to the Cadastre and the Land Register. The only aim of integrating was to prevent duplications and facilitate the sorting out of information.

⁴ Countries intending to collect property taxes rapidly should not combine the introduction of a Cadastre with a assigning of titles in land registers. Assigning of titles to property rights (fundamental human rights) asks for disclosure of intended owners and a possibility to raise objections and court judgments. Delay in the collecting of taxes will be inevitable

⁵”. <http://www.gltm.net/index.php/publications/publications/publications-list/send/2-gltm-documents/2332-fit-for-purpose-land-administration-guiding-principles-for-country-implementation>. Page VIII of the executive summary.

Servitudes were not registered in the Cadastre because servitudes already were mentioned in the deeds in the Land Register and not relevant for collecting taxes. Eventually the joined name list was integrated in the computerized registration of the Cadastre. It made the computerized registration a "servant of two masters": the by civil law governed Land Register and the by administrative law governed Cadastre. In the years before the introduction of the new Civil Codebook in 1992 pleas for juridical merging of Cadastre and Land Registers were thoroughly discussed. Upgrading of the civil law meaning of the Cadastre was ultimately rejected because it should put the existing conveyance system upside down. Changing the juridical meaning of cadastre boundaries was rejected because the proposed alternative should put the system of adverse possession upside down. Both will be explained in the next paragraphs.

4. THE CONVEYANCE SYSTEM

Dutch civil law for acquiring property rights is based on a deeds system. The system is inherited from France and modified with Dutch pragmatism. A contract of sale has to be continued by recording of a deed of transfer in the Land Register. For this transfer a causal system exists. If the recorded deed is preceded by an invalid contract, for example in case of tort, the buyer does not acquire the title. However as long as defects are not published in the Land Register a third party who is not aware of the defects may rely on the Land Register. For this reason the system of the Dutch Land register is often described as a semi title system. Reliability of the Land Register is advanced by Dutch Registrars, who verify whether the aimed legal result could be achieved. A Registrar who a defect assumes sends a warning to the involved notary public and to the concerned parties. In this warning he expresses his reservations about the legal consequences and adds that he will report this warning in the cadastral registration. He offers notaries an opportunity to withdraw the submission. In theory a notary should verify all the previous deeds over a prescription period, but in practice this never happens. Only the last deed is checked on authority, competence and servitudes. The minor risks of errors in previous deeds are accepted because of the general insurance of notaries. The Dutch notary public functions as "clearing house". Buyer and his mortgagors transfer the purchase money to the notary, who has to transfer the money to the seller and his mortgagors. He does so after receiving a statement from the registrar that a deed is received and after verifying the registration of the Cadastre. The verification is restricted to new submitted requests for recording in the Land Register. Registration of these submissions is completed before 9:00 the next working day. If there are no new submissions registered the notary knows that he can transfer the purchase money. If the proposals for increased legal meaning of the Cadastre had been implemented the notary should have to postpone the transfer of the purchase money till the updating of the registration of the Cadastre was completed. This should take more time and that was considered undesirable. Delayed transfer of purchase money does not suit the merchant spirit of the Dutch.

5. DIFFERENCES BETWEEN CADASTRAL BOUNDARIES AND CIVIL LAW BOUNDARIES.

Pursuant to Dutch civil law the true boundary is the result of the intention of the parties as described in the deed of transfer. So when the neighbours in the period between surveying and signing of the contract have agreed to shift the boundary or when incorrect information is provided to the surveyor the new cadastral boundary will differ from the truth. A frequently occurring reason for differences is adverse possession for twenty years. In those cases prescription of the possibility to have the possessor removed results in acquiring of title by the possessor. Acquiring can be recorded in the land register with of a so called "prescription statement" but is not demanded. In practice only a few "prescription statements" are recorded. The system reflects a mentality of tolerance and preference for informal solutions that is deeply rooted in Dutch culture and is often described as the "polder model". Some historians put this down to the geographical position of the Netherlands. Without compromise and consensus on pumping of water and maintenance of dykes it is impossible to live on land that is largely below sea level. Philosophic background dates from the sixteenth century when the famous Dutch philosopher Erasmus criticized a lack in tolerance of the Catholic Church against Protestantism. In fact the civil law system comes down to a legal system of general boundaries. In the years before the introduction of the new Civil Code representatives of the by then existing faculty of Geodesy of the Technical University of Delft pleaded the introduction of a system of fixed boundaries based on research by surveyors. They proposed that surveyors who presume that boundaries have shifted after adverse possession should publish proposals for resurveying of the cadastral boundaries. After completing a period of objections and appeal the proposed cadastral boundary should be implemented as fixed civil law boundary. Dutch Notaries and other lawyers disagreed with this proposal. They wanted to maintain a system of in fact general boundaries. Main argument was that a societal demand for fixed boundaries was missing and that upgrading the juridical meaning should be expensive and result in cumbersome procedures. Surveyors should have to verify authority, competence and identity of informants and have to complete a legal training for that. The independence and reliability of surveyors should have to be guaranteed by a supervisor. In other words a system comparable to that of licensed surveyor should have to be introduced and make surveying more expensive. Furthermore was feared that boundary disputes should increase. Landowners who are satisfied with the existing location of a fence or ditch should receive information from a surveyor about differences with the location of a cadastral boundary. It could result in claims to remove physical boundaries or claims for financial compensation. The neighbour should probably react with claiming acquiring after adverse possession for longer then 20 years and a boundary conflict should be borne. To settle the discussion, the Minister of Justice charged one of the most respected lawyers in the Netherlands, member

of the Supreme Court and Commissioner for the new Civil Codebook, with the task to solve the conflict. The Commissioner drafted the actual Cadastre law based on the existing hybrid juridical system. The law got the collective name “Kadasterwet” but maintained the difference between a Cadastre governed by administrative law and Land Registers governed by civil law. There are different chapters for Cadastre and for Land Registers and different courts to solve disputes. As young assistant registrar I had the honour to assist in talks with the Commissioner. His leading principle was that the new Cadastre law should fit the Dutch culture as is reflected in our Civil Code. He accepted a system of optional re-registration of the Cadastre but with a less decisive role of the surveyor. The Institution has to provide evidence of acquiring after adverse possession to a notary public, who verifies whether sufficient statements from all known stakeholders are collected. After approving these documents, the notary public executes a deed of re-registration. The recording of this deed in the Land Register results in a change of Cadastre boundaries but only 10 years later the re-registration acquires civil law effect. This intermediate period was esteemed necessary because existing property rights are fundamental human rights that have to be safeguarded by procedures that offer absent owners sufficient time to claim their rights. It is striking that at the moment a Cadastre in Greece is being introduced with a system that is close to the original proposal of Dutch surveyors. Re-registration in Greece is mandatory and results in fixed cadastral boundaries with immediate decisive legal meaning. All the arguments to reject this system in Netherlands now seem to occur in Greece. The Greek project turns out in an invitation for boundary disputes and causes delay and over extension of costs. If Greece should have chosen for the cautious "fit for purpose approach" of Dutch king William 1, as described in paragraph 2 of this paper, introducing a Cadastre for the collecting of property taxes should have been much easier. In 2011 the promoting of the Dutch Cadastre to basic register⁶. resulted in renewed proposals for mandatory registration of acquiring after adverse possession. The Groningen Centre for Law and Governance from the University of Groningen did empirical research on this topic and advised against mandatory registration. The benefits should not outweigh the costs in the Netherlands⁷.

6. ADVANTAGES OF THE MERGER ORGANIZATION

The original aim of merging was to achieve economies by preventing duplications and to ease the sorting out of information. Especially during the years of manual registrations this purpose seems to be achieved. In present time these types of advantages are less serious. Without merging the same type of economies can be achieved by electronic connecting of registers.

⁶ See paragraph 8

⁷ P 184 of “Verbetering betrouwbaarheid basisregistratie Kadaster” ISBN 978-90-8974-610-8

7. DISADVANTAGES OF THE MERGER ORGANIZATION

Many drawbacks of Dutch merger organization involve the hybrid juridical system. The Cadastre registration became a “servant of two masters”. Just as in the famous play of the Italian play writer Carlos Goldoni⁸ different demands from different masters are sometimes difficult to combine. In the next paragraphs drawbacks will be explained with practical examples.

7.1 JURIDICAL MISUNDERSTANDINGS

Even important officials of the Dutch Institution have difficulties in explaining the hybrid juridical system. It made the audience suppose that the Dutch merger resulted in equal legal meaning of Cadastre and Land Registers. In the previous chapters was explained that this is incorrect. The registration has a double function for a by civil law governed Land Registers and a by administrative law governed Cadastre.

7.2 UNEQUAL SECURITY DEMANDS FOR A SHARED ICT SYSTEM.

The importance of a reliable real estate market justifies the highest security level for the ICT system that provides entrance to the Land Register. The system has to be up to date and should contain data of submitted but not yet approved documents. If for example a recent seizure is missing a buyer will pay for land he cannot acquire because the seizure has a higher ranking. The notary uses cadastral parcel numbers to trace these documents. File numbers of submitted but not yet in the Land Register recorded documents are added to the number of the Cadastral parcel. If the notary because of these “last minute documents” assumes that a seller/ debtor aims to frustrate enforcement of a creditors debt by means of a so called Paulian transaction he will not transfer the purchase money. The file numbers added to the names in the Cadastre are of equal importance. A creditor uses the name to sort out whether a debtor owns real estate and foreclosure is possible. In case of an error he will miss that possibility. It makes the information as entrance to the Land Register crucial for a proper functioning of the real estate market. The providing of information to other governmental organizations is less crucial and has lower demands for topicality and integrity. Recently a Dutch newspaper⁹ revealed that unauthorized persons could easily enter the shared computerized registration. It caused a lot of publicity and questions in Dutch Parliament. The Board promised improvements and the Minister denied urgent

⁸ an Italian play writer who lived in the 18th century and wrote the famous play “servant of two masters”.

⁹ Financieel Dagblad of 13 February 2017, “Kadaster kaupt met Veiligheidsrisico’s ICT”.

affect risk because of separated systems for updating of the registration and for providing information. Because changes only are uploaded to the information database after verification and approval the information should be secure¹⁰. With this answer the Minister seemed to get lost between Cadastre and Land Register. Normally verification and approval takes place after five days and that is too late for a topical entrance to the Land Register. The “clearing house”¹¹ demands entrance to the Land Register with topicality of the last business day. To achieve that topicality a system of provisional registration of documents in operation is developed. The question is in how far this provisional registration is protected against unauthorized changes. Answers have to be provided in a by law demanded yearly report by independent experts¹². The report has to be distinguished from the by law demanded three years check of quality of data of the Cadastre¹³. It illustrates the differences between a topical entrance to the Land Register and the providing of less topical information to governmental Institutions. [Figure 1]

7.3 HAMPERED EXCHANGE OF DATA WITH OTHER REGISTERS.

The exchange of data with other registrations can be hampered by the double function of the Cadastre. This was clearly demonstrated when the countrywide introduction of a system of basic registers asked for uploading of identifying data from the basic register of legal persons. The Court of Audit warned for mistakes in these registers¹⁴. Because of the limited affect risk uploading to the system for the Cadastre seemed acceptable. If for example the wrong person receives a taxes assessment complaints will simply result in corrections without serious damage. However the affect risk of errors in the entrance to the Land Register is much higher. When the name of a debtor is incorrect the creditor cannot trace the properties of his debtor and will miss the opportunity to start a foreclosure. It made registrars refuse uploading and restrict data exchange to the adding of reference numbers from basic register¹⁵.

7.4 FINANCIAL VULNERABILITY

In the Netherlands for many years deficits at surveying were compensated out of an overabundance of income for recording deeds in the Land Register. Although a lack of financial transparency regularly was

¹⁰ www.tweedekamer.nl/kamerstukken/plenaire_verslagen/detail?vj=2016-2017&nr=52&version=2

¹¹ see paragraph 4

¹² article 3d paragraph 4 Kadasterwet

¹³ article 7u paragraph 1a Kadasterwet

¹⁴ www.courtfaudit.nl/english/Publications/Audits/Introductions/2014/10/Basic_Registers

¹⁵ Mrs Imke Tromp “De koppeling tussen de Basis Registratie Kadaster en het Handelsregister, JBN December 2015.

criticized cross subsidizing still exists¹⁶. Over the years it was even extended to different types of new activities. It makes the organization vulnerable. The income for recording in the Land Register is strongly related to the housing market and fluctuates more than the income of other activities. When the income of the profitable Land Registers decreased and the expenses for loss-making activities remained stable deficits could no longer be compensated and the fees for recording in the Land Register had to be raised.

8. FUTURE TRENDS

8.1. CHANGING OF THE REGISTRATION SYSTEM

In 2008 the Cadastre registration was nominated Basic Register and made part of a network of electronic linked Basic Registers. It means that other public authorities for the start of their public task have to rely on the Cadastre registration. Because the existing hybrid legal system was maintained, information from the Cadastre can still be overruled by the information in deeds in the Land Register. This caused new pleas for juridical merging and in the long turn these pleas could very well be successful because the main objections¹⁷ gradually will disappear. A system of previous approval and computerized processing of deeds of transfer is underway and will speed up the updating of the registration after new recordings. Result could be extending of the third protection of the Land Register to specific data of the Cadastre. Difficulty is that some parts of the actual registration of the Cadastre are unreliable. It makes gradual introduction inevitable. For this purpose is proposed to add “mirror statements” to the Cadastre. Content of the statement should be something like “the registration is in accordance with recordings in the Land Register providing third party protection of article 3:24 civil code¹⁸. Clients could rely on such a statement because of the statutory liability of the Institution for errors in the Cadastre¹⁹. After gradual successful introducing of such “mirror statements”, support may be expected for the introduction of a title system in Dutch Civil Code.

8.2 PROVISIONAL CADASTRAL BOUNDARIES

Recently a new system for subdivision of Cadastre parcels was introduced in the Netherlands. A representative of the owner can submit a drawing with proposals to subdivide his parcel. The drawing is fabricated and submitted by means of a by the Institution developed computer system. The system

¹⁶ Page 62 of “Werken aan maatschappelijke meerwaarde binnen de context van een open overheid” Andersson Elffers Felix, offered to Dutch Parliament on 17 December 2015, TK 25268.129

¹⁷ See paragraph 4

¹⁸ Was proposed by W. Louwman and B.A.M Jansen in Geo-Info 2010-4, p 12 and W. Louwman and Z. Klaasse in WPNR 6728, p 886 .

¹⁹ Article 117 of the Kadasterwet.

generates the coordinates of the boundaries and creates new cadastral parcels with provisional cadastral boundaries. Afterwards private surveyors compare the by owners provided information with the physical boundaries and survey the definitive cadastral boundary. Outsourcing to private surveying companies is allowed because the cadastre boundary is not decisive²⁰. Repeated advises by legal scientists give reason to expect that this system of in fact general boundaries in future will remain. So it seems that far most of the work that in the past was carried out by surveyors of the Cadastre in future will be replaced by drawings provided by (representatives of) the landowners and verification by private surveying companies.

9. CONCLUSION

The Dutch merger is strongly based on Dutch culture and history. Because of national differences generic answers to questions involving the preferred form of a merger seems impossible²¹. Demerge of surveying parts of the Cadastre (self service and outsourcing of surveying) , computerized processing of previously approved deeds an extending third party protection to parts of the Cadastre could in future gradually change the existing merge. At the horizon appears one Institution with the meaning of a Land Register and a department for outsourcing of surveying.

[Figure 1]

²⁰ See paragraph 5

²¹ Pursuant to Article 5 (3) of the Treaty on the European Union these national differences have to be respected.

Bottleneck of merger: Cadastre servant of two masters with different demands

