Responsible Land Governance:
Towards an Evidence Based Approach

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OVERSELLING THE MIRROR AND CURTAIN PRINCIPLES OF LAND TITLING

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Abstract

Two forms of the land registration component of land administration systems are normally distinguished: deeds registration and title registration. In the latter the register is supposed to reflect the correct legal situation ("mirror-principle"), and there is no need for further (historic) investigation beyond the register ("curtain principle"). In reality, as shown in recent student work, both these principles do not work out as simple as this sounds. The mirror is either very incomplete (allowing for overriding interests) or tends to put the title before reality, even if the title has been acquired through manipulation. The curtain is lifted, and buyers want easy (on-line) access to earlier transaction documents to verity themselves how the current right holder on the title came into that position. With the proclaimed advantages of title registration not real, and some disadvantages still there, also the legal framework of fit-for-purpose land administration needs to be rethought.

Key Words: Land registration, registration of title, mirror principle curtain principle, land recordation

INTRODUCTION

One of the key components that makes that a land administration system can bring tenure security to land right holders is land registration. In most literature two types of land registration are distinguished: deeds registration and title registration. The latter can be described as follows:
"A title registration system means that not the deed, describing e.g. the transfer of rights is registered but the legal consequence of that transaction i.e. the right itself (= title). So the right itself together with the name of the rightful claimant and the object of that right with its restrictions and charges are registered. With this registration the title or right is created." (Henssen 1995: 8).
Therefore the register is supposed to reflect the correct legal situation ("mirror-principle"), and there is no need for further (historic) investigation beyond the register ("curtain principle"). Whatever is registered is guaranteed to be the truth for a third party of good faith and a bona fide possessor who does not appear on the register will be compensated ("insurance- or guarantee principle"). (Henssen/Williamson 1990: 31).
These are nice principles to consider in theory, but how does this play out in the reality of different settings? Some recent studies by (MSc and PhD) students show realities that could be interpreted as weakening the bold descriptions of the mirror and curtain principles in real life implementations of title registration, e.g. via the so called Torrens title.

MIRROR PRINCIPLE

"As such, the Torrens system is said to enshrine the 'mirror principle'- the register effectively reflects all interests affecting the land." (Wu, 2008). An important issue that comes up here is the question what do we mean with 'all interests affecting the land'? Often that is first of all reduced to all interests mentioned in the law or otherwise derived from the legal system. In many countries such lists of 'formal land rights' that need to be registered, do not cover certain types of (shorter) land use rights, let alone interests that stem from tradition or custom. Shorter rights (e.g. leases of less than 12 years in England) can still be in existence without the register showing them; the so called 'overriding interests'. The Ghanaian Land Title Registration Act for instance has a long list of such overriding interests, even including a person in actual possession of the land.

And even when the register mirrors all interests affecting the land at the time of creating this title, changes occur in the sets of interests held, and who holds them. In land registration we consider this the transfer of the rights, and the question is how well these transfers are captured by updating the title. In case of (market) transactions, especially selling and buying, most of the parties to such a transaction will engage with the land registry to get the title updated due to the transaction. This might even be mandatory upon a fine, or even be a necessary condition to complete the transfer of the rights. Nevertheless the question arises, what happens if parties between themselves have moved the interest in the land from the seller to the buyer without having the records showing this. The mirror is out of sync. Does this mean that the interests are as before (so the legal situation has not changed even with the parties intending to change the interests), and that the 'reality out there' should be a mirror of the title? That puts the registrar, keeper of the title registration, in a very powerful position.

Even more precarious is the situation for other types of land transfer than (market) transactions. Especially inheritance of land is a clear point. The mirror can never be so strong as to deny that the registered owner has died, and the interests are clearly held by the heirs. How to be sure who are the heirs and how to make sure the title is updated are not easy questions. Even in Western countries with well-functioning land registration land registered in the 'dead hand' is not uncommon (in the Netherlands a few percent of the properties is still registered in the name of the deceased). Issues with adverse possession of land, both affecting full parcels as well as strips around the presumed boundary, are another example.

So when we see 'the title is supposed to reflect the correct legal situation', do we read 'the legal situation on the title is assumed the correct one' (unless in very exceptional situations we can prove otherwise). That would mean that the mirror is the other way around. Not the title being the copy that reflects the master (legal reality), but the title being the master. Of course in a perfect world with everybody quickly reporting the transfer, no conflicts between competing claims, efficient and clean procedures in the registration offices etc., this is not a large issues. However, that is rarely the case in practice. Land is contested between different people with competing claims (sometimes both reasonable, sometimes one is bogus) and offices might be understaffed or

otherwise under resourced, and the working ethics might leave something to be desired. Those with connections or money might be able to get titles that should not have been issued. But once they are, what is their meaning and power?

CURTAIN PRINCIPLE

In a true title system there is no need for further (historic) investigation beyond the register. That would mean that soon after the registrar has updated the title based on filled documents (esp. contracts or other transaction documents) that convinced him or her, these documents could be thrown away. The curtain principle makes it unnecessary to check them at a later stage, and thus why keep them? I have never heard of a country that actually does this, since when the title is being challenged, they are important proof of why the title has been made as it currently reads. They may be needed as evidence that the registrar did his or her work correctly, or even to avoid the court from squashing the title if the competing claim also has some kind of evidence available.

Keeping all the transaction documents (often called deeds) to be able to inspect them to determine (or verify) the chain of transactions from a good root of title is the essence of the (basic) deeds registration system. Nevertheless even in countries that operate under Torrens titling, strong advise has been recently made to not only keep the underlying documents for verification in special cases, but to make them easily (on-line) accessible for verification, as suggest for instance in the recent PhD on land registration in Uganda (Wabineno 2016). With the amount of titles issued that are incorrect (or issuing of double titles for the same land), a prudent buyer is back to inspecting him- or herself (or the advisor) whether all is in order regarding the seller mentioned in the title being really the current (and only) right holder to buy from.

OVERSELLING TITLING?

We see that in many countries the curtain has been or should be lifted to allow prudent buyers to check and verify before they buy whether the right holder mentioned on a title is really the right one, and nowhere the full consequence of trashing the processed documents has been taken.

We also see that the mirror is either reduced in meaning due to overriding interests, or starts to work up-side-down by putting the title above the 'correct legal situation', especially hurting the weaker land holder who might be manipulated out of his or her right be an unscrupulous person manipulating his or her name onto the title instead. This would at best create a conflict in which not so easily the 'correct legal right holder' wins, but the one with the longest breath or reach.

LAND RECORDS VERSUS TITLES

With such high demands on operating a truly functioning title system, it is logical that the mirror and curtain principles in their true meaning should not be applied, thus weakening an important part of the proclaimed advantages of title registration over deeds registration. This then brings out the question whether the also existing disadvantages of title registration compared to deeds registration (strong bureaucratic involvement, need for highly educated and well-resourced land registries, longer processing time of transactions, .. (see Zevenbergen 2002: 54-55) would not call for a new form of land recording that is fast, cheap and realistically in its quality promises. This seems to be in line with an appropriate legal framework in terms of fit-for-purpose land administration. Design requirements for such a more local and less sophisticated land recording system have been defined in two stages with the Global Land Tool Network (see Hendriks et al 2016).

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