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What Would Title Registration Bring to A Deeds System with High Quality Land Information?

Jaap ZEVENBERGEN and Hendrik PLOEGER, the Netherlands

Key words: land administration, registration of deeds, registration of title

SUMMARY

The registration of rights, restrictions and responsibilities should support the land market. An important element of such a land administration system is therefore its aim to reflect the current right holders of the land and property. Over time the way land transactions (and therefore the actual owner or holders of rights in the land) have been evidenced, moved from oral agreements, via private conveyancing to registration of deeds, and ultimately registration of title (Larsson 1991). Although most literature sees each step in this development as providing a better system, there are countries with well operating land administration providing a high level of tenure security which legally still operate 'just' a deeds system (e.g. France, South-Africa and the Netherlands).

In case of the Netherlands the administrative side of the cadastral records contains high quality information on the rights and right holders, derived from the registered deeds, and for many issues society relies on that information. Being a part of the Dutch system of 'key registrations' it is even obligatory to be used by the public sector. The introduction of improved legislation in 1992 (both a revised Civil Code and the introduction of the specific Law on Cadastre and Public Registers) combined with the (early) digitalization of these administrative records, over time has further increased the quality of the information. Some (small) interventions over the years have added to this quality as well. At the moment a number of further (administrative) improvements are under consideration.

Although in general systems of land registration can be seen to be on a 'sliding scale' from simple deeds to advanced title registration, in a recent study we found that there is a discontinuity somewhere on this 'sliding scale'. Whereas it is getting harder and harder to further improve the quality of the information, the full benefits can only be reaped when the law at some point gives legal status to this information (i.c. see it as a title record). Depending on the specific context, incl. the problems experienced due to current weaknesses, power balance between stakeholders and more general e-government developments, the jump to title registration may be warranted or not.

What Would Title Registration Bring to A Deeds System with High Quality Land Information?

Jaap ZEVENBERGEN and Hendrik PLOEGER, the Netherlands

1. INTRODUCTION OF TRANSACTION EVIDENCE¹

Land administration can only fulfill its functions for both current and prospective land right holders, as well as for the different levels and branches of government, when the land information (on who, how and what/where of the rights) is up-to-date and correctly reflecting the current situation. Over time the way land transactions have been evidenced has changed. The manner in which a transaction is confirmed and documented is key here. With the development of societies, different types of transaction evidence have developed as well. They can be classified as shown in Figure 1. With regard to the transfer of land (in its limited meaning) a second question exists. Land by itself is not an identifiable good. All the land of the world forms a continuum, of which pieces have to be identified which can be treated as immovable goods in which rights can be vested (UNECE 2004). This second problem will not be discussed here. To answer the first question, we will discuss the development of the solutions to the question how to transfer (rights in) land, focusing on the last two steps.

1.1 Oral and private conveyancing

As the need to transfer rights develops in a paperless and close knit society, transactions will be based on oral agreements, which will be completed by symbolic acts replacing the handing over that usually completes the transfer of a movable good. This is often done by handing over a small symbol, which has been taken from the immovable good. In Ghana this is called the ‘cutting of guaha’, whereby the seller gives or breaks a leaf, twig, blade or grass (Ollennu/Woodman 1985, p 125). In the Netherlands the seller used to ‘throw’ a twig or blade from the land to the purchaser (Dekker 1986a, p 4). Since it is not only important for both parties to be aware of the transfer, but also for the other people (‘the rest of the community’), this symbolic act has to be performed in the presence of witnesses. This works well as long as a community remains close knit, and transfers are infrequent, but gives problems when a community gets larger or less coherent, and when memories grow dim.

Societies in which writing becomes more and more normal, usually start to use paper to ‘witness’ the transfer. When writing is still only done by a small group within society the (illiterate) parties might go in front of a judge, and declare there that one transfers the right to another (or even have the judge declare that the ‘new’ owner is the owner). The courts will keep record of their activities, and so the transfer is witnessed in writing. At a later date one can retrace that this transfer took place. In other societies specialized ‘writers’ (called notaries in much of continental Europe and Latin America) would make a document witnessing the transfer. An extra complication can be found in the case that land passed through inheritance

¹ Most of the sections 1 and 2 is based on Zevenbergen, 2002, p. 31-38, 42-43, 48, 60-62.

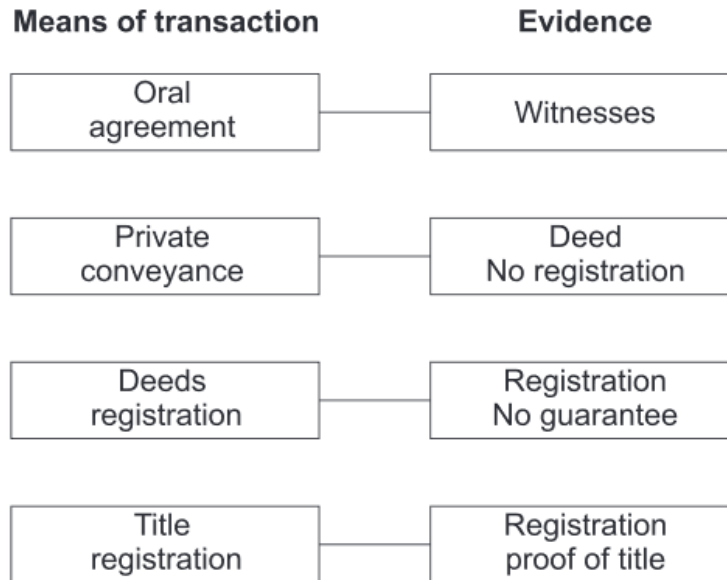


Figure 1: types of transaction evidence (taken from Larsson 1991: 17)

and no transfer document was drafted between them. In such a case the fact that the right passed through inheritance has to be proven in another way. These documents witnessing a transfer are often called deeds. Traditionally these deeds were left in the hands of the ‘new’ owner, and were handed over to the next ‘new’ owner over and over again. After several transfers a whole stack of documents was handed over to the next ‘new’ owner, and usually all these documents were checked by a legal professional before the next transfer was made. This system is called ‘private conveyancing’ and of course has several risks like destruction, theft or falsification of the one or all documents in the stack (see for examples Zevenbergen 2002, p 34-35).

1.2 Introduction of registers

Instead of leaving the documents in the ignorant and/or malicious hands of the owner-of-the-day, their storage could be entrusted to an independent third party, who will greatly limit the chances of loss and falsification. Such registers of documents have been set up throughout history in many different countries at different places like the office of a notary or lawyer, a court, the tax authority, a local authority or an office especially established to store such documents. This most simple form of registration of deeds, often has the following drawbacks:

- a. In many cases there was no obligation to register the deed, although usually a registered deed would get precedence over a non-registered deed or a later registered deed affecting the same land.
- b. No uniform system for identification of properties. The description of the land was left to the parties to the deed.
- c. A register arranged according to the deposition dates, which made it difficult to search the register to establish if the seller had a good title. (Larsson 1991, p 22)

In order to improve this situation jurisdictions tried all kinds of enhancements (see for instance Dale/McLaughlin 1988, p 23). The first problem (a) could be solved by making the registration of all deeds compulsory, but these rules were not always sufficiently effective, because of limited powers to implement and control the law (Larsson 1991, p 22). The second problem (b) was tackled by introducing an unambiguous identification of the subject unit of land (prior to registration), often on a map and with a unique identifier . To solve the third problem (c) indexes to the main register were introduced.

The first indexes were person-based ‘grantor/grantee’ indexes, which still form the base of many deeds registries in US counties (compare Dekker 1986b, p 219-223). The most simple one is keeping a list of all documents mentioning the names of both parties; the grantor/grantee index. Still it is not easy to trace back the right document. Furthermore it is complicated to determine if the two sales by a party concern two different pieces of land or the same piece of land twice. Even if the related deeds are studied it is questionable if the property description will be such that it will be easy to determine this. Since the rights, owners, and usage may change but the land remains forever, the land parcel is an ideal basis for recording information (Dale/McLaughlin 1988, p 20). Therefore a better way of tracing back the documents is a system in which a parcel-based index is kept, and updated after every transfer with a reference to the document concerned. This way a quick overview can be reached. Basically this constitutes a simplified picture of most title registration systems (e.g. Germany), as well as the parcel-based deeds registration systems (e.g. ‘old’ Scotland). In some countries (parts of) the contents of the deeds are copied onto the register, instead of only referring to the place where the deed can be found (e.g. Spain).

The property numbers could be allocated purely administratively, as long as the keeper of the register is convinced the deed deals with a new property, and not with a property which is already contained in the parcel-based index. It is not easy to determine that unless the land is described unambiguously and with regard to its surrounds. The best way to do that is make use of a parcel identifier, to which additional information can be linked as well. In that way something is created that is called a cadastre in quite some countries. Since the information contained in this case is mainly legal, it concerns a judicial cadastre. In a similar way one could also create a file for each land unit –once clearly identified– in which all future transaction documents will be stored. In most countries however, the property number is a separate, administrative number assigned by the staff of the registry or the court (see also the class ‘Basic Administrative Unit’ in LADM, ISO 19152 (Lemmen 2012)). It is quite often linked to a parcel identifier that is assigned by the cadastral or survey office.

1.3 Level of inspection and legal status linked to registers

Once parcel-based indexes exist, different legal regimes could be introduced for entering information into them and for the legal status of the information that is included. Originally documents offered for registration will be accepted and stored at face value. Usually a few formal checks are likely to be made before the document will be accepted for registration. This will usually include a minimal set of items that need to be present in the document, and

in several systems a check will be made if the person selling is likely to be the owner (for instance by verifying the previous deed which has to be mentioned in this one). Several systems have introduced a rather extensive investigation into the transaction as it is presented for registration. Larsson (1991, p 22) calls this ‘title investigation’. Böhringer (1997, p 174) refers to it as a “strict examination of the entry request in a formal judicial procedure”.

Another important question is about the legal status of information.

- 1) The legal status of the information that is included in the registration is limited to just being informative in a basic system. It indicates that the parties have created a legal fact with the intention of having a certain legal consequence, and decided to have it registered. Usually people relying on it, and who do not know of a problem, are regarded to be of good faith (*bona fide*). E.g. ‘old’ Ghana, some US states.
- 2) Often this is strengthened by the fact that registration is compulsory either to affect third parties, or even to complete the transfer (constitutive). In this case non-registration means that (for third parties) the legal consequence did not take place. On the other hand registration does not prove that the legal consequence did take place. E.g. France, the Netherlands.
- 3) That proof is included in the last scenario, in which one can rely on the information ‘on the register’. Usually this register takes the form of a parcel-based book, in which for each property a given set of items is presented, obviously including the present owner (and other right holders). After the extensive investigation of a presented transaction (as mentioned before), the entry will be made or updated. The level of reliance one can place in the register can still differ from ‘public faith’ (good until proven wrong; e.g. Germany) to a full guarantee (e.g. Australia). Since contradictory situations can never be totally ruled out, the system is usually complemented by indemnification for the ‘loser’. The protection offered (either via guarantee or via indemnification) is restricted virtually always to those who acted in good faith (*bona fide*) and often to those who acted for valuable consideration.

So there are countries in which the moment a new name is entered through the proper procedures there, he or she will become the undisputable owner, even if the transaction as such was not valid for whatever reason (also called ‘title by registration’). (Christensen and Stickley 2000; Goymoure 2013; Dixon 2013) The idea of such a system is that the register reflects the (legal) reality as well as possible, and –to protect the purchaser– one can rely on the entries in the register, which can even be guaranteed (e.g. Germany). Some systems give such an importance to the entries in the register, that the register itself becomes the legal reality, which seems to be an inversion of the original intent of the mirror principle (see 2.1). In many societies operating such a system, the owner gets a piece of paper, usually called title certificate, that contains the information that is on the register at the time of issuance of the paper. There are examples from countries where during a transaction the piece of paper is handed over as a representation of the transfer of the piece of land, without the registry being informed of the transfer. One should be aware that possession of the certificate is not conclusive of any right to deal (Burdon 1998, p 131 on Scotland). Therefore the use of title certificates is now being abolished (e.g. Alberta, Canada) or questioned (e.g. Australia, Birrell et al 1995, p 2-3).

2. DEEDS VERSUS TITEL REGISTRATION

In classifying land registration systems the distinction that is usually made first is between registration of title and registration of deeds. Legally speaking the most elementary difference is that “deed registration is concerned with the registration of the legal fact itself and title registration with the legal consequence of that fact.” (Henssen 1995, p 8). Most authors, though, take several additional aspects into account. In the same publication Henssen describes both systems in a way which is very similar to the definition given at the 1972 Meeting of the Ad Hoc Group of Experts on Cadastral Surveying and Mapping (UN 1973, p 25, McLaughlin/Nichols 1989, p 81, Larsson 1991, p 17-18), and given here:

“Title registration

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.

Deed registration

A deed registration system means that the deed itself, being a document which describes an isolated transaction, is registered. This deed is evidence that a particular transaction took place, but it is in principle not in itself proof of the legal rights of the involved parties and, consequently, it is not evidence of its legality. Thus before any dealing can be safely effectuated, the ostensible owner must trace his ownership back to a good root of title.” (Henssen 1995, p 8).

2.1 Key elements of land registration

For land registration, either deeds or title, Kurandt describes four land registration principles:

- speciality principle
- booking principle
- consent principle
- publicity principle (Kurandt 1957, p 17-18)

He sees them as the base for the (German) system of title registration. Henssen uses the same list (although he puts the speciality principle at the end) as the four basic legal principles of any type of land registration. He describes each of the principles as follows:

- “The booking principle implies that a change in real rights on an immovable property, especially by transfer, is not legally effectuated until the change or the expected right is booked or registered in the land register.
- The consent principle implies that the real entitled person who is booked as such in the register must give his consent for a change of the inscription in the land register.
- The principle of publicity implies that the legal registers are open for public inspection, and also that the published facts can be upheld as being more or less correct by third parties in good faith, so that they can be protected by law. ...
- The principle of speciality implies that in land registration, and consequently in the documents submitted for registration, the concerned subject (man) and object (i.e. real property) must be unambiguously identified.” (Henssen 1995, p 7)

Whereas Henssen says that these principles can generally be recognized in different systems, they are more useful as a base identifying areas of differences between systems. Even in his own text it becomes clear that the principle of publicity is interpreted very different in different countries (and times). The same goes for the other principles. For instance in most US-jurisdictions the change of a right is not depending on its booking, although in practice most changes are booked (mainly due to the fact that mortgage banks demand this). The consent principle is not explicitly applicable in the Netherlands. The registrar is not allowed to block the registration of a deed in the land registry when the transferor is not registered in the cadastre as the previous owner (in practice notaries will check this before completing the deed). Contrary to the above principles, which put the focus on an activity, there is another list of more result oriented (fundamental) principles. This list is often found in Anglo-Saxon literature, and attributed to Ruoff. He claims that registration of title succeeds or fails according to the degree with which the local law and local administration accord with three fundamental principles:

- mirror principle
- curtain principle
- insurance principle (for details see e.g. Simpson 1976, p 22, Zevenbergen 2002, p 43).

Each of the four plus three principles can only be achieved by having it included in the relevant national (or state) law (legislation and/or case law/jurisprudence), and even then different levels of (legal) provisions on how to enforce and guarantee are possible (see also vertical axis of Figure 2). Furthermore the principles collectively give some theoretical background on how to perceive land registration (esp. title registration).

2.2 Title vs deeds registration

In general there appears to be no short definitions of either one of these types of registration. Usually, depending on the chosen perspective, one type is described and the other type is confronted therewith. An important reason for lack of such short definitions is that it is usually tried to combine two things into them. On the one hand there is the theoretical desire to describe two ideal types, which are each other’s extremes. On the other hand there is the desire to have the definitions fit several existing systems of land registration that operate in practice. Those systems in practice, however, never fully fit an ideal type, especially since the

definition needs to take several aspects into account which can hardly be fitted into a one-dimensional classification. This can even be seen from the above historical developments (section 1) and definitions (section 2). In the first description cited the emphasis is on the item that is registered, whereas in the free standing descriptions the question of evidence is added to it.

Larsson (1991, p 24) also indicates that there are certainly many intermediate stages of moving from deeds to title registration to be found in various countries, like South Africa. On the other hand Hofmeister and Auer (1992, p 17) claim that ‘deeds will never become title.’

Clearly the classification “title versus deeds” only has a very limited value. Trying to put all these differences into a one-dimensional classification leads to oversimplification. Combined with an extreme legalistic point of view, this has led to a lot of misunderstanding. Especially well established (administrative) practices, which have become part of the law at large (through custom) have not gotten the attention they deserve. Furthermore technological developments (esp. in ICT) have provided the instruments to soften some of the former differences (esp. databases can be queried in many ways, not needing separate indexes for parcel, address, owner, transaction, date etcetera). To avoid such debates one has to look at systems of land registration in a more-dimensional way. A first attempt to do so can be reached by following Dekker, who classifies land registration along two lines; the question which documents are registered, and the question which legal proof the contents of the land registration gives (see Zevenbergen 2002, p 63-64).

The idea that the traditional distinction between title registrations and deeds registration has only limited value, has been expressed by McLaughlin, Williamson and Nichols. They say that in reality most systems lie on a spectrum somewhere between the two extremes (McLaughlin/Williamson 198, p 96). Also they argue that “In practice this distinction is blurred; in some cases an improved deed registry system may provide as many, if not more, advantages than a land titles system that has inadequate arrangements for managing the information in the system.” (McLaughlin/Nichols 1989, p 81, similar Dale/McLaughlin 1988, p 24)). Referring to the latter, Palmer (1996, p 64) argues that “the original differences between the two systems can be attributed to quality of information. Improvements made to information management (such as better examinations by registrars and the creation of parcel-based registers) in deeds registries may render them virtually indistinguishable from title registries. Furthermore, the distinctions between registration of deeds and titles may have relevance only in countries using English common law.” He then suggest that it would be more useful to distinguish between “positive” and “negative” systems (also the terms usually used in the Dutch debate)). Even better is a multi-dimensional approach, focusing on jurisdiction-wide coverage, quality control, currency, guarantee, and indemnity. (Palmer 1996, p 64-66).

In the end the value of registration depends on whether it is authoritative and complete and has validity. "Not only a provision in law gives a strong legal evidence, an efficiently, effectively updated system and well trained officials which are concerned with the 'deed' give in principle the value to the registration system". (Hessen 1988, p 37) Unfortunately Simpson turns this more or less upside down as can be seen when he talks about South Africa.

He argues that “the only reason for classifying the South African system as deeds rather than title registration would appear to be that, technically, it is not the fact of registration which proves title but the document of transfer, if duly registered. But does this make any real difference in practice if the registrar is required to satisfy himself that a deed is in order before he accepts it for registration, and to reject it if he is not satisfied, particularly if the deed itself when registered has the effect of a certificate of title?” (Simpson 1976: 105) He concludes that it is misleading to classify it as a deeds system, and that it is registration of title to all intents and purposes (Simpson 1976: 105). Classifying it as a deeds system is only misleading, when one has developed a biased opinion towards deeds systems (Zevenbergen 1998a: 575).

2.3 Multidimensional model (‘gliding scale’)

As we saw in much of the international discussions and literature, the question whether one operates under a registration of title or registration of deeds system gets quite a lot of attention. In reality we believe that we have to see this as a multidimensional issue, that can e.g. be depicted with a ‘gliding scale’ of the amount of legal provisions that enforce and guarantee the holder’s rights, see Figure 2.

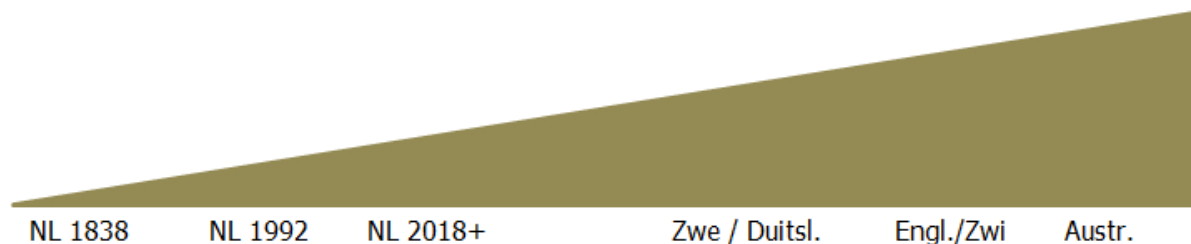


Figure 2: ‘Gliding Scale’ of registration types (Ploeger and Zevenbergen, 2018)

vertical: legal provisions that enforce and guarantee
horizontal: ideal types: pure deeds (left) to pure title (right)

3. SITUATION IN THE NETHERLAND

The situation in the Netherlands is a clear case in point. After more local record keeping started in the 16th century, especially during the French revolutionary period, more systematic record keeping was setup in the Netherlands. During the short period it was part of the French Empire (1810-1813), work to introduce the Napoleonic Cadastre started (and continued after regaining independence, followed by the creation of the Kingdom of the Netherlands in 1815). In the same time the Napoleonic Civil Code was introduced in that time, including the first public registers. With the introduction on the first truly national Dutch Civil Code in 1838 the current public registers were introduced, including provisions in the code on how the legal requirements and meaning of registering the deeds in them. Differently than the French system, the Dutch CC included the formality of registration for a transfer to be valid - also between parties . With among others the introduction of better administrative procedures both public register and cadastre (jointly kept by one Agency, normally referred to as Netherlands’ Kadaster) improved over the years, and the cadastral administrative part was computerized around 1990. In the meantime a renewed Civil Code was enacted in 1992, and

next to it a Law on the Cadastre and Public Registers, offering a sound and secure basis for the system of land registration. After 2000 the possibility to register notarial deeds by internet was introduced, and the quality of the data in the cadastral registration further improved. And although the true register is the collection of (now digitally kept) notarial deeds, the cadastral administrative part looks and feels increasingly like a ‘title page’.

This feeling was further enhanced when in 2007 the Law on the Key Registration Cadastre (KRC) was enacted, which made the cadastral records “authentic information” for the public sector. Governmental bodies (national and local government as well as agencies) need to rely on this data, unless contrary evidence is supplied, in which case the source holder needs to be directly informed to verify if their records need updating.

Even though this change was made for use of the data in the public sector, the law and parliamentary discussion specifically said that nothing would change in the (legal) status of the cadastral data in the private sector. With increasing attention to e-governance and e-society this is hard to maintain, as people expect governmental data that can be assessed on the Internet increasingly as correct. And even experts (lawyers, judges, ..) find it hard to understand that the same piece of data would be authentic for a public sector actor, and a mere administrative summary of underlying deeds for a private actor.

3.1 Analysis of the Dutch system of land registration

The question can be asked to which extent the current situation of the Dutch system adheres to the earlier introduced principles. Therefore we made an analysis of the current situation of the Dutch system on the basis of the four general land registration principles and the three fundamental principles of a registration of title (see above 2.1)

Specialty principle

The specialty principle is met by the requirement of article 20 Law on Cadastre and Land Registry that in the deed that will offered for registration in the public registers the parcel number of the property must be mentioned. However, it must be noted that the identification of the parcel does not guarantee the legal boundaries of the plot. A discrepancy between the parcel boundaries and the legal boundaries will occur in particular as a result of adverse possession of border strips. Also in case of a discrepancy between the parcel boundaries and the factual description of the land, the latter will prevail.

Booking principle

In the case of transfer after e.g. a sale, this has been met by the requirement of article 3:84 Dutch Civil Code: for completion of the transfer, registration of (a copy of) the notarial deed in the public registers is a condition. However, for other cases of acquiring rights (succession, adverse possession, marriage) no registration is needed.

Consent principle

The consent principle is also met by the requirement of article 3:84 Dutch Civil Code. Furthermore, in the event of a change in the registration in the KRC, the Land Registry will send a notification to the parties involved. Parties have the right to raise an objection and

appeal.

Publicity principle

The Key Registration Cadastre (KRC) can be consulted by anyone (on-line, for a small fee). The cadastral map is even published as open data. Furthermore, anyone can obtain a copy of a deed from the public registers. For a transfer, the publicity principle is met by the provision of article 3:84 Dutch Civil Code BW. In addition to these cases of compulsory registration, article 3:17 Dutch Civil Code provides a system of optional registration of legal facts. One can think of fulfilling a condition in a legal act under resolutive or suspensive condition, or the annulment of the legal act because of a defect in the contract. However, there are facts that can also be invoked against third parties without registration. In particular, we mention the succession and the acquisition by adverse possession.

Mirror principle

The main rule is that the KRC provides a complete overview, not only of ownership, but also limited rights in rem (e.g. long leases) and public law restrictions. However, there are exceptions. In the first place, easements are not included in the KRC, and can only be known - but not perfectly – from the registration of deeds. More fundamental is the possibility of acquisition (and loss) of rights without a registration. In practice, someone who wishes to transfer a right that is not registered in the KRC will not succeed without convincing with proof the transferee and especially the notary how he became the actual holder of the right. However, the registrar cannot refuse to enter the name of the transferee into the KRC as long as the disposing power of the transferor mentioned in the deed is not established. He will, however, notify notaries and parties involved of the discrepancy between the registered deed and the KRC, and put a warning against the name.

Curtain principle

In the case of private law legal transactions, not the KRC but the registration of deeds will be decisive. However, in practice the title search by the notary will be limited to the previous transfer, as the notary can be confident that his predecessor has done the same with the previous one. This usually results in a 'good root of title' rather quickly, unless the land has been inherited several times (unregistered) in the meantime.

Insurance principle

The starting point is that no guarantees are given by the registrar in the Dutch system. In the event of an omission by the registrar, liability may exist on account of tort. Of course, damages because of careless or incomplete investigation by the notary can also lead to professional liability.

All in all the four general principles are more clearly adhered to than the three specific ones; consistent with the continued legal status as a (very improved) deeds registration system, regardless of the data quality.

3.2 Quality of the land information

What Would Title Registration Bring to a Deeds System with High Quality Land Information? (9972)
Jaap Zevenbergen and Hendrik Ploeger (Netherlands)

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Regardless of this lack of enhanced legal status of the data in the private sector, the quality of the data keeps further improving due to both the legal provisions, the continued cooperation between notaries and the registrar within Netherlands' Kadaster, and the nearly closed loop of digital data exchange (no retyping or cross-referencing mistakes anymore) for normal transfers. The only weaknesses remain the possibility to acquire rights without registration, like inheritance and adverse possession. Clearly the data on the rights, the right holders and location of the properties are of very high quality for any case that has passed in a commercial transactions since the mid 1990s.

Further improvements in record keeping approach have been added and even more are being considered. This can be seen represented by the NL 2018+ mark in the Figure 2.

Although, in the context of the recodification of the Civil Code, it has been decided not to switch from the existing registration of deeds ('negative system') to a registration of titles ('positive system'), the introduction of the CC 1992 and the Law on Cadastre and Public Registers are very important steps. which have further increased the reliability of the system and thus also the accuracy and completeness of the representation of the legal status of immovable property in the KRC. The confidence that citizen and government may have in the system is therefore rightly high. This is not only reflected in the generally accepted term 'semi-positive' for the system, but also the inclusion of the among others the administrative part of the cadastre in the system of key registration. There are various mechanisms, ranging from purely administrative to civil law procedures that promote correction of errors in this KRC. The instrument of the cadastral renewal plays its own role here, due to the civil law effect (after 10 years) that the person assigned in the Register becomes the owner or right holder. This can in the long term actually be called a guarantee of accuracy of the display of the legal status in the Register. Apart from the described developments and mechanisms, automation has an important influence on the existing practice concerning real estate transactions. This will have consequences for the future roles of the Netherlands' Kadaster, citizen and legal specialists.

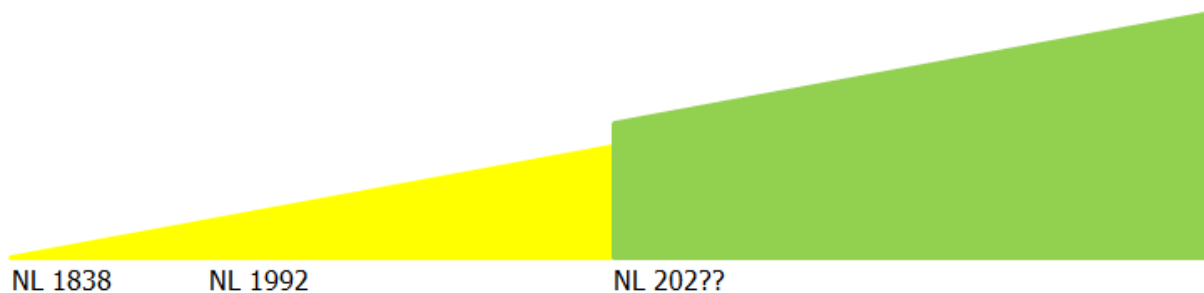


Figure 3: 'Gliding Scale' with discontinuity (Ploeger and Zevenbergen, 2018)

3.3 Discontinuity along 'gliding scale'

Regardless of all the improvements made to it, without changing the Civil Code and the Law on Cadastre and Public Registers, ultimately the system remains a deeds registration notwithstanding the high quality of the data in the KRC that summarizes it. The efforts to further improve the quality of the data are increasingly resource intensive (and use cases hard to make since effort and impact are often not made in the same place). Also extra work for every transfer to reduce issues for probably less than one in a thousand is not easy to sell; to society, the (paying) clients, government nor parliament. And parliament would be needed to change the law.

Nevertheless we came to the conclusion there is a discontinuity in the continuum around the middle where the Dutch system is at; see Figure 3. A number of benefits of safely relying on the records, no need to search the good root of title (be it only until the previous transaction or 20 years), and allowing all sectors of society to rely on the data, cannot be reached within what fundamentally remains a (very improved) deeds registration; even if increasing amounts of effort is put into enhancing the data quality even further. Only a 'jump' over the threshold to the title registration side of the continuum would make it possible to fully profit from the advantages of the increasing data quality, and to fully live up to societies expectations of government data online, for both public and private actors. So we may have to agree with Hofmeister and Auer (1992, p 17) who claim that 'deeds will never become title.'

3.4 Lack of driver for change ?

In 1976 Rowton Simons wanted to classify the (apartheid run) South-African Deeds Registries as a title registration, since it worked so well. With that reasoning we were tempted to also classify the Dutch deeds registration system as such. However, Simpson was such a proponent of title registration (which in many countries has gotten into lots of trouble unfortunately), that it seems he could not accept a well-functioning land registration system to be classified anything else.

During our study we concluded that quality and societal status can be very good, but that in certain legal cases, only the law can give the full legal status to the data, that brings a number of advantages that cannot be reached otherwise.

The legacy of a negative (or deeds) registration does not fit with the developments described in this paper. The reality and the digital data about it must be the same. Popularly said: 'What You See Is What You Get'. The number of cases where this is not the case must be kept to an absolute minimum. In a fully Digital Society, it can only be a matter of time before that is demanded. But in this case it is the good that stands in the way of the better (unlike the original saying).

The Netherlands has a smooth operating land and property market, which is rarely disrupted due to title issues. Furthermore its current long standing institutional setup (with the usual vested interests) is not under threat, also as the costs of it have been kept reasonable by regularly reduction of Registration Fees due to digitalization of the Netherlands' Kadaster , and a semi-market structure incl. price competition among notaries for drafting deeds. It seems not very likely a window of opportunity to introduce this 'jump' will open any time soon. Although one never knows what might happen in the future.

REFERENCES

What Would Title Registration Bring to a Deeds System with High Quality Land Information? (9972)
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FIG Working Week 2019
Geospatial information for a smarter life and environmental resilience
Hanoi, Vietnam, April 22–26, 2019

Birrell, Sandra; Barry, John; Hall, Dennis and Parker, John (1995). Is the Torrens System suitable for the 21st Century?, Paper presented at the 1995 New Zealand – Australia Cadastral Conference ‘2010 - A Vision’, http://helium.dosli.govt.nz/cadconf/wksp_b1.html (visited 18 December 1995)

Böhringer, Walter (1997). Comparison of the Land Registry System in Central Europe with Other Forms of Property Law: Introduction to the Basic Features of Central European Land Registry Law and Apartment Ownership, In: Notarius International, 1997/2, p.166-177

Burdon, Ian (1998). Automated Registration of Title to Land, Registers of Scotland
Christensen, Sharon A. and Stickley, Amanda P. (2000) Electronic Title in the New Millennium. The Flinders Journal of Law Reform 4(2):pp. 209-234.

Dale, Peter F. and McLaughlin, John D. (1988). Land Information Management, An introduction with special reference to cadastral problems in Third World countries, Oxford: Clarendon Press

Dekker, H.A.L. (1986a). Kadaster [Cadastral], Numij’s Studie en Praktijkreeks Vastgoed, No. 2, Leiden: Numij (Dutch)

Dekker, H.A.L. (1986b). Nationale Grondboekhoudingen, Overzicht kadaster-systemen [National land recordings, Overview of cadastral systems], Leiden: Numij B.V. (Dutch)

Martin Dixon, (2013) Title by registration or conquest: Interpreting the Land Registration Act 2002 in England and Wales, International Journal of Law in the Built Environment, Vol. 5 Issue: 3, pp.194-206, <https://doi.org/10.1108/IJLBE-03-2013-0008>

Henssen, Jo (1995). Basic principles of the main cadastral systems in the world, In: Modern Cadastres and Cadastral Innovations, Proceedings of the One Day Seminar in Delft on May 16, 1995, FIG Commission 7 and University of Melbourne, p. 5-12

Hofmeister, Herbert and Auer, Helmut (1992). Das Moderne Grundbuch [The Modern Land Registry], Schriftenreihe des Bundesministeriums für Justiz No. 58, Vienna: Österreichische Gesellschaft für Internationale Zusammenarbeit im Notariat und Bundesministerium für Justiz (German)

Goymour, A. (2013). Mistaken Registration of Land: Exploding the Myth of “Title by Registration”. The Cambridge Law Journal, 72(3), 617-650.
doi:10.1017/S000819731300072X

Kurandt, F. (1957). Grundbuch und Liegenschaftskataster [Land book and parcel cadastre], Sammlung Wichmann, Band 18, Berlin: Herbert Wichmann Verlag (German)

Larsson, Gerard (1991). Land Registration and Cadastral Systems: tools for land information and management, Harlow (Essex): Longman Scientific and Technical

What Would Title Registration Bring to a Deeds System with High Quality Land Information? (1997)
Jaap Zevenbergen and Hendrik Ploeger (Netherlands)

FIG Working Week 2019
Geospatial information for a smarter life and environmental resilience
Hanoi, Vietnam, April 22–26, 2019

Lemmen, Christiaan (2012). A Domain Model for Land Administration, Publications on Geodesy 78 (ISBN 978 90 6132 336 5), Delft: NCG, Netherlands Geodetic Commission, 2012

McLaughlin, J.D. and Nichols, S.E. (1989). Resource Management: The Land Administration and Cadastral Systems Component, In: Surveying and Mapping, No. 2, p. 77-86

Ollennu, N.A. and Woodman, G.R. (1985). Ollennu's Principles of Customary Land Law in Ghana, Birmingham: CAL Press

Palmer, David W. (1996). Incentive-base Maintenance of Land Registration Systems, PhD Thesis University of Florida, Gainesville

Ploeger, H.D. and Zevenbergen, J.A. (2018) Compleetheidsgarantie eigenaar en perceel in de Basisregistratie kadaster [Garantee of compleness of owner and parcel in the Key Registration Cadastre], Delft 31 March 2018 (Dutch)

Simpson, S. Rowton (1976). Land Law and Registration (book 1), London: Surveyors Publications

UN (1973). United Nations, Report of the Ad Hoc Group of Experts on Cadastral Surveying and Mapping from 9 to 20 October 1972, contained as Annex II to United Nations Economic and Social Council E/CONF.77/L.I. of 2 January 1985, Materials for the Third United Nations Regional Cartographic Conference for the Americas, p. 25-34

UNECE 2004, Guidelines on Real Property Units and Identifiers, United Nations/Economic commission for Europe, Geneva, Switzerland 2004

Van der Molen, Paul (1995) Napoleonic systems in the Netherlands, Belgium and France, presented at: Modern Cadastres and Cadastral Innovations FIG Seminar, Delft, 1995

Zevenbergen, Jaap (2002) Systems of Land Registration - Aspects and Effects, Publications on Geodesy 51 (ISBN 90 6132 277 4), Delft: NCG, Netherlands Geodetic Commission, 2002 (210 pp) - <https://repository.tudelft.nl/islandora/object/uuid%3A44e404e9-c1e9-4c20-b1e1-977ee9c11570>

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Geospatial information for a smarter life and environmental resilience
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