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Establishing Property Rights through a Secure System of Land title Management

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Introduction

Land is a critical economic asset in any economy. The need for a timely, accurate, safe, simple, secure, and universally accessible system of registering and recording land transactions and interest in land to support a modern land administration system is widely accepted not only as an important mechanism for empowering the poor, enabling them to relieve themselves of the misery of poverty but also to reduce the costs of doing business.

Efficient land transactions and well functioning land markets can play an important role in creating confidence and lowering the cost of doing business. In this context, the establishment of secure property rights not only provides asset owners the incentive to invest in their property but also enhances the effectiveness of land being used as collateral in accessing credit, when in most cases it represents 'dead capital'

Wherever there is relative clarity of title and easily understood and effective procedures for property transfers, the market is affected positively. Not surprisingly, therefore, land prices in the areas developed and maintained by the Defence Housing Authorities (DHAs) are appreciably higher than those of properties in other parts of the same city. This is not only because of better town planning or better scheme location but also because of the higher comfort level of the general public with respect to the veracity of title documents and the validity of titles.

Record-of-Rights in Land and Related Legislation

The records-of-rights in land in Pakistan are of the fiscal variety. The person shown on the records is responsible for paying land revenue or property tax and is, consequently, presumed to be the owner, unless it can be proved to the contrary. The title to land is, therefore, only incidental.

Modern methods of record keeping were initiated by the British and were dictated by the need for revenue. Tax on agricultural land was the most important source of government revenues and in order to assess and collect it, it was necessary to identify those responsible for paying it. The record which was frequently up dated to reflect changes of ownership was, and continues to be, maintained by one central agency in the provincial government, the Board of Revenue. It was for this reason that over time a presumption of truth became attached to this record and it had become the principal source/document for deciding title of agricultural land. With the decline in the importance of land revenue for government income the [significance of these records has diminished as far as resource generation is concerned but they still constitute the principal](#)

[documentation of title on agricultural land, although doubts exist about the accuracy, completeness and currency of these records.](#)

In the urban areas, however, there is no single agency keeping a conclusive record of rights of properties. Over a period of time a number of entities have been created to administer urban land. Each one of them has evolved its own practices and procedures to record ownership and changes in it. This is quite different from the system in place in rural areas, where, as explained above, one agency, the Board of Revenue maintains the record of rights in agricultural land.

Pakistani law does not admit to the provision of a certificate from the government guaranteeing that the person mentioned in the records-of-rights is the true owner. In other words, if the records were to be proved wrong later, the state cannot be taken to court and a suit filed against it. The records-of-rights in land and other legal provisions suggest a structure, at least in theory, of records in which all transactions are noted. The entries in respect of transactions are not viewed as conclusive evidence, although these may be viewed, in the courts of land, as having a presumptive status; the records are regarded as *prima facie* evidence.

The entries in the records-of-rights can be challenged in the courts of law. The reason is primarily that the objective underlying the legislation pertaining to the recording of transactions, i.e., the registration of documents, was not to provide a guarantee from the state of title to land. For instance, the Transfer of Property Act does not envision that the state shall guarantee title to property. The documents of title provided by the vendor to the vendee do not certify title. They are private documents in respect of a transaction between private parties that only serve to confirm that they refer to one of the transactions in the entire chain of transactions. The registrar by entering the transaction in the official records only confirms the validity and accuracy of the document. He does not thereby give any assurance of title to the transferor of the property.

Furthermore, the Registration Act envisages registration of documents and not registration of titles. The Registrar merely registers a document and records a transaction but does not guarantee that the transaction is valid. The registrar is not compelled to confirm the validity of the title. According to Rule 135 of the Registration Rules, 1929, it is not the concern of the Registrar to establish the validity of a document. In fact, he cannot even refuse to register a document on the grounds that it is a fraudulent transaction since the executor was dealing with a property not owned by him. The Registrar is neither empowered nor required to question the transaction. Not only is the Registration Office not supposed to go into questions of title, the

legality of transactions and the validity of the document it is expressly forbidden by law to concern itself with these issues. It is in essence a government revenue collecting agency and that is what the framers of rules see it as.

Moreover, oral declarations of gift, under Islamic law do not have to be registered. Same is the case for wills. Thus, perfectly valid titles can be created without the transaction being recorded anywhere. Any search by a buyer in the Revenue Record and the Registrar's Office will not provide any clues to such a transaction.

And the courts maintain that registered land documents or receipts of property tax in the name of the person do not ensure title but only serve as evidence to title which are taken into consideration when scrutinizing the bonafides of a person claiming to have 'legal' title.

Moreover, Pakistani law also recognizes that a person mentioned in the record of rights may not be the actual owner. The property may have been purchased by one person (benamidar) in the name of the owner on record (benami) for a number of reasons, such as to avoid tax, to defraud creditors, or to avoid fragmentation of property on account of the Islamic law of inheritance. Under the Benami Law of Transactions (a common law) the court recognizes the right of the purchaser of the property to claim that the land actually belongs to him by claiming that the person mentioned in the record or the document had not paid any consideration for the property and was only holding it for him in the capacity of a trustee.

Traditional System of Conveyancing

The established system of conveyancing visualizes that the buyer must investigate the seller's title to the property – "let the buyer beware". Despite the exercise of due caution the title may still be defective. The reason is that although the buyer may have satisfied himself of the authenticity of the transactions leading to the present transaction, it is just possible that some of the documents of the earlier transactions were defective on account of forgery, lack of consent, consent granted by a minor and hence not valid, etc. In other words, the document merely records a transaction but does not prove that the parties named in the document have the legal right to enter into such a transaction, i.e., the validity of the transaction is not guaranteed by the document and the certified copy of the deed. For example, names of legal successors may not have been recorded in the records-of-rights in land. Hence, many legal owners do not have possession, while many of those in possession do not have their names recorded in the relevant

registers of rights in land. The result, we all know, is never ending litigation and the overburdening of the judicial machinery.

Need for State Guarantees of Title to Property

With the growing pressure of population on land, and given the Islamic law of inheritance, the demand for land and disputes over title will increase, and with it the importance of certainty of title.

Even if we were to have a record of deeds it would not record matters which impact upon title but need not be recorded in a deed. For instance, succession on death provides title by the operation of law and not because of a transaction between two parties.

The government should, therefore, set up a system of guaranteeing title to land, rather than a system that merely serves the purpose of registration of documents.

Advantages of State Guarantees to Title

If the government were to develop a system of guaranteeing title it would not only be of great benefit to those involved in land transactions. By tackling insecurity of title and by enhancing the marketability of land, it would be possible to reduce the workload of the courts to settle title disputes, enable implementation of land reforms, facilitate credit availability to small farmers, generate tax revenues by providing information that can be used to check evasion of income tax and prevent cost and time overruns in development projects involving land acquisition.

The importance of modern technology and the introduction of a GIS is universally recognized as a way of enabling quick and efficient recording of title transfers. It may initially turn out to be an expensive proposition, for example, on account of indemnification losses. The costs, however, if they are not largely met from increased tax revenues can be minimized by setting up a fund to begin with, supplemented by registration charges as transactions get recorded. But then this route provides the only lasting solution to the problems discussed above. Only those who are profiting from the poorly maintained records – the officials maintaining them and the property brokers – will oppose an up-to-date, more accessible, system for recording land related information.

Systems in Other Countries

These are summarized below for different routes that could be adopted to achieve the same goal- certainty of title :

The Torrens System in Australia and adopted in over 50 countries, including Kenya, Uganda, Tunis and Syria

Given below are the important characteristics of the Torrens system whereby the state certifies the authenticity of title:

- a) The definitive nature of the title.
- b) Repeated, costly examination, of records is no longer required, simplifying the conveyancing procedures and systems..
- c) The problems created by genuine errors and mistakes in the past can be avoided.

Experience in several Australian states shows that when the central government created a database of all parcels of land and their respective owners they were able to detect many more legitimate tax payers.

The English System

The Land Transfer Act in England also requires a compulsory registration of title to land. The registered holder is regarded as the sole owner.

The difference of the English system from the Torrens system (which is much simpler) is that titles can be corrected in the event of fraud. In the Torrens system the courts have limited, if any, jurisdiction over the records of titles.

The US System

In the US each of the 3,600 counties has its own systems for recording title transactions (these being recording systems and not registration systems), although recording is not necessary for the validity of the instrument. Unlike the Torrens and English systems the evaluation of the validity and the quality of the title in the US system is the responsibility of private parties using the data in government custody. However, nowadays mortgage underwriters require title insurance for every transaction that they underwrite. As a result, title insurance has almost become universal and title insurance companies have become the usual agencies to conduct title searches. These changes have made the US system similar to the Torrens and English systems with respect to comfort it brings to buyers on the quality of the title to land.

Recommendations

1. Set up a system of registration of titles, going beyond a project aimed at automation of records of rights to land and transactions in property being tried in the Punjab and completely scrap the obsolete and dysfunctional systems managed by Patwaris, tehsidars, tapedars and Mukhtiarkars.
2. There is a need to establish a centralized land registry system in the form of a central register of title of urban land- the most expensive and commercially attractive land. And, in our opinion the provincial governments should give the responsibility of determining title to such land to the Excise and Taxation Department (E&T). This department has the most complete and accurate record of urban properties in the province and hence best suited to shoulder this burden. For it to be able to perform such a function efficiently and effectively it will have to be mandated by law and provided the necessary resources in terms of finances, trained manpower and essential hardware and software facilities. Moreover, the Registration Department should be bifurcated and the wing dealing with urban properties should be placed under the E&T department. Alternatively, the institutional arrangement proposed above can be placed under the Board of Revenue by establishing a Revenue Authority
3. As a first step in the long term strategy to design to implement a system of title registration there should be a requirement for the compulsory registration of all documents relating to property- including sale agreements, declaration of gifts, awards, transfers and powers of attorney (in the last case with the sub-Registrar of the area in which the property is located). Any party claiming title through adverse possession would be required, within six months of acquiring such title, to register his claim. A system of registering deeds can provide the platform on which a system of registering titles could eventually be built.
4. General Powers of Attorney should be abolished altogether.
5. Benami transactions would have to be declared unlawful
6. Any suit with respect to any immovable property should be compulsorily registered with the Registrar of the High Court. The Registration Act and the Stamp Duty Act should be amended to reflect this. Moreover, by linking court records to the computer database of the Registrar prospective buyers can be informed that the property is under litigation.

7. Simultaneously, the government could start a process of converting presumptive titles into exclusive titles after preparing draft lists that would be open to public inspection for a period of 6 months during which objections and disputes would be settled.
8. One of the main reasons for the long delays in settling title disputes in the courts of law is the system of multiple appeals and revisions from the court of civil judge to the Supreme Court, even in the case of a small property dispute. This system must be replaced by one in which a party in a civil claim does not have a right of more than one appeal. The final court of appeal should be the High Court and not the Supreme Court, since property is a provincial subject.