

# PIDE Policy Viewpoint

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## *Establishing Property Rights through a Secure System of Land Title Management*

### **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 is the cornerstone of a proper land market. Such land markets are an important mechanism to empower the poor and reduce the costs of doing business.<sup>1</sup> Secure property rights provide asset owners the incentive to invest in their property while allowing easier collateralisation. Without secure tradable property rights, land is 'dead capital'.

Even in Pakistan, where titles are clear and transfers are easy, land prices command a premium. For example, Defence Housing Authority (DHA) properties are appreciably higher than similar properties in the same city. This is mainly because people have faith in the title and its transferability (even when we account for better planning and management).

### **A Revenue Record and Not a Title**

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, therefore, is only incidental.*

Modern methods of record-keeping, initiated by the British, were dictated by the need for revenue. Tax on agricultural land, an important source of government revenues, required identification of those responsible for paying it. The record, updated 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 deciding the title of agricultural land. These records still constitute the principal documentation of title on

<sup>1</sup>See Hernando De Soto, *The Other Path: The Economic Answer to Terrorism*. New York: Perseus Books, 1989, 2002. Also, Hernando De Soto, *The Mystery of Capital: Why Capitalism Triumphs in the West and Fails Everywhere Else*. New York: Basic Books, 2000, 2003.

agricultural land, even though land revenue has declined in significance; and there are problems in 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. A number of entities have been created over time to administer urban land. Each one of them has evolved its own practices and procedures to record ownership and the changes in it. This is quite different from the system in place in rural areas, where only the Board of Revenue maintains the record of rights in agricultural land.

Pakistani law does not admit of 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 could not 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 courts since there is no guarantee of title envisaged in the law. The Transfer of Property Act also does not envision that the state will guarantee title to property. The documents of title provided by the vendor to the vendee do not certify title; they are private documents relating to a transaction between private parties confirming only one transaction in an 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 transferrer of the property.

### **Registration**

Furthermore, the Registration Act envisages the registration of documents and not the registration of titles. The Registrar registering a document records a transaction but does not guarantee that the transaction is valid. 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, the Office is expressly forbidden by law to concern itself with these issues. It is in essence a government revenue collecting agency, and that is how the framers of the rules see it.

Moreover, oral declarations of gift, under Islamic law, do not have to be registered. The same is the case for wills. Thus, perfectly valid titles can be created without the transaction being recorded anywhere. Any search by a buyer at 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 a title which is taken into consideration when scrutinising the bonafides of a person claiming to have a 'legal' title.

Moreover, Pakistani law also recognises 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*)<sup>2</sup> in the name of the owner on record (*benami*)<sup>3</sup> for a number of reasons—to

<sup>2</sup>Urdu legal word indicating the holder of the deed without the title.

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 recognises 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 visualises 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, the 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, as we all know, is never-ending litigation and the overburdening of the judicial machinery.

### **Need for State Guarantees of Title to Property**

Given the growing pressure of population on land, as well as the Islamic law of inheritance, the demand for land and the disputes over title will increase, and with these the importance of the certainty of title.

Even if we were to have a record of deeds, it would not record matters which impact upon title. 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 be of benefit to those involved in land transactions only. 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 are universally recognised 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

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<sup>3</sup>Urdu legal word for the deed without the title.

minimised by setting up a special fund to begin with, which can be supplemented by registration charges as transactions get recorded. This route provides the only lasting solution to the problems discussed above. Only those who are profiting from the poorly maintained records—i.e., the officials maintaining them and the property brokers—will oppose an up-to-date, accessible, system for recording land-related information.

### **Systems in Other Countries**

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

#### ***The Torrens System adopted in Australia and 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 the title:

- (a) the definitive nature of the title is established;
- (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 U.S. System***

In the U.S. each of the 3,600 counties has its own system 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 U.S. 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 U.S. system similar to the Torrens and English systems with respect to the convenience it brings to buyers on the quality of the title to land.

### **Recommendations**

1. We should 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, Tehsildars, Tapedars, and Mukhtiarkars.
2. There is a need to establish a centralised land registry system in the form of a central register of title of urban land—the most expensive and commercially attractive land. 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. To be effective, it should have the legal mandate and the necessary resources in terms of finances, trained manpower, and hardware and software equipment. Moreover, the Registration Department should be bifurcated and the section 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 and implement a system of title registration, there should be a requirement for 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 should be required, within six months of acquiring such title, to register their claim. A system of registering deeds can provide the platform on which a system of registering titles can eventually be built.
  4. General Powers of Attorney should be abolished altogether.
  5. *Benami* transactions will 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 would 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.

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—beginning with 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.

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