

Title Registration System in Sri Lanka: Comparative Study of Law in Austria and Ghana

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Abstract

In Sri Lanka registration of deeds was proposed to be replaced with registration of title system, introduced by the Registration of Title Act 21 of 1998. Under this system certainty of ownership of a land is guaranteed by the government, taking away repeated examinations of the past title. Therefore, title registration is expected to minimize land disputes and forgeries and looked forward to have dynamic land market. Today, after 18 years of implementing the land registration system in Sri Lanka, can we be satisfied with the results of implementation of the Title Registration Act? The answer is "no", because there are many inherent weaknesses in the title registration law in Sri Lanka.

The objective of this research is to identify issues prevailing with the implementation of the Registration of Title Act 21 of 1998 in Sri Lanka and to propose amendments to improve implementation of registration of title to suit for address the need for the present land market in Sri Lanka. I collected data of title registration in Austria and Ghana. By analyzing the legal situation of these countries, legal provisions they used and success rate and compared with Sri Lanka to find out what the reasons are for infancy of title registration in our country and how to overcome those problems and for a dynamic system of title registration and what are the functions have to be fulfilled.

This act does not have adequate efficiency and proper scheme suits to the Sri Lankan situation of the society. So necessary amendments should be done before implementing this act otherwise it will be a money and time consuming processes.

Keywords: Registration of Title, Land Market, Implementation of Registration

Weaknesses in Registration of Title Act 21 of 1998

1. Under the *Registration of Title Act 21 of 1998* commissioner for registration or a conciliation board appointed by the commissioner will investigate and

determine the title of each parcel of land. The question is whether it will ensure a due and proper investigation because it is not an easy task. This will, instantly result in thousands of land disputes. There is a problem whether the commissioner or the conciliation board appointed by the commissioner is competent enough to decide the questions arisen by the disputes of personal laws and this act does not provide provision with regard to the procedure which should be adopted by the commissioner or the conciliation board.

2. According to the *Registration of Title Act 21 of 1998*, the title of a land may be categorized as first class title or second class title. The problem is the confusion about the validity of the second class title. What can be done with a second class title? Will it be acceptable by a financial institutions? Can an owner of a land with a second class title sell or mortgage it? Will it be acceptable by the public? The division done by this act, first class and second class is not clear.

3. Another problem is the rights of the co-owners enjoying an undivided land is taken away by a co-owner by this act according to section 15 and of this one among the co-owners will be appointed as a manager for the particular parcel of land. This will be done by the commissioner of the title settlement.

Under the *Registration of Title Act 21 of 1998* the manager will be vested with rights of a Trustee under *trust ordinance*. But a trustee under the trust ordinance is not an heir or owner with the property of the trust. So it cannot be fell within the objectives of a trust. This provision is impractical.

4. It does not take away the necessity for repeated examination of the past title. Because of the ambiguous situation created by the *Registration of Title Act 21 of 1998*, although the claimants' produces first class titles to the financial institutions they used to be examined due to lack of confidence on the first class certificate given under the *Registration of Title Act 21 of 1998*.

5. *The Registration of Title Act 21 of 1998* is not strong enough to prevent frauds. Many frauds take

place in these investigations under *the Registration of Title Act 21 of 1998* due to the possibility of producing forged documents for the investigations for granting certificates.

Another reason for this situation is the lack of power, competency and facilities for the commissioner of title settlement. They do not have power to summon witnesses. On the other hand they don't have enough knowledge and competency. When they have an issue they have to refer the matter to District Courts. And the procedure introduced by the *Registration of Title Act 21 of 1998* does not have provisions to prevent frauds.

6. It does not reduce the cost of the parties for the transactions of lands. Repeated searching of the past title may not reduce the cost of the parties.

7. It does not help to create an efficient and effective land market.

According to the latest information from www.bimsaviya.gov.lk/web (Ministry of lands) implementation Title Registration Act has been completed in a very few divisional secretary's division although the act of Title Registration Act was enacted in 1998 and by now 18 years have been passed.

Title Registration in Austria

In Austria there is a well-developed, effective system in land registration. Austria is a country situated in central Europe neighboring Mediterranean area.



Location of Austria

(source:gerda.schennach@bev.gv.at.www.ovg.at)

It has different climatic Zones, different landscapes, and different kinds of flora and fauna. It has a federal state consisting nine provinces. The total extent of the country 83858 square kilo meters, surrounded by 8 countries with a population of 8.1 million and has joined European Union in 1995.

In 1817 cadaster was started in Austria for the purpose of taxation from real state. In 1870 land registration system was introduced using the cadaster. In 1969 the legal cadaster (cadaster of boundaries) and the existing cadaster were merged to make a qualitative cadaster and in 1980 digital real estate database was implemented having the cadaster in digital format. In 2012 Electronic certification was introduced to the cadasteration system. The system in Austria is a title registration system that gives the registered owner a public faith. Anyone can identify the present owner and the obligations or encumbrances or rights to a land by referring the general civil law book. Eg:-Ownership's Leases, Mortgages.

The system of title registration in Austria is closely related with the cadastral map. Each parcel of land is well defined with boundaries and extents.

In this system of title registration, every entry changing the rights of the owner is done by the land book courts. The judiciary is involved in the title registration. In a land book court there are notaries, lawyers and surveyors and every change in ownership is well investigated and inputs the changes in to the database. So this system is a joint effort of judiciary and government officers, well-practiced in Austria. All the legal rights of the lands tenure is entered in the General Civil Law book, including possession, ownership (both single and joint) easements, lease, mortgages and condominium.

This system in Austria is controlled by several laws.

01. For the land book there is a law on its creation (1929)
02. For the cadaster there is the subdivision law (1929)
03. A law on its keeping (1955)
04. Survey law (1968)
05. A law on its migration to the computer (1980)

There are two folders in transferring legal rights.

1. The transaction
2. Publicly visible activity

Publicly visible activity means changing the title in the land book, which is resulted by a transaction. When the transaction is done parties involved prepare a notarized deed which they intend to register in the land book. This deed can be drafted by themselves with the help of a notary or a lawyer. This document must have to be accompanied by several other supporting documents, mostly

governmental approvals. Then the application must be made to the land book judge. After taking the approval from the land book judge only, the land book will be updated. After updating the land book it will be effective retrospectively to the moment the application was filed. When a transaction has taken place, before updating the land book, the parcel of land has to be changed or formed. This changes or subdivisions are done by a licensed surveyor and entered in to the cadaster by the survey department. If it is identified and numbed properly when it is referred to the cadastral map, it makes easier to update the land book and the cadastral map, when the land book judge is given the order to update.

Although land registry and cadaster work fully independently they are unified in a common data base. So cadaster information as well as land book information could be obtained from this data base. All these information are opened to public and land book courts, cadaster offices, notaries, licensed surveys, banks and many others have online access to the data base. In land registration the legislation on privacy does not apply in Austrian Law because all the information are public.

In 1980 after introducing digital land parcel database it contains land book information as well as cadastral register. Land book and survey department make changes to this database when needed. Survey department, notaries, lawyers and many other have online access to this database.

The institutional structure of the land management sector in Austria is well organized. There are number of key players within this organization. They were given specific roles in land management.

In Austria it factions a national system of land registration and it is mandatory to register each and every parcel of land in real estate. In this national system of land registration data about real property units and real property right are entered; and cadaster authorities and by land registry authorities administer and maintain holders of property rights. Land register authority is a judicial function, done by local courts. These two institutions share the administration and maintenance of holders of property rights.

Each legal entity is defined by a property number. This sometimes can be made several property numbers. The land register offices are under local courts which is under the federal ministry of justice.

These courts operates under 3-5 public servants supervised by a judge from a local court. These officers are responsible for the registration and maintains of lands.

As the private sector involvement, it can be seen, private notaries but publicly authorized and attorney –at-law help people to do legal transactions. Private surveyors are licensed help to do subdivisions of land parcels and to restore boundary points. Private professionals are governed by many professional laws and private ethics. The authorization for professional practice is awarded by the ministry of science, research and economics.

This Austria system works well keeping an effective land market with a high level security in the legal aspect operating for a long time.

Although this system gives good security to the title the registration fee is high and the public has to spend another sum of money to get the services from the private practitioners (Ex:-Notaries, Lawyers, Surveyors) and to the government stamp fees must also be paid. So it takes a high cost for the land registration. On the other hand this system of registration is not so quick. It may take a longer time for the procedure which must be followed and require some documents other than the deed and some approval from Local Authorities as well as the government.

To avoid the delays and inconveniences for the public the system was decentralized. There are 187 land registry courts. So the most offices have a limited workload.

The causal doctrine, which means the entry of land book will not repair the problems in the title is applied in the Austrian Law. But, only bona fide third parties can rely on the land book.

Only problematic area can be seen this system is, although it supplies a high level of security, the combination of many offices, high cost and long processing time hinder the land market of growing to its full potential.

Title Registration in Ghana



Location of Ghana

(source: <http://www.bbc.com/news/world-africa-13433790> Ghana country profile)

This country is officially called as the republic of Ghana and has a sovereign unitary presidential constitutional democracy. It is situated in West Africa surrounded by Burkina Faso in the North, Togo in the East, Gulf of Guinea and Atlantic Ocean in the South and Ivory Coast in the West. Ghana gained independence from Britain in 1957. The sources of economy for this country are gold, cocoa and oil.

In Ghana there are two categories of land.

01. Customary Lands.
02. Public Lands (state lands).

Customary lands and public lands (State Lands) are in the ratio of 80% : 20%. State lands are the lands acquired by the government through compulsory acquisition for public purposes.

The land tenure system mainly depends on unwritten customary laws. The customary lands are owned by the communities such as stools, skins, families or clan. Ownership of the customary lands are rooted in trust ship and fiduciary principles. There are complex series of rights and interests exists in customary lands. These includes allodial interests, customary free holds, share cropping, share farming, alienation holdings, communities common property rights and a rage of derived secondary rights.

The lands are owned by these communities are held by the chief or head of the family or clan or fetish priests for the benefit of the members of that group. Members of the group can enjoy these lands as "customary free hold." Access to these rights are by inherit and not by contracts. But creation by free hold rights are forbidden by the 1992 constitution. Now a days the private ownership of lands can be acquired by the way of grant, sale, gift or marriage. Public lands are vested with the president of the government for the benefit of the public use.

During the colonial period, in 1883, the Land Registration ordinance was introduced to control the registration of deeds and land transactions. In 1895 it was replaced by deed registration by "The Land Registry Ordinance 1895" which govern deed registration until the enactment of Land Registry act 1962 was enforced. In 1972 mortgage decree was introduced to Ghana. Since the concept of prescription has not been included in Ghana Law, in 1972 limitation decree was enacted to introduce the concept of prescription to Ghana. In 1962 although Land Registry Act was introduced there were weaknesses in implementation. Identifying the land parcels, administration of record room were not successful. To improve the quality of land registration and to register oral and customary transactions, convincing decree was started in 1973, was failed. In 1986 Land Title Registration Law was introduced to overcome the flaws in land registration and to change substantive laws.

In the existed system there were so many issues & shortfalls. Poor maps and records, uncooperative attitude of municipal agencies as well as lack of professional and technical skills. However after 1986 the government took measures to improve the working process and this has reduced the cumbersome procedure of Title Registration.

This was introduced for two purposes. They provide certainty and facilitate the proof of the title to make land sales safe, simple, cost effective and prevent frauds. By the above mentioned laws transfers can be done through forms but a long procedure has to be followed. Ex- As the registry map is prepared for a limited area, individual plans have to be prepared through the Surveyor General. Many problematic areas have arisen in Ghana when performing Title Registration. When a transaction was done and need to register, very often underlying paramount title

has not been registered or the registered owners cannot be notified since the land registry does not have residential or postal addresses of the owners and the boundaries and extent are not settled yet. Sometimes it is difficult to locate the relevant entries to a particular land as they are not entered to a particular order. As an example records are not even based on any criteria as the district. Another problematic area is the lack of resources in the surveyor department and the Land Title Registry; and also the weak cooperation between Land Commission and Deed registry. As an example, to prepare a parcel plan or cadastral plan the surveyor department takes three to twelve months thus resulting undue delay. In most situation customary law gives the title and oral transaction are frequent.

In the Title Registration process in Ghana government agencies including Land Title Registry, the surveyor department and private practitioners such as lawyers are licensed surveyors are involved. But all these agencies are rather centralized and only a few branch offices are exists. The relationship between the legal agencies and surveyor department is at a distance. All the performance must be accompanied with the title plan which is directly derived from the registry map. Although private surveyors are involved in this process, all work must be done under the control of Director of Surveyors. In the practical aspect there is a lengthy gap between laws and daily practical procedures are lengthy and expensive.

Although Land Title Registration Act is introduced to lessen the weakness, some important weakness remain still untouched, resulting lack of security ultimately causing land litigations. Ghana government, during the past three years, has enhanced public education through media in English and Local language in order to face these challenges.

Another challenge arisen is inadequate public education. In Ghana over 60% of population is illiterate. Public education was done mainly through the distribution of flyers and brochures and by public lectures. But these means are not effective to the society.

Introducing title registration instead of deed registration has not been effective in Ghana, leaving the above mentioned weaknesses unresolved. Weakness within the laws, institutional failures, lack of information on lands and unawareness of people

etc have been identified as the major causes for the failure of effectiveness of introducing title registration system in Ghana.

Today there are three laws governing the registration of instruments and land titles.

01. Stamp Duty Act 2005(Act 689)
02. Land Registry Act 1962(Act 122)
03. Land Title Registration Act (PNDCL 152)

Cross Analysis

	Sri Lanka	Austria	Ghana
Inhabitants (Millions)	2.8	8	18
Whether customary law prevail	Yes	No	Yes
Judicial intervention for land registration	No	Yes	No
Corporation of the cadastre and registration	Combined	Separated	Separated
Percentage of land under TR		99%	1%
Efface of land market	Un Satisfactory	Well developed and effective	Un Satisfactory

Does the Customary Laws affect implementing Title Registration?

In Ghana customary laws are prevailing up to date and also the Percentage of the title registration is very low as well as effectiveness of the land market is also unsatisfactory. When in a country where customary laws are prevailed most of the time it differs from the statutory law about the land tenure in the same country. In most of the cases tenure shows overlapping rights among individuals or groups. Ex:-In Ghana experience although the 1986 land title registration aimed at solving problems of the overriding land tanner and interests, most of the other problems are not solved, substantive laws are not changed. So the issues remains unresolved.

In Sri Lanka we also face the similar situation, we have different laws as Kandyan law, Thesawalame, Muslim law etc. Under these laws succession of land

rights are different and sometimes different laws are accepted for land rights. When considering the countries which have systems of developed land rights with no customary laws and the same law prevails throughout the country. Ex:- Austria success rate of the land rights are high. Here in Sri Lanka land rights are ambiguous and poorly defined. So in order to identify a particular persons land rights lot of legal measures must be taken. And this can be only done by the judiciary. Lengthy time will be taken which is very expensive and waste of exercise. So our laws need lots of updates and development new law reforms are vary essential in this area. Because of the economic and social development, modern technology has made the life style of people different. But yet the laws prevailing in the country are unchanged, creating a huge gap between the laws and the social requirements. So my view on this is that, first the personal law in Sri Lanka must be updated and reforms must be introduced to the laws which can incorporate modern life styles and developments of the country.

Corporation between cadaster and registration

Corporation between cadaster and registration is crucial for a dynamic land registration. In a system of registration many role players are active in addition to the parties who have done the transaction. This may vary from country to country. In some countries all of the process is done by government organization but in some countries government organization, private practitioners and may be also private sector involved in this task. In this process two main functions firstly the land registration and secondly the cadaster can be identified.

The first function land registration is done by various parties in various countries. In some countries like Austria and Sweden, it is done by judiciary (regional courts), in countries like England ministry of justice, in Ghana a body within the ministry of lands, in Sri Lanka department of land registration. The second function is usually done by a cadastral authority or survey department or by private practitioners. In different countries they have this cadastral authority attached to different departments. In Germany minister of finance and in Ghana minister of economy.

Then we must see the computer database which is also influential to registration. In Austria we find there is only one database to keep the information

by the courts and the surveyor department. But in Sweden there are databases maintained for different functions within one organization. Private practitioners' involvement is very important in registration of lands. In The Netherlands and Indonesia deeds can only be drafted by specialized lawyers. In Austria at least deeds need notarization.

In Austria the corporation between cadaster and notaries are well established and very supportive to each other. Cadaster is accurately done by licensed surveyors using modern technology. Maps are digitalized and land parcel data base is already prepared and can be accessed on line. When a transaction is done notarized deed is made. When the land book is approved by the judge the land book will be updated even though the land book and cadaster register function separately. In practice they cooperate very well. These two systems are connected to all relevant offices. The computer system supports these relationship although registration of lands and cadaster has different laws and different ministerial responsibilities.

When considering Ghana, the cooperation between cadaster and registration is mostly affected by weak identification of land plots. Because when the lands are not clearly identified the recoding system will not be effective. On the other hand in this country, although land title registration Act introduced substantive laws in 1986, still over ridings interests are prevailing and this has caused implications. Transfers still can be done through forms. Another issue, although index map exists there are also individual maps signed by the director of surveyor, lack of resources and corporation between cadaster and deeds has made an ambiguous situation in title registration in Ghana.

Judicial Intervention to Land Registration

Austria has very satisfactory intervention of judiciary in registration of title, besides the civil code of that country gives a solid frame work for the land registration. This law is well developed over a long period and worked out well for a long time and suits for the necessities of the land registration. Intervention of judiciary is a part of land registration. In the latter part of title registration when a notarized deed is completed then the application for registration must be done to the land book courts.

The judge has to approve the application before the land book will be updated and the registration will be completed.

In Ghana no judicial intervention and there is a big gap between law book and the daily practice. Although the law is in existence weaknesses and corruption within the organization affects the whole system.

But in the Registration of Title Act 21 of 1998 in Sri Lanka deciding the title and legal work in drafting deeds has taken away from professionals and given to government officials. This is major setback as I see in this act. The professional work in drafting deeds, convincing, deciding the title of lands must not be taken away from professionals since only government officials cannot do legal work in a professional manner. Legal professionals and judicial officers could play a great role in title registration. The government can get the service of professionals by absorbing them in to government service. On the other hand government can establish separate civil courts for land registration. In developed countries like Austria and Sweden this function are done by the civil courts. Otherwise most of the decisions given by government officials will again be heaped in district courts and the procedure of deciding title will take a very long time and the legislator's ambition of introducing Registration of Title Act will not be a success.

Recommendations

1. Introducing amendments to the implementation of Title Registration Act would be beneficial. Adjudication procedure in the present act does not have enough provisions and details. So this act could be amended or new adjudication act can be enacted.
2. If the power deciding title is taken away from the commissioner of title registration and given to judiciary again most of these problems could be solved. If this authority is retained with the commissioner of title registration (administrative officers) such officers should be appointed from the officers with good knowledge and working experience in the field of land law and must be vested with adequate authority and staff to discharge this duty. This could be done by establishing adhoc courts for this purpose.
3. Amendments must be introduced to remove the provisions of co-ownership and

provisions must be introduced to encourage co-owners to reach an amicable settlements otherwise the co-owned property must be removed from title registration. The provisions of the appointment of the manager should be amended or suitable provisions must be introduced to appoint a manager equated to a trustee.

4. If the deciding authority on the title process is given to judiciary this undivided problem of lands can be taken away and amendments could be introduced to the Act by giving authority to judiciary to end the co-ownership by the courts instituted to adjunction before bring in undivided lands to title registration. If it is done no more problems will occur about co-ownership.

5. If amendment can be introduced to grant the adjudicating authority to judiciary the necessity of giving second class title will not arise as judiciary can solve the problems and decide the title clear before bringing to title registration. So there will not be any need of giving second class title for a land.

6. New legal reforms for the land laws must be brought instead of personal laws varying from person to person. All Sri Lankans Can have one law about inheritance, succession, marital rights.

7. Granting the adjudicating authority to judiciary will end the problems of personal laws as judiciary is competent enough to consider all these personal law matters and decide the title.

8. There should be more provisions to defeat fraudulent transfers. And new reforms should be introduced to make void transactions which are done fraudulently.

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