

Cadastre against Ownership

There is widespread opinion that the establishment of private ownership of land must be preceded by the organization of cadastre in order to have precisely defined borders between properties and to provide each owner with a document confirming his ownership rights. The aim of this paper is to disprove the above by using both historical experience and actual facts. Therefore it is necessary to understand why this idea still predominates.

It can be observed that in many countries, despite international aid and many years of efforts, the organization of this precious cadastre shows no signs of moving ahead and sometimes falls so farbehind that there is delay in recording even current information. Thus, the cadastre not only fails to serve as a guarantee of private ownership of land but becomes a major obstacle on the way to its establishment.

Under the pretext of providing better guarantees of private ownership, these states (former colonies and former socialist countries) subordinate the establishment of private ownership to that of the cadastral registering of new owners' rights. With this aim in mind they organize a bureaucratic procedure intended, theoretically, to provide for the issuance of ownership certificates to those whose ownership rights have been confirmed. But in practice this procedure only increases the bureaucratic powers over land.

What is Ownership?

Prior to the discussion of how private ownership can be established, one has to define the essence of the concept itself, for it has no simple definition. At different times and/or different countries private ownership of land may mean larger or smaller parcels of rights. In some countries it may, for instance, include the right to build a fence around one's plot, in others - it may even forbid unauthorized entry.

Nowhere can ownership of land be absolute, i.e. there is no country where owners can do with their plots whatever they wish. Absolute, private ownership, the 200 years' old dream of the French revolutionaries, was quickly modified by the realities of public life, and a number of laws, limiting the rights of private owners, were introduced one by one. In modern times, given the scale of technical progress, it is even more important that these limitations are made increasingly stricter.

In industrially developed countries, there is practically no type of land-use which can be implemented without official approval. Construction permits have been obligatory everywhere for a long time already, and even the right to cultivate soil tends not to be automatically included into the parcel of ownership rights. In the EEC countries, for the last five years it has not been sufficient to possess a meadow to have the right to keep a cow on it and to produce milk; one has also to obtain a milk-production quota. It means that the market value of a meadow with a quota is a very different from that of a meadow without one.

It must be noted that full rights to land ownership can be divided between different owners. Ownership may be partial when different owners possess different rights on the same area; one, for instance, has the right to hunt, another - the right to till soil. But what makes the ownership rights of land (be they absolute or relative, full or partial) cardinally different from all other rights of occupancy is that one can not only live on

one's property or cultivate land, but also sell it. I become an owner of a right only when I can sell it to someone offering me the best price, or give it away as a present without asking permission of a third party.

Some countries have introduced so-called "commercial ownership" to the advantage of traders renting their premises from property owners. They are allowed to sell their renting rights without permission from the actual owner, whose rights are limited to receiving rent. Thus, within one property two kinds of rights overlap: the rights of the trader and the rights of the owner of "walls".

The above already permits us to draw two conclusions:

As ownership rights cannot be absolute, it is important to have their detailed legal description to prevent authorities from arbitrarily tampering with them.

As the essence of the right of ownership is the right to sell, it is necessary in the first place to make the selling right legally secure by introducing a transaction registration system which would, for instance, make impossible the sale of one property to two different persons.

Historically, Private Ownership was Established without a Cadastre

Historical facts prove that to establish private ownership of land, one has no need of a cadastre. There is no European country where the emergence of private ownership was preceded by that of a cadastre. In the UK, for instance, there is still no cadastral registration of property in the true sense of the term.

Perhaps French history can supply the best proof that private ownership has nothing to do with cadastre. France is a country where private ownership was given the rank of a "sacred human right" on a par with the equality, the safety and the right to "fight against oppression". In France, the security of sales transactions was guaranteed as far back as 1771 by the establishment of a "Mortgage Register" to register all sales transactions, despite the fact that in those times ownership rights were still divided into land lord rights ("direct ownership") and the rights of occupancy ("ownership of use").

The revolutionaries of 1798 did not need any cadastre to introduce the most severe regime of ownership in history. They abolished the former ownership right (see above) to the full advantage of the latter, turning a property owner into a small monarch of his plot of land, a little similar to the big, absolute monarch, they had dethroned. Moreover, they even destroyed the several existing private cadastres established by some large land-owners in order to better substantiate the rents they had collected. At first, this was done spontaneously, as part of the destruction of palace archives, but later they adopted a law obliging owners under pain of severe punishment, to submit all remaining cadastral documentation to be publicly burnt. It was not until 20 years later, beginning in 1807, by order of Napoleon, that they began to organize a general cadastre in order to better substantiate land tax distribution. It took 40 years to establish that cadastre... As for Paris, this task had to wait till better times and was achieved only in 1980s, or 150 years later.

Two Fundamentals of Ownership

There are two mutually opposed concepts of ownership based on two models of its establishment: ownership built from below, and ownership built from above.

The first model is based on law and prescription. Law determines what rights the occupants of a given plot will have in what cases; or when they are exempt from paying

rent, or from certain restrictions on land-use or transfer of their rights. In the case of a dispute arising, and only in that case, each party can produce documents or draw on neighbors' evidence to enable the judge to confirm their right, if the term of prescription is still valid.

The idea of prescription is to pacify social relations. It is easy to see that the origin of any ownership lies in eviction, use of force, cunning and injustice, but we prefer to ignore this fact and take into account only the current state of affairs provided it has not been questioned during a certain period of time. The term of prescription in different times and countries varied. In the Ancient Roman Republic it was two years (two peaceful harvests collected in one place sufficed to recognize the person as its owner), in the Middle-Ages the term of prescription could be as long as 40 years, and in some provinces even 150 years. In France, since the adoption of the Civil Code, it is 30 years.

Another way to establish ownership rights is for them to be decreed by the state or by another authority. This method was used in all times by conquerors to redistribute the best lands of the conquered. This system was adopted in all colonies during settlement periods after more or less brutal liquidation of the natives' rights under the pretext that they had never been registered. In this way the first colonists' rights were properly and legally secured on lands which were the easiest to use. Currently, this system still exists, even if somewhat covertly, in a number of politically unstable countries where each new power distributes the former power's ownership amongst new customers to flourish on the ruins of their predecessors.

Two concepts of cadastre correspond to these two basic types of ownership of land:

Ownership based on prescription and political recognition of acquired rights uses a purely fiscal cadastre concept aimed to achieve an equal distribution of taxes.

Ownership based on the concession of land by the state (or, more precisely, by special bureaucracy, control over which is the main attribute of power) is characterized by a legal cadastre.

The first type of cadastre is represented by the German land register. It does not establish new rights, appearing as a result of administrative organization combining the cadastral service with those of transactions and mortgage registers.

The Torrens System

Thus, former colonial powers such as Spain, Portugal, France, the United Kingdom or tsarist Russia (the latter only partly) employed two systems of cadastre and land law. One system was for themselves, the other for their colonies. The best among the latter (from the technical point of view) was the system of Torrens named after its author and selected to serve as a model for later systems.

It would serve our purpose to study the situation in which the system of Torrens was born, a system which still remains a model for those countries where they make no difference between cadastre and ownership. It was expressly for Australia, where the British colonial army easily effaced all preceding land ownership rights of the indigenous population, that Colonel Torrens invented his system of land distribution regarded as a state award to new settlers; the act was registered in the form of an entry into a cadastre list, which was an official confirmation of the new settler's right of ownership on the given plot of land. This system was a rationalized edition of principles already used somewhere else, beginning with the United States where lands cleared of Indians had been divided on a map and transferred to their new owners, thus originating that rectangular topography which looks, to the great surprise of European visitors, as if it had been drawn by a draughtsman.

A similar system (with small alterations) was adopted by other colonies including those where indigenous private ownership of land had existed prior to the conquest, as it allowed the new power to liquidate all ancient rights and begin redistributing land from the zero phase, recognizing some old rights while ignoring others; thus securing the support of one part of the population in order to control the other.

When these countries became independent, the new national powers retained the old system, turning it quickly to their own advantage, a perfectly understandable course of action.

Two Roots of a "Cadastral Imperialism"

Even more surprising is the fact that not only does the situation not change, but international experts, too, in the majority of cases go on supporting this system recommending it to all countries where the ownership of land has not been secured or has been secured poorly. They are not discouraged by the example of some of these countries which have been (theoretically) trying for 40 years to introduce a cadastral system in order to legally consolidate private ownership on land, but, despite considerable international support, have not achieved even a semblance of success outside the fashionable districts of their capital.

The cause of this delusion being so persistent is that, for different reasons, the views of two groups of agents coincide.

On the one hand, international experts maintain (and rightly so), that consolidation of private ownership can only benefit the economic development of any country, but when confronted with problems of that kind, they can at best suggest only technical solutions in order not to interfere with the internal policy of the country they are working in. So a cadastre is in most cases a technical solution which can pass as a politically neutral one. One can calculate how many computers will be necessary, work out different alternatives, devise a program for training local technicians or a system of financing. In other words, a good report is produced with figures and time-frames, forgetting that similar work was already carried out a few years before by a previous study group.

On the other hand, local bodies quickly understand that they could obtain good profit by introducing private ownership by themselves. As their authority enables them to decide who can be registered as an owner of land, make their influences considerable. At the same time, this influence rapidly dwindles as soon as ownership rights have been distributed on a permanent basis. Therefore, their instinct is to do everything they can to prolong this process to eternity. Under the pretext (at best) of examining the observance of the rights of third parties, or the justification of every claimant's rights to ownership, or providing for better equality of all citizens' rights, or obtaining precise measurements of the plot in question, they would invent whole new procedures, generally very expensive and often accompanied by a trial period during which the owner must prove that he uses the plot exactly in accordance with the aims stated in his request for ownership rights. Sometimes this steeple-chase is so well organized that no candidate can achieve his end without having to by-pass the law... This goes on until new people coming to power decide to bring the situation back to "morality", to put an end to the "abuse", and cancelling all previously attributed rights, they start everything anew.

The Value of a Property is in the Ownership Rights that go with it rather than in its Area

Special attention should be paid to a technical fashion raging in all countries which is to demand, with the development of technical means, an increasingly greater precision in

measuring the area of properties regardless of the cost and expediency. Common sense should tell us to stop looking for greater precision where the cost of measuring exceeds the value of the property itself. Nevertheless, countries with poor financial resources often strive to introduce sophisticated systems of satellite topographic surveys, numeric cadastral systems and pool together multiple geographic data bases which are not in use even in the countries who produce the necessary equipment and where the much more expensive real estate would have justified such care for precision.

But in modern societies the legal security of real estate is determined by clear definition of ownership rights attached to it rather than by precise measuring of its borders. It can be of no real importance to find out to-day that the area of the property you bought yesterday is not exactly 5000 sq.m as it had been maintained, but only 4 900 sq.m or even 4 800 sq.m, as you will not want to cancel the deal for that reason. On the contrary, if you bought a property in the belief that you would be able to build there a house of 10 000 sq.m , and the municipality suddenly change their mind and refuse to grant you a permission for more than 5000 sq.m, then it means that your money has been wasted. Now days the actual value of a property depends more on the ownership rights attached than on the exact knowledge of its area and shape. Since Ancient Egypt, land surveyors have been a valuable instrument for raising taxes, but lawyers have been the ones who could create real property.

Russian Land is not untouched in term of rights

To maintain that in Russia privatization of land must be preceded (or at least accompanied) by the organization of cadastre means in the first place to accept a generation-long confusion, for at best it would take a dozen years to sort out the consequences. It would also mean recognizing that no land rights (either de jure or de facto) have ever existed in the country. Meanwhile Russia is not another Australia, sparsely populated with tribes of gatherers and hunters.

The land here has already been divided, occupied and valued by the population which in fact enjoys all occupancy rights, collective or individual, sufficiently valuable for them to have been fought for. Even if, in theory, beginning from 1928 land belonged uniquely to the state, this dummy ownership could not prevent certain individuals from having a family plot, or a tiny dacha "on the basis of the rights of permanent occupancy", or even larger properties which some people, lately, have been in a position to obtain.

Even apartments rented out to people by the state for purely symbolic rate represented remuneration in kind. Some of these flats were built in better locations, some in worse. Now, can anybody seriously consider, under the pretext of those occupants having no "title of ownership", "razing everything to the ground" as the song goes, for a second time? Would not it be better to do the opposite: to transform as quickly as possible all properties occupied "by fact" into properties owned "by law", thus establishing at last a market economy on a clear legal basis instead of keeping everybody in permanent uncertainty, vulnerable to any change of the wind?

Currently, it is possible by force of only one law permitting free sale of actual occupancy rights to transform all these occupants into owners, or at least the owners of their leaseholds (a British concept) if they wish to stick to the idea that community preserves property intact (the British concept of freehold).

Ownership is Unjust but that Injustice can be Corrected

Of course, the actual distribution of land and housing rights is unjust, and this injustice has even increased of late. One can dream of restoring justice by giving each Russian an

equal share of the (imagined) property of the former Soviet Union: an equal share of housing space and an equal share of land. But experience shows that the only thing a bureaucratic machine is capable of is to replace one injustice by another: each new power strives to provide benefits for its own supporters, thus making the system of ownership unstable.

To trust any administration with the responsibility of creating and distributing ownership is to be a Utopian. Such a system has never worked well, except in the "new countries," after stripping off the rights of the aboriginal population. We have to admit, because it is true, that ownership is essentially rude and unjust. Its only advantage is that it can be efficient, if properly applied. However, ownership does not have the last say in the life of society. There is, for instance, the tax system whose job it is to make the winners pay for the benefit of the losers, thus preserving, if only partly, the balance.

Is there a difference between a country where all the land belongs to the state which rents it out to those who use it, and a country where all the land belongs to private individuals who pay a tax to the state? Practically none, in economic terms, provided that the occupants have the right to sell their occupancy rights. The difference may be only psychological, due to the difference in the meaning of the two words. Though, psychology can sometimes be important, too.

Thus, if the political function of the state is to make up for, a posteriori, the injustice of ownership by means of a fiscal system ... the establishment of a cadastre becomes in its turn very useful, if its aim is to distribute taxes as equally as possible.

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