



**Economic and Social
Council**

Distr.
GENERAL

HBP/2001/1
HBP/WP.7/2001/1
25 January 2001

ORIGINAL : ENGLISH

ECONOMIC COMMISSION FOR EUROPE

COMMITTEE ON HUMAN SETTLEMENTS

Working Party on Land Administration

WORKSHOP ON SECURITY MECHANISMS IN THE CREATION OF
REAL PROPERTY MARKETS: PROTECTING RIGHTS

Report prepared by the delegation of Spain in cooperation with the secretariat

Introduction

1. The workshop on security mechanisms in the creation of real property markets took place in Madrid from 28 to 29 September 2000. It was organized by the Ministry of Justice of Spain and the Land Registry of Spain.
2. Representatives of the following countries participated: Albania, Armenia, Austria, Belarus, Bosnia and Herzegovina, Canada, Czech Republic, Denmark, Finland, France, Georgia, Germany, Hungary, Iceland, Latvia, Lithuania, Netherlands, Norway, Poland, Portugal, Republic of Moldova, Romania, Slovakia, Slovenia, Spain, Sweden, Switzerland, the former Yugoslav Republic of Macedonia, Ukraine, United Kingdom, and United States. A representative of the ECE secretariat also took part.
3. The workshop was opened by Ms. A. López-Monis, Director-General of the Land Registry of Spain. She welcomed the participants on behalf of the Minister of Justice. She stressed the importance of land registration for ensuring the efficiency of the real estate market and protecting property rights, and said that land registries should play a greater role in sustainable urban development.

4. At the official opening, Mr. A. Pau Pedron, President of the Land Registry of Spain, explained the organization and structure of the land registration system and related services in Spain. He stressed the need for this system to be flexible to meet the requirements of private persons and the different sectors of the economy, as well as of land use and urban development.
5. Ms. B. Lipej, Chairperson of the ECE Working Party on Land Administration, and Mr. G. Vinogradov, Secretary, reported on the activities of the Working Party, with particular reference to land registration and sustainable urban development. In this context it was reported that the ECE Committee on Human Settlements had adopted the Strategy for a Sustainable Quality of Life in Human Settlements in the 21st Century at its meeting in September 2000.
6. The following participants were elected Chairpersons: Mr. P. Van Der Molen (Netherlands) for session I (Legal security in real estate markets), and Ms. B. Lipej (Slovenia) for session II (Land development and the land registry).
7. The following topics were discussed:
 - (a) Session I-1: Problems in creating legal security mechanisms in real estate markets
Moderator: Mr. F. De La Puente (Spain); rapporteurs: Mr. B. Kjellson (Sweden); Mr. J. Wolters (Denmark); Mr. F. Baias (Romania); Mr. J. S. Rodríguez Sánchez (Spain); Mr. H. Depeyre (France);
 - (b) Session I-2: Construction of an effective legal security system for real property
Moderator: Mr. F. De La Puente (Spain); rapporteurs: Mr. H. Auer (Austria); Mr. L. M. Cabello De Los Cobos (Spain); Mr. F. Méndez González (Spain);
 - (c) Session II-1: Land development process and land registration legislation
Moderator: Mr. J. S. Rodríguez Sánchez; rapporteurs: Ms. M. Laha (Albania); Mr. R. Arnaiz Eguren (Spain); Mr. F. Acedo-Rico Hennings (Spain);
 - (d) Session II-2: Registry of titles in land development
Moderator: Mr. J. S. Rodríguez Sánchez; rapporteurs: Mr. V. Ogorodnikov (Russian Federation); Mr. L. Mendoça (Portugal).
8. Mr. J. Manthorpe (United Kingdom) presented the results of the ECE Study on Land Registration Legislation.
9. Technical visits were organized to the Madrid Land Registry and the Index Service of Madrid.

I. MAIN ISSUES OF THE DISCUSSION

A. Legal security in real estate markets

10. The main purpose of a financial system is to favour the balanced development of the economy. Credit, and mortgages occupy a fundamental place here, is one of the essential elements of this development and its importance depends largely on the guarantees offered to creditors. Regardless of the type of guarantees used, the security of legal commerce rests on the reliability of the information available to the contracting parties. This requirement will always be imperfect as long as the parties themselves provide this information. It would be better if the useful information is registered at a public registry established by a neutral and objective authority.

11. The primary aim of a national land registration system is to guarantee the private right to specific properties and thereby to guarantee the owner's right to use the property or transfer his right, partly or completely, to other persons. Despite the various registration or boundary systems, legal registration might not fully guarantee boundaries between neighbours. Depending on the country, this is, to a certain degree, a matter of negotiation between the neighbours and a judgement by authorized persons or by the courts.

12. Disagreement between neighbours on the determination of their common boundary compared with the evidence of the boundary determination in the land registry/cadastre calls for a legal tool to solve any deviation. In addition, there is no State guarantee on the boundary determination despite the registration or boundary system. So the challenge for politicians and professionals is to create conditions for quick, secure and cheap methods to solve boundary disputes in the context of the overall land registration system.

13. Generally, there are three types of registration systems. One is recording, or private conveyancing, systems. Such systems serve only to disclose information; they do not have legal properties and their only function is to save search costs for title insurance companies. The second type is the deed registration systems, which give priority to registered deeds over unregistered ones, but at the same time cannot guarantee the legitimacy of the owner of the property. The third type is registries of titles, with the fundamental feature that the registered title is officially established.

14. The land register safeguards the interests of owners but also of those who may have legitimate claims on the land. It ensures the effective functioning of a society where the prime source of personal, corporate or government wealth is land and property. Land registration is vital for land management (agriculture, environment and urban development).

B. Land development and the land registry

15. It is always a difficult task to deal with such complicated legal regulations as those on the process of land use (urban development) and on the land registry, which is the central institution for protecting rights to real property. Urban development is a multidisciplinary activity, which

should be carried out within a defined legal framework. On the one hand, the process of changing land use and building activities is subject to public authorization procedures. On the other, the results of these developments- new building sites and structures - become subjects of the real estate market, which means that the legal trade in these units falls under the regime of private law and its mechanisms for protecting the title to real property.

16. The whole process of transforming land-use patterns inevitably requires the control of local and regional authorities. An important function of such control measures is to prevent illegal change in land use and construction. Effective land development policies and monitoring procedures are as important as adequate land development regulations, otherwise, the law would be violated in many instances.

17. The establishment of legal regulations on real estate in countries in transition is essential for the stability of rights over this real property, and for ensuring its disposal in a legitimate and transparent way. In many of these countries the situation is aggravated by mass population migration from rural to urban areas. This migration is accompanied by the occupation of agricultural land in the suburban zones of major cities and the subsequent use of that land for the construction of illegal housing.

18. In many countries, the following features characterize these areas:

- (a) Very low level of economic activity with few enterprises, most of which are loss-making;
- (b) Lack of suitable land for agriculture and stockbreeding;
- (c) Isolation as a result of lack of infrastructure and high transport costs;
- (d) Lack of social infrastructure and high unemployment.

19. Unauthorized construction can be separated into two types: construction on a parcel of land belonging to the builder himself and construction on public land. In the first case, a widespread practice of recognition of the right to unauthorized construction exists, both legally and administratively through subsequent formalizing of the building permit and allowing the building to be used. Despite the fact that the civil legislation specifies only legal acceptance, in practice, in many countries the recognition is administrative. For example, in the Russian Federation, more than 90% of all unauthorized constructions are accepted for use through administrative channels. The legal procedures are applied only if the local authorities refuse to accept the unauthorized construction and these cases are usually settled by the courts in favour of the builder.

II. CONCLUSIONS AND RECOMMENDATIONS

A. Legal security in real estate markets

20. Property ownership and other real rights arise from the need of human beings to regulate their enjoyment of tangible objects, especially in third-party relations. Nevertheless, it is the law that lays down rights and decides their content, scope and effects. It is the legislation of each country that determines what rights may be enjoyed and protected, and to what extent. The land

registry represents the ultimate protection that a set of laws can provide for the holders of real property rights and, like the rights it protects, it is a legal creation. **The land registry is the response of today's legal codes to the problems of uncertainty in the exchange of real property.**

21. Unlike rights, objects and their physical circumstances exist by themselves, requiring no legal declaration to ensure their existence. Objects are what they are, regardless of whether the law acknowledges that they exist. The law merely regulates the consequences of their existence. This radical difference between rights and objects makes for a difference in how the law handles them. For a right to exist and to be protected, it suffices for the law to affirm that it exists and to state the degree of protection it is granted by law. The law cannot, however, rule that a non-existent object exists, nor can it attribute to an object essential characteristics different from its real characteristics. The law can specify protection for the description of properties in a cadastre so that buyers may rely upon property descriptions, but if such protection is to be viable, competent experts have to verify the situation on the ground, which takes time and costs money. **It is therefore important to have a sound legal framework for land markets and land registries.**

22. Since rights are creations of the law, it will be the law that determines the extent to which their existence and content are protected. Their protection is ultimately a political decision. A land registry system provides the greatest protection, making information on the existence and status of rights accessible to all. Land registry systems are not uniform, and the amount of protection they provide varies according to each particular system's legal tradition and needs. **Land registry systems may vary according to a country's legal history, traditions and needs.**

23. Whereas land registries are systems for protecting third parties, the greater the amount of information they provide, the greater protection they afford. The more information the land registry provides, the less information has to be sought elsewhere. A modern land registry system has to offer sufficient information about the real property, about the holder of the right and the reason why he holds the right, about any personal restriction affecting the holder of the right, about limitations on the registered right, about any legal or administrative procedures affecting the registered property, etc. The information obtained has to be legally relevant so that it can serve in court as evidence of the legal status of the real property in question. **The definition of the content of a land registry system should meet the demands for the legal security of third parties acting in good faith as far as possible.**

24. The need to create certainty in law is especially important in mortgage rights. As the mortgage secures the movement of money that allows real property to be traded, so will the volume of real property trade depend on the certainty that the mortgage provides. Modern land registry systems do not actually create the real property market, but they are indispensable for the market's development. The adequate protection of mortgage rights requires the strict legal regulation of mortgage rights and of the legal procedures for foreclosure. The proper legal regulation of mortgage rights must cover the content of the right as far as possible, distinguishing clearly between the creditor's rights and the owner's rights, and the foreclosure procedure, which

must be quick, simple and economical. **Systems for land registry should facilitate the legal security of mortgage rights.**

25. The land registry is a compilation of data on properties, their owners and the rights to such properties, and the huge volume of information that land registries can provide must be placed at society's service. Consequently, the land registry, in addition to its essential purpose of providing certainty in law, has a second increasingly important purpose: to provide information not only to individuals but also to the administration. There are many aspects in which the land registry can be useful (spatial planning, clamping down on illegal construction, tax administration, justice administration, farm policy, etc.). A modern land registry must guarantee the effective, economical flow of information among the different administrations. **The land registry should facilitate public administration by providing sound legal land information.**

26. An efficient and modern land registry system should meet the following criteria:

- (a) The documents presented at the land registry should meet the maximum requirements of authenticity, integrity and validity according to each country's laws;
- (b) The purpose of the contract should be defined not only by the parties but also by reference to a technical identification system (graphical, digital);
- (c) Control of legality by the registrar should be as broad as possible;
- (d) The registrar should have a complete knowledge of the legal system;
- (e) The legal effects of the system should, at least, not challenge non-registered rights. Other systems add two strong legal effects: the presumption of the existence, legitimacy and validity of the registered rights; and, above all, public faith or absolute protection for the registration holder against any other person;
- (f) The land registry should provide information on the object and the right to the public quickly, completely and inexpensively; the document containing the information should be usable as evidence in court.

Thus, the legal framework should clarify the criteria for land registry systems.

27. The rights protection system based on the land registry which has full legal effect minimizes the cost of obtaining information and maintaining rights. The more complete the contents of the land registry, the lower the system's overall costs (all the necessary information will be available from a single source, without having to consult others). The stronger the protection under the law, the more self-sufficient the land registry with no need for complementary mechanisms (to provide the level of security the market requires) (there will be no need for complementary or alternative security mechanisms that do not add anything to the absolute protection provided by the registry). **Effective land registry systems minimize transaction costs.**

28. The workshop recommends that:

- (a) Sound legal frameworks for land and the land registry should be developed as an essential part of the institutions which rule a society;
- (b) The land registry system should be based on a solid graphical or digital description in a cadastre, but its development must not hinder the protection of the rights;
- (c) The financial relationship between land registry and cadastre should be analysed

in order to provide the cadastre with sufficient means to keep pace with the developments in the land market;

(d) The description of objects of rights should use an appropriate object identifier. The workshop supports the initiative of the ECE Working Party on Land Administration to publish a report on object identifiers;

(e) The land registry and geometric description of objects should be aligned in such a way that the description of the geometry does not hinder the protection of rights;

(f) Attention should be given to the capacity building required to develop and maintain land registry and geometric descriptions;

(g) Since the institutional building (land law and public administration on land issues) is a matter for politicians, close cooperation between land registrars and politicians is required;

(h) Research should be undertaken on the relation between land registry, cadastre and spatial data infrastructures as a means to make all kinds of scattered land-related data accessible to users;

(i) The user requirements from the public administration of the land registry should be identified in order to facilitate good governance;

(j) Good regulations should be worked out on the relation between registered and non-registered rights in terms of validity and legality of rights against other persons (third parties);

(k) Legal provisions should be developed so that land registry information is considered valid for the courts;

(l) The benefits of a land registry to society should be made visible to gain goodwill from politicians and users and as a justification for investments;

(m) The relation between land registry and cadastre should be included in the legal framework;

(n) Since both the cadastre and the land registry are considered part of land administration systems, developing and maintaining systems for land registry requires an integrated approach.

B. Land development and the land registry

29. The quality, flexibility and security of the legal procedures of land transformation in the urban development process (spatial planning, management, building) have to be backed by all the means of the legal system. Every technique available should be used, both those that stem from the regulation of the public administration's action and those aimed originally at protecting the ownership of real estate and transactions.

30. It is recommended that countries that have not yet established land registration systems should carry out the first registration as soon as possible in order to avoid the development of illegal possession. Land registry is a legal institution whose essential purpose is to create legal presumptions in favour of the holders of the rights recorded in the registry. The goal of the information posted in the registry is to validate the purchase, transfer, creation or termination of rights to real estate.

31. It is recommended that the land registry should collaborate with other public and private institutions dealing with land administration with the aim of finding suitable socially accepted means of legalizing illegal buildings and discouraging new illegal developments.

32. It is recommended that the land registry should publish the results of planning execution (such as the introduction of modifications in parcels; information on encumbrances associated with planning; the determination of parcels transmitted to the administration as a result of planning; etc.)

33. Administrative procedures for turning developable land into urban land appropriate for building should be speeded up and made more flexible for the benefit of society.

34. It is recommended that urban development policy should be implemented prior to housing policy, so as to obtain land that can be used for housing development in a reasonable time.

35. Public administrations should aim at developing a policy to deregulate and liberalize the land market. Further on they should activate all mechanisms at their disposal to make more land available at more affordable prices. The administration should ensure the provision of special loans for low-income buyers, with reasonable interest rates and repayment terms.

36. It is recommended that adequate legislation (civil, environmental, administrative) should be implemented to deal with the problems of illegal land divisions and unauthorized constructions.

37. Administrative issues such as effective supervising mechanisms, including the inviolability of the home, the effectiveness of penal actions and the efficient work of administrations issuing construction permits have to be addressed in the most professional and active manner.

38. The legality of land division should be proved by the land registration authorities. The legality of new construction or substantial modifications to existing structures should also be verified by the land registry. Otherwise, registration should be denied.