

Land Governance and the Legacy of 1215

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1. THE IMPORTANCE OF 1215

15 June 2015 sees the 800th anniversary of a remarkable event that has had a profound influence on the development of land governance in the English-speaking world, namely the sealing of the *Magna Carta* (or Great Charter). In 1215 on an island at Runnymede in the River Thames near Windsor, reputedly too far away from the banks for those attending to be hit by an arrow from a longbow, and on land too marshy for armoured knights to use horses, the English barons forced King John to attach the Great Seal to the Magna Carta (or Great Charter). The Magna Carta set out the liberties (ie rights and privileges) of the barons, free men, and various other bodies, and set limits on the powers of the king. It contained the principle that the king, and therefore the government and the barons, were bound by law and the law placed limitations on the king's and the government's powers. The Crown and the monarch's government, as well as powerful individuals, could act only in ways which were lawful. As Dr Thomas Fuller wrote in 1733, "Be you never so high, the Law is above you." Or as Thomas Bingham, the former Lord Chief Justice of England and Wales and former Senior Law Lord of the UK (ie senior judge in the UK's then supreme court), wrote:

If you maltreat a penguin in the London Zoo, you do not escape prosecution because you are Archbishop of Canterbury; if you sell honours for a cash reward, it does not help that you are Prime Minister.....There is no special law or court which deals with archbishops and prime ministers: the same law, administered in the same courts, applies to them as to everyone else." (Bingham, 2010, p.4)

Those attending the ceremony had few illusions about King John and his willingness to abide by the agreement. Consequently various copies of the Magna Carta were made for safe keeping and sent to various parts of the kingdom. Four of the original copies survive today – two in the British Museum, and one each in Salisbury and Lincoln Cathedrals. The impact of the document is all the more remarkable as within three months it was repudiated by King John, who did not earn his epithet "Bad" for nothing, and annulled by his ally Pope Innocent III.

When John died the following year, much of his realm was under the control of LouisCarpet, the French Dauphin, who had been supported by some of John's opponents. Under these inauspicious circumstances, one might have expected the Magna Carta to have become little more than an interesting footnote to history. Yet it did not, but survived and contributed key elements to both the (uncodified) British constitution and the American Constitution. Two clauses in the original Magna Carta remain on the UK's statute book today, the more

significant is clause 40: “To no one will we sell, to no one deny or delay right or justice.” This remains part of the monarch’s Coronation Oath. Clause 39 provided that no free man was to be arrested or imprisoned, exiled or destroyed “save by the lawful judgement of his peers or the law of the land” (Carpenter, 2015). Their relevance can be seen in the current coronation oath. On 2 June 1953 when Queen Elizabeth II was crowned, she swore to:

“govern the Peoples of the United Kingdom of Great Britain and Northern Ireland, Canada, Australia, New Zealand, the Union of South Africa, Pakistan, and Ceylon, and of [Her] Possessions and the other Territories to any of them belonging or pertaining, according to their respective laws and customs [and to] cause Law and Justice, in Mercy, to be executed in all [Her] judgements”

<http://www.royal.gov.uk/ImagesandBroadcasts/Historic%20speeches%20and%20broadcasts/CoronationOath2June1953.aspx>.

The world did not change in 1215 but the Charter did set in motion a process that resulted in the development the rule of law and the protection of property rights under the law.

The relevance of this history to land governance is that at the heart of policy in this area lies a paradox that Magna Carta holds the key to understanding. In the World Bank’s 2015 *Doing Business* rankings on registering property (World Bank, 2014), the UK is ranked 68th and the USA 29th. The UK does not have a cadastre and the USA has such a fragmented system of local property registration that title has to be insured through private title insurance companies rather owners relying on guarantees through registration. If either of these countries were to be eligible for World Bank loans, they would undoubtedly be under pressure to reform their land administrations and install a “modern” system of land registration and cadastre as an essential part of their structural reforms. Yet they are ranked 1st and 2nd in the Jones Lange LaSalle 2014 Global Real Estate Transparency Index (JLL, 2014) and are ranked 4th and 25th respectively by the World Economic Forum 2014 in terms of security of property rights (WEF, 2014). They have amongst the most efficient real estate markets in the world, with well-developed systems of mortgage and property-backed finance, and whose real estate is sought after by domestic and foreign investors.

The key to understanding why the real estate markets in these countries are so efficient whilst their land administrations lack many of what are conventionally regarded as being essential elements for the protection of property rights, is the legacy of 1215, namely that the rule of law provides effective protection of human rights, including property rights. In particular, that private property rights are protected from being expropriated by government without due legal process that can be challenged in independent courts and without fair and timely compensation being paid. Individuals are able to protect their property rights from those more powerful or better connected than them who might wish to appropriate them. The lesson would appear to be that land administration systems can be technically deficient without significant adverse consequences for the efficient functioning of property markets, providing

there is strong rule of law to protect property rights. The paper explores the relationship between the rule of law and aspects of land governance and the security of property rights using a variety of statistical sources. It uses them to develop the argument that improved systems of land administration are of themselves insufficient protection for property rights unless there is also investment in developing their legal protection through enhancement of the rule of law. This is much more difficult to achieve since it is about changing norms, values, and attitudes and not just systems. There is a danger that without this investment, improved land registration systems could be exploited by an elite or fail to protect the full range of property rights.

2. HOW MAGNA CARTA CAME TO BE SEALED AND SURVIVED

In order to understand the significance of the Magna Carta it is necessary to examine how it came about and also, in spite of its initial repudiation by the Crown with the support of the Pope, it survived and became the cornerstone of the British constitution. This is not just a matter of importance to the United Kingdom but the ideas contained were exported around the world: through conquest and the subsequent granting of independence with national constitutions that embodied these principles; through migration to the British settler states of USA, Canada, Australia, New Zealand, and South Africa; through trade and the need for rules to facilitate fair markets; and through international bodies like the United Nations and Council of Europe, where British jurists were influential in drawing up the Universal Declaration of Human Rights and the European Convention on Human Rights.

King John acceded to the English throne in 1199, succeeding his elder brother Richard I (*Richard the Lionheart*) of Crusades fame. Their father, Henry II (Henry Plantagenet), had amassed a significant empire including not only England but also Normandy, Anjou, Aquitaine, Poitou, and Gascony in France from his mother and father and his wife, Eleanor of Aquitaine. This put him in a position to challenge his French overlords, the Carpet kings of France. For this reason, this part of the dynasty is often referred to as the Angevin kings. Henry's sons lost much of their French inheritance, Richard winning some of it back after his return from the Crusades and imprisonment only for John to lose it gain. In this lies the reason behind Magna Carta. In order to defend their French lands and those of the barons, the kings had to raise significant revenues through taxation and other financial impositions on the barons and knights. For an unsuccessful king like John, who had a knack of insulting and upsetting those whose support he needed, this spelt trouble. With no obvious successor after John's murder of his nephew Arthur, some barons turned to Louis Carpet as a replacement. Their seizure of London gave John little alternative but to seek an agreement. A list of grievances was drawn up and what became the Magna Carta was negotiated with John. The range of clauses indicates the extent to which the rebel barons had to build up a coalition of the discontented.

As well as the clauses on justice and freedom from imprisonment already mentioned, Magna Carta contained a number of other significant clauses. These concerned the regulation of the ways in which the king could raise money, with no taxation to be raised except by common counsel of the kingdom and limits on the sums that could be raised from the barons. Horses, carts and wood were not to be expropriated from free men except with their consent. Land was not to be seized if there were chattels to pay the debt. There were to be investigations into past misdeeds and the return of property to those dispossessed without lawful judgement. There were protections for the under-tenants of the barons against their overlords exploiting their power to extract more than they were entitled. The provisions in Magna Carta applied to freemen but not to the villeins or serfs. The Charter provided for an enforcement mechanism in the form of 25 barons who were to see that the king and his agents followed it and by knights in each county to control the malpractices of local agents of the king.

No doubt John hoped to exploit any wriggle room in the Charter and when this proved difficult, he repudiated it. There the matter should have rested except that in October 1216, fighting rebel barons, and with much of his kingdom under the control of his enemies and Louis Carpet, John died. He was succeeded by his infant son, Henry III, under the guardianship of William Marshall. Marshall succeeded in defeating the rebels and winning back the country for the child king. In so doing he had the Magna Carta reissued in 1216 and again in 1217 after the civil war ended. In 1217 it was accompanied by the Charter of the Forest dealing with royal forests. It was reissued in definitive form in 1225 by Henry III in his own right when he needed to raise taxes to resist incursions by Louis into his French lands. Henry III resissued it several times more, including in 1265 when compelled by the Great Parliament. His son Edward I reissued the Charter in 1297 and 1300 in order to secure tax revenues for wars in France, Scotland and Wales, and these versions included limits on the crown's powers of expropriation.

As one leading historian of Magna Carta has noted:

Magna Carta survived. It did so because it asserted one fundamental and treasured principle, that of the rule of law. Itresponded to real grievances and offeredwhat seemed effective solutions. In the thirteen century the Charter was hardly of equal benefit to all sections of society. Yet society changed while Magna Carta remained, so that in the end the rule of law shielded everybody. Already by 1300 those from top to bottom of English society saw the Charter as a protection against arbitrary rule. Magna Carta was set on the long journey that would take it around the world. It would indeed last 'in perpetuity' (Carpenter, 2015, p. 490).

By the seventeenth century it had become part of a myth that the freedoms enjoyed by Englishmen under the Saxon kings has been usurped after the Norman invasion of 1066 placing the population under a Norman yoke. Magna Carta was seen as part of the process of regaining these supposed historical liberties and reinforced by later political

settlements between Parliament and the Crown. Although Magna Carta had much to say about the barons and free men, it did not address the 60% of the peasantry who were serfs or villeins. By this time there were no slaves but villeins were not free to leave their land, which they held in return for services and other charges to their lord. How this tenure evolved into something that more closely resembled freehold owed little to Magna Carta and much to the Black Death and subsequent plagues after 1349, which turned England from a country of abundant labour and shortage of land into one with abundant land and a shortage of labour. The copyholders, as the villeins became, held their land by customary tenure but the custom of the manor became binding on the lord, replacing uncertain charges by fixed ones.

3. EXAMINING THE IMPORTANCE OF THE RULE OF LAW IN LAND GOVERNANCE

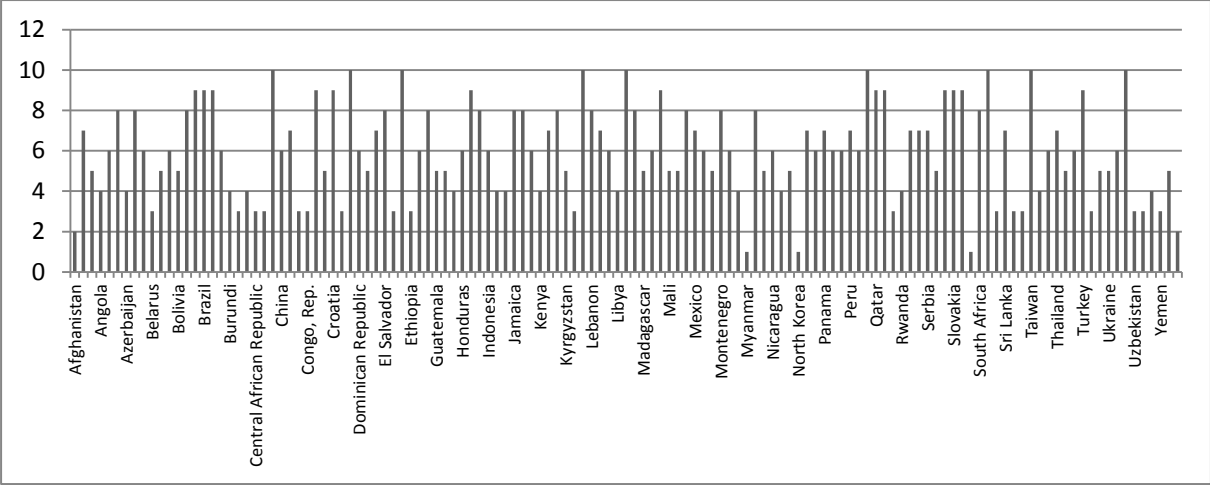
The hypothesis that the rule of law is fundamental to the protection of property rights and that land registration, though a valuable tool, is a secondary factor requires data for a sample of countries on the security of property rights, the rule of law, and property registration. A number of potential sources exist, though it should be recognised that none of them is free from problems (Grover R & C, 2012).

Each year the Bertelsmann Stiftung Transformation Index (BTI) examines the extent to which transition and developing countries are moving towards democracy and a market economy (<http://www.bti-project.org/bti-home/>). BTI currently looks at 129 countries and assesses them on 52 criteria, which are grouped into 19 main areas with an overall score and summary scores for status and management. In addition to quantitative measurements for each of the criteria, a report is produced for each country. The scores are produced by experts following a codebook (Bertelsmann Stiftung, 2014). This should provide a consistent method of scoring. At least two experts are involved, one local and one international and the process is designed to remove subjectivity and provides for checking and review. A national score is produced, which particularly for larger countries, could be subject to regional variation. Ultimately, the scores are based on the judgements of experts.

The BTI includes a measure of the strength of property rights. Criterion 9.1 poses the question, “To what extent do government authorities ensure well-defined rights of private property and regulate the acquisition, benefits, use and sale of property?” For a country to receive a score of 10 property rights and regulations have to be well defined and enforced and rights should be limited solely and rarely by overriding rights of public interest that are constitutionally defined. By contrast a score of 1 means that property rights and regulations are not defined in law and private property is not protected. A score of 4 means that property rights are defined in law but they are not implemented or enforced consistently or safeguarded against arbitrary state intervention or illegal infringements. Figure 1 shows the range of scores

ranging from 10 in countries such as Chile, the Czech Republic, Estonia, and Lithuania, all members of the OECD or European Union, down to 1 in North Korea, Myanmar, and Somalia and 2 in Zimbabwe and Afghanistan.

Figure 1 Strength of property rights in transition and developing countries as measured by BTI



Source: <http://www.bti-project.org/downloads/bti-2014/>

The BTI also measures the strength of the rule of law. As well as an overall score, BTI also looks at four elements of the rule of law:

- The extent to which there is separation of powers so that there are checks and balances so that the power of the state is subject to the law.
- The extent to which there is an independent judiciary free from the influence of political decision-makers, powerful individuals and groups, and from corruption.
- The extent to which public servants and politicians are held accountable if they break the law, engage in corrupt practices, act when they have conflicts of interest, behave unethically, or the law is undermined by political corruption.
- The extent to which civil rights limit the exercise of state power with the rule of law protecting personal liberty, preventing the violation of civil rights, and discrimination against women and ethnic and religious groups.

The BTI does not contain any assessment of the efficiency of property registration since has been made instead of data from the World Bank’s annual *Doing Business* survey (World Bank, 2014). One of the areas in the survey is registering property and measures the number of procedures, the time in days and the cost as a percentage of the value of the property taken to purchase a property and transfer the title to the buyer (<http://www.doingbusiness.org/methodology/registering-property>). The scenario assumes that the buyer and seller are domestically and privately owned limited liability companies with 50 employees located in the peri-urban area of the largest business city. The property has been

owned by the seller for the last ten years without a mortgage and the sales price is its value. It is registered in the land registry or cadastre and so is not a first registration and is free of title disputes. It is located in an area zoned for commercial activity and consists of land and a building. The land area is 557.4 square metres and the building is a two-storey warehouse of 929 square metres that is 10 years old, in good condition, and complies with all the relevant codes and regulations. It is vacant, will not be subject to rebuilding, will not be used for any special purposes or has anything on the land that is specially regulated, such as trees, historical monuments, or natural water resources. The value is assumed to be 50 times the per capita income. The costs include fees and transfer taxes. The scenario is part of measures aimed identifying the ease of doing business. Therefore it is not concerned with the majority of properties in a country, which are residential. However, the scenario does provide an indication of the efficiency of property registration, with fewer procedures, more speedy registration, and lower cost relative to the value of the property being regarded as indicators of greater efficiency.

Data on the security of property rights, the rule of law and the efficiency of property registration was available for 125 countries listed in the BTI, the missing ones being countries for which there is no information about property registration. Table 1 shows the relationship between strength of property rights and the measures of the rule of law and efficiency of property registration.

Table 1 Correlations between strength of property rights and indicators of the rule of law and efficiency of property registration in BTI countries

Variable	Correlation coefficient	Source of data
Rule of law	0.810	BTI
Separation of powers	0.683	BTI
Independence of judiciary	0.771	BTI
Prosecution of abuse of office	0.805	BTI
Civil rights	0.777	BTI
Procedures (numbers)	-0.102	Doing Business
Time taken (days)	-0.240	Doing Business
Cost (% of property value)	-0.313	Doing Business

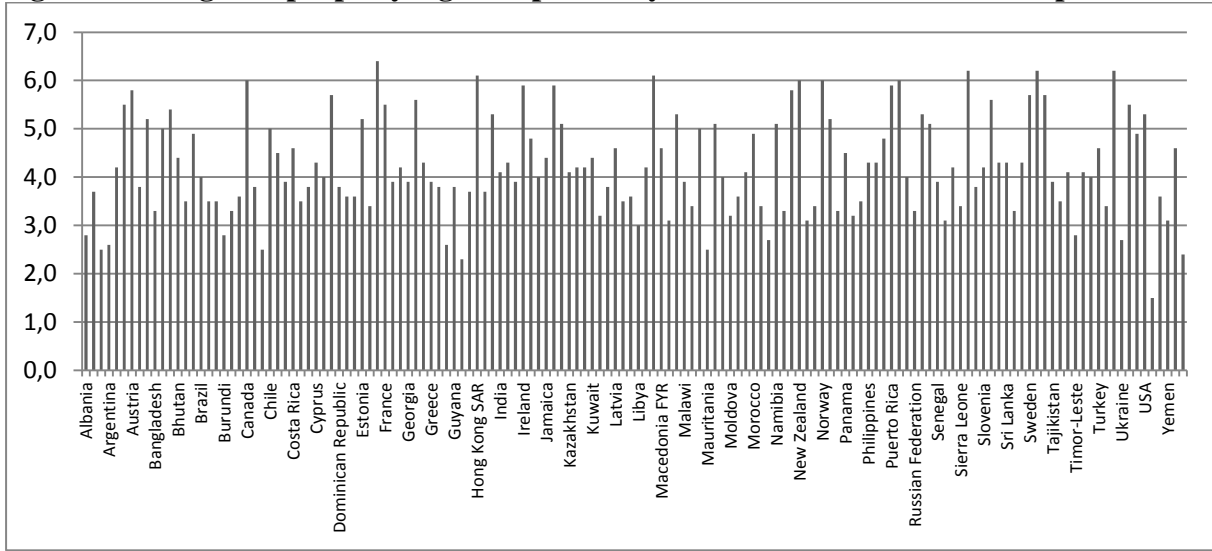
Source: calculated from Bertelsmann Stiftung (2014) and World Bank (2014).

There are high correlations between the strength of property rights, the four component parts of the rule of law used in the BTI and, particularly, with the summary measure of the rule of law, suggesting that private property rights are stronger where the rule of law prevails. The

signs in the correlation coefficients for the efficiency of property registration are as one might expect – fewer procedures, less time taken to register a property, and lower cost of registration all being associated with strength of property rights. However, the strength of the correlations for the efficiency of property registration are weaker than for the rule of law indicating that the strength of property rights is a more significant influence.

An alternative approach to examining the strength of property rights is that of the World Economic Forum in its annual survey of international competitiveness (World Economic Forum, 2014). It surveys 14,000 business leaders in 148 countries, of which 144 produced enough valid results for analysis. The sample size varies between countries with 369 for the USA and 363 for China down to 32 for Swaziland and a median sample of 87. The criteria are ranked on a seven point scale. The WEF survey is therefore based on the opinions of respondents rather than of a small number of experts. It does raise questions about sample size and representativeness in each country and the degree to which the respondents are in a position to calibrate their answers. Two potential problems are a degree of patriotism causing respondents to score their answers too highly and lack of detailed knowledge of other countries with which to compare their experience of their home country. Respondents do have experience in the course of their working lives of the issues they are asked to comment on.

Figure 2 Strength of property rights reported by World Economic Forum respondents



Source: World Economic Forum (2014)

The questions include asking how strong in their country the protection of property rights was, with 7 being extremely strong and 1 extremely weak. Property rights in this case include those over financial assets. The range of responses is shown in Figure 2. There is a wide range reported with Finland scoring 6.4 (out of 7) and Singapore, Switzerland and the UK 6.2, whilst Venezuela scored 1.5, Haiti 2.3, and Zimbabwe 2.4. The WEF also asks its respondents about the extent to which the judiciary is independent from influences of government, citizens

and firms, which is a key element of the rule of law.

Using the WEF data provides an alternative perspective to that of the BTI in two respects. It covers a wider range of countries, 144 in total, including the higher income ones that the BTI does not cover. It also enables examination of the strength of property rights and the rule of law as perceived by business users rather than as evaluated by experts. The WEF data on strength of property rights was compared to that on judicial independence and the *Doing Business* data on property registrations for 142 countries with the correlations being shown in Table 2. The conclusions are similar to those reached with respect to the BTI countries namely that there is a high level of correlation between the strength of property rights and judicial independence. The signs of the correlation coefficients for the three measures of property registration efficiency are as expected, namely that an increase in the strength of property rights is associated with fewer registration procedures, more speedy registration, and lower costs of registration. For this data set the cost of registration is not a significant influence. However, in each case the correlation is much lower than the indicator of the strength of the rule of law.

Table 2 Correlations between strength of property rights and indicators of judicial independence and efficiency of property registration in WEF countries

Variable	Correlation coefficient	Source of data
Judicial Independence	0.902	WEF
Procedures (number)	-0.246	Doing Business
Time (days)	-0.313	Doing Business
Cost (% of property value)	-0.153	Doing Business

Source: calculated from World Economic Forum (2014) and World Bank (2014)

Jones Land LaSalle produce a Global Real Estate Transparency Index (GRETI) every two years (JLL , 2014). The 2014 survey covered 95 countries, with transparency of the property markets for different tiers of city in the BRIC countries (Brazil, Russia, India and China) also being examined. The composite index is derived from five components: investment performance measurement (25% weighting), market fundamentals (20%), governance of listed vehicles (10%), regulatory and legal matters (30%), and the transaction process (15%). The survey uses 115 pieces of quantitative and survey data. The composite index produces a score of between 1 (highly transparent) and 5 (opaque). Scores vary from 1.2 and 1.3 for the UK and USA to 4.6 for Libya and 4.5 for Ethiopia, Mongolia, Myanmar, and Senegal.

Table 3 presents an analysis of the relationship between market transparency, as measured by

GRETI, the rule of law and the efficiency of property registration for 91 countries. The signs for the correlations are different for those in tables 1 and 2 because a low score for the GRETI indicates a higher level of transparency. As with the analyses of the strength of property rights, there are low correlations between market transparency and the measures of efficiency of property registration, in this case, particularly the cost of registration. The indicator for the rule of law is taken from the World Bank Governance Indicators for 2013. The methodology and sources are discussed by Kaufmann et. al. (2010). The sign for the correlation with the rule of law is negative as a lower score in GRETI means that the market is more transparent whereas a higher score in the rule of law indicator means that the rule of law is more dominant. Again, the correlation with the rule of law is significantly greater than those with the measurements of the efficiency of property registration.

Table 3 Correlations between the Global Real Estate Transparency Index and the rule of law and efficiency of property registration

Variables	Correlation coefficient	Source of data
Rule of law	-0.815	World Bank Governance Indicators
Procedures (number)	0.273	Doing Business
Time (days)	0.343	Doing Business
Cost (% of property value)	0.105	Doing Business

Source: calculated from JLL (2014), World Bank (2014) and www.data.worldbank.org

4. CONCLUSIONS

The main conclusions to emerge from this analysis is that neither the strength of property rights nor property market transparency are closely associated with the efficiency of property registration when measured in terms of the number of procedures, time taken for registration or cost of registration. Rather, a significantly stronger influence would appear to be the rule of law. This suggests that property registration and measures to improve its efficiency are of less importance in securing property rights than the rule of law. The rule of law is what fundamentally protects rights since only it can ensure that their owners have protection against expropriation by the government and by powerful interests, who may capture the government and use its powers to serve themselves.

The core idea behind the rule of law is that “all persons and authorities with the state, whether public or private, should be bound by and entitled to the benefit of laws publicly made, taking effect (generally) in the future and publicly administered in the courts” (Bingham, 2010, p. 8). Implicit in this is that the courts should be independent and make rational decisions based upon laws and precedents and that the laws and precedents should themselves be publicly

available. If property registration takes place within such a context, then it can help to enhance the security of property rights. By itself is unable to do so as efficient property registration cannot prevent the registration body or cadastre from behaving in ways which undermine rights by, for example, adopting rules that destroy certain rights unless the legality of its actions are capable of being challenged in the courts and reversed by decisions of the courts. It cannot prevent expropriations that fail to satisfy the test of public purpose or ensure that there is fair and timely compensation. By itself, it cannot prevent the powerful or corrupt from taking and re-registering their neighbours' lands as their own unless these can be reversed by the courts.

Does this mean that the investment that has been undertaken in improving property registration systems has been a waste of money? The answer is no because such systems are an essential for the efficient functioning of property markets. They significantly reduce the costs of due diligence when buying property or making loans secured against it. They place obstacles in the way of those who encroach or trespass on other's property. They are a necessary but not sufficient condition for either secure property rights or an efficient property market. An efficient property market also requires other conditions to be satisfied, such as transparent information about prices and transactions and a valuation infrastructure that is capable of advising buyers, sellers, and lenders about market prices. Secure property rights require the protection of the rule of law. This means that no-one and no institution is above the law, including the government and powerful institutions, businesses, and individuals. The individual property owner should be able to obtain effective protection from the courts and law enforcement agencies against those seeking to dispossess him or her using unlawful means and to obtain an enforceable judgement from independent courts whether actions by others against his or her property rights are lawful. That is the legacy of 1215 embodied in many subsequent codes, constitutions and declarations.

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BIOGRAPHICAL NOTES

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