Book review

New Perspectives on Land Registration: Contemporary Problems and Solutions

Amy Goymour, Stephen Watterson, Martin Dixon (Eds)
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The edited collection "*New Perspectives on Modern Land Registration: Contemporary Problems and Solutions*" (Goymour *et al.*, 2018) offers an extensive array of rich and careful technical expositions of land registration law in England and Wales, Scotland, Australia and New Zealand, offering detailed explanations of the inner workings of land registration from a range of academics and practitioners, including current and former law commissioners. The collection does not however offer new perspectives on land registration. It does not seriously question the constructions of property being produced through registration, or their broader effects, or engage with the interdisciplinary and critical literature that exists on the formalisation of title and the automation of its conveyance. Instead, the book takes for granted law's role in the production of markets in land and assumes that the laws related to land registration can only be critiqued for the level to which they facilitate those markets. The book is difficult to review because of the lack of a substantive introduction to draw together underlying themes or perspectives. This is not to take issue with the merit of any of the individual chapters in the book on doctrinal terms, but rather to suggest that much deeper questioning and critical analysis is required for the politically important task of finding new perspectives on land registration.

The enclosure, privatisation and ownership of land are deeply political, historically specific processes inextricably linked to notions of propriety and personhood. The transfer of entitlement to enclosed, privatised land is thus not only a necessarily complex legal task but also one that is dependent on and productive of relations of power. For a very long time, as Alain Pottage has demonstrated, power was located in local community memory (Pottage, 1992, 1994). The seemingly banal change in legal process from proving and transferring title through paper deeds to relying on a central register involved a shift in power away from local community memory and towards a central administrative archive, and a corresponding shift in the very idea of what was being proven and transferred (ibid). As we now move away from paper registries and towards digital technology, new constructions of property are being produced and with them new formations of power. Last year, the Law Commission released its extensive report on updating the Land Registration Act (LRA) 2002, HM Land Registry announced its ambition to become "the world's leading land registry for speed, simplicity and an open approach to data, and aiming to achieve comprehensive registration by 2030", a number of Australian states took steps towards

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paperless, digital platform-based conveyancing, and the Ghanaian Government partnered with IBM to build a blockchain-based registry. "Proptech", the use of digital platform-based technology to find innovative ways of extracting value from real estate, is emerging as a new industry in late capitalist economies around the world. In the English and Welsh context, the proptech industry is being actively supported by HM Land Registry, even as law struggles to regulate it. In light of these developments, new perspectives on land registration and its social, economic and political significance are pressing and important. Particularly for legislative schemes in which registration is necessary for the agreed title transfer to take effect ("title by registration systems"), land registration not only provides the machinery for dealing with property but also manufactures new constructions of property.

The pieces in this collection do not consider the question of how land registration might be changing what "property" means. Instead, the pieces take the meaning of property as beyond question and go on to offer highly technical readings of recent legal developments, focussing in particular on the issues of priority amongst competing claims to property in land, and how such priorities have been dealt with by the courts in the context of the LRA 2002. Usefully for law reformers, practitioners and judges, these pieces point towards areas of ambiguity in the legislation and how such ambiguity might be resolved. Consistent with the concerns of most academic and practicing private lawyers, the pieces also focus on the issue of rectification of the Register and indemnity. In so doing, the authors demonstrate the accuracy of Pottage's hypothesis that registration is "not simply a different or better way of doing the job of conveyancing, but rather that it brought with it a change in the understanding of what that job was" and involved a transition from a form of property based on contract to one based on insurance (Pottage, 1995, p. 372). The emergence of a legal form of property based on administration and insurance, and with it an understanding of land future oriented and speculative rather than historically oriented and proven, is evident in this collection but is never explicitly articulated or conceptualised. Indeed it is striking that neither of Pottage's work nor the relevant work of other legal theorists such as Bill Maurer (1999, 2012) or Marilyn Strathern (1999, 2011) is mentioned. Engagement with such literature would enable new perspectives on land registration to emerge, perspectives that illuminate how this legal technology affects what "property" and "land" mean today, and how those meaning in turn affect conceptions of political community.

Land registration law is difficult to grapple with for common lawyers in large part because it departs from the internal logic that has underpinned land law for centuries – that of title based on possession. Land registration law differs so fundamentally from "the general law" of property in land that Pamela O'Connor, one of the contributors to this collection, has previously referred to jurisdictions with title by registration systems as "bijural" because they encompass two distinct legal systems (O'Connor, 2009). In the English context, "the general law" has for centuries been structured through the connected doctrines of title, estates and tenure, which have their conceptual basis in possession. These legal concepts are inextricably connected to sovereignty over territory and therefore to the violent, expansionist history of British Colonialism and its contemporary geopolitical legacy[1]. In England and Wales today, as Cousins' chapter in this volume tells us, land registration has its own jurisdiction (21-28). As Nicholas Hopkins' chapter shows historically there has been recognition by at least one Chief Land Registrar that registration of title is an exercise by the state of sovereign authority, meaning that the Registry's provision of indemnity was a constitutional matter (210). But what does it mean for sovereignty over territory when the legal basis of title to land shifts from possession to registration? Relatedly, and as hinted at in Simon Cooper's chapter proposing a tort-like requirement of care upon the various parties

involved in registered conveyancing (175-204), what does it mean for property and personhood? These questions are not asked in the book, but must be, if new perspectives on land registration are to emerge.

As Goymour and Hickey point out in their chapter, the shift to registration does not mean that possession and its concomitant concept of title relativity have lost all relevance for English land law, or by implication for other common law jurisdictions. The Register, as they argue, "is a basis of title, but it is not necessarily the only basis" (93). The relationship between title derived from different bases and the political authority supporting these bases is a fascinating and urgent question, but it is not one that is pursued in this book. In the Australian context, commentators have argued that each title derived through its "Torrens" registration system is "akin to an absolute grant from the Crown" (Hepburn, 2013, p. 229). The same probably cannot be said for title to English and Welsh land derived through the LRA 2002, which promises indemnity and power but not indefeasibility, as expounded in careful detail by Watterson and Goymour in their four consecutive chapters on the nature of LRA 2002 title. As their chapters and others in this collection shows, possession remains a source of title in England and Wales. As Emma Lees argues in her chapter, English courts have a preference for "returning" land to ostensibly innocent owners rather than prioritising acquirers and their "dynamic security", as the logic of registration is programmed to do (104). This reverence to possession is consistent with the broader context of England's move to title by registration coming much later and more gradually than was the case for many of its colonies. In the shift to registration, how does the different weight given to possessory entitlements vary in relation to the jurisdiction's relationship to the former British Empire? The two chapters on the Registers of Scotland could have provided the basis for an interesting comparative analysis, Scotland having a land register dating back to 1617, and being a nation with a history of colonialism but also with a law and national culture distinct from that of the English. As Kenneth Reid and Emma Waring show, having adopted a legislative scheme similar to that of England and Wales in 1979, in 2012, Scottish law was amended to shift Scottish law away from title by registration (Reid 157-174; Waring 413-436). An interesting but unasked question for the book's editors is how the 2012 removal of the "Midas touch" in Scottish land registration might be connected to contemporary campaigns for Scottish sovereignty.

Much of the analysis in the collection is framed in terms of "A, B and C" style hypotheticals, which are sometimes necessary in property law. Property law's susceptibility to abstraction is also what makes title registration a prime candidate for automation: with the humans and land removed, all parties are nominal signifiers with which algorithms can efficiently deal. What role remains for law as automation of land registry procedures takes hold? As Pownall and Hill inform us in their chapter, of HM Land Registry's total workforce of around 4,000 people, only 116 are qualified lawyers employed as such (7). Digital automation of the register is discussed in the final piece by Thomas, Griggs and Low, who offer useful comparative insights into the advanced digitisation of the Registers in Australia and New Zealand, raising important questions about the allocation of risk in this conveyancing process. Their argument that the "benefits of transactional security come at the burden of passive ownership" (439) raises profound questions about what ownership means within a political community where frictionless capitalism has been all but realised and transfers are both automated and guaranteed. Such questions are particularly pertinent in the Australian and New Zealand contexts, where the land being transferred constitutes both the spoils of British Colonialism and the material basis of the existing nation-state. The point that title by registration systems shift the basis of title away from historical possession to state-controlled registration to obvious advantage of settler colonial

formations has been made by many scholars (Ainger and Pearson, 1991; Godden, 2003; Harris, 2010; Bhandar, 2015; Keenan, 2016, 2018; Mawani, 2016). These would have been a useful set of perspectives to engage with here. Such engagement would have enabled a questioning of what automation of the Register means for jurisdictions where the basis of title to all land is a series of historical events based on racist violence, which contemporary political norms purport to disavow.

Elizabeth Cooke acknowledges that there are "deeper questions" lurking behind the technicalities of registration (4), and Pamela O'Connor hints towards the political significance of land registration in her chapter on the role of land registration in global development policies. As she points out, these policies have been spurred on significantly by economist Hernando de Soto's theory that poverty in the Global South could be cured by formalising the entitlements of people living in informal settlements, releasing the capital "hidden" in the land on which they live (de Soto, 2000). O'Connor makes two key arguments, making her chapter a standout in the collection. The first is that land registration projects "are premised on the assumption that there is a public interest in supporting the regime of private property" (31), and the second, that 'lawyers continue to discuss the legal aspects of title registration systems with little reference to the perspectives of the other disciplines [. . .] there is a need to bridge the communication gap [. . .] Theoretical perspectives have been underdeveloped in legal studies of title registration" (30). How would legal understandings of land registration change if we questioned the premise that private property is in the public interest and engaged with the wealth of scholarship from humanities and the social sciences, which would equip us to explore this possibility? What new perspectives are prevented from coming to view when the kinds of doctrinal analysis in this book proceed on the basis that questions of land registration are outside of questions of power? As entitlement to land remains at the heart of political conflicts at every scale, as digitisation and automation raise new challenges to all forms of authority including property law and as students and scholars from around the world demand the decolonisation of legal curriculum and knowledge production, these are the most pressing question to emerge from this collection.

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Note

1. See *Mabo v Queensland (no 2)* (1992) 1 CLR 175.

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Further reading

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