THE USE OF THE IMOLA TEMPLATE IN DEED SYSTEMS

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Preface

The Imola project aims to produce an electronic form that allows citizen from the different EU countries to get information out of the land registries.

Initially it's being developed for systems using the real folio, where queries start from the location of the land.

Since in Europe there are different countries that handle the personal folio, where queries start from the owner, there should to be an adaption of the form for these systems as well.

In order to develop a form one has to be informed about the existing systems and their properties.

Therefore I will start explaining the fundamental properties of the "Deed" system. Afterwards I'll try to compare with the "Title" system and the "Public Faith" system, which situates itself between the two former ones.

This comparison will be done from a theoretical point of view. Since we see that practically no system used in whatever country fits 100% under one of the three mentioned categories. Finally, I think that we should try to catalogue most cases as being merely one of these types.

I will also briefly highlight the standards a good system should meet and the strengths and weaknesses of all systems.

Next to that we come to the Belgian deed system and the recent rather interesting changes of approach.

In the end I'll try to make some recommendations for an "Imola" form, suitable for our system. But merely I hope that stirs up a group discussion based on a broader view.

The deed system

Fundamental for a deed system is the fact that it is not the title that is recorded in the Registry, but the deed.

To understand the difference there's needed some extra information. Most countries where some kind of a deed system is applied have a causal system.

For immovable properties the intention of moving the ownership from one hand to another is taken up into the deed. It results in several obligations as well for the alienator as the acquirer.

A has to deliver the goods, hand over the possession a.s.o. . B has to pay the price as principal duty.
If all these conditions are met, one can deduct that the "Title" of property has gone over.
The deed itself is never proof that the legal consequences intended by the parties, actually did take place.
Of course the same principle goes for the transition of rights as superficie, easements……
On the contrary transition by inheritance happens " ab intestat", which means by the simple fact that somebody dies.

All of this has important consequences for deed registration. This means that registering a deed never can give someone perfect surety of his "Title" , in the meaning of being entitled.

It informs contracting parties about the existence of agreements in the past , expressing the will to handover property. Whether this has really taken place depends on the fact if the contract has been properly executed. Did all parties fulfil their obligations?

The deed, a document that describes one isolated transaction, is registered. It is evidence that a particular transaction took place. But it is itself no proof of the legal rights of the involved parties, and by consequence no evidence of it's legality.

Thus, before dealing safely can be effected the alleged owner has to trace his ownership to a good root of title. Generally spoken this means that all obligations following out of the contracts written down in the deeds in fact have been executed over the period needed for obtaining prescription (generally between 10 and 30 years). Of course this needs all parties involved to be granted with the power of acquisition or alienation. So, for every deed one has to ask as well the question if the alienator is entitled to act as owner and as well does he have the legal authority to sell?

There fits in the role of a professional, mostly the notary, being a public officer, but also other legal practitioners with experience in the matter. The deeds the notary and the parties sign have the advantage to enjoy authenticity. This means that they reflect the truth, at least for as far the parties are honest, if not, bad faith is proved. This is very important for later investigation by parties wanting to contract.

Out of this theory it may be clear that the guarantees a deed system delivers, only can be very limited.
In fact it only gives insurance on registerable but not registered facts and about the existence of a contract on a certain fixed date. That is why it is often also called a negative system with a passive role for the Registrar. Generally in this system there is little investigation by the Registrar before entering the deed in the registry. If the deed meets to some standards, prescribed by local law, he takes it up into his documentation. Again this a theoretical thesis as we'll see further on how systems have been adopted to meet with the requirements of offering certainty..

The main goal is to advise third parties of the fact that parties have created a legal fact with the intention of having a legal consequence, and decided to register it. Generally it's compulsory in order to affect third parties. People (bona fide) can rely on that.

Generally the register is public. In fact this is a primary need to fit with the goal.
Sometimes registration is constitutive. Which means that it's one of the obligations that have to be fulfilled before there can be a transition of property.

Mostly there is a personal folio, although this is not essential. In Europe roots to the fact that countries that in time started using the system practically all have the French "Code civil" as their origin.

Next to this civilian instrument there is generally a cadastre in which, on a parcel based index, the state gathered some information on immovable property mainly in order to collect taxes. If this is done meticulously enough it can serve as a base to describe properties in deeds, no more no less.

In time the deeds mostly were meticulously entirely copied and indexed. Nowadays this is a question of electronically kept databases, which deals with a lot of former shortcomings of the system.

The title system

The system is often called "Torrens system" relating to Sir Robert Torrens who as first implemented the system as a part of a land reform in South Australia in 1885.

The legal consequence of the inscription, being a fact, covers the right. So the right itself, together with the name of the rightful claimant and the object of that right, with it's restrictions and charges, are registered. The fact that a right is described in the register means you are "entitled " to it.
It is the manifestation of constitutiveness of inscription.

The "Mirror principle" guarantees that the register is a mirror to the judicial state of the property

The "Curtain principle" means that an interested person does not have to investigate the underlying contract or former contracts in order to be sure about the transferable rights.

The register itself is an authoritive record kept in a public office.
It is at all times final; which sometimes only leads to financial compensation after a wrongful inscription.

It is generally composed by three sections. Parcel/owner of the right/ encumbrances. There is only one register including a map and property registry register. Research in it is parcel based.(Real folio)
To that there is referred to topographical maps that tend to be (too) little detailed.

Mostly registration is not compulsory.
It often exists next to an older less performing system, offering less guarantee

Before inscription there is severe investigation. Afterwards inscription guarantees the clear and unambiguous consent of the former owner. The registrar controls as well if the contract meets the standards to let the transfer take place and the existence of encumbrances of different kind. This investigation can be very time consuming. On the correctness of items and on forgotten inscriptions the state offers a guarantee.

That is why the system is often called positive in which the Registrar has a very active role in the acceptance to inscription.
In order to provide contracting parties with some security in between there can be a preliminary inscription offering security in relation with third parties, similar to that in a deed system.
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Nevertheless the guarantee is not total because there are practically always "Overruling interests". These are exceptions to the rule that only registration covers a valid right and are blemish to the completeness of the register and are likely to be kept to a minimum.

The "Public Faith" system (fides publica) (Offentlicher Glauben)

Even more than the two other definitions this term is only known by professionals. It offers security in a degree somewhere in between the two others. Nevertheless it is interesting to catalogue it apart since most of European called "Title systems" in fact belong to that category.

When buying under this system,
* in good faith
* from a registered alienator
* who is not restricted (see Vormerküng)
* nor contradicted (see caveats- Widerspruch)
one is protected so far that the state guarantees the authority to of the former known owner to alienate.

This has to be controlled by the Registrar and gives him a rather active role.

It is a protection against trespassing the limits of the authority to dispose of a registered owner. The lack of authority to dispose of the alienator is purged.

Here as well in some cases there is possibility to ask for a provisional registration. It offers a similar protection as deed systems do. It is conceived as a constructive notice to third parties.

Registration is in most cases constitutive for the transition of the right.
This means that as long as the registrar did not agree to enter the transaction in the register, the contract is pending.

There is also protection against any damage caused by not being informed about a fact that should have been registered but is not.

In these systems there are some possibilities to register forms of opposition if one does not agree with the indications in the register (wiederspruch) . This system is not that final as we saw it is in title registration. On this point it is comparable with deed systems where a margin annotation can prevent third parties from the fact that there is a summon to obtain the termination of the contract and the verdict to it.

There is no insurance for all other legal facts that are mentioned in the deed.
Again here it is not the title itself that is registered.

On the other hand many countries do indeed have legislation extending the guarantee.
So it is on the balance of a positive or negative system .

The register is mostly kept in court and is parcel based. The documents that have to be presented to the register must be seen by legal private practitioners (notaries or lawyers)

Strengths and weaknesses of both deeds and title system

Since the "Public faith" system is a compilation of the two others , only the last ones will be taken into account. Before comparing we should make a survey to what standards a system should meet to be effective.

First of all there is the question, why do we register after all?
The answer is quite evident. With movable property, possession and in relation to that ownership, is mostly obviously remarkable for contracting and third parties. Which is impossible with regard to immovable property. Think for instance at the delivery, an important part in the transition of property

That is why, by describing it in contracts and putting up a register we try to set up a mirror to the property itself. By extension it provides evidence for the owner about the property and its encumbrances. This is the first requirement banks set before even thinking about granting a loan. Afterwards comes the importance of priority rights as a debtor, guaranteed by a mortgage.

If we know that loans are often the start or in every case a support of the economy we see the importance of a reliable property registry system.

This is as much a fact for a European couple wanting to buy the family home, as it is for someone in a post- war situation who wants to set up again his business without cash ,or as it is a family father living in a slum and just wanting security of tenure over the house he lives in or the piece of land where he wants to put up a tea plantation , for which he needs a micro-credit.

These examples illustrate that there is no "best" system. In every specific circumstance the most appropriate system should be taken into account. We all know that the system should be

effective and as cheap as possible. But these demands mean totally different things in the City of London and in the Savana in Africa. The same goes for the need of clear boundaries.

I'd like to refer to the FIG (federation Internationale des Geomètres) statement on cadastre, which goes as well for property registry.

a) **Security**: The system should be secure such that a land market can operate effectively and efficiently. Financial institutions should be willing to mortgage land quickly and there should be certainty of ownership and parcel identification. The system should also be physically secure with arrangements in place for duplicate storage of records in case of disaster and controls to ensure that unauthorised persons cannot damage or change information.

b) **Clarity and Simplicity**: To be effective the system should be clear and simple to understand and to use. Complex forms, procedures, and regulations will slow the system down and may discourage use of the system. Simplicity is also important in ensuring that costs are minimised, access is fair, and the system is maintained.

c) **Timeliness**: The system should provide up-to-date information in a timely fashion. The system should also be complete; that is all parcels should be included in the system.

d) **Fairness**: In development and in operation, the Cadastre should be both fair and be perceived as being fair. As much as possible, the Cadastre should be seen as an objective system separated from political processes, such as land reforms, even though it may be part of a land reform program. Fairness also includes providing equitable access to the system through, for example, decentralised offices, simple procedures, and reasonable fees.

e) **Accessibility**: Within the constraints of cultural sensitivities, legal and privacy issues, the system should be capable of providing efficient and effective access to all users.

f) **Cost**: The system should be low cost or operated in such a way that costs can be recovered fairly and without unduly burdening users. Development costs, such as the cost of the adjudication and initial survey, should not have to be absorbed entirely by initial users. Low cost does not preclude the use of new information technologies, as long as the technology and its use is appropriate.

g) **Sustainability**: There must be mechanisms in place to ensure that the system is maintained over time. This includes procedures for completing the Cadastre in a reasonable time frame and for keeping information up-to-date. Sustainability implies that the organisational and management arrangements, the procedures and technologies, and the required educational and professional levels are appropriate for the particular jurisdiction.

Taking these recommendations into account each community should choose how they arrange security of tenure and property registry.

Sometimes it may be enough to be secured as a group. Examples exist to protect a community form forced evictions. Several solutions, not necessary hi- tech, are very accessible and yet mean a big change. African examples show that even a simple document where the person is identified with a photograph and fingerprint and a satellite picture can make a world of difference between security or none. Especially
Un- Habitat has been very active in that domain.

Finally when trying to compare systems we will always end in the comparison of title and deed systems and person based or parcel based documentation.

Purely theoretically seen I think we cannot deny that a parcel based, title system seems to offer the most security. In most literature it is written with some sort of a religious belief. I used to think like that myself. Yet, after some years in practice, I had to admit that a lot of prejudices against the deed system were wrong.

A parcel bound system certainly has its advantages. One can divide an existing parcel in 100 pieces, as well horizontally as vertically. Full ownership can be shortened by encumbrances; there can be a joint ownership between 100 persons; there can be bare ownership and enphyteusis But in the end when we count all rights together we still keep 100% property
A personal system cannot guarantee that, and overruling rights are more likely to occur.

On the other hand IT solutions have solved a lot of the problem. The advantage of an easy way to put indexes by up going parcel numbers does no more exist since data bases are that performant that they can search on all data and filter them.

And finally, when it comes to countering that religious belief, shouldn't we fundamentally ask the question for whom do we register? In favour of the parcel or in favour of the person? So, since databases are so flexible right now, shouldn't the person be the first ID?

Indeed the curtain principle and the direct guarantee on the ownership of the title give certainty. It seems to offer security after little investigation before conveyancing. But on the other hand society gets that complicated that the information that is kept in a title register is by far not sufficient to form a clear idea about the property. For instance an existing easement to use a well might be much less important than environmental information or urbanistic regulations.

Where a title system should make it possible to make simple private agreements we see that this is scarcely done without the help of professionals due to complication.

Theoretically a deed system demands every time an investigation to the root title. This may seem to be a hard job, but generally it causes not many problems to rebuild the situation to the moment prescription is enough to prove ownership.
The benefit of the mirror image a title system has again seems to be less in practice than in theory.
For professionals it is not much cheaper to do the research but the organization of the system is certainly more expensive.

On the other hand the curtain principle might make it for contracting parties and third parties more difficult to see the whole contract since it is not necessary to archive them

Furthermore certainly not all existing title registry systems offer compensation for damages.

Above all this countries using the deed system often make the use of a professional compulsory. Notaries deeds have the power of authenticity, which gives some guarantees.
Forced by law they have to ask some information from all sorts of authorities and from the seller. If, later on, it becomes clear that he has lied, automatically it is an as bad faith proven fact.

Investigation of all sorts can be obliged about relevant items as urbanism, soil pollution, degree of thermal insulation, leases, future expropriations a.s.o.
In deed system the investigation of the title has to be performed up to the root. Generally it has to be done for a period sufficient enough to obtain ownership by prescription. The notary offices prove to be very well organised to do that investigation. Furthermore it can be forced by law to take up a history of property in the deed for the whole period.

If this is reported in the deed, it can be consulted by everyone.

Deed systems are generally public and it's characteristic to guard the deeds themselves or certified copies.
Surely in time keeping up such an archive was difficult Deeds had to be transcribed by hand or later copied.
This was a work of monks with consequence that much information, not strictly necessary as evidence for the title transfer was copied also. On the other hand practice learns that a lot of this information is particularly interesting to get a good view on the property in its whole. There were huge amounts of paper in moist cellars. There was always a danger of loss a.s.o.
Again the storage capacity of computers is nowadays that huge so that the disadvantage is swept away.

Title systems aim to produce a clear situation. Deed systems try to collect the necessary information in order to be able to clear up difficult situations.
Hence daily practice has taught me that there is very little discussion on ownership and that defective deeds with sometimes very unclear clauses referring to former deeds don't seem to produce problems.
So, why put energy into solving problems that finally likely will not even occur! This is unfortunately what a title system tends to do.

The duty a registrar has only to inscribe a title when there is no doubt on the legality, does imply that an in-depth research is necessary. This takes time. In title systems where registration is constitutory this means that there is a vacuum and the decision about property is pending. This produces insecurity.

On the other hand, again with the help of IT , deed systems succeed in quicker and quicker registration., even simultaneously with the execution of the deed might not be impossible.

Generally title system seems to be the best way to start when one has a clear canvas; when there is a first inscription. Of course we should start to think on what will happen when we move to other planets but on earth there are no such places left. In time this option has been taken by colonial powers.
But they overruled shamelessly existing systems, based on customary law. As a result the fact that much of the last ones were unwritten and also were conceptually different, these rights were denied. This is a situation we cannot accept any more. Customary law also often does not know the concept "ownership" and puts more emphasis on "Tenure". We have to take into account that it is not the law that should adapt to the property registry system but vice- versa.

Conclusion is that it is not the system itself that is relevant for the performance, but the way it is organized. It's all about security. Here follow some recommendations:

* the description in contracts of parties and goods should be unambiguous and preferably laid down by law. For deed systems it is preferable that cadastral numbers in deed also reflect to the future situation

* Whether it is in title system in the register itself or in deed system in a cadastre it is necessary to have sufficiently detailed parcels for the whole covered area. Of course the degree of detailing may vary.

* Registration should be compulsory. It is the only way third parties can get a clear view.
* Registration should happen soon after conveyancing

* Organise a system so that all changes of property of immovable goods are inscribed, including for instance inheritances.

* try to inscribe all (legal) fact that are relevant at the time being.
More than getting proof on some items, registry systems should be more or less an open source for all sorts of relevant information, resulting in security

* The assistance of a legal expert (notary or lawyer) is a added-value. They at least should have a clear view on the entire contract that contains the transition of property. A good contract delivers a security that goes far beyond what registry may offer

* Make research easy . Nowadays databases are that powerful so one has the possibility of different approaches

The Belgian system

Belgium clearly has a deed system and there is no intention whatsoever to change it, since it has proven its workability.

Nevertheless lately there have been several improvements and in the near future some changes should result in a better security for parties.

The main result of registration is that it affects also third parties. They cannot deny the existence nor the priority some legal facts get by inscription or transcription of the deed.

Furthermore there is a specific protection against double sales before registration.

It is a personally kept system. Originally based on an alphabetic system. Nowadays referring to a national register in which every citizen, company and foreigner who has some interest gets a number.

Purely for administrative reasons the database which makes an inventory also mentions the parcels, but not in a unique way . This makes a parcel based research possible though unreliable.

It is negative since it only guarantees for legal facts that should be mentioned in excerpts and are not and furthermore for some well-defined facts.

Legally seen it is still a documentation that is held by the Land Registrar himself and he is personally responsible for the damage caused by wrong information. But that system is to be changed in the upcoming years.

Deeds used to be entirely transcribed in but nowadays are kept as PDF files in a very secured system.
The documentation is open to the public but consultation is not free.

Encumbrances and eventual objections are inscribed as annotations to the deed. They are kept the same way in the documentation and, if still relevant, are present on excerpts. Deeds of bailiffs in a procedure of seizure are kept in the same way.

Generally speaking only deeds referring to property transition due to contracts under living are inscribed.

By law some juridical facts are also, for instance leases for more than 9 years or containing discharge for more than 3 years.

Entries in the registry are only possible through deeds, drawn by notaries or other legal persons granting the power of authenticity.
The way how persons and parcels are described in deeds are legally prescribed, as well as a lot of other legal facts that concern the property.

Generally information out of the registers is given by excerpts, delivered on paper.. But full copies of deeds are available too.

The system relies on a quite detailed and digitally kept cadastre, covering the entire surface.

A main defect remains the absence of property transitions due to inheritance being inscribed in property register. Of course being " ab intestat" is the main legal ground to that. But the public is not served by that explanation.

It is an absolute necessity to book the effects of inheritance as well, in order to provide security sufficiently. So, it is very positive to read in the governmental statement of the actual government that such a measure should be considered. Of course this must be realized at the lowest cost.

Recently the services are in a process of a quite big transition, as well legally as technically and as an organization.

The property registry offices (bureau des hypothèques/ hypotheekkantoor) used to be part of the Ministry of Finance; together with the cadastre that had a surveying and fiscal role and an office called "Registration" that dealt with the fiscal consequences of transition of immovable property and was responsible for publicity on personal rights (f.i leases)

Due to a change in constitution the fiscal role became a regional competence.
So the service had to re- invent itself a bit.

At the same time it came clear that we should dispose of central database collecting all information on immovable property. So the "Agency of patrimonial documentation" was born.
It consists of the three formerly known directories. There was taken a fundamental option to merge them where possible and in this way avoid double or triple work. In order to make this possible the terrestrial area of competence of the three sections has become the same.

In term of organization it was a huge change. It took some 10 years of preparation. But now we see the results on the field. The database "Patris" exists and is linked to another database containing all information on the person.

The idea is that the information is collected in a unique way in these databases and that everyone who needs information, to which he is legally entitled, can collect it here, without bothering people again.

For instance if we get our tax bill it is already partly filled in with information out of these databases.
Connection to other databases is also possible. So right now there is also a direct line between notaries and the agency. They can consult the same data we do.

Also for the property registry this fundamental option has some consequences.

Our offices used to work stand alone in jurisdictional units. The IT was locally built and kept. Right now our system changes to a nationally kept one.

Since 2014 the databases of the Chamber of Notaries and the Administration are connected. Legislation has changed so that it became compulsory for notaries to present deeds for registration electronically. Together with that, the time to do so has generally become 15 days, coming from generally 2 months a few years ago. In practice we see that deed are presented much earlier than that, sometimes even on the day it was signed. This certainly serves the security.

Going a step further there is decided that the property registry offices are to make new entries and changes of property in the central database "Patris", using a program (Stipad) that is working in co-operation with the database Property Registry is using (Hypo)
It is an option to make both merge and at least to make new entries the same for the two of them.
"Hypo" was the database working round registered deeds and was very accurate but working with the person as a base. The starting resources of "Patris" were the cadastral information, which was parcel bound and accurate enough for fiscal purposes.

The recent changes are intended to merge both databases as soon as possible and for now at least trying that entries for fiscal purpose, match with the ones for civilian purpose at the property registry office. To that purpose it is the employees of the Property Registry office that makes the inscription in both registers with the high quality standard they are used to. This extra work makes a reorganization of the offices internally necessary.

It is the option of the agency to make research in the property registry system also possible on the parcel, through an interconnection between the two of them.

I am greatly in favour of all the changes since they serve a more modern idea on security in the domain of immovable property. It is not only the "property" question, which in European countries generally poses no problems, but merely the limitations due to all sort of legislation that are indispensable to know. I think we must be able to register in a way that some kind of "Google" research of the property will make decisions possible with a broad view. We must not try to guarantee too many things since tomorrow it might become clear that exactly these guarantees don't matter anymore economically.
The Belgian solution to require from notaries to implement a lot of, actually relevant, information into their deeds is very positive to that process.

In practice our deeds are signed after control of the notary and give, in an authentic way, information on the transfer of ownership but give among others also information about lease situation, urbanism, soil pollution, matrimonial regime, public and private pre-emption rights, a.s.o..

Since the registry is fully public this is practically seen a very performing system. Of course a high responsibility rests on the notaries which act very professionally. Without obligation but pushed by IT systems a sort of a canvas of a deed is used by notaries. For a professional it is very clear to consult.

Recently there has been implemented a method to deal with a better description of the goods in deeds so that they can be entered in the registry without any confusion.

Notaries have to describe sold parcels in their deeds referring to the cadastral number. Only when parts of parcels were involved in the transaction, he had to describe them as "Part of parcel x ". After mutation a new number was given in the cadastral documentation. This was one of the problems on giving parcel based information out of the property register since the known number did not correspond with the actually existing one. Surveyors maps often were necessary to clear the situation.
Therefore surveyors and notaries are now obliged to declare the intention of alienation to the cadastre and deposit the surveyors map. The previewed new number is given by cadastre and in the deed the new number has to be inserted.
Next to that apartments are given also a unique number in the same way. In the deed where the internal division is formed, the future numbers are entered, specific for each apartment.
Both these measures are very interesting for security since there can be no more confusion about the sold property in future.
Also concerning parties strict demands are legally fixed for deeds. In the database on persons identification "Sitran" the main id is the national number every citizen gets. Companies and foreigners get an equal number.
If transferring parties mentioned in a deed are not traceable in this database registration can be refused.

I think these are a few examples of a modern way deed systems deal with increasing security.

Deed systems and IMOLA

Remains the final question. How can we produce an "Imola" form, useful for deed systems as well?

Regarding the guarantees offered by a deed system, I see no problem. A simple "Disclaimer" with the necessary general information can be sufficient.

There are more problems with the person based indexation. Searches in database of the land registry are only reliable giving up the name of the owner of a right.

For instance Belgian database does offer possibilities to search by parcel numbers as well. But you will only get a right answer in 95% of the cases, which is not enough.
One could go through the cadastre by asking who is the owner of a particular parcel. Again in 95% you will get necessary information on the name of the owner. Since cadastre was originally meant as a fiscal database it met its goal when somebody, among the owners, was found to pay them.
So, in a certain query one might get the answer that the owner is "MR. X and others", which again is not enough for civilian use. For the future there might be no problem anymore since the system "Stipad" we introduced in 2015 enters by cadastral number, each owner, with the particular part he owns.

In title system one can ask the simple question, giving up a parcel number: "Who is the owner and what are the encumbrances?". You will get a clear answer.

Turning the question around in a person based deed system does not work at all!

It should be formulated in the following way to get a valuable answer:
I give you a name. Is this person known in your documentation? If yes, the query can be limited to specified goods.

If necessary one can extend the query a former owner over a given period. In that case the registry office examines the deeds and reconstructs former situations.

The answer will be that you obtain an inventory about all fitting deeds, describing the main features. If necessary getting a full copy of the deed is possible.

Furthermore the usual ABC division, we find in title systems, does not at all appear in deed systems and users of deed systems have difficulties to categorize legal facts and rights in it.

Unfortunately, for the time being I see no other possibility than developing an extra form! Or at least make it possible that a query starts as well by entering a name in section B and get an answer about the deeds a particular person is known in, in the area covered by a specific office.

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