# Table of Contents

1 Introduction 1
   1.1 Introduction 1
   1.2 Background 2
      1.2.1 The publicity principle 2
      1.2.2 Publicity in practice 3
      1.2.3 Information identified or identifiable to a natural person 5
      1.2.4 State of the Art 6
   1.3 Research Design 8
      1.3.1 Research Question 8
      1.3.2 Research Method 9
      1.3.3 Choice of legal systems 10
      1.3.4 Outline and Structure of the Research 11
   1.4 Relevance of the Study 12

Part I PUBLICITY

2 The publicity principle 17
   2.1 Introduction 17
   2.2 Publicity and Third-Party Effect 18
   2.3 Publicity and Legal Certainty 21
   2.4 Publicity and Specificity 23
      2.4.1 Specificity 24
      2.4.2 Specificity as a procedural requirement 25
      2.4.3 Interpretation of Deeds 27
   2.5 Publicity an Effect or a Requirement? 31
   2.6 Publicity and its Scope 33
      2.6.1 An increase in scope by using a registration system 34
      2.6.2 Justifying publicity with transaction and information costs 37
         2.6.2.1 Transaction Costs 37
         2.6.2.2 Verification 41
   2.7 Publicity and Information Monopolies 45
   2.8 Publicity Increased by Technological Developments 51
      2.8.1 Digitisation and ease of access 52
      2.8.2 Interoperability 54
   2.9 Conclusion 55
# Table of Contents

3 Registration 59

3.1 Introduction 59

3.2 Reasons for Registration 59

3.3 Who Keeps the Register 62

3.3.1 Germany: Judicial Authority 62

3.3.2 England & Wales: Public Authority 63

3.3.3 The Netherlands: Semi-Public Authority 65

3.3.4 Privatised Land Registration: New South Wales 66

3.3.5 Private Registration System: MERS 67

3.4 What Type of Registration System 70

3.4.1 Deeds Registration Systems 70

3.4.2 Title Registration Systems 72

3.5 English system of Registered and Unregistered land 74

3.5.1 Land Registration of Registered Land 75

3.5.1.1 The Registers 76

3.5.1.2 The Indices 81

3.5.1.3 Local Land Charges Register 82

3.5.2 Land Registration in Unregistered Land 83

3.5.2.1 The Registers 84

3.5.2.2 The Index 94

3.5.3 Conclusions on English Land Registration 94

3.6 The System of Land Registration in The Netherlands 95

3.6.1 The Registers (De Opembare Registers) 95

3.6.1.1 Registrable facts, rights and interests 97

3.6.1.2 Registration of personal rights in the registers? 103

3.6.1.3 General formal requirements and contents of a deed 104

3.6.1.4 Hypothecs 4D Register 104

3.6.2 The Main Cadastral Register (Basisregistratie Kadaster) 105

3.6.2.1 Nature of the Main Cadastral Register (BRK) 105

3.6.2.2 The Main Cadastral Register as an Index 106

3.6.3 Conclusions on Land Registration in the Netherlands 107

3.7 The System of Land Registration in Germany 109

3.7.1 The Registers 110

3.7.1.1 General Land Register (Grundstücksgrundbuch) 112

3.7.1.2 Apartment Register (Wohnungsgrundbuch / Teileigentumsgrundbuch) 119

3.7.1.3 Building Lease Register (Erbbaugrundbuch) 121

3.7.1.4 Apartment Building Lease Register (Wohnungserbbaugrundbuch / Teilerbbaugrundbuch) 122

3.7.1.5 Building Register (Gebäudegrundbuch) 122
Table of Contents

3.7.1.6 Register of Mines (Berggrundbuch) 123
3.7.1.7 Register of Deeds (Grundakten) 124
3.7.2 The Indices 126
3.7.2.1 The Ownership Index (Eigentümerverzeichnis) 127
3.7.2.2 The Grundstücke Index (Gründstucksverzeichnis) 128
3.7.2.3 The Inbox (Eingangsliste>) 128
3.7.3 Conclusions on German Land Registration 128

3.8 Conclusion 129

Part II PRIVACY

4 Privacy 135
4.1 Introduction 135
4.2 The Right to be Let Alone 136
4.3 Privacy as Control (of information) 139
4.4 Privacy as Secrecy or Concealment 142
4.5 Privacy as Identity Building or Personhood theory 144
4.6 Privacy as a Taxonomy 145
4.7 Privacy in Context 147
4.7.1 Context-relative informational norm: Four Parameters 147
4.8 Conclusion 150

5 Data Protection 153
5.1 Introduction 153
5.2 Technological challenges posed to data protection 154
5.2.1 Increased availability of information 154
5.2.2 Interoperability and aggregation 156
5.2.3 Role of data brokers 160
5.2.4 The Dangers of Wrong Information 162
5.2.5 De-identification & re-identification 164
5.2.6 Privacy by design 165
5.3 Legislating Data Protection: Sectoral vs omnibus approach 165
5.4 OECD Guidelines 167
5.5 Fundamental Rights 169
5.5.1 International Covenant on Civil and Political Rights (ICCPR) 170
5.5.2 European Convention for the Protection of Human Rights and Fundamental Freedoms 171
5.5.3 Council of Europe Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data (Convention no. 108) 179
5.5.4 Charter of Fundamental Rights of the European Union 182

5.6 Data Protection Directive 183
5.6.1 Similarities and differences with other instruments 184
5.6.2 Article 29 Working Party 185
5.6.3 Scope 186
5.6.4 First element: personal data 186
5.6.4.1 Natural person 187
5.6.4.2 Any information 188
5.6.4.3 Relating to 189
5.6.4.4 Identified or identifiable 190
5.6.5 Second element: which is processed 192
5.6.6 Third element: wholly or partly by automatic means, or are a part of an existing or intended filing system 193
5.6.7 Conditions for the processing of personal data 193
5.6.7.1 Data Protection Principles 194
5.6.7.2 Fair and lawful processing of personal data 194
5.6.7.3 Purpose limitation 196
5.6.7.4 Adequate, relevant, and no longer than is necessary nor excessive in relation to its purpose 198
5.6.7.5 Right to rectify, erase or block 202
5.6.7.6 Right to object 203
5.6.7.7 Proportionality 204

5.7 General Data Protection Regulation 205

5.8 Conclusion 208

Part III ACCESS

6 A fully open system: The Netherlands 213
6.1 Introduction 213
6.2 Brief historical overview 214
6.2.1 The Dutch Civil Code of 1838 215
6.2.2 Towards the new Dutch Civil Code and the focus on information 217
6.2.2.1 Technical developments in between the Civil Codes 218
6.2.2.2 Privacy considerations leading up to the New Civil Code 220
6.3 Data protection legislation and the Land Registry after the new Dutch Civil Code 224
6.3.1 The ‘pervert’-article 224
6.3.2 The 1993 Colloquium 226
6.3.3 The Implementation of the Data Protection Directive 230
6.3.3.1 What personal data is in the Land Registry? 230
6.3.3.2 Limited application of the Wbp; no access log and no legal recourse 232
6.3.3.3 Purpose bound disclosures and specificity 234
6.3.3.4 Purpose bound disclosures and secondary use 237
6.3.3.5 Bulk disclosures 238
6.3.3.6 A possibility for shielding an individual registration: Article 107b Kw 240
6.3.3.7 Internal policy to restrict access: the notary’s address & APG-counter 243
6.4 Conclusion 247

7 A Fluctuating System: England & Wales 253
7.1 Introduction 253
7.2 Brief historical overview 253
7.3 Access to Land Registration information in registered land 261
7.3.1 Access under the Land Registry Act, 1862 261
7.3.2 Access under the Land Registration Act, 1925. 263
7.3.3 Towards an open land registry 268
7.3.3.1 1970 - A relaxation of the closed nature of the Land Registry 268
7.3.3.2 1973 - Failed privatisation of the Land Registry and a new call for an open registry 270
7.3.3.3 1976 - Searching the Index of Proprietors’ Names and Price Paid 271
7.3.3.4 1977 - Inspection rights in connection with criminal proceedings and proceeds 272
7.3.3.5 1981 - An inspection right for mortgagees in relation to Matrimonial Homes 272
7.3.3.6 1982 - An inspection right after obtaining a court order 273
7.3.3.7 1982 - Removal of legal barriers for a computerised Land Registry 273
7.3.3.8 1985 - Opening up the register to simplify conveyancing 275
7.3.3.9 1985 - The Law Commission Report on Inspection of the Register 276
7.3.3.10 1987 - An inspection right for tenants 282
7.3.4 Access under the Land Registration Act, 1988 282
7.3.5 Access under the Land Registration Act, 2002 285
7.3.5.1 Towards e-conveyancing 285
7.3.5.2 The access regime under the LRA 2002 286
7.3.5.3 Restrictions on Searching the Index of Proprietors’ Names 287

ix
7.3.5.4 Exclusion of certain documents and information from the inspection right 288
7.3.6 2007 – closing off internet access for certain documents 291
7.4 Access to Land Registration information in unregistered land 293
7.5 Conclusion 294

8 A Legitimate Interest Test to Access: Germany 297
8.1 Introduction 297
8.2 Brief legislative background to §12 GBO 297
8.3 Three Manners of Access 303
8.4 Constitutional Questions 307
8.5 What Interests are legitimate 309
  8.5.1 Presumption of a legitimate interest 310
  8.5.2 A legitimate interest: Private interest(s) 311
  8.5.2.1 The (co-)owner not including apartment ownership 312
  8.5.2.2 Limited property right holder 312
  8.5.2.3 Apartment owners 312
  8.5.2.4 Manager of an apartment building 314
  8.5.2.5 Former residents 314
  8.5.2.6 Tenant 314
  8.5.2.7 Neighbour 315
  8.5.2.8 Lawyer 316
  8.5.2.9 Notary 316
  8.5.2.10 The lawyer-notary (Anwaltsnotar) 317
  8.5.2.11 Professor 318
  8.5.2.12 Potential purchaser 318
  8.5.2.13 (potential) Auction purchaser 318
  8.5.2.14 Realtor 319
  8.5.3 Credit-debit relationships 320
    8.5.3.1 Creditors (general) 320
    8.5.3.2 Banks 320
    8.5.3.3 Construction worker 322
    8.5.3.4 Creditors in insolvency 322
    8.5.3.5 Shareholder of a company 323
    8.5.3.6 Bailiff / process server / executor of claim 323
  8.5.4 Familial relationships 323
    8.5.4.1 Sons and daughters 324
    8.5.4.2 Maintenance obligations 324
    8.5.4.3 Executor of testament 325
    8.5.4.4 Fathers and daughters 325
### Table of Contents

8.5.4.5 Former partner (divorced) 325  
8.5.4.6 Former partner (not divorced) 326  
8.5.4.7 Estranged son/Daughter in law 327  
8.5.4.8 Heir(s) 327  
8.5.5 Public interest(s) 328  
8.5.5.1 Press interests 330  
8.6 What evidence is required 334  
8.7 Access to different parts of the land registry 336  
8.7.1 Index (Bestandsverzeichnis) 337  
8.7.2 Ownership Index (Eigentümerverzeichnis) 337  
8.7.3 The Grundstück Index (Grundstückverzeichnis) 339  
8.7.4 Section 1 Grundbuchblatt 339  
8.7.5 Section 2 Grundbuchblatt 340  
8.7.6 Section 3 Grundbuchblatt 340  
8.7.7 Deeds (Grundakten) 341  
8.8 Position of the Registered 342  
8.8.1 Access Log 344  
8.8.2 Relationship § 12 GBO and Personal Data Protection 345  
8.8.3 A right to be forgotten for the registered? 348  
8.9 Conclusions 352  
8.9.1 From open to closed, from legal to legitimate 352  
8.9.2 Flexibility in an open norm 353  
8.9.3 Flexibility Serving Publicity and Privacy 353  
8.9.4 Flexibility and Legal Certainty 355  
8.9.4.1 Time 356  
8.9.4.2 Nature of the interest: Public or Private 356  
8.9.4.3 Type or Capacity of Applicant and the presumption of a legitimate interest 357  
8.9.4.4 Type of Section to which Information is Requested 358  
8.9.5 Some questions about the role of the notaries and the desirability of the parallel access route to Land Registry information 359  
8.9.6 A balanced system of access to information in the Land Registry 360  

9 Conclusion 363  
9.1 Introduction 363  
9.2 Publicity Principle 364  
9.2.1 Principle of Publicity in Theory 364  
9.2.2 Transaction-relevant Information 365  
9.2.3 Concerning the Subject-Right-Object Relationship(s) 365
Table of Contents

9.3 Principle of Publicity in practice; Land Registries 367
   9.3.1 Rights or Deeds registration 368
   9.3.2 Financing of Land Registries 369
   9.3.3 Centralised or Fragmented Land Registries 370
   9.3.4 Information Monopoly 371
   9.3.5 Multi-purpose Land Registries 372
9.4 Publicity Does Not Require Absolute Openness 374
9.5 Safeguarding Privacy by way of Data Protection Legislation 376
   9.5.1 Privacy 376
   9.5.2 Data Protection Legislation 377
   9.5.2.1 Free Flow of Information with Adequate Safeguards 378
   9.5.2.2 Data Protection Requirements 379
   9.5.3 Privacy as a means not the goal 385
   9.5.4 Privacy Does Not Absolutely Limit Openness of Information 385
9.6 How Publicity and Privacy can be Reconciled in Land Registration Systems 386
   9.6.1 The false dichotomy between publicity and privacy 386
   9.6.2 Use of Technology to Improve Privacy in Land Registration 387
   9.6.2.1 Standardised Deeds 387
   9.6.2.2 Access Logs 388
   9.6.2.3 Individual Safeguards 389
   9.6.3 A legitimate interest test 389
   9.6.3.1 Advantages of a legitimate interest test 390
   9.6.3.2 Disadvantages of a legitimate interest test 391
9.7 Conclusion 392

Bibliography 395

Case Law 447