

Land Rites: Innovations in land tenure for the urban poor

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Geoffrey Payne

Every day, millions of people around the world spend their hard earned cash improving houses which they don't legally or officially own. The vast majority of them are poor households in the urban areas of the South or transition economies of Eastern Europe. In some cities, more than half the entire populations live in various types of unauthorised housing and the numbers are increasing faster than other forms of development.

Why do people risk investing in an activity which many urban authorities seek to prevent or remove? The answer is partly that most have little choice. Land in urban areas tends to be expensive, especially in areas near employment centres where the very poor need to live. Globalisation has accelerated the commercialisation of urban land markets in developing countries to the point that in the mid 1990s, land in Mumbai, (Bombay) India was the most expensive in the world, despite the fact that a large proportion of the population live below the official poverty line. The only practical answer for many people was therefore to occupy unused government land, or purchase agricultural land from farmers and build a house without permission to meet their immediate needs, improving it over time as resources permitted.

In some cases, people do not consider that they are acting illegally, even though they do not possess a title deed to their property. In many parts of Africa, for example, customary tenure systems have existed for centuries before colonisation introduced the notion of private property in the new urban settlements (Payne 2001). Similarly, throughout the Middle East, Islamic systems of land tenure have enabled cities to evolve unique forms appropriate to social, cultural and climatic conditions (UN 1973). Both customary and religious tenure systems enabled low-income households to obtain land on terms and conditions which they were generally able and willing to meet. In many countries, these tenure systems continue unchallenged in the rural areas. After independence, however, migrants swelled urban populations causing them to spread into areas of customary tenure. This led to ambiguity and conflict over the role of local chiefs, who traditionally allocate land to members of their community under well established and officially recognised arrangements. People living in such areas understandably object to being considered illegal occupants of their land, even though they lack statutory titles to prove ownership. The inability of the state and the unwillingness of the formal market to increase the supply of planned residential land at prices which the poor can afford, has perpetuated dependence on these traditional practices and introduced new ones.

In yet other cases, people may act in ways that are based on historical precedents which have not been repealed and can therefore claim a degree of legitimacy. The Ottoman Land Law of 1858, for example, entitled any citizen to claim unused state land and occupy it for as long as they used it. Naturally, when migrants from rural areas arrived in the big cities, they did not consider they were acting outside the law by applying this traditional approach, though the local authorities responsible for implementing an urban master plan saw things very differently.

Legitimacy versus legality

These examples demonstrate that urban land tenure issues in the South are highly complex. It is not a subject that can be defined in terms of legal or illegal, formal or informal. Tenure systems are also the outcome of historical and cultural forces and reflect the relationships between people and society and between people and the land on which they live. In this sense, tenure can be defined as *the mode by which land is held or owned, or the set of relationships among people concerning land or its product*. Property rights can also be defined as *a recognised interest in land or property vested in an individual or group and can apply separately to land or development on it*. Naturally, societies which place a great deal of emphasis on communal interests will reflect this in the forms of tenure which are officially recognised, whilst those which give priority to the interests of individuals will encourage

private tenure systems. Thus most communist countries, and half of sub-Saharan African countries (Mabogunje 1990) brought all land under public ownership, and others imposed severe constraints on individual rights. In customary systems, land is regarded as sacred, and man's role considered to be one of stewardship, to protect the interests of future generations. Allocation, use, transfer, etc, are determined by the leaders of the community according to its needs, rather than through payment, though some form of token amount (eg beer money, or cattle) is often extracted as a sign of agreement. Private tenure systems are intended to ensure the most intense and efficient use of land and are favoured by societies which place priority on the rights of individuals.

Each of these systems has advantages and limitations. Land nationalisation all too often resulted in bureaucratic inertia, clientelism and corruption, whilst customary tenure has become subject to commercial pressures that have eroded the social cohesion from which it derived its legitimacy. Private tenure systems have the benefit of transparency and efficiency, but have proved singularly weak in enabling the poor to obtain land and shelter. Whilst no single tenure system provides advantages without some major limitations, it is clear that globalisation has tended to reinforce statutory tenure systems based on Western preoccupations with the rights of the individual. Those unable to meet the terms and conditions imposed by commercial land markets offering individual titles are therefore forced into various non-formal solutions. Initially, most of these consisted of land invasions, usually of government owned land, but as this ran out, people purchased plots on the urban fringe from farmers and developed land which was legally theirs, but was not in locations approved for residential development. Later still, these processes became commercialised and entry was only possible at a cost determined by the informal market.

The co-existence of these different tenure systems and sub-markets within most cities creates a complex series of relationships in which policy related to any one has major, and often unintended, repercussions on the others. To further complicate matters, many settlements and even dwellings within settlements, move between one category and another, yet subtle differences between categories, which may be invisible to outsiders, can be critical to those living in them. In some cases, several forms of tenure may co-exist on the same plot, as in Calcutta, where *'thika'* tenants rent plots and then sublet rooms to others who sub-let beds on a shift system, with each party entitled to certain rights. Tenure status of individual plots and settlements also change over time.

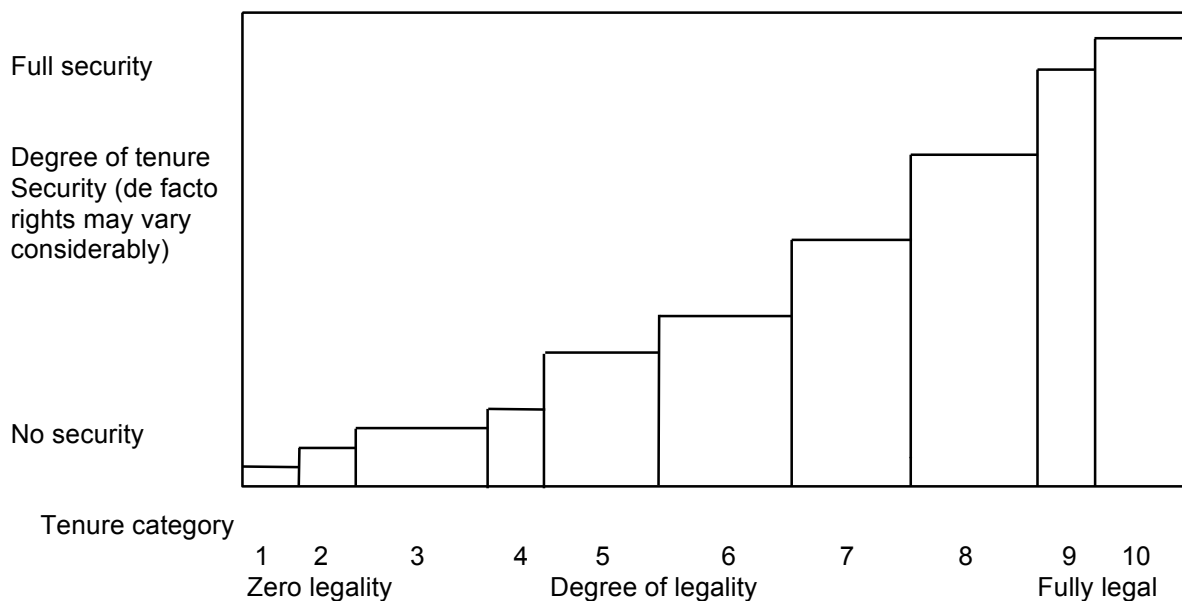
By the 1990's, non-formal tenure categories had become one of the largest single forms of land development in cities of the South and are increasing more rapidly than any other (Payne 1989). The result is their increasing diversification. In fact, most people now live at some point on a continuum, in which they may be the recognised owners of the land, but have constructed a house in an areas not zoned for residential use, or they may simply have failed to conform initially to official regulations or procedures. In some cases, there may even be more than one legally acceptable system operating, such as statutory, customary and religious systems (as in Islamic countries).

An illustration of the wide range of tenure categories which exist in many cities is shown in Fig 1, though this omits customary and religious categories for reasons of simplicity. Before any attempt to intervene in land markets is made, it is therefore vital to assess the full range of de jure and de facto tenure systems and sub-systems which exist in any city, so that policy can be based on local realities. The categories shown in Fig 1 are indicative and may vary from one time and place to another¹.

The widespread existence of various non-statutory tenure systems in areas is partly a response to the failure of statutory tenure systems to meet the needs of lower income groups which invariably represent the majority of urban populations. It may also reflect the persistence of traditional practices for obtaining and developing land that are not officially recognised. These alternative forms may, however, reflect the needs of the poor and enable them to obtain land in areas that would otherwise not be affordable or available. Where official mechanisms deny the poor legal access to land and shelter, such alternatives can claim to provide a degree of social and moral legitimacy. The larger the proportion of people unable to conform to official norms and procedures, the more they are undermined, risking a reduction in respect for the law in general.

¹ Figs 1 and 2 are reprinted from Payne (2001) with permission of the publishers.

Fig 1: Typical distribution of urban tenure categories by legal status



Tenure categories found in many cities:

- 1 Pavement dweller
- 2 Squatter tenant
- 3 Squatter 'owner' - un-regularised
- 4 Tenant in unauthorised subdivision
- 5 Squatter 'owner' - regularised
- 6 Owner - unauthorised subdivision
- 7 Legal owner - unauthorised construction
- 8 Tenant with contract
- 9 Lease-holder
- 10 Free-holder

NB: For simplicity, this illustration deletes customary and Islamic tenure categories

Policy responses and the myth of property ownership

Unfortunately, the response of many authorities has been to act without understanding this complexity. In Delhi in the mid-1970s, and to some extent also today, the authorities have conducted a campaign of removing residents who they consider illegal occupants, even though many claim rights dating from Mughal times. Such draconian responses to massive informal development may be understandable, but they do not resolve the problems of enabling people to obtain access to secure land in which they can build their lives and contribute to society. They simply move the problem somewhere else.

The most common single approach adopted to date in addressing this problem is to provide settlers with land titles. This approach has several objectives:

- To provide settlers with the most secure form of tenure available;
- To enable households to use their property titles as collateral in obtaining loans from formal sector finance institutions in order to improve their homes, or develop businesses;
- To help local authorities increase the proportion of planned urban land and provide services more efficiently;
- To enable local governments to integrate informal settlements into the tax system
- To improve the efficiency of urban land and property markets.

Recent reviews of urban land tenure policy (eg Payne 1997; 2000) suggest that this approach has had limited success in meeting these objectives. In fact, Oswald (2001) goes so far as to claim that European countries which have high levels of home ownership actually have higher levels of unemployment and lower rates of economic growth than those which encourage diverse tenure

systems, such as rental. Home ownership reduces labour market mobility and may divert investment from more productive channels.

Land titling programmes have been implemented in many countries during the last two or three decades, though usually on a highly selective basis, rather than at the wider urban scale. The approach received a major boost in the early 1990s through the work of Hernando de Soto (1989) who advocated the formalisation of informal settlements, based on empirical research in Peru. His arguments were reflected in the World Bank's Housing Policy Paper (1993), entitled 'Housing: Enabling markets to work', a title which harnessed the social concept of enablement to the market bandwagon. The paper listed improvements to property rights as the first priority in terms of demand side instruments (ibid:iii). Furthermore, tenure security and property rights are listed (ibid:10) as among the most important factors influencing housing demand and it is claimed that insecure tenure leads to under-investment in housing and to reduced housing quality. For lower income countries, the paper recommends developing market-oriented systems of property rights and allocates priority to upgrading systems of land titling and regularising tenure in squatter settlements. The form of tenure proposed, as a long term objective, is individual freehold titles, or private ownership (pp34, 71 and 82), though it is accepted that other forms of title which can be upgraded to full freehold title over time may be appropriate.

This approach is softened considerably in the World Bank's recent Draft Urban Strategy Paper (2000), which makes limited reference to urban land tenure except to emphasise the need for 'stronger property rights' in real estate markets and 'secure and clear' tenure in upgrading projects. However, the momentum in favour of a land titling approach has recently been given a boost by the publication of de Soto's second book (de Soto 2000). This takes his earlier argument in favour of formalising informal settlements one step further by advocating that property ownership has been the foundation on which capitalism itself has flourished and that if the Third World is to develop, it will need to follow the path laid out by the West. De Soto claims that the major stumbling block that keeps the rest of the world from benefiting from capitalism is its inability to produce capital, and that whilst the poor already possess the assets they need to make capitalism work for them, they hold these assets in defective forms. By this he means that they lack titles to their properties which they can use to invest in businesses, rendering their assets as 'dead' capital. He confidently estimates the total value of such 'dead' capital is at least US\$9.3 trillion.

De Soto then claims (ibid:65) that the "substantial increase of capital in the West over the past two centuries is the consequence of gradually improving property systems, which allowed economic agents to discover the potential of their assets, and thus to be in a position to produce the non-inflationary money with which to finance and generate additional production". This is a major claim and he presents the evolution of property rights systems and increasing prosperity in Europe and the USA in support of this assertion. The implication of his analysis is that if only the governments of developing countries can get their act together and provide universal property ownership with clear titles and rights enforceable in law, then capitalism would enable countries to lever themselves, and their poor majorities, out of poverty and into the promised land of capitalist affluence.

To what extent are de Soto's claims supported by evidence? He is surprisingly modest in discussing the methods by which he arrived at the estimated scale of 'dead' capital, apart from "surveying the cost of the building and observing the selling prices of comparable buildings". He and his team apparently spent "many thousands of days counting buildings block by block" but he omits to say how he extrapolated from the case studies in five countries where he was conducting such surveys to the rest of the world in order to obtain his global estimate. Of more interest than the sum, however, is its significance. If one accepts the figure as reasonable, this would confirm his conclusion that the poor have amassed vast assets despite their poverty. Yet he chooses to overlook that such assets were invariably developed through access to credit, albeit not normally from formal institutions. His assertion that property cannot easily be traded on the open market without titles overlooks research which shows that by international standards, residential mobility within the large cities of Latin America is very limited (Persaud 1992 in Gilbert 2001) and in Bogota and Santiago is equally low for those with and without titles (Gilbert 2001:7). In South Africa, it appears that many households who obtain titles are selling their subsidised housing units for less than their face value, simply because they cannot afford the service charges, let alone the costs of servicing additional loans. There is even anecdotal evidence in many countries that the poor are as suspicious of borrowing from banks as the banks are of lending to the poor. His claim that extra-legal property is sleeping (rather than dead) and only needs a kiss from the Prince Charming of the formal banking sector to awaken it to prosperity also overlooks the manifest failure of banks to lend to the poor

even when they possess titles. After all, what self-respecting bank manager would lend to a household without first checking that they were able to service the debt, before checking the collateral against which the loan is to be secured?

De Soto's comparison between the experience of the USA and the Third World has two major flaws. First, and most importantly, while he provides fascinating material on the development of property rights and increasing affluence of the West, he fails to provide any empirical evidence in support of a causal relationship between the two. He conveniently overlooks the role of colonialism and slavery in building the economies of the West. Neither is it difficult to refute his notion of the link between property ownership and affluence in the UK. In 1914, when Britain was at the apex of its economic and political power, only 10 percent of its population were property owners (Malpas and Murie:1999). The remaining 90 percent were tenants and therefore not in a position to use the property they occupied as collateral in obtaining credit.

The relationship between property ownership and economic development is central to de Soto's hypothesis. However, the proportion of home owners in Munich, Germany is 17 percent, in Stockholm, Sweden 11 percent and in Zurich, Switzerland, a mere 7 percent (UNCHS 1996:212), compared to 55 percent in Jakarta, Indonesia and 53 percent in Delhi, India. However, does anyone seriously consider that per capita incomes are higher in the latter than the former? At national levels, Bulgaria has more than twice the proportion of households (87 percent) in owner-occupied housing, than Germany (40 percent), yet few would consider Bulgaria more developed or affluent (ibid:221).

Furthermore, de Soto admits that it took Great Britain 250 years (when its population was only 8 million) to evolve a formal system of property rights – and the USA two hundred years. Given the far larger numbers and greater constraints found in the South today, how long is it likely to take before countries can evolve their own solutions? More importantly, what are they supposed to do in the meantime? De Soto acknowledges that the very survival of capitalism was uncertain just fifty years ago, when communism was a force to be reckoned with. Now capitalism reigns supreme and communism is dead, but who knows what will be the dominant development paradigm in another fifty or hundred years? By claiming that capitalism is the only show in town and that the rest of the world should bow to its inevitability overlooks the very forces of global change that he uses to support his conclusions.

Finally, de Soto's views have an invidious dimension. His infatuation with property rights as the cure for all ills does not stop in the USA with land and housing, but extends to *all* property, including intellectual property rights, as farmers throughout the South are beginning to discover to their cost. Perhaps one of the reasons why the neo-liberal establishment has showered de Soto with praise is that it is almost unique, at a time of widespread anti-globalisation riots, for a son of the South to state that the capitalist approach to development is not only correct, but the only one which works.

None of this criticism is intended to deny that individual property ownership represents an attractive option for many people and deserves a place in the tenure policy of any government. What it is intended to demonstrate is that it is highly dangerous to place all one's eggs in one basket, especially at the present time, when land registries are so incomplete and inaccurate that moves to provide titles in urban or peri-urban areas may encourage or intensify disputes over who has the primary claim. Even Tiger Woods would be unlikely to win tournaments if restricted to using a single club to play every shot. In Peru, where de Soto's approach has been taken up wholeheartedly by his brain-child COFOPRI, the vast majority of titles have been allocated on government owned desert land well outside the urban areas. Once the programme moved into the urban areas proper, and the situation became more typical of other cities around the world, claims and counter-claims slowed down delivery dramatically. Perhaps this is why he makes no mention of COFOPRI in his book.

Where de Soto scores highly is in his insistence that legal systems cannot aspire to legitimacy if they cut out 80 percent of their people (de Soto 2000:151). He claims (ibid:171) that "any attempt to create a unified property system that does not take into account the collective contracts that underpin existing property arrangements will crash into the very roots of the rights most people rely on for holding onto their assets". He continues, "to be legitimate, a right does not necessarily have to be defined by formal law; that a group of people strongly supports a particular convention is enough for it to be upheld as a right and defended against formal law. That is why property law and titles imposed without reference to existing social contracts continually fail. They lack legitimacy". It is to identify and review forms of property

rights which enjoy social legitimacy and can form the basis for improving urban management and the living conditions of the poor that is the focus of this book.

Diversity and choice

Under conditions of rapid urbanisation, competition for secure, serviced land is increasing in all developing countries. This places greater pressure on existing tenure systems and requires governments to formulate policies which encourage efficient land use and improve accessibility to it, especially for the urban poor. The central issue is therefore what forms of land tenure are most likely to achieve the objectives of improved efficiency and equity in different contexts? In addressing this issue, it is necessary to recognise that although land tenure raises important technical and procedural questions, it is ultimately a political issue, since rights over land cannot be isolated from packages of rights in general.

Perhaps the first point to make is that there are no absolute standards by which security of tenure can be defined. For squatters who have lived in a settlement for many years, their *perceived* security of tenure may be indistinguishable in practice from households living in legal housing. It is therefore important to distinguish between de facto and de jure tenure status and such distinctions can only be assessed through participatory studies and surveys of local investment in environmental improvements.

It has also been suggested above that the policy objectives outlined in this paper can be more effectively achieved through other methods than the provision of formal tenure. For example, high building and planning standards, restrictive regulations on land use and development and cumbersome administrative procedures raise entry costs to formal shelter and inhibit development. A radical review and sustained reform of the regulatory frameworks by which urban land markets are managed, such as permitting modest initial development and incremental development, together with the introduction of 'one-stop-shops' for processing land transfers and development proposals could generate major improvements in the efficiency and equity of urban economies and land markets.

Recent research directed by the author reveals that there are numerous examples of innovative approaches to providing secure tenure which meet the needs of the urban poor and are also compatible with the need to increase transparency and efficiency in land management and operate within the constraints of limited administrative resources. Among the examples reviewed are the Certificate of Rights in Botswana, the Concession for the Real Right to Use (CRRU) in Brazil, the Community Land Trusts and Temporary Occupation Licences (TOL) in Kenya, land rental arrangements in Thailand, co-operative tenure in South Africa, shared land titles in Turkey and incremental rights in both Egypt and Colombia. Details of these and other examples are available in a media pack and a forthcoming book².

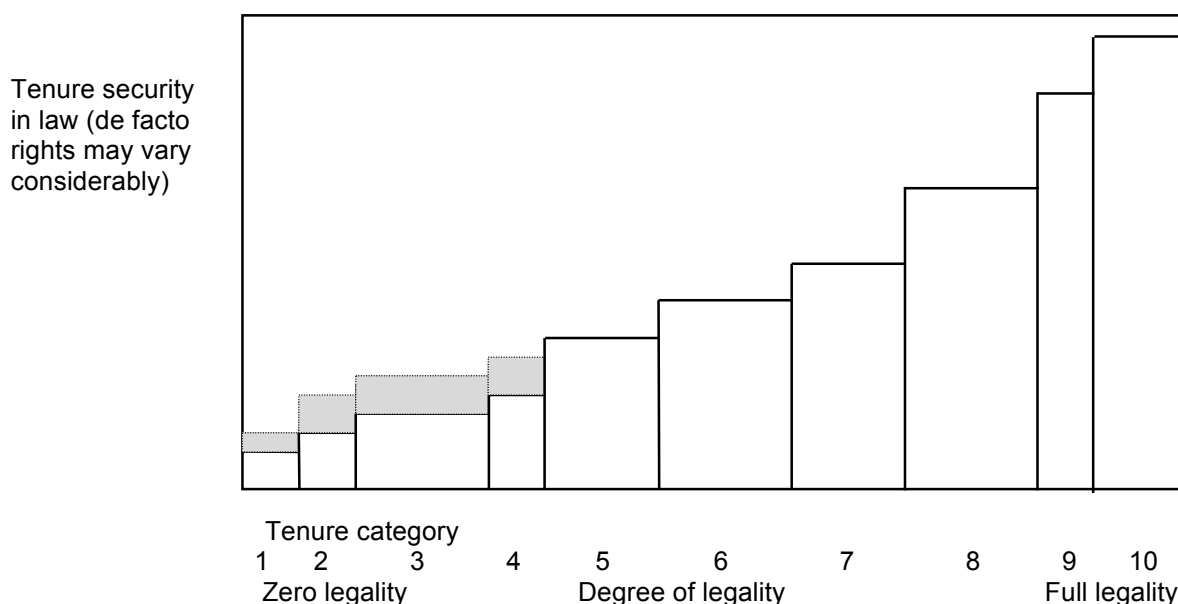
The evidence suggests that caution is advisable in effecting major changes to tenure systems. This is partly because titles and rights once granted cannot easily be withdrawn unless occupants fail to meet agreed obligations and because the wider implications of specific tenure policy changes are presently difficult to predict. A starting point may therefore be to regard every step along the continuum from complete illegality to formal tenure and full property rights as a move in the right direction, to be incremental. This would minimise market distortion and the risk of undesirable social consequences.

Until more information and experience are acquired on the impacts of tenure changes, one option is to increase the rights of residents within existing tenure arrangements, rather than changing their formal tenure status (Payne 2001). Such options appear to offer improved security, increased public sector influence over land development, modest increases in tax revenues and practical options for financing land development. A diagrammatic illustration of this approach is presented in Fig 2. This indicates how a rights based approach may be able to increase tenure security (and therefore equity) at the bottom end of the continuum for the most vulnerable social groups and thereby reduce distortions in land and housing markets by gradually reducing the difference between formal and non-formal categories. For example, if residents in the lowest categories of tenure (1-3 in the figure) are protected from eviction through the provision of occupancy permits, etc, their security will increase, though the commercial value of their property will remain relatively low, thereby minimising market distortion and making it easier for the urban poor to afford it.

² Provisional details: Payne, G (ed) 'Land Rites: Innovations in land tenure for the urban poor' ITDG Publishing, London, forthcoming 2002.

Consideration should also be given to increasing the range of tenure options available, possibly by adapting existing indigenous tenure systems, or innovations from other countries. This will help to minimise short term fluctuations in land prices and other indirect consequences and enable households - and governments - to learn from experience and adjust to change at an acceptable pace. As more and more households are forced into living in various types of unauthorised settlement, they have acquired strength in numbers and the authorities are increasingly reluctant to undertake forced evictions. As such, perceptions of de facto security have increased, irrespective of de jure tenure status. What concerns households more is therefore access to services and, to a lesser extent, credit. For this reason, a major consideration of tenure policy should be the ways in which it can facilitate improved access to these benefits. In the meantime, strengthening the administrative capacity of land registers is a pre-condition to establishing efficient land markets and systems of property rights. It is also important to remember that social and cultural needs have an important place in maintaining the way that tenure systems operate.

Fig 2: Likely consequences of improving tenure rights in unauthorised settlements



Tenure categories found in many cities (The number and proportion of categories will vary in each case):

- 1 Pavement dweller with approval to remain
- 2 Squatter tenant with protection
- 3 Squatter `owner` - regularised
- 4 Tenant in unauthorised subdivision - with protection
- 5 Squatter `owner` - regularised
- 6 Owner - unauthorised subdivision
- 7 Legal owner - unauthorised construction
- 8 Tenant with contract
- 9 Lease-holder
- 10 Free-holder

NB: For simplicity, this illustration deletes customary and Islamic tenure categories

Initial efforts at policy formulation should therefore focus on identifying existing statutory, customary, religious and non-formal tenure systems to assess the extent to which they enjoy a degree of social legitimacy and provide the basis for building a more integrated and consensual legal framework. All tenure options should therefore be offered on terms and conditions which create a 'level playing field' and do not involve hidden incentives or distortions, such as selective access to subsidies. Where individual titles are offered, recipients should be made fully aware of possible negative consequences, such as possible reductions in property values, responsibilities for maintenance and exposure to property taxes and service charges, etc.

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