

## **URBAN LAND TENURE ISSUES IN DEVELOPING COUNTRIES: TITLES OR RIGHTS?**

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### **Introduction**

It is a great honour to be invited to contribute a paper to this most important of events, especially at a time when South Africa is undergoing a period of immense change and development. Such moments of historical importance do not occur often and when they do, they place a great responsibility on the shoulders of all involved, directly and indirectly, to build a future in which the lessons of the past can be learned and the experience of others harnessed. I can only hope that my small contribution to this conference will be of some use to those with responsibility for formulating and implementing new land and housing policies. The paper addresses urban land tenure issues and draws heavily on a recently published review of the literature<sup>1</sup>

Access to land has rightly been recognised as a pre-condition in implementing *any* urban development or housing policy. As many observers have noted, land is unlike other resources in that it cannot be made or moved. It also excites intense emotional and psychological attachment in a way that services, materials and finance do not. As South Africa and other developing countries consider their options for creating a dynamic and equitable housing sector, it will therefore be important to formulate an appropriate land policy. Systems of tenure and property rights will constitute a key element in such a policy. Surprisingly, however, the subject of urban land tenure has not received significant attention in the literature until the 1980's, so that governments have not been able to formulate or modify policies on the basis of sound information. Given this situation, it is perhaps advisable to briefly list the characteristics of the most common tenure systems.

### **Existing tenure systems**

From various sources, land 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 similarly 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. Rights may cover access, use, development or transfer and, as such, exist in parallel with ownership. On this basis, it is clear that the ways in which a society allocates title and rights to land is an important indicator of the nature of that society. It is therefore culturally dependent, rather than economically determined.

There are often different systems of legislation relating to land, and different forms of tenure, co-existing in the same country and, sometimes, even within the same city. In addition to private freehold and leasehold, public rental, religious systems and customary tenure co-exist legally within many countries. To further complicate matters, there is often an assortment of unauthorised settlements with varying degrees of legal and illegal tenure as, for example, when legal occupants of a plot develop it without permission, or without conforming to official standards or procedures.

There may also be a range of rental tenure categories, from legal through unofficial contracts to personal arrangements. In fact, in many South American cities, the rental market alone represents more than half of total housing supply. In this sense, it is therefore simplistic to think of tenure in black and white terms of legal, or illegal, since there is generally a continuum of tenure categories within most housing markets. In many countries, there may even be more than one legally acceptable system operating, so that migrants moving

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<sup>1</sup> Payne, Geoffrey 'Urban land tenure and property rights in developing countries: A review' Intermediate Technology Publications, London 1997

from customary areas to urban centres may be considered to be behaving illegally, simply because they are operating in accordance with systems which are not locally applicable.

Each form of tenure has its advantages and limitations. Among the most common types in developing countries are the following:

#### Customary tenure

This is found in most parts of Africa, the Middle East, Melanesia and North America. It evolved from largely agricultural societies in which there was little competition for land, and therefore land had no economic value in itself, but where survival was often precarious and depended upon careful use of the land to ensure an ecological balance. 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. With urban expansion, the system has tended to become ambivalent.

#### Private tenure

This is largely an imported concept in developing countries and is generally concentrated in urban areas, where it served the interest of colonial settlers. As such, it may co-exist with other tenure systems. The system permits the almost unrestricted use and exchange of land and is intended to ensure its most intense and efficient use. Its limitation is the difficulty of access by lower income groups.

#### Public tenure

Virtually all societies acknowledge the concept of public land ownership to some degree. In socialist countries, all rights are vested in the state, while in capitalist countries, it may be restricted to a narrow range of public requirements, such as strategic or communal uses. The concept of public land ownership is largely a reaction to the perceived limitations of private ownership in that it seeks to enable all sections of society to obtain access to land under conditions of increasing competition. Although it has frequently achieved higher levels of equity than private systems, it has rarely achieved high levels of efficiency.

#### Islamic tenure systems

There are four main categories of land tenure within Islamic societies. The religious foundations of the Waqf hold areas of land which are protected from legislative encroachment, whilst 'mulk', or private lands, are also protected in law; 'miri', or state controlled land which carries 'tassruf' or usufruct rights, is increasingly common, whilst 'musha', or communal lands, are gradually ceasing to be a major factor under the requirement by land registries that ownership of land parcels has to be proven (United Nations 1973:Vol V:37).

#### Non-formal tenure categories

As stated above, these include a wide range of categories with varying degrees of legality or illegality. They include regularised and unregularised squatting, unauthorised subdivisions on legally owned land and various forms of unofficial rental arrangements. 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. Some of these non-formal categories, such as squatting, started as a response to the inability of commercial markets to provide for the needs of the poor and operated on a socially determined basis. However, as demand has intensified, even these tenure categories have become commercialised, so that access by lower income groups is increasingly constrained. Despite this, they represent the most common urban tenure category in many countries and accommodate the majority of lower income households.

#### **Recent trends in land tenure policy**

Among the diverse approaches towards land tenure, national land ownership has proved popular in many countries. Mabogunje (1990) observed that 20 out of the 40 countries in sub-Saharan Africa had nationalised

all lands and extinguished private freehold ownership, though some have reversed this approach since. In India, the Urban Land Ceiling and Regulation Act of 1976 sought to bring large vacant private land-holdings under public ownership. However, the increased demands that public ownership place upon the state have invariably proved greater than the ability to develop and allocate lands according to needs, so that a substantial proportion of urban populations were forced into unauthorised settlements.

In countries where governments have supported private land ownership systems, high costs, reinforced by equally high planning standards and complex administrative procedures, also forced many lower income households into unauthorised settlements. The resulting insecurity has been compounded by the requirement from financial institutions for title deeds as collateral for loans, denying such households access to formal credit and the opportunity to improve their housing conditions.

The issue of land tenure has recently received increasing attention as part of the World Bank's latest housing policy paper. This placed great importance on the need to improve tenure security for urban households in developing countries and listed improvements to property rights as the first priority in terms of demand side instruments (World Bank 1993:4). In the case of lower income countries, this is defined as developing market-oriented systems of property rights. Tenure security and property rights are listed (ibid:22-23) as among the most important factors influencing housing demand. It is also claimed that insecure tenure leads to under-investment in housing and to reduced housing quality.

What forms of tenure and property rights does the Bank advocate? In the section on formerly centrally planned economies, it proposes that private ownership should be permitted, whilst in lower income countries, the priority is to develop market-oriented systems of property rights. It is envisaged that this would take the form of issuing land documents at a large scale and regularising tenure in squatter settlements. The form of tenure proposed, as a long term objective, is individual freehold titles, or private ownership (ibid: pages 4, 64, 115-117 and 134 ), though it is accepted that other forms of title which can be upgraded to full freehold title over time may be appropriate. This policy approach deserves a brief review to assess its likely consequences in practice.

### **Policy issues and land titles**

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 for all categories of demand. The central issue is therefore what forms of land tenure are most likely to achieve these objectives of 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, and have received a water supply, sewerage, electricity and public facilities over time, their *perceived* security of tenure may be indistinguishable in practice from other households living in legal housing. It is thus important to distinguish between de facto and de jure tenure status.

Secondly, as countries increasingly adopt market led approaches to economic development, so the tendency towards commodification or commercialisation of urban land is intensified. Well located plots in the formal economy now command astronomic prices and even plots or rooms in squatter settlements, which ten years ago would have been allocated to friends or relatives free of cost, are now sold on an increasingly open market. It was recently reported that a squatter shack in Bombay was on the market for US\$15,000, despite lacking any title, services, or paved access!. Even rights to part of a pavement in cities like Bombay, can attract a relatively large sum within their particular sub-market. Several studies therefore lend credence to the move away from diverse indigenous tenure systems towards a market led system of individualised commercially based tenure.

This trend does not mean, however, that the variety of tenure sub-markets has been reduced, since new commercially based tenure systems have emerged. In many cities, informal commercial land subdivisions now represent the largest single channel of land and housing supply. As they have expanded, so they have diversified in terms of the level of security provided and the social groups served. Local terms such as *gecekondu*, *bidonville* and *favela* may now subsume processes of land settlement, development and exchange which embody significant differences in perceived tenure status not recognised by outsiders. Nonetheless, changes to the status of one tenure category, or sub-category, will inevitably have a direct or indirect impact upon the others.

Against this background, what are likely to be the consequences of encouraging systems of individual titles or regularising insecure tenure as recommended by the World Bank? Will they:

1. encourage investment in housing construction and improvements;
2. improve access to formal channels of credit;
3. widen the property tax revenue base of local authorities;
4. enable urban development authorities to increase their influence over land and housing markets and
5. improve the efficiency and;
6. the equity characteristics of such markets?

#### 1) Encouraging investment in housing

It is undeniable that perceived security of tenure is widely accepted as a precondition for households to invest in house construction or improvements. This is not the same thing, however, as saying that full titles are the only means of achieving acceptable levels of security. Numerous examples exist of considerable investments being generated simply by an official statement that a settlement will not be removed, by the provision of services, or by the issuance of certificates of use.

In one case notable case during the 1980's, the government of Pakistan offered freehold titles to about 100,000 households living in Karachi's squatter settlements. Merely by *offering* titles, however, the residents considered that they would be free to enjoy permanent occupation of their plots. Consequently, only 10 per cent eventually took up the offer; the remainder presumably considered the administrative charge for the title deeds was not worth paying, or they did not wish to expose themselves to paying property taxes. In another case in Cairo, residents of a squatter settlement rejected offers of freehold titles because they considered the cost too high; yet the offer of titles, together with the provision of services, was sufficient to stimulate considerable investment in house construction and improvement and increase land values substantially (Daef 1993). Conversely, cases exist where the provision of titles is not sufficient, *in itself*, to achieve increased levels of security, investment in house improvements or increased property tax revenues (see Payne 1997:26).

#### 2) Improving access to formal credit

Land titles are widely accepted throughout the world as a secure form of collateral for large loans and this goes a long way to explaining their popularity. However, many households in developing countries, especially poorer ones, do not require large loans, since they do not earn enough to service them. What they require is access to small loans to enable them to build an extra room (eg for rental income), or to improve the quality of their existing accommodation. For such loans, other forms of collateral would invariably be acceptable. It is the reluctance of formal credit institutions to enter the small loans market for the poor because of the high transaction costs and risks which is the real impediment to obtaining formal credit.

Even for those households wishing to obtain larger loans, the value of titles as collateral may be less in practice than has so far been assumed. The reasons for this are quite simple. Public sector finance institutions frequently find it difficult to foreclose on defaulting loans, even when they possess the title deeds to a property, because it is politically unacceptable for public authorities to be seen to forcibly remove poor people from their modest houses. Traditionally low levels of cost recovery in public sector schemes indicate

that it will take some time to change the culture of such institutions.

For households seeking loans from private sector finance institutions, the primary consideration in approving a loan is the ability to repay it. Collateral is irrelevant unless households can satisfy this initial criterion, since responsible institutions would be reluctant to provide loans only to have to foreclose on them soon afterwards. This inevitably restricts formal private credit to households who can demonstrate adequate levels of income or savings and this, by definition, excludes the poor. It is the level of incomes and savings which therefore determines accessibility to credit, since unless these are adequate, the question of collateral remains academic. It can therefore be concluded that the provision of titles are unlikely, in themselves, to increase access to formal credit.

### 3) Improving the property tax base

As was mentioned in the Karachi example above, the provision of titles may not generate a corresponding increase in tax revenues. This may be because households who perceive that they are secure, refuse to pay taxes, or because the high tax thresholds make it difficult in practice for them to meet the costs. The common arrangement by which central government agencies collect property taxes, may also reduce the incentive to pay, if households feel that they will receive nothing tangible in return. Arrangements by which property taxes were collected by local authorities for expenditure on services which local people valued, and at rates which reflected different levels of income or property value, may be one means of addressing this constraint.

### 4) Increasing public sector influence over land and housing markets

The regularising of land tenure on a large scale, as proposed by the World Bank, and presently being initiated in Indonesia, may have serious negative consequences which have so far not been acknowledged. For example, it inevitably sends a signal to land-owners and developers that significant and sudden increases in land values can be realised by subdividing land illegally. The Bank itself notes that prices for houses with tenure may be 25-60 per cent higher than for similar houses without it (IBRD 1992:41), representing a considerable profit margin for agents involved in informal sector subdivisions. Title provision or regularisation may therefore stimulate the very processes of unauthorised development they seek to prevent and therefore reduce, not increase, public sector influence over land and housing markets since titles, once granted, cannot be withdrawn and may create further demand which could prove politically irresistible. Improving rights, rather than providing titles, may therefore be a preferable option.

### 5) Improving the efficiency of land and housing markets

One of the reasons which prompted the Bank's latest sector policy was a recognition that its previous project based approaches had failed to make a significant impact upon land and housing markets. Cohen (1992) has acknowledged that the new approach of market wide interventions is raising the stakes to a high level in that whilst the failures of individual projects may not have been significant, failures at market levels would be.

In this connection, the cause for concern is that governments in developing countries have little experience of formulating and implementing urban land tenure policies appropriate to all sections of demand. The direct and indirect, positive and negative, consequences of a specific policy measure are therefore particularly difficult to predict - and if they cannot be predicted, they cannot be controlled. Also, unlike policies concerning interest rates or taxation, which can be adjusted upwards or downwards as circumstances require, tenure is a uni-directional policy instrument, in that it can only be increased. The unpredictability and inflexibility of tenure instruments therefore make it difficult to apply with any degree of confidence as a means of improving the efficiency of land and housing markets.

### 6) Increasing the equity of land and housing markets

Given the high proportion of tenants in the cities of developing countries, particularly in informal settlements, the impact of regularisation policies render large numbers of people homeless. The provision of land titles may raise land values which are then passed onto tenants, many of whom cannot afford to meet the costs and are displaced in favour of higher income groups.

It is obviously difficult to estimate the numbers or proportions of tenants displaced as a result of upgrading or

title provision in squatter settlements, but a recent doctoral thesis (Daef 1993) traced more than 21 per cent of tenants in a Cairo settlement who were displaced as a result of an upgrading project which included the offer of land titles to squatter owners. An additional proportion was known to have been displaced, but could not be traced. Anecdotal evidence from other observers (eg Kundu 1990, Mitra 1988 and Parikh 1996) suggests that this tendency may be common.

#### Conclusions on the World Bank policy

The Bank's housing policy paper represents an ambitious development in its contribution to the sector and offers exciting opportunities for market wide improvements. Its objectives of increasing the security of tenure of poorer households, improving the efficiency and equity of housing markets, increasing the effectiveness of public sector agencies, and improving access to credit, all deserve widespread support.

However, the Bank is surprisingly reticent regarding the impact of its tenure proposals on the rental sector, particularly private informal rental housing, which accommodates a large proportion of the urban population and almost all of the poorest households. This is particularly the case in squatter settlements where absentee 'owners' are widespread and where it may be difficult to protect tenants and sub-tenants when allocating titles. There is therefore a real danger that a policy approach which emphasises the benefits of owner-occupation, and provides various incentives for it, may result in the creation of a large under-class which is denied access to any form of affordable or acceptable housing. This is hardly consistent with the objective of improving the equity of urban land and housing markets.

The implicit agenda of the Bank is to associate private freehold tenure with the promotion of individual human rights and the development of 'property owning democracies'. These carry associations of a universally valid concept of development which has yet to be universally agreed. In this connection, it is worth remembering that Bangladesh has one of the highest levels of property ownership in the world (about 98%), whilst Switzerland has one of the lowest. Another problem with a market based approach is that it becomes extremely attractive to hold land as an investment and a hedge against inflation, especially in countries where financial institutions are not well enough developed to attract and channel domestic savings into more productive sectors. Willcox (1991) has even indicated that title documents in Pakistan are worthless, since the state does not guarantee them and possession alone provides security of tenure, a fact well known to all who encroach on unused land. This deters financial institutions from providing loans even to those *with* titles.

Another limitation of freehold tenure systems is that only a small proportion of households can afford even the subsidised cost of a plot with title. In a well functioning and self-regulating market, where changes in demand stimulated changes or increases in supply, this would not be a problem. However, land markets in most developing countries are often controlled by a few powerful groups and are severely distorted due to the lack of stable and profitable channels for more productive investment. Until these distortions are removed, it is essential to protect vulnerable groups from the rigours of such markets and the sloping playing fields on which they operate.

Colclough (1991) has argued that where there are serious market imperfections, liberalisation could actually make matters worse and that under such conditions, the market itself is the problem to address. Platteau (1994) goes further and concludes that under certain conditions, more complete liberalisation can entail *new* market imperfections. Finally, the assessment of Bank intervention on land tenure in Tanzania by Shivji (1992) concludes that the process of titling became the process of the more powerful and influential getting themselves registered as owners to the disadvantage of others. In addition, land markets have not emerged on the scale expected, land has been held increasingly for speculative purposes, registration has not increased access to credit and titling has worked against the interests of women and children. He also tellingly claims that these failures have been verified by the Bank's own research without, apparently making a dent in its orthodoxy (ibid:54).

The important point is that policies which emphasise and encourage freehold may unintentionally or inadvertently discriminate against other forms of tenure which may be more appropriate for large sections of

the population. For example, it is common for many low-income households to prefer the mobility offered by rental tenure systems, providing they enjoy adequate security and legal rights. Such protection may be easier to achieve in land markets which encourage a variety of tenure options, rather than one at the expense of others.

### **Policy options - the benefits of a rights based approach**

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 property rights as a move in the right direction, to be made on an incremental basis. This would minimise market distortion and the risk of undesirable social consequences.

Until more information and experience are gained on the impacts of tenure changes, one option is to increase the rights of residents without changing the formal tenure status. The Certificates of Use in Botswana and Lesotho are one example. The arrangement in Hyderabad, India, in which some slum settlements are designated un-objectionable, and therefore to be officially tolerated, is another. In high density areas, it may be appropriate to offer condominium ownership, on the lines being implemented in Brazil, Malaysia, Thailand and the Philippines.

A further option is to extend existing customary arrangements. One example of this can be found in Egypt, where a modest ground rent, or 'hekr' is charged to informal settlers on government or unclaimed desert land. This does not grant title, and could not be transferred, but ensures that if households have to be displaced, they will receive compensation for the buildings they have erected on their plots. Such an arrangement distinguishes between the ownership of land and the ownership of property and facilitates access by the poor to plots which would otherwise have been beyond their means. Farvacque and McAuslan (1992) also recommend that where a national code for land law is inapplicable, the best approach is to build on what exists and develop local forms of regulation, rather than trying to impose institutions from the centre, modelled on imported systems. Doebele (1988) lists several other options, including community land trusts, transfer development rights (TDRs) and co-operative tenure forms.

Such intermediate options have the benefit of improving tenure security, increasing public sector influence over land development, raising modest tax revenues and stimulating local opportunities for financing land development. They are not necessarily ideal, but they have been shown to work.

The limited experience which governments and international agencies have of implementing market wide changes in tenure systems, suggests that it would be advisable for policies to encourage modest, incremental changes in the short term. Emphasis 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.

Research would be helpful to identify 'pressure points' to indicate the limitations of the existing systems of tenure and the needs of vulnerable groups in terms of access, use, security, affordability, location and transferability. This will help identify options for improving their rights without prejudicing the operation of the market as a whole, though the ability to implement any changes will depend upon the institutional capability of municipal or provincial government agencies. This is frequently a major impediment to the implementation of *any* land tenure policy, since the existing tenure status of a given land plot may be open to dispute. Strengthening the administrative capability of land registers is therefore a pre-condition to the establishment of efficient land markets and systems of property rights. Whilst this may be fully funded by user fees in the longer term, it may require subsidies for lower income applicants in the short term, together with increased incentives to administrative staff to operate more efficiently.

Finally, the increasing commercialisation of land and property markets in almost all countries will exert a powerful influence on land tenure policies and therefore housing policies. However, it is important to remember that every society is unique and that social and cultural needs have an equally important place in maintaining community values and a sense of identity.

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