

# Secure Land Use Rights

The Importance of Appropriate Legislation for Legal Tenure in  
Developing Countries

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# 1 Introduction

Land ownership and security of tenure are complex challenges in many developing countries. Nonetheless a properly working market for land and real estate is an essential attribute in developing a country's economy and overall wealth. The lack of working systems for land tenure and security of ownership has repeatedly shown to undermine the urban development. The lack of legislation has also been used repeatedly for harassment, blackmailing and exploitation of the residents. Not having proper regulations of land use and land ownership also leads to a constantly expanding black market and informal sector within urban areas. Informal settlement does not always appear because of deliberate occupation of land – often the legal system in the country simply does not work sufficiently to provide rights to land even if the settlement is planned in a proper way and legal titles easily could be provided.

In this paper I will investigate the importance of legal security of land and the role of that system in developing countries. I will look in to different challenges and try to highlight examples, both good and bad, from different parts of the world. Further I will go through different land right systems such as ownership, leasehold and usufruct.

## 2 Urban Shelter Development

Article 17 of The Universal Declaration of Human Rights states that “Everyone has the right to own property alone as well as in association with others”. The Declaration of Human Rights is one of the most fundamental documents on human rights and dates back to 1948. Even if the right to own property is a fundamental part in the laws of most countries it is in many cases questionable how well the systems works.

The United Nations have predicted that the urban area in developing countries in 2030 will cover approximately 600 000 square kilometres. This is three times as much as in 2005 (UN Habitat, 2005). A vast majority of the rapidly urbanizing countries around the world do not have the adequate administrative systems or financial muscles to cope with this development. As a result, more and more people are forced to live in slum areas under fierce conditions. In sub-Saharan Africa for example around 90 per cent of new urban settlements are slum areas without any legal security.

### Traditional planning and regulation systems

One major challenge for many developing countries is out-dated regulatory frameworks. In large parts of Africa, Asia and Latin America the frameworks that are still in use today are based on colonial rules and regulations adapted in the 19<sup>th</sup> and 20<sup>th</sup> centuries. Those frameworks do not emphasise the challenges of today’s urbanization and are not adapted to the local conditions. One example that is discussed by Payne is Kenya, where the current regulations are based on the British Town and Country Planning Act of 1947 and have barely been updated since (Payne, 2008). In Tanzania the land management legislation up until rather recently dated back to The Colonial Land Ordinance of 1923 (Kironde, 2004). This of course creates a substantial challenge to having a working legal system for land, which also shows in the figures that around 90 per cent of the new settlements in urban Tanzania are informal.

## Definition of Tenure

Before further investigation of the regulatory systems some definitions could be useful. One of the most central aspects of this paper is security of tenure, and therefore it is important to understand what that means. Secure tenure is defined by UN Habitat (UN Habitat, 2008) as:

*(1) Reasonable duration of rights appropriate to the use to which the land is put and the social needs of the land user, and*

*(2) Effective legal protection against eviction or arbitrary curtailment of land rights, with enforceable guarantees and legal/social remedies against the loss of these rights.*

It is important to distinguish between tenure and ownership. An ownership of the land gives in general subsequently the owner a secure tenure, but a tenure is not the same as ownership. Tenures are in general of different quality and security, but to fulfil the purpose the two criteria above need to be fulfilled. It is however important to recognise that secure tenure per se can be acquired for land that has been illegally occupied, depending on the public policies in the country. The many different stages and variations within tenure are often defined as the *continuum of tenure*, which refers to the fact that tenure is as a rule not a solid state but more of a continuous development with many different stages and variations. For example an informal, but sufficiently working, system of tenure can very well work better than an insufficient formalised one.

## Legal titling

Ownership of land is in general considered as the strongest form of legal tenure. The ownership often comes with the legal title to the land that creates a state of freehold. In many projects around the world legal titling has been used for securing the tenure of land for settlers, with very mixed results. The process of legal titling is generally very costly and the regulatory frameworks in many countries do not support the legal titling to be managed in a efficient way. Payne (2008:29) highlights again Tanzania as an example, where receiving a legal title is an extremely costly process that will take you several years and extensive amounts of work to go through. As a consequence, around 98 per cent of the properties in Tanzania are without legal title.

One of the strongest arguments of legal titling is that the value of the land increases and that it becomes possible for the title holders to get loans to improve their property. This is, however, argument that could be questioned. This topic is extensively discussed by Payne (2005) and he concludes that in many cases there is no significant connection between legal titling and increased investments or access to loans. Legal titling programmes could subsequently be a burden for the society and the individuals and the outcome does not stand in proportion to the investment it takes to give out legal titles.

Research has found that formalized legal titling in some cases very well could leave the tenants in a more insecure position than before they received the legal title (Payne, 2005). With a legal title, the value of the property rises and attracts attention from higher income groups who with their superior position can take advantage of the title holders. This is an extreme but yet realistic situation and illustrates that legal titling is not always the best solution for the beneficiaries.

### Security of land – the rural perspective

In fact, the issue with secure tenure is not only a challenge in urban areas. The rural perspective is not extensively investigated, but still a few examples of challenges can be found. Not surprisingly, China faces big difficulties in the agricultural sector due to lack of land legislations. The Chinese system is based on an aged system of communal ownership implemented in the 1950's. The system today has evolved, but still individuals or families cannot own their land. Instead the rural land is communally owned by villages and the farmers got exclusive right to use a certain proportion of the land belonging to the village (Guanzhong, 2006:3). This system put the farmers in a insecure position of leasehold where they cannot in an efficient way influence the development of the land and they are easily exposed to the risk of losing their land. This insecure system also makes it hard for investments in a more efficient agriculture. This could be solved by a legal titling system that allowed individual ownership of land, and with more and more of the society in China taking a direction of market-economy the land legislation system will probably have to develop as well.

## 3 Urban Shelter Design

### Alternative approaches to tenure security

As concluded above, giving legal titles as a mean of acquiring security of tenure for settlers is, in many cases, not an adequate way of development. But what alternatives are there? The UN Habitat report *Secure Land Rights for All* (UN Habitat, 2008) promotes a model which is described as an *incremental approach*, meaning that the security of tenure should develop over time. Instead of focusing on costly legal titles the authorities should focus in short- and medium-term security. During the time more long term sustainable solutions should be developed and adapted to the local conditions.

This approach has been carried out in many different projects around the world. A few of the more innovative approaches will be presented and discussed here.

#### ***Focus on social aspects and infrastructure in Colombia***

Instead of giving legal tenure to the land, authorities instead took the approach of securing necessary services and infrastructure such as water, sanitation, electricity, storm water drainage and such. Besides this, the settlers are protected from eviction through legislation. In this way, the matter of legal tenure becomes obsolete. The effect of legal tenure and added value of land in combination with strengthening the market value of properties are achieved without formalization of legality, which would have been a long and costly process.

#### ***Usufruct in the Philippines***

Usufruct could be defined as a state of leasehold where the poor settlers are entitled to use government land for a certain amount of time. The time varies, but in general it is longer time periods such as 50 years, and the contract can be renewed. In an example discussed by UN Habitat (UN Habitat, 2012:30), Habitat for Humanity cooperated with the local government in Taguig, Metro Manila, to set up a housing area where Habitat for Humanity was the beneficiary of the usufruct contract and coordinated the construction of mid-rise apartment buildings on the location. This was after construction turned over to the families and with the usufruct contract they had affordable housing benefiting from all the

opportunities of owning the property but without having to pay mortgage for the land. Similar approaches have been successful in more parts of Metro Manila within the extensive relocation projects going on in the metropolis. One of the success factors of usufruct is documentation of the mutual agreement. Upon the establishment of a usufruct, leasehold contracts between the authorities and the beneficiaries are set up. This contract is often complemented by contracts to regulate for example loans for housing materials. The main point is that the usufruct beneficiaries agree to follow certain regulations in the contract, that ensures their rights to the land. If the contract is violated they may be evicted from their property. This creates a common interest in upholding the contract.

### ***Temporary Occupation Licenses in Kenya***

The concept of temporary occupation licenses, TOLs, has been tried out in Nairobi, Kenya. TOLs are preferably approved for a limited amount of time, commonly one year. The license can be renewed afterwards upon agreement between the land owner and the license holder. The TOLs are cheap and efficient ways of providing land and giving tenure security for short periods and are commonly used for commercial establishments. However, there are examples of TOLs being used for more extensive time periods and could therefore also work for semi-permanent residential purposes. The idea is to give the land owners, in most cases in Kenya local or national government, the opportunity to use idle land in a better way without losing the long term control over the land. TOLs are also used extensively in for example Singapore, where the focus is commercial use.

### ***Certificate of Comfort in Trinidad and Tobago***

Another concept highlighted by UN Habitat is the Certificate of Comfort introduced in Trinidad and Tobago (Trinidad and Tobago, 1998:11). Settlers can receive a Certificate of Comfort that will prevent them from the risk of eviction from state land. The settler will have to prove that the property in question belongs to him and that will have to be confirmed by two witnesses. The Certificate of Comfort is a cheaper and faster way to achieve what would be achieved by a legal title: the security of land for the settler. The Certificate of Comfort gives however not the legal right to the land, it is merely a personal right to protection from eviction.

## Challenges with innovative solutions

As stated earlier, giving proper legal tenure and right to land faces a substantial challenge in many countries. Alternative approaches seem many times as a fruitful option to traditional titling and have also shown to work sufficiently. However, the lack of pure legal right to land may in some cases prove to be a threat to the system. This comes of the fact that many of the systems described above lean on mutual trust to agreements between settlers and a second part, usually the government. If the trust in the government is lacking and the belief in the government's ability to fulfil its obligations is weak, this could post a severe peril to the framework as a whole. For the settler to feel safe and secure and have trust in the agreement he needs to be able to trust the counterpart to not violate the conditions under which it was settled. In many developing countries, especially among informal settlers, the trust in authorities often is very limited and many examples of mistreatment and harassment has been revealed over the years.

## 4 The Role of Professionals

The success of all kinds of regulatory frameworks is dependant on how they are implemented and advocated. In this sense, the role of professionals to carry this out becomes essential to fulfil the purpose of regulations. A common issue observed in many parts of the developing world is a lack of trust in authorities and subsequently a lack of trust in professionals. To take a concrete example: research found out that in India around 15 per cent of the total costs to gain a legal title of land goes to bribes and other "informal charges" (Payne 2008:42). The situation is the same, or worse, in many countries. The necessity of bribing professionals to gain progress is a severe drawback in the process of building trust between authorities and the people. Fighting corruption should be a highly prioritized area for all governments in order to build up trust to government agencies and professionals. Unfortunately this is not the case today and corruption will continue to be an obstacle for developing proper regulatory frameworks for housing.

Another essential role of professionals is about education and capacity building. There are examples from Africa where a decentralized approach to land regulations has proved to be very efficient, where a central government agency,



instead of administrating all land regulations itself, has worked with local authorities to build up local capacity and knowledge in how to administrate land issues (UN-Habitat 2008:21). This could overlap the issue with asymmetrical information where a few professional planners at a central government agency are keeping track of the enforcement of all land legislations. Furthermore, the knowledge about the regulatory frameworks among the people are commonly low and the information is hard to acquire efficiently. In this case information and capacity building on a local level could be a way of overcoming the gap.

To conclude, building appropriate frameworks for land regulation and legislation is a necessity for the urban and rural development in all developing countries. It has repeatedly been shown that ownership and traditional legal titling are not always the most sufficient solution, the key to success is instead to implement a system that will meet the local needs. Furthermore, having well trained professionals to support the system and also to support the people is undoubtedly required to fulfil the purpose of the legal framework.

## References

Guanzhong, James Wen

2006 *China's Rural Land Tenure System*. Hartford: Trinity College Press.

Kironde, Lusugga

2004 *Tanzania Case Study*. London: Earthscan.

Payne, Geoffrey

2005 *Impacts of Land Titling Programmes*. London: Earthscan.

Payne, Geoffrey Majale, Michael

2008 *The Urban Housing Manual*. London: Earthscan.

ISBN 1-84407-148-0

Trinidad and Tobago

2008 *State Land (Regularisation of Tenure) Act Chapter 57:05*. Port of Spain:  
Laws of Trinidad and Tobago, Ministry of Legal Affairs.

UN-Habitat

2012 *Innovative Urban Tenure in the Phillipines*. Nairobi: UN-Habitat.

ISBN 978-92-1-132525-6

UN-Habitat

2008 *Secure Land Right for All*. Nairobi: UN-Habitat.

ISBN 978-92-1-131961-3