

SECURITY OF TENURE - BEST PRACTICES -

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1. Introduction

Various definitions of secure tenure exist, but the most recent definition that was agreed upon during the Expert Group Meeting on Urban Indicators in October 2002, is: “*the right of all individuals and groups to effective protection by the state against forced evictions*”. Under international law, ‘forced eviction’ is defined as: *‘the permanent or temporary removal against their will of individuals, families and/or communities from the homes and/or land which they occupy, without the provision of, and access to, appropriate form of legal or other protection.’*¹ The prohibition on forced evictions does not, however, apply to evictions carried out by force in accordance with the law and in conformity with the provisions of the International Covenants on Human Rights (the International Covenant on Civil and Political Rights and International Covenant on Economic, Social and Cultural Rights).

Under international human rights law, secure tenure is one of the seven components of the right to adequate housing, which again is linked to the right to land. The other six components are: (1) availability of services, materials, facilities and infrastructure, (2) affordability; (3) habitability; (4) accessibility; (5) location; and (6) cultural adequacy. All human rights apply equally to women and men, and women’s equal right to adequate housing, land and property is firmly entrenched in international law.

Land rights can be equated to a bundle of sticks; each individual stick defines a way in which the land may be used, the profit that may be derived from it, or the manner in which some or all of the rights may be disposed of. A number of such rights can occur on the same parcel (e.g. a freehold owner, an easement/servitude holder for use of way, occupancy right holder(s) or informal settlement dwellers who are protected from forced evictions). In most countries, a range of land rights and tenure types exist, which form a continuum (from informal to formal). Rather than only focusing on formal, registered tenure types that are often inaccessible to the poor, recognition of informal, often innovative tenure types are another option, from where more formal tenure could be achieved through a step by step approach, if so desired.

With regard to registration of land rights, the increasing assumption is that a range of recordal systems (from formal cadasters and registers to local authority records, community register, electricity bills and/or oral evidence) is a prerequisite to substantive secure tenure and equitable access to land for the urban poor.

¹ General Comment No. 7 (1997), adopted by the Committee on Economic, Social and Cultural Rights, HRI/GEN/1/Rev. 3, p. 94. For full text, see: <http://www.unhcr.ch/tbs/doc.nsf/MasterFrameView/959f71e476284596802564c3005d8d50?Opendocument>

The next section will give a brief overview of the main existing tenure types, and some of their advantages and disadvantages for the (urban) poor. Subsequently, a table containing best practices and approaches towards security of tenure for the poor is provided, underlining that a range of different tools can be used towards this end.

2. Forms of tenure

Freehold and registered leasehold (including co-ownership) are the most expensive tenure types, because they use professionals to create the right, transfer it and maintain the (centralized) registration records over time. As a result of the length of time it takes, and the lack of human and financial capacity in government, most countries do not have universal coverage, and most developing countries only have 10% of land parcels documented. Some of the other problems associated with freehold or registered leasehold are:

- Only a small proportion of households can afford even the subsidized cost of a site with a title. Those who can afford that cost often realize the true market value and sell to higher income groups.
- In customary areas, freehold creates classes of those with and those without land rights, as it cannot accommodate extended family and group rights easily. Where there are numerous tenants in an informal settlement or customary area, freehold often forces existing low-income tenants out of an area, as they can no longer afford the rents, which rise dramatically after titling.
- Titling without any protective measures/equal land rights has led to exclusion of women and children and created an increasing number of landless (in cases where freehold is still preferred, joint registration deals with this problem to a large extent).
- Even with a freehold title, household incomes are often too low for finance institutions to be interested in lending.

Documented, unregistered rights

Tenure types in this category are: unregistered lease or leaseholds, rental, occupancy right, use right (including sub-lease, sub-rental and co-tenancy, and co-occupancy right). In general, the ownership on the basis of which the lease is issued cannot be transferred, but all and any other right that is part of the lease can be transferred. Land leases that include most of those rights are generally *registered* and require inputs from surveyors and lawyers (which is why they are grouped under freehold). Land leases that include only a few rights are often administered by local authorities, using non professionals to create the land parcels and administer them. Leases for housing are usually administered by local authorities and their agencies for government-owned housing, and through private contracts for privately owned housing. The level of tenure security attached to each type of lease depends on a variety of factors. Local authority leases, while giving basic tenure security to residents, are generally more affordable and can be more transparent than freehold. They also provide more flexibility in the medium and long term to manage land development and land use changes in the city. Compared to freehold, leases are much cheaper, can be delivered faster, are more flexible and can be made even if a land ownership dispute is ongoing, can be upgraded incrementally as and when required and the technological system to handle leases can be much cheaper and

simpler to use. However, leases are only useful if the lessor is acceptable to the lessees. Partnerships, a user-friendly justice system, and the role of well informed NGOs is critical in the creation of good lessor-lessee relationships. The exclusion that women face in the titling process, also applies with regard to leases, and requires specific measures, such as joint registration or joint recordal in the name of both spouses.

Group tenure is much more affordable than individual tenure, as it does not require such specialized land administration approaches to secure individual rights. It diminishes the number of registration units and thereby also the survey, registration and public land administration costs. The unit of group registration can be the land parcel (block), a building or plot of land (belonging to a housing cooperative) or the area belonging to a customary group or sub-group. This unit can be registered in freehold or lease, for example in the name of a cooperative, community land trust or housing association, while individual occupation rights/sub-leases are granted by the group. Lease length and conditions, inheritance rights, rules on transfer of rights outside the group, maximum area, decision-making process etc are then decided by the group. Safeguards against transfer of the land and regulating transfer of the development on the land must be put in place to protect the group from land market pressures. To work successfully, land administration for group tenure generally involves partnerships between the community, the local authority, NGOs who supply the technical know how, landowners and housing associations. For women to also benefit from group tenure, protective measures must be included regarding internal distribution of individual rights, such as joint recordal of occupation right/sub-lease/landhold title, inheritance rights for women, consent of spouse before an individual right can be transferred etc. Finally, the group might be able to access channels of finance as a group, which they could not do as individuals. Strong social cohesion of the group is an important condition for group tenure to be a success.

Formal, undocumented tenure types

Adverse possession, legal protection against forced eviction and use/occupancy rights without certificate are some examples of tenure types in the land rights continuum that provide a certain degree of security of tenure. For each of these types, however, improvements can still be made (e.g. regarding adverse possession: simplified and affordable procedures for claimants of adverse possession; regarding ‘anti-eviction laws’: conditions before, during and after forced evictions must be in compliance with international law requirements etc.).

Informal tenure types

De facto recognition of occupation (e.g. political patronage, proof of payment of utility bills, oral evidence, informally recognized customary rights, perceived secure tenure etc.) form a major part of the tenure types found in slums and informal settlements. The level of security of tenure that they provide depends on various local circumstances, and whether any other protection against forced evictions are accompanying them. They are the basis from which an incremental approach to tenure improvements can be developed.

3. Best (and worst) practices and approaches towards secure tenure

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| Recognize and treat informal settlers as having a 'right to the city' (Brazil) and include them in planning and decision-making with emphasis on social and gender equity | Exclude informal settlers in regulatory frameworks and planning and assume that a <i>general</i> focus will also benefit the poor, particularly women |
| Reassess conventional tenure types and land registration systems, and use them in more innovative ways. Create new, more appropriate instruments, e.g. basic lease for cooperative, community land trust, housing association + internal group tenure (Guinea-Bissau, Kenya, India, Australia, Pakistan) | Continue with conventional instruments, which are inaccessible and unaffordable to low-income groups. |
| For people who cannot afford any form of <i>legal</i> tenure, a step by step, incremental, approach from perceived/temporary secure tenure to improvements/legalization could be the best option (e.g. Namibia, Pakistan) | Not recognize any informal tenure types and proceed with large scale and rapid tenure reform |
| Strengthen and simplify land administration and processing of records before planning (Namibia). Increase understanding of record keeping and ensure gender awareness. Open system of land records to public (Uganda). In case of basic lease + group tenure, record keeping should be partnership between local authority and community to ensure currency of records and accessibility and transparency to community | Put pressure on weak land administration system. Underestimate record-keeping requirements and keep land records closed to public. Not allow partnerships in record keeping. |
| Carry out public land inventory and land audit (Netherlands, South Africa partly): clarify beforehand which level of government owns which land, clarify who owns/leases private land, clean up cloudy titles, sort out disputes and administrative 'limbo' situations | Find out during court procedures that there are no records that establish which level of government is responsible for which land and suffer long delays in sorting out private ownership |
| Record existence of informal settlements in city plans + record land use and de facto land rights in register (rural Mozambique) | Poor records combined with corruption can lead to allocation of land that is already occupied, often by the poor. |
| Decentralize land management responsibilities (Uganda), including administration of deceased estates, with clear guidance from central land and succession laws | Land management systems and administration of estates that are too centralized and costly |
| Create special zones for subsidized, social housing (Brazil, Philippines) | Apply middle-class standards city-wide |
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| <p>City-wide, affordable planning that accommodates existing informal settlements rather than requiring that such settlements comply with the plans (Indore - India)</p> | <p>Ad hoc planning Require that informal settlements comply with plans, rather than accommodate existing reality</p> |
| <p>Involve local communities in adjudication process: include participatory and gender sensitive approaches, community meetings and transfer of knowledge to the community in adjudication (rural Mozambique)</p> | <p>Adjudicate without involvement of local communities and risk conflicts at later stage due to lack of understanding, gender awareness and fairness.</p> |
| <p>Prohibit forced evictions by law (Brazil), provide legal aid, (incl. community based paralegals) and recourse in case of violation + simplify court procedures in case of violation. Recognize important role NGOs play in mobilization against forced evictions. If informal settlement is only protected by 'anti-eviction law', community and/or local authority should keep simple records of occupation (rural Mozambique, India)</p> | <p>Forced evictions are not prohibited by law and court procedures too costly and lengthy. Legal aid is not available or too costly. If occupation of informal settlement is not recorded in any way, legal recourse after eviction is almost impossible.</p> |
| <p>Simplify procedures and adopt special regulations for adverse possession that are affordable for low-income people (Brazil law not implemented in practice). Allow group claims to adverse possession (while including a gender perspective) and provide legal aid</p> | <p>Use existing court procedures which are costly and lengthy and do not help slum dwellers</p> |
| <p>Support training of male and female paralegals who assist legal aid centres, mediate in disputes and raise awareness on the ground (Chile, Uganda, Kenya)</p> | <p>Legal aid and legal literacy only available to those who can afford it</p> |
| <p>Recognize existing customary land rights. In dealing with customary land for urban development and extension of cities, involve tribal leaders, customary occupants, title holders, local authority and consider form of communal/village ownership (Tanzania, Guinea Bisseau)</p> | <p>Encroach on customary land without regard to existing customary rights</p> |
| <p>Prohibit discrimination in rights & access to land. Formulate or amend laws to ensure that equal land, housing and property rights (including equal inheritance and marital property rights) are entrenched in the law (Latin America) and that these laws are implemented (e.g. through awareness raising, legal aid and paralegal networks)</p> | <p>Allow discrimination, thereby excluding women and vulnerable groups and violating international human rights law</p> |

3. Specific focus on women's secure tenure

In addition to law and policy reform, the following approaches play an important, complementary role to improve women's secure tenure:

- Awareness raising through media campaigns, land rights information centers, legal aid centers, paralegal networks etc.
- Training of professionals, government officials, Members of Parliament, the judiciary, police officers etc. on the repercussions of gender-based discrimination and on the advantages of implementing women's equal rights to land, housing and property.
- Collecting, analysing and disseminating gender-dissaggregated data and information and integrate this data in all planning and policy formulation;
- Include urban poor women in design, implementation, management and maintenance of housing projects. Recognize the role of women's organizations in housing programs, particularly in networking for the purpose of efficient collection and repayment of housing loans. Support peer exchanges with groups who run successful saving schemes;
- Ensure sufficient representation of women in decision-making bodies related to land and housing, and in community groups;
- Liberalize credit eligibility requirements by adopting terms and conditions for loans that suit the needs of the low-income groups, particularly women. Simplify collection methods and recognize already existing practices that work well for the urban poor.

4. Conclusion

For low-income groups, flexible legal formulae for guaranteeing security of tenure are more useful than focusing on individual freehold tenure and formal land registration systems. Step by step approaches to tenure improvements allow for a minimum level of change that improves land market efficiency while protecting low-income groups interests. Among the most useful approaches for the regularization of informal settlements are blocks, super blocks containing blocks and special zones, linked to a form of group rights, leases and local land record systems, structured around the blocks. However, if the group is not socially cohesive, more individual approaches may be needed. The informal settlement dwellers themselves will be able to identify which approach could work best for them if they are presented with a range of alternatives. In this process, the rights, needs and role of women must be actively considered and protective measures in their interest taken.