

Legality and legitimacy in urban tenure issues

Abstract of a paper by Murat Balamir and Geoffrey Payne¹, submitted to the ESF/N-AERUS conference to be held at Katholieke Universiteit Leuven, Belgium, 23-26 May 2001

Abstract

The paper provides an update on current research² reviewing innovative approaches to tenure for the urban poor. Findings from the research indicate that in most cities in the South, tenure systems exist within a continuum of traditional, statutory and informal categories. In many cases, it is difficult to distinguish between these systems, making it impossible to predict the outcomes of specific policy measures.

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.

The paper reviews examples of innovative approaches to tenure intended to facilitate access to shelter for the urban poor and increase legitimacy without necessarily providing full legality.

Introduction

Land and housing tenure in Turkey and many other countries is an issue of legitimacy, rather than legality. Beginning with late 1940's, massive numbers of rural migrants flooded into the primary cities. Their housing needs could not be met by governmental agencies or the market system. Yet traditional arrangements, such as customary tenure systems or, in the case of Turkey, civil regulations of Islam (Seriat) and later legislation (Mecelle, 1869) under centuries of Seljuk and Ottoman rule, allowed tenure on land, based on local needs and approval.

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² 'Land Rites: Innovative approaches to tenure for the urban poor' a research project being undertaken by Geoffrey Payne and Associates with land tenure specialists in 15 countries. The project is scheduled for completion in June 2001.

As long as nobody in the neighbourhood objected, shelter needs could be immediately satisfied. If conflicts arose, decisions of local judges (Kadi), or chiefs in the case of customary tenure systems, provided the final settlement, relying on convictions of legitimacy rather than the rules of some distant legislation.

As increasing democratisation transformed people from subjects to citizens, so tenure issues based on local legitimacy, acquired a degree of legal status. Throughout sub-Saharan Africa, customary tenure systems enjoyed widespread official recognition, especially in rural areas. However, tensions began to increase as small urban settlements expanded dramatically into major cities and enveloped large swathes of rural country. Clashes between traditional land allocation practices and the inherited or imported statutory systems increased, leading in many cases to the declaration that customary tenure no longer enjoyed legal status, especially in urban or peri-urban areas. In some countries, the situation was further complicated by land nationalisation, under which the State assumed powers of land management in the name of the nation, thereby assuming the powers previously held by local chiefs.

Unfortunately for politicians, experience has shown that passing legislation is easier than enforcing it, especially if laws lack social legitimacy. With the authorities incapable of meeting housing needs, the new urban immigrants settled unused land and built their shelters informally. Means of avoiding the costs of formal housing were devised and soon adopted throughout the expanding towns and cities, generating a political milieu conducive for revising existing laws, or simply ignoring them. The contemporary history of urban living in Turkey and other countries is thus a history of innovative informal tenure rearrangements, and their selective adoption into the legislative body proper. At least three major tenure systems have been adopted in Turkey since the early 1950's.

Processes of Appropriation

Direct appropriation and spontaneous occupation of public (or private) land is the most common form of violation of the Civil Code and Development Regulations. This usually implies the immediate completion of construction work to avoid outright eviction. Once occupied, the 'gecekondu' ('built-overnight') provides the dweller some security of tenure, even if a court decision is taken for eviction. At its peak, half of the population of the three metropolitan cities lived in gecekondu buildings. A second step in securing tenure is the regular payment of property taxes, which provides evidence for *de facto* use and enjoyment of property, and credits the owner in certification of occupation, an initial step towards freehold (Box 1). Payment of property taxes also facilitates the provision of public infrastructure and services. Such services are rendered particularly widely at times of elections. In the more recent cases of direct appropriation, intermediaries (ranging from community leaders to despots) have emerged, who (at the expense of removing all freedom) organise the process, making it a considerable business.

BOX 1: A Case of Appropriation

<p>A low level public functionary for 24 years, SS was appointed to Ankara in 1996 at the age of 45. Upon arrival, he immediately built a gecekondu close to his brother-in-law, who has been in Aksemsettin Mamak since 1988, an area recently favoured by</p>

gecekodu builders. He did not pay anyone for the land, and does not know whether it belongs to a person or the State.

It took only a couple of days for him to construct four walls and a roof, hiring a carpenter for a day. He paid for all building materials though, on a short-term consumption credit (US\$1400) borrowed from a bank, with reference to his job. When the foundations were laid, the municipal inspectors spotted him and demolished his work. "If one is determined however, one finds the right relations and persons, and gets over such barriers".

He now lives in this two-room 75m² gecekodu, with a garden of about 100m² surrounded by poplars. SS is contented with his home, even though he considers it 'a bit distant from the city'. He has not yet applied for a certificate or title, but still he will not refrain from making further investments so long as he lives there. He is confident at some stage he will be eligible for the freehold. With a net monthly income of US\$200, the family does not own a car, but the household items include a colour-TV, telephone, computer, refrigerator, automatic washer, dish-washer, and vacuum-cleaner. Currently, his wife is abroad, the veterinary son is doing his military service, and the daughter is attending university.

No infrastructure existed when they moved in, but piped water was available in the following year. Unauthorised use of electricity is extensive in the area, usually with further networking from someone who already has an unauthorized connection. Electricity becomes available soon after piped water is formally metered. SS has been duly paying all taxes since connections to networks have been made. Even without titles, he believes that his gecekodu at its current state could sell for US\$7-8,000. 'Living free is worth all that' and there is always the potential for freehold in land, and at least a flat at the end of the process.

Processes of Apportionment (Shared-Ownership).

A second tenure alternative is to purchase a land-share in which individuals cooperate in buying a large tract of land on the urban periphery and share it (Box 2) informally. In such cases, a subdivision plan is prepared by the landowner or a real estate developer and private agreements are drawn up between individuals, providing them formal share-titles together with informal allocations of land. Since private subdivisions are illegal, it is not possible to obtain building permits. Development in shared ownership is therefore a double-offence. Depending on the individual's access to capital, building activities could start as a gecekodu, a modest single house to be modified later with extensions, or a substantial multi-unit block. Often the latter replaces the simpler buildings as the city grows and property prices increase. Even though subdivision plans and construction work are both unauthorised, holding a share-deed provides greater security than in gecekodus on appropriated land. Insistent lobbying then pressures the local authority to ratify the subdivision plan. In these processes, a High Court decision (1975) that confirmed the shareholders' disposal rights on specific locations of the jointly owned land is often exploited. Recent regulations provide avenues towards freehold status in land and buildings, and are applicable for cases of both appropriation and apportionment. With revisions in local plans accommodating higher densities, urban renewal

processes are facilitated, which leads to freehold tenure of units in apartment blocks for share-owners.

Box 2:

The tolerated success of shared-ownership

MÇ's life story is similar to thousands of others, a dramatic transformation from a background of stable and stagnant rural life for centuries, into a track of life with many risks, options and indefinite consequences in the city. Now 66, he lives in Öveçler Ankara, with his wife and one of his three daughters. A bachelor when he first came to Ankara in 1951, he lived as a 'gecekondu' tenant for five years, sharing a room with two other villagers. Having had his primary schooling back in the village, he initially worked wherever he found a job, in a bakery for a year, but mostly in the constructional sector where he learned how to install electrical systems.

Having completed his military service (1956-1958), he went back to the village and married. The family settled in Atıfbey, Ankara as a gecekondu tenant. MÇ continued his career in the constructional sector which enabled him find a job later as an electric technician when one of the universities recruited him in 1969 through examinations. In 1959, he bought land with a relative, first in Solfasol then in Öveçler where he now lives. Both were informally shared. For 500m² of private agricultural land outside the municipal boundaries, he paid about US\$1/m². He was informed of the availability of this land through his countrymen already settled in the area. MÇ himself worked with friends for about a week in the construction with pressed blocks, of two rooms and an entrance hall. At the stage of foundations, municipal inspection teams interfered. He managed to complete the gecekondu and move in though, living there for ten years. This was later replaced in stages, by the current two-storey concrete building, all financed by savings.

Until 1990, he had two cows and chicken in the shed in his yard, and sold milk to neighbours for 13 years. At the moment they seem to be well-off with around US\$700 net monthly income, rental from his wife's flat and the daughter's salary, the other land in Solfasol maturing for development, and daughter's Skoda Favorit at the parking lot. In 1998 MÇ built a small house in the village, where the family spends the summer months. He is active in the Örenköy Citizens Association, paying US\$1/month.

In the early years, Öveçler had no infrastructure. Water had to be carried from the collective tap, and long walking-distances to public transportation were common. Roads, piped water, energy lines, and waste water systems were provided in 1965. After 1980, the telephone became available. The administrations did not seek legal rights or titles in the provision of these services.

The Improvement Plan for the area was prepared according to Law 2981, and has been in effect since last year, and as more and more share-owners arrive in agreements, constructions started for blocks of flats. MÇ has been regularly paying municipal and property taxes, and applied for the freehold. He is critical of the plan for its allowance of identical rights to individuals who have illegally appropriated public land, unlike his rightful purchase of land from a private owner. MÇ's land of 240m² was reduced to 130m² in the process, which is considered to be equivalent to

a flat. This equity is transferred to a plot subject to development in joint-ownership with 8 other owners. Even if this right is purchased by others, it should comfortably provide him a decent flat. Beginning with a total disregard of the existing legal system, gradually building up legitimacy and equity, this is the final stage of 50 years of determination and entrepreneurship.

Processes of Appurtenance

Multi-unit residential blocks represent 85-90% of all urban residential investments in Turkey, and are constructed through the co-operation of entrepreneurs, landowners, and partner households. Sharing of the appertaining parts of a building is described by an easement. The landowner receives 25-50% of the prospective building depending on the value of the land. The entrepreneur then recovers his costs and profit with the sale of remaining apartments. Capital for substantial investments and the acquisition of otherwise expensive freehold land are thus ensured. The Civil Code only tolerates such easements however, for ten years. Following this, any of the shareholders could go to court to terminate the joint-ownership. The courts usually decide to unify ownership, favouring the partner with the largest share. After decades of illegal tenure, the 'Flat-Ownership Law' (1965) allowed freehold tenure in 'independent parts' of buildings, describing the obligations of shareholders in the management of buildings. Flat-ownership is the final stage for the other two processes. Although freehold in separate flats constitutes the essence of the system, this type of development is responsible for the generation of a mosaic of tenures, harbouring tenants and owner-occupiers as well as rentier households in a symbiotic existence.

Tolerance breeding injustices

Local administrations in Turkey are tolerant to the extent that they are often accused of populism. Tolerance is not only dependent on political interests, but is sustained by interlocking forms of legitimacy. Apart from the historical and cultural '*background legitimacy*', the survival circumstances of the migrants generate a '*legitimacy of existence*'. The longer their presence in an area, the stronger is their '*acquired legitimacy*', and administrations refraining during this period from carrying out the legal requirements warrant a '*latent legitimacy*'. Migrants as voters have a natural '*political legitimacy*', and with the existing real market exchange values and the likely future recognition of tenure rights there are grounds for a '*potential legitimacy*'.

Irrespective of how laws are encroached, in efforts to minimise land and housing costs, local and central authorities ignore most of these offences and prefer to legalise the consequences. Decisions on eviction or demolition are politically non-rewarding. Media and public opinion as a rule support the victims. In practice, individuals are seldom proscribed for this kind of offences, and mass evictions are not observed unless unauthorised developments are in the way of some public project, such as protection zones of reservoirs, or archaeological sites, etc.

About a dozen laws have been enacted since 1948 that in various ways condoned informal tenure and development offences. Law 2981 (1985) provides for regularisation, by allowing higher densities in local renewal plans both for gecekondus and other unauthorised developments. This is not only a process of securing tenure, but also a benevolent donation of development rights, terminating in

blocks of flats wherever demand justifies, and providing freehold dwellings to the original illegal occupiers of land.

Other examples of tenure innovation

The Turkish approach to urban tenure issues reflects a highly pragmatic response to the need for large numbers of largely poor people to obtain access to land and shelter on terms and conditions they can accept. The market price for an officially zoned, legal access to a plot of land is beyond the means of all but a minority of the population of many towns and cities in the South and even many cities in the North. This barrier is raised even higher by the costs required in conforming to planning and building regulations and the time required in following administrative procedures for obtaining official permits.

The examples developed in Turkey have their counterparts in most other countries around the world. For example, in Botswana, Certificates of Use were adopted in the 1970s in recognition of the need to provide a measure of tenure security to households unable to afford formal shelter and encourage them to maintain and improve their houses when and as they could afford it. The system enabled residents who could afford the fees to upgrade to the more formal Fixed Period State Grant tenure and proved popular, though there is presently a freeze on further allocations.

In Brazil, the Concession of the Real Right to Use (CRRU) land has been adopted in several cities, notably Porto Alegre and Recife. It has stimulated the regularisation of *favelas* on public land, or in selected private areas and has been based on the notion that public land should not, and need not, be privatised for the recognition of housing rights to take place. In fact, it has been argued that the unqualified privatisation of public land might undermine the other main objective of tenure regularisation programmes, namely to guarantee that the original residents are able to remain in the areas where they live.

It is in this context that the CRRU has been used. Being a recognised right to land, the CRRU is not a mere administrative permit and cannot be easily revoked. Although it is a form of property rights, it is more specifically a form of leasehold and as such does not imply the full transfer of freehold titles. However, the CRRU can provide legal security of tenure as it can be registered at the public registry office, thus pre-empting eviction measures during the period stipulated in the title. The time limit of most titles has varied between 30 and 50 years, but they can be renewed.

The CRRU allows the beneficiaries to transfer the right to legal heirs as well as selling, renting out and using the property as a collateral, although experiences have varied. Whereas in Porto Alegre, the local legislation still only accepts transfers of rights in cases of death, in Recife, CRRU rights can be transferred when the original beneficiaries wish to move out, subject to control by both the state and the local communities so that the public investment is not capitalised upon by land subdividers. The CRRU can be, and has been used in an individual or in a collective manner, in this case recognising group rights.

Recognising the active participation of women in the process of social mobilisation and in the management of the regularisation programmes in *favelas*, CRRU titles

have been issued in the names of both partners. Should a conflict exist, women have even been given a priority treatment for the recognition of titles. In Porto Alegre, for example, after the CRRU title had been given to an unmarried couple, a celebrated judicial decision reverted it only to the woman's name after she separated from her partner on the grounds of domestic violence

Another example of an innovative approach to tenure is the Community Land Trusts in Kenya's cities. These were introduced in the 1990s to combine the advantages of communal tenure with the virtues of market-oriented individual ownership. By retaining ownership of the land in the hands of a group and allowing members to hold leases from the group title, it is designed to control transfers and discourage speculation. However, in spite of numerous advantages, Community Land Trusts have some limitations. For example, they are new and not yet well understood. Not only politicians, but also administrators at the local level, are not well versed in its precise intent and mechanics. They also require lengthy and complex documentation, although the task is made slightly easier by the prototypes already developed. For some people, the communal ownership of the land could also be a disincentive, since restrictions on sale in the open market discourage speculation and the rapid realisation of capital appreciation. Members also have limited access to loans from commercial banks.

In Bolivia, the need to put existing housing to full use and also increase access for those in need of housing, led to the development of the 'anticretico' tenure system. This was a response to massive rural-urban migration, which led to a rapid growth of informal settlements around the major cities. The "anticretico" contract means "against a normal credit" and is now recognised by national legislation, due to its importance for peoples' livelihoods.

'Anticretico' is a mechanism involving two parties, the owner of a house on one side and the person who needs a shelter on the other. They make a legal contract, in which the former receives a lump sum of money from the latter for the right of using the owner's property for a period of normally two years. What makes the "anticretico" tenure system different from simple rental agreements is that at the end of the contract period, the owner returns *the full amount* deposited to the property user. For the property owner, this is an effective way of raising capital sums without incurring high interest rates from the banks, whilst for the user, it represents an effective way of living at low cost for those able to raise the deposit. 'Anticretico' tenure also encourages people to maintain the property, due to the possibility of purchasing the property when the contract period expires.

In Hyderabad, India, government agencies provided a degree of tenure security to poor households by classifying illegal settlements as 'objectionable' or 'non-objectionable'. The former were in areas considered unsafe or likely to be required for a public project and gave residents notice that they could not expect long term security. For the majority of slum residents, however, the classification of their settlements as 'non-objectionable' was effectively a green light to long term security. In Ahmedabad, the Slum Networking Programme granted residents of other unauthorised settlements ten year licences to their land, enabling them to improve both their houses and the local environment.

Unfortunately, the situation in Delhi, Ahmedabad and other Indian cities has changed dramatically during the past couple of years. Court orders favouring the land owning agencies, together with large-scale evictions have shattered the perceived security of tenure of the slum dwellers. The latter have suddenly realised that their social and political connections or a host of semi-legal documents are not of much use. Many of the industrial and commercial enterprises in both cities have been closed down and evicted, despite their having approvals from a number of departments of the local government and paying normal fees. Understandably, this has sent shock waves among the slum dwellers in the two cities and is likely to discourage further investment in housing and amenities. Such changes in policy expose the reality that insensitive governments intent on imposing some arbitrary notion of order or control can remove even formal recognition. The fact that such measures rarely succeed is of little consolation to the masses of poor people who suffer major social and economic dislocation as a result.

In Egypt and many other countries, tenure security is achieved by the accretion of various rights over time. These may include receipts for the payment of property taxes or service charges and the cultivation of good relations with local politicians. In Franco-phone Africa, it is these processes which enable the urban poor to acquire de facto and eventually de jure tenure rights. For example, land in urban Benin is characterised by the existence of a very dynamic informal land delivery system that is tolerated, and to some extent partly controlled by the State. This attempts to integrate customary tenure practices into the sphere of modern law and planning regulations and involves procedures that combine land readjustment, or re-plotting, the re-allocation of plots, and the provision of “housing permits” to occupants.

This land delivery system has two main advantages. Firstly, the State does not intervene in the allocation of land, at least in the initial stage. Instead, customary owners play a key role in the provision of land for housing in all urban and suburban areas and negotiate directly with households seeking a plot. Secondly, the system offers reasonably good security of tenure, after the land readjustment and redevelopment process has been completed. The process requires communities to participate in identifying rights holders, resolving land related disputes at settlements level, and organising themselves in order to negotiate with public authorities. This opens the way for further innovative approaches to tenure, provided that minor adjustments are made regarding both administrative procedures and participatory processes.

Many observers consider this land delivery system as a relatively efficient one. However, it has some major limitations in that it can be difficult to identify “presumed owners” and land readjustment procedures is relatively expensive and are not transparent, leaving the door open to corruption and clientelism.

A common assumption regarding land tenure for the urban poor is that only the provision of formal, statutory, individual freehold titles will suffice to provide security and access to services and credit. In Peru, the government established COFOPRI (Comisión de Formalización de la Propiedad Informal) in 1996 to create a mortgage based credit and real estate market through formal land ownership in formerly informal settlements. Massive land titling and registration began with the financial back up of the World Bank. Today, COFOPRI claims to have achieved in their objective of titling one million titles, a major achievement by any standards. However,

most of these were on government owned desert land well outside existing urban boundaries. Now that COFOPRI is moving into the urban areas themselves, staff are finding that numerous claims to individual parcels of land are slowing the allocation process dramatically. It is this complexity that exists in other cities around the world which suggests that the Peruvian approach may have limited applicability.

In other countries, such as Colombia, titles are in any case irrelevant in terms of influencing access to basic services. Colombian legislation entitles all citizens the right to obtain public services such as water supply, sewage disposal, electricity, circulation, storm drainage, garbage recollection, telephone, and gas for their homes. The only thing required to achieve this right is to prove that they live in the housing unit. A range of intermediate tenure systems, such as 'Declarations of Possession', 'Buying and selling rights for future use' and 'Communal tenancy', all provide stepping stones with increasing rights and levels of protection from eviction which enable poor households to obtain secure housing at affordable costs. In such cases, land tenure is not even a subject of concern to the majority of poor households since they are protected by law from forced evictions without due legal process and are entitled to receive all essential services irrespective of their tenure status.

A further limitation of formal titles to land is that they expose the poor to market forces and they can get trapped into selling it and thus being displaced from their original location. For tenants, they also expose the poorest households to the threat of higher rents or forced evictions.

Conclusions

This paper provides a summary of ongoing research into innovative approaches to the provision of secure tenure for the urban poor. The findings clearly demonstrate that urban tenure systems are highly complex and dynamic and heavily influenced in their operation by historical, cultural, and political factors. In many cases, these outweigh the obvious economic forces generated by land markets and make any attempt to impose a universal approach both over-simplistic and ultimately counter-productive.

Individual freehold titles are the tenure solution favoured by many international agencies and national governments. However, even in situations in which they are the most appropriate option, they are unlikely to increase access to formal credit significantly, since it is low-incomes which deter finance institutions from lending to the poor. Furthermore, the administrative capacity to deliver titles at the scale required is rarely available; even in Peru, the ability to maintain the allocation rates required declined when the agency moved into urban areas where land ownership is more complex.

Various intermediate or pragmatic approaches have demonstrated a degree of social and political legitimacy which conventional legal tenure systems often lack. As such, they deserve more sympathetic consideration from analysts, but particularly from international and national agencies responsible for formulating and implementing land tenure policies. This is not, of course, to deny that they have limitations, but to widen the range of options available, which is, in itself, a desirable approach.

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