

UNIVERSITETET FOR MILJØ- OG BIOVITENSKAP

# Formalisation of Land Rights in Informal Settlements

---

Generating or Solving Conflicts?

Semester assignment APL306

Ewa Kristina Svensson Schage

22.12.2009

Contents

1.0. Introduction .....	3
2.0. Definition of concepts .....	4
3.0. Sources of land rights .....	6
4.0. What is an informal settlement? .....	8
4.1. Security of tenure .....	9
5.0. Formalisation in theory .....	10
6.0. Conflicts .....	13
6.1. Actors .....	14
6.2. Cultural conflicts .....	15
6.3. Conflicts over rights .....	17
6.4. Institutional conflict containment.....	18
6.5. Distributional conflicts .....	19
7.0. Conclusions .....	21

## 1.0. Introduction

According to classical economic theory, the need for property rights only arises in a situation where resources are scarce. In informal urban settlements today, land is definitely scarce and people live very close together. These settlements also grow very rapidly in population as people come from the countryside to find jobs and earn money to send home to the family. Property rights do exist, but they are for the large part informal. Informality in land holding is not the same as insecurity, as there are unwritten rules as to what kinds of rights are protected in the different settlements. If the right one holds is protected, one can normally be quite sure that forced eviction will not take place. However, these informal rights are often not recognised outside the local community and the need to formalise the property rights to gain entrance to the property market and to make use of the property's potential as capital is ever present. Growing demand for land in urban and peri-urban<sup>1</sup> areas as the cities grow also creates the need to formalise the property rights to ensure legal protection from governments, opportunists, property developers and others. Douglass C. North (1990, p. 51) points out that property rights will develop when scarcity has made it "worthwhile to incur the costs of devising such rights". The same goes for formalisation processes. The largest cost in such processes is to design a system which is effective and considered legitimate by both the land holders and others and which creates incentives to continue to follow the rules of the system. According to the cost-benefit analysis presented by North, the benefits in formalising land rights in informal urban settlements have not yet exceeded these costs. This however depends on what time perspective one has on conflict structure and handling.

In this article I will focus on some problems concerning the formalisation of land rights in informal urban settlements. To illustrate some points I will use examples from the southern parts of Africa. Today, millions of people live illegally on land they do not have the formal ownership to. These are mainly poor people who because of the lack of formal title are not able to exploit the land's potential as capital and thereby generate economic growth. This is however the view of Hernando de Soto (2000) which has been widely praised, criticised and modified by other authors.

The literature on the subject of formalisation of land rights is quite extensive and can be divided into several categories. There is the literature from scholars within the field of

---

<sup>1</sup> The term peri-urban refers to areas along the urban boundaries, in between countryside and city.

surveying, property rights and land law; the so called ‘activist literature’ from actors within the settlements working to improve living conditions (for example squatter organizations); the literature on common property which is also quite extensive. This article is however based mainly on social science literature, though I have tried to relate this literature to some of the above mentioned categories. This choice of literature, has most certainly affected the focus of this presentation and most likely also the final conclusions.

What I will try to explore in this article is whether formalisation of land rights is a way of solving conflicts in informal settlements or if it is a generator of new conflicts. First I will look into the specifics of what an informal settlement is before I lay out some theories around formalisation. The theories I have chosen here are far from exhaustive compared to the literature which exists within the field, but will help to illustrate a few points. Finally, I will try to define and identify some conflicts related to formalisation of property rights. In this, the focus will be on conflicts in the long term versus the short term perspective.

## 2.0. Definition of concepts

Douglass C. North (1990, p. 33) defines *property rights* as the rights that individuals achieve over their own labour and what they produce. He also claims that “[a]ppropriation is a function of (...) the institutional framework”. The reason for this is to find in the theory of *transaction costs*, i.e. the costs measured in money, time and work spent to take possession of the rights are a function of the relevant formal and informal institutions (North 1990).

*Institutions* are the rules and norms which define how actors behave within a given environment. The presence of institutions creates a structure for interaction and makes it more predictable which again lowers transaction costs (Sevatdal & Sky 2003). The meaning of property rights also has different meanings in different African countries. Many governments retain the actual ownership of land and give the people long-term usufruct rights which can be traded (Toulmin 2008). Recent developments in Ethiopia are examples of the negative consequences which might follow from this system of ownership (McCrummen 2009, as referred below)

*Land tenure* refers to a bundle of rights held by one or more individuals or groups (Durand-Lasserve & Selod 2007). Tenure can be both formal and informal and should in theory not be affected by formalisation. The distinction between formal and informal settlements is not relevant to the existence of the rights or even necessarily to the *security* and protection of the

rights, but rather to whether or not the rights are recognised outside the local community. It is also important to notice that private ownership is not necessarily the same thing as individual ownership as customary systems often are a lot more collective in the rights structure. One of the biggest challenges to formalisation according to Robbins & Svendsen (2007) is creating land rights systems which are able to incorporate private, collective ownership and property rights. This is however not consistent with many well-functioning systems of today, where collective ownership is registered in a way which incorporates the complex rights structures and where the relationship between the rights holders is regulated by additional contracts, laws or charters specifically adapted to local conditions, culture and traditions.

*Conflict* can be defined in many ways, but here I choose to define conflicts as situations where the actors have incompatible interests, values, needs or wishes. It is however not necessary for a conflict to get violent or expressed in any way. Underlying conflicts are perhaps the most common form of conflict which often exist without erupting. They are repressed by juridical and social institutions and often come to the surface in connection to changes in these, whether incremental or sudden. Thus a formalisation process connected to land rights will inevitably result in underlying conflicts coming to the surface.

It is difficult to exactly describe the meaning of the term *formalisation*. Durand-Lasserve & Selod (2007, p. 7) has defined formalisation as “a process by which informal tenure is integrated into a system recognised by formal authorities”. This definition draws on the dichotomy between formality and informality without really explaining either. Formal authorities include many diverging bodies and levels of government, which according to this definition does not recognise informal rights. Immediately it is tempting to separate formality and informality by claiming that formality is achieved by putting something in writing (in a qualified way so that it is recognised) and all that is not written is informal. If that were the case, however, informal rights systems would be the norm rather than the exception as many functioning systems today are based solely on verbal agreements and rights.

The definition of land registration in Bruce (1998) is maybe more accurate when transferred to formalisation. Land registration is defined as registration of already existing property rights in land. In both these definitions the main premise is that the rights already exist on the ground. Sustaining such a situation however also implies that the rights are actually recognised and respected by the local community, and often also by local courts and officials who deal with land questions. Is it still informal? I ask this rhetorical question to make the

reader aware that defining the concepts of formal/informal rights and formalisation is a quite difficult task which cannot be undertaken outside the specific context one has in mind.

For the purpose of this article, I just want to emphasise a few aspects of the concept of formalisation which can be considered valid in spite of the discussion above. Formalisation of land rights is a way of recognising already existing rights and making them public, i.e. known outside the local context. An important aim of land rights formalisation is to ensure recognition from other actors outside the immediate social and geographical context. When formalising existing rights, a need to formalise rights which have not needed specific recognition until now will almost inevitably also surface (cf. under about residual rights), and conflicts considering who should be allocated these rights will occur. To be successful, a process of formalisation therefore must have a firm foundation in local cultural practices and customs, but it must also take into consideration what actors outside the local society demand from a formalised system.

It is also important to keep in mind that tenure reform is not the same as land reform. Land reform relates to the act of redistributing land with the intent to change the agrarian structure. Tenure reform on the other hand involves a change in the kind of rights the rights holders have over the same land as before the reform (ibid.).

Any other terms will be defined as they come up in the text.

### 3.0. Sources of land rights

Camilla Toulmin (2008) outlines several ways for land rights in Africa to come into existence. The origin of the right can define whether the rights can be transferred through inheritance or sale, or if there exists an underlying rights holder who can veto transactions. The following presentation of land rights sources is based on Toulmin's article.

First of all, land rights can come from *first settlement*. This is most common in rural areas where the settlers cleared a spot, settled and started farming. It is common that this land passes down the family line (either through the male or the female line depending on tradition). Land rights acquired by first settlement have a high degree of legitimacy among rural residents and can be considered secure. Rights to land can also come from *conquest* by rivalling tribes, colonial powers or other outsiders. These rights can be varying in rigidity depending on the political climate. To illustrate, when the British came to Zimbabwe (former

Rhodesia) white farmers occupied vast land areas and started cultivation. Their property rights were protected by the colonial government. After decolonisation and Mugabe's rise to power in the late 1970's, there has been an ever ongoing process of government reform whose purpose was to lead land redistribution away from the few white farmers and over to the black majority (Bernstein 2003; Palmer 1990). In practice however, it has turned out to be a process where members of Mugabe's network have enriched themselves with the blessing of the president. For the majority of the population, the difference between the two regimes were maybe not that noticeable, but the scheme can still be used as an example of the importance of the political climate when it comes to distribution of ownership rights. A third source of land rights is *allocation* by local or national government as part of a bigger development project or as land grants to investors. In these cases the risk of corruption is however imminent in less transparent societies. Experienced actors in the market will often try to take advantage of these kinds of schemes and in countries with big bureaucracies, low wages and poor routines for handling cases, corruption amongst bureaucrats represents a very real problem. Long time *occupation and use* can also result in rights to land, or at least create the basis for a claim. Rights generated by occupation and use will in many cases collide with rights achieved in other ways, especially through first occupation. The fifth source of land rights is often ignored when speaking of informal property rights, but is nevertheless an important one; *market transactions*. In urban settlements it is quite common to trade in land rights, but these transactions are informal and therefore difficult to follow for an outsider. Despite informality, the market mechanisms are ever present. The informality of the transactions makes it difficult and outright impossible for actors outside the settlement to participate in the market as the needed information is achieved through informal channels based on personal relations and trust. These informal transactions continue in spite of formalisation at the risk of undermining the whole process. In Wallacedene, and informal settlement outside Cape Town, South Africa, the squatters were granted occupation rights in the end of the 1980s through the beginning of the 1990s. A record of the land holders was created to secure the land rights through different governments and land and housing schemes. The extent of informal transactions on the ground made this record outdated in fairly short time and somewhat undermined the whole process of providing formal rights to the residents (Muzondo et al. 2004).

Rights to the same piece of land can also be acquired in two or more different ways without creating conflict or tension as they are not always colliding. It is not unusual that different

utilisation of the same land is carried out by different people, for example the right to have animals grazing is acquired by long occupation and use, while the right to live on the land and cultivate the soil is acquired by first settlement. These rights are not necessarily conflicting despite that they are connected to the same plot (Toulmin 2008). This situation of “split” property rights is not something that occurs solely in Africa; we find the same rights constellations many other places, for example in England under *common law*. The English property system builds on the notion that each plot consists of a series of *estates* which can most easily be defined as usufruct rights, such as the right to build a house, the right to cultivate wheat and the right to graze animals on the plot. Each estate can be held by one person, potentially causing a rather complicated rights structure (Sevatdal , personal communication, 14. December 2009). A potential conflict area is where one of the rights holders who has the rights to the ground itself, the so called residual right. Often conflicts do not arise if and when the formalisation process makes it necessary to point out concrete rights holders to all the rights that are formalised. Otherwise, the question of the residual right rarely comes up unless there is a finding of natural resources of economic value and the like on the property. In urban areas, finding natural resources of any value is not very likely, but the right to develop a plot can be just as valuable. This right does not lie to the person occupying the plot or living on it, but to the person with the residual right. Depending on the occupants’ rights, the holder of the residual right may get problems when trying to exploit this right. When formalising split property rights however, this conflict is likely to surface and necessary measures must be taken and incorporated in the system to deal with this.

#### 4.0. What is an informal settlement?

According to Durand-Lasserve & Royston (2002) there are three main forms of informal settlements of which unauthorised land development is the main type. This kind of settlement occurs in peri-urban areas where people settle mainly on private agricultural land or customary owned land. Often customary land owners are the main providers of land even though their ownership is not formally recognised by the state. In another type of informal settlement, the occupants have rented or purchased the land from informal developers or rights holders through a generally legal transaction, which is not registered. The land is often not considered suitable for urban development, it is not in tune with planning laws or regulations or it does not live up to norms and regulations regarding infrastructure and necessary services (ibid.). The third type of informal settlement identified is squatter

settlements. These also occur in peri-urban areas and are most common on publicly owned land, though they are also found on privately owned land<sup>2</sup>. They generally result from gradual occupation or an organised “invasion” by large groups of people and it is contrary to common belief not free of charge to live there. There are systems for collecting both rent and sometimes also entrance fees for settling in the first place (ibid.). The squatter settlements are probably the most vulnerable to forced evictions, because the inhabitants generally are the poorest people of the society, but also because of a lack of group mentality (caused by cultural differences etc.) which makes it more difficult to stand up to the authorities. The settlements are in many cases situated on centrally located land which may have a high value as development land or where it is downright dangerous to live.

#### 4.1. Security of tenure

As mentioned, informality of tenure is not the same thing as insecurity of tenure, and security of tenure can vary greatly between different informal settlements<sup>3</sup>. The security of tenure can be quite high in the settlements mentioned above, depending on how the authorities view the legality of the settlement. Amongst the inhabitants one often finds a sizeable amount of people from the middle class who are well protected against forced eviction because of their economic situation and political influence. In many cases it is considered more important for tenure security that the rights are recognised by the community itself and the neighbourhood around (Durand-Lasserve & Royston 2002). This security can however be less stable than the security provided by a formalised rights system depending on the conflicts level of the customary system. Conflicts within the group of customary owners, as well as conflicts within the community over conflicting allocations of the same plot and conflicts between customary owner and public authorities over ownership and use of the land, can result in less secure tenure for the population. This in turn creates an incentive for formalising the tenure.

A personal experience from Mombasa, Kenya, can illustrate the risk and insecurity of tenure experienced in many squatter settlements (see also Otiso 2002). In January 2002, squatters who lived along the main roads were given a couple of days’ notice before the bulldozers came in the middle of the night and tore down all the houses and sheds within 50 meters of the roads. People we talked to confirmed that the bulldozers were sent by the Mayor who

---

<sup>2</sup> Security of tenure in squatter settlements on privately owned land is often lower than on public land. A reason for this is the overarching responsibility the authorities have for their inhabitants and the need for alternative places of settlement in case of eviction, cf the case of Mombasa, Kenya, referred to under.

<sup>3</sup> One can also find great variations in security within the same settlement.

wanted to “freshen up” the town so as to achieve the status of “city”. Part of the strategy to achieve this was to widen the main roads, and because the people living next to the roadside were squatters without formal rights to the land, it was relatively unproblematic to “remove” the settlement through forced eviction. The rubble from the torn down houses were recycled by the squatters and used to build new houses on land further off the road, still without formal ownership to the land.

There are however four relevant factors to the security of tenure in informal settlements (Durand-Lasserve & Royston 2002). First, how long the settlement has existed. The older a settlement is, the more legitimate they are and the risk of forced eviction is reduced. Second, the larger a settlement is in terms of population, the more secure it is from forced eviction. This is however not necessarily true for the settler in the outskirts of the settlement who probably are the most at risk. The third factor which defines the security of the settlement is the level of cohesion of the community organisations. In pressure-areas this cohesion is often quite low because of great influx from many different places. This results in both heavy growth and problems following, and cultural differences which do not help establish any group-mentality. A fourth and very important factor in tenure security is the support received from for instance non-governmental organisations (NGOs). Where NGOs are present, it becomes more difficult for local authorities to forcefully evict people from settlements without offering any alternative. This can be for example squatter organisations who work for the rights of squatters and to better conditions in squatter settlements. In addition to these four external factors, tenure security is also to a large extent challenged by endogenous power relations, a kind of “survival of the strongest” and forced eviction may come from fellow-inhabitants who for some reason want that exact plot.

### 5.0. Formalisation in theory

A lot has been written about formalisation of land title and the rewards that may be won by introducing a national formal land rights system in developing countries. De Soto (2000) claims that there will be at least six positive effects from introducing formal property rights systems to informal settlements. First and foremost it will contribute to triggering the economic potential of property as capital. In short, this means that by making information, references, and enforcement mechanisms accessible to the public, one will also create credibility and trigger the interest of the market, thereby supporting economic growth. The second effect de Soto mentions is the possibility to integrate and concentrate information into

a common system which will contribute to moving the extra-legal<sup>4</sup> sector into the legal sector. This information is today scattered and sometimes inaccessible.

The third effect from introducing formal property rights is, according to de Soto, the creation of credibility for the actors in the market by making them accountable for their actions.

People who do not have any collateral will inevitably be less credible as contracting partners and contracts will be made mainly between actors who already know each other, i.e. friends and family. This limits contracting possibilities remarkably.

By formalising property rights de Soto claims that a fourth effect will be to make property fungible (flexible) by separating the physical asset from its economic features. When formalising property rights and making tenure secure, the immaterial representation of the property rights in the form of a deed etc. will be enough to assure contracting partners of solvency. It will also be possible to get information about the properties that surround the one of interest and from this information one will be able to plan more consistently and in accordance with surrounding areas. This means that by making property available and easily negotiable, it can be used more flexibly and thereby produce a surplus value and create growth (ibid.).

The fifth effect of formalisation of property rights is that it will tie people together in a network through their ownership to land and thereby create a mutual dependence. This will again spur incentives for collective action and investment in infrastructure. Transaction costs from establishing such infrastructure as water and electricity will be reduced because the information about users is accessible and reliable. The sixth and final effect of property formalisation claimed by de Soto, will be protection of transactions through registering them and making them public. Thus making it possible to follow a trail of transactions regarding a single plot to simplify the process of estimating the assets of the property as all transactions will be public and protected by this.

De Soto's theory has however been widely criticised for being oversimplified and for building on assumptions that are no longer valid (Sjaastad & Cousins 2008). He compares the situation in colonial USA with the situation in developing countries today which is at best methodically

---

<sup>4</sup> People and businesses operating outside the legal market; unregistered and unsupervised by authorities. The extra-legal sector is often very large in peri-urban areas in developing countries. According to de Soto (2000) there are places where the legal sector constitutes the exception from normality because of the size of the extra-legal sector.

risky, but most probably the comparison is impossible because the two situations are based on completely different premises. According to Madrick (2001, referred in Sjaastad & Cousins 2008, p. 3), the growth of American economy had nothing or very little to do with property rights. There was however a high degree of literacy among the population which one does not see in most developing countries today. In addition, resources were abundant and freely available which also is quite the opposite of the situation one sees today where wars are fought over natural resources because of scarcity. This scarcity is particularly present in urban settlements. The Americans also imported a culture of commerce from the old world which contributed to the rapid growth of the intra-American market. Madrick also notes that in the period of rapid growth in America, the government was quite interventionist on behalf of “the little guy”, which again gave Americans the needed incentives to start businesses within the framework and institutions created by the government. In other words, the institutions (though informal ones) were created to spur investments and lay the ground for economic growth. In informal settlements today, there are already institutions which determine the actions of the inhabitants so when wanting to create investment incentives, one must work within the existing framework. Thus, mere formalisation of property rights will not necessarily have the same effects on economic growth for the inhabitants as in the American case, because so many of the other factors are not present, which makes comparing the situations somewhat like comparing apples and bananas.

It is not only the economic assumptions of de Soto which are not fully valid, there is also an inconsistency between *his* theoretical situation on the ground and the situation that is actually found in many informal urban settlements today. These settlements have grown as a result of more and more people settling down without any overarching plan and the physical shaping itself may create problems in the formalisation process (Robbins & Svendsen 2007). An example of this is from Mathare Valley in Nairobi, where the settlement is extremely large and dense. Because of this density and the physical shape of the settlement, it has been noted that it will be near impossible to reach all the plots when building infrastructure such as water and sewage pipes, electricity and systems for waste removal. The many rights holders “in the middle” who cannot be reached by this infrastructure, will not be able to use their plots as a basis for wealth generation because the plot will have little or no value on the formal market. Even though it may eliminate the burden of paying rent, which is good for the individual, it will not be a source of upgrading and socio-economic development (*ibid.*). This allegation is

however contested with referral to for example Hong Kong, where one has been able to reach nearly all inhabitants with the infrastructure, even though the population density is very high<sup>5</sup>.

## 6.0. Conflicts

The conflict potential when formalising land rights is formidable, which may be a main cause as to why the process of formalising is taking some time and has failed many places. This empirical evidence may be an explanation for why formalisation often is considered to be a conflict generator more than a conflict solver. There is however a need to clarify the conflict situation somewhat. In the short term, the cost of formalising land rights in terms of the conflict level is potentially very high compared to leaving the situation as it is today. Even though the conflict level may already be high in informal settlements, keeping the status quo will in most situations be less conflict-filled than starting a process of change which inevitably will wake underlying sleeping conflicts. In the long term however, the potential rewards (in the form of conflict reduction) from formalising rights may be substantially higher than the rewards from leaving the situation as it is. This can be related to the cost and benefit analysis by North (1990, as mentioned in the introduction) about scarcity and formalisation; when the cost of scarcity exceeds the cost of formalisation, property rights will be formalised. One should then think that when the benefit of conflict reduction in the long run exceeds the benefit of non-formalisation in the long run (which it most likely does in many places), formalisation processes would be put into motion. This is however rarely done, and some of the reason for this can be found in politics. It is very difficult for politicians who depend on popularity to act upon major reforms which will have very high costs in the short run when the benefits do not show themselves until later.

Before I go into specifics, I will try to make a theoretical base for understanding different conflicts that may arise in informal settlements. My main focus will be on different kinds of conflicts and how they may occur on different “levels” in a local, national and international context and how the conflict level may differ when looking at the matter in a short or a long term perspective. A conflict can be defined as a situation where the actors have incompatible interests and try to impose those interests on others. This may again cause a unconstructive situation of tactics and power-play and often result in less than optimal solutions (Rognes 2008). Rognes uses this definition in relation to negotiations tactics to underline the importance of focusing on interests that the actors have *in common* to reach an overall

---

<sup>5</sup> The building manner is however quite different from many informal settlements.

satisfactory result which is relatively easy to enforce. In my opinion this view is also very relevant when discussing problems and conflicts linked to formalisation of land rights. As I will show here, there are several important and deeply rooted conflict lines that are apparent both within the informal settlements themselves, and which come to the surface when a formalisation process is put into motion. Thus a major challenge will be to succeed in drawing on the common interests of the actors to reach what negotiations theory calls an integrative result (ibid.).

When it comes to the different kinds of conflict that may arise in relation to a formalisation process I choose to highlight three major conflict lines. All these conflicts can occur on different levels, or more exact *between* different levels of society.

### 6.1. Actors

To better understand the different conflicts that may arise, it is necessary to map out the different actors that are present in an informal settlement. It is important to note that individuals may be categorised as different actors depending on the situation. First of all, the inhabitants of the settlements constitute a large and many-faceted group of actors. When describing conflicts involving the inhabitants it is important to remember that these conflicts exist on an individual level. The underlying causes for these conflicts may be entirely individual, but there are some conflict lines that appear more often than others, especially conflicts over specific rights or land use and conflicts based on cultural/regional/ethnic differences (Muzondo et al. 2004). These conflicts are presumably best solved on the individual level as this is where they occur, but it can be claimed that clear, formalised rules for holding property which are adapted to the situation on the ground and thereby considered legitimate by the residents, can help avoid many of these conflicts.

Indigenous, religious and ethnic leaders and authority figures constitute another important group of actors in informal settlements. They often have quite an important influence on the individuals' behaviour and group behaviour. Many places ethnicity and religion is a subject of very high importance, which to a large extent defines the action patterns of the population, and the official view of an ethnic leader or chief may define how individuals act in given situations. This is especially conspicuous in cultural conflicts as I will discuss below.

Another important group of actors is what I choose to label the authorities. The authorities consist of local, regional and national governments and the bureaucracies behind these. They

must not be confused with indigenous leaders as mentioned over. Authorities act based on some kind of formal institutional framework, first and foremost institutions with base in formal laws and regulations.

Both individuals, indigenous leaders and authorities may play the role of market actors. The market situation can be formal or informal, national or international. In addition to these actors, one can also find companies, other countries and organisations acting in the market. A very recent example of this is the Ethiopian government's sale/lease of farm land to the Saudi-Arabian state and companies: In Ethiopia, the government has the so called residual right to all land while the people are given usufruct rights which may be more or less temporary (McCrummen 2009). International organisations and other countries may also have another role besides market actors, inasmuch as they want to assist in creating full-scale formalised systems for the settlement. The incentive for this can have roots in a basic interest in creating a functioning market for land and land rights.

## 6.2. Cultural conflicts

Cultural conflicts are obviously conflicts which arise between different cultures, but also between different sub-cultures within the same culture. When I refer to cultural conflicts, I mean the kind of conflicts that have their base in cultural differences; many cultures share characteristics on several areas and conflicts which arise around those subjects do not fall under my definition. Those kinds of conflicts have other underlying differences as their main cause.

Conflict may arise concerning what kind of rights should be formalised. To establish a system of formal property rights which is considered legitimate by the population, it is necessary that the system reflects the actual ownership situation. What is to be owned, how it is to be owned and by whom, depends to a large extent on traditions with deep roots in local culture. To gain legitimacy outside the community however, the system must also incorporate the kind of rights that are considered relevant in the larger context, i.e. outside the community. There are a lot of problems connected to achieving this, first and foremost to identify the "standard rights" needed for a system to be perceived as legitimate in the larger context. Since there are considerable differences even between the formal land rights systems which are considered similar, these characteristics are not easy to identify. A land administration model called the social tenure domain model (STDM) has been developed by Lemmen et. al. (2009) and the

main focus is on flexible systems based on a global standard and which are manageable by the local community. In this way, cultural features can be incorporated into the system to heighten the legitimacy among the population. The STDM is meant to integrate formal, informal and customary land systems with administrative and spatial components. Another important aspect with the STDM is that it will relate property rights to plots to personal identifiers such as fingerprints instead of names (*ibid.*). If this is successful, the cultural conflict line can be less important as an obstacle to formalisation.

The cultural conflict line is also present at an intra-national level, especially between central, regional or even local authorities and the inhabitants of the informal settlements. There may be a strong wish from the authorities to formalise the rights in the settlement, both as a means to battle poverty in the country, and subsequently to increase the country's economic competitiveness. This trail of thought is closely linked to the theories of Hernando de Soto (2000) which are briefly explained above. As mentioned, the essence of de Soto's theory of economic growth and formalisation is that the one inevitably follows the other. In developing countries growth generation is of the utmost importance, and the seeming "simplicity" of de Soto's theory makes it easier for governments with scarce resources available to act on his theories hoping to spur economic growth.

Because of the difficulty to conform the official records to the situation on the ground and the lack of legitimacy among the residents, practice has shown that even formalised land often is sold informally, further undermining the formal system (*cf.* the experience from Wallacedene). This is a serious setback for de Soto's theory, as it is theoretically based on the assumption that it is self-upholding. There is in many illegal settlements no will to seek formalisation because the settlement is considered just a place to sleep while working in the city so that they can send money back to their rural home. Their connection to the land is thus a lot weaker than what would be expected from residential areas in general. Formalised tenure might cause a rise in rent and is generally not looked upon as a good for people with this weak connection to the land. One of de Soto's assumptions is that once individuals get formal property rights to a plot, they will continue to follow the "rules" and keep all transactions within the new, formal system. Formalising property rights for people with such a weak link to the land may even cause the inhabitants to sell the property informally and send the money home. This undermines the formal system, strengthens the informal systems and reverses the formalisation process. It also creates a situation where developers are given the chance to

monopolise the ownership of the slum and further weaken the chance of the poor to exploit the potential for economic growth (Robbins & Svendsen 2007).

It is of course tempting to take a system that works and apply it wherever needed. The design of formal property rights systems are however deeply embedded in the historical reasons for developing them, which again are based on geographically, culturally and contemporarily dependent ways of holding property at the time of the creation of the system. The systems resulting from this incremental process is strictly local (or national) in design, attributes and general information value (ibid.).

### 6.3. Conflicts over rights

Another area where conflict potentially (and probably) will arise in the case of formalisation is between the inhabitants themselves over the identification of the true rights holders. In systems where there are no reliable sources of information about rights, it will be problematic to unambiguously identify the proper rights holder. The probability that some rights may be claimed by two or more people is near certain. A reason for this may also be the inability of the formal system to incorporate the actual rights on the ground because it is not created to be nuanced enough to incorporate the different rights. Rights which in the informal system were not conflicting, may be so in the formal system which will near certainly simplify the rights structure to achieve a manageable and easily applicable system. Conflicts over the true rights holder may of course also be out in the open long time before the formalisation process commences, but they may also be the result of opportunism or they may come from the sudden need to point out one or a few right holders from a situation of collectively held rights. This transposition is one of the biggest challenges to the work of developing an efficient formal property rights system and is also the main reason as to why implementation of already functioning formalised systems imported from elsewhere will be utterly problematic.

These conflicts are however mostly present in a short term perspective; before, during and immediately after the implementation of a new system. It is to expect that if one manages to create an adequate institutional framework for identification of the true rights holders and for solving the conflicts that arise, these conflicts will fade in a long term perspective and in time be exceeded by the benefits, cf. North (1990).

These kinds of conflicts are situated on the individual level; between people or groups of people who for various reasons claim conflicting rights to the same plot. Rights conflicts may

however also be present on a government – individual level. In many African countries, the government is the owner of all land and decides who gets the formal rights and who does not. Governments can often be reluctant to transfer full property rights to the citizens in fear of losing power and influence (Toulmin 2008). This may result in rights conflicts between inhabitants and authorities. A recent example mentioned earlier of government's rather surprising management of the country's property is the situation in Ethiopia where the government has sold and leased out the best and most fertile agrarian land to Saudi-Arabian state and companies, who use modern production methods which yields a lot more than with the traditional methods used by Ethiopians today. The food produced is then exported to Saudi-Arabia among other countries (McCrummen 2009). In a situation of extreme food shortage, the means of producing food are taken away from the population and will make starvation even worse to combat in the long run.

#### 6.4. Institutional conflict containment

As institutions are frameworks of rules for handling human behaviour, they must also be seen as a way of containing conflicts. Institutional change may trigger formerly contained and underlying conflicts. Informal settlements are based on informal institutions such as tradition, culture and the result of historical development of ownership and property rights in the community. What distinguishes informal institutions from formal is most importantly that the informal institutions are not established by political bodies (Sevatdal & Sky 2003). The incremental development of the informal institutions has made it possible to incorporate the handling of new conflicts as they come up and thereby avoiding that the conflicts erupt openly. A process of formalisation will obviously have to entail some institutional change, which may cause the contained conflicts to come to the surface. These conflicts will however be most present in a short term perspective, assuming that when developing and planning the institutions incorporated in the new, formal system one will succeed in accommodating the conflicts expected to arise. The existing institutional framework is often not suitable for direct incorporation of formal property rights. Building new institutions from the ground is however a very time consuming task which involves a great deal of planning, cooperation between actors and which implies very high transaction costs. If we go back to North's (1990) theory of property rights and transaction costs as mentioned above, we can see that the institution of formal property rights is a(n inverse) function of scarcity and transaction costs.

The institutional approach to the problems around formalisation of property rights is linked to the theory of path dependence, which states that once an actor, institution or the like has made one decision, this decision binds the further development to a certain path, excluding others. Once the actor or institution has started on one path, adapted the rules, behaviour etc. to this path, it will be almost impossible to change direction of the development, at least not without considerable transaction costs. This applies even though the institutional arrangement proves sub-optimal (ibid.).

The informal land ownership in many developing countries is to be characterised as an institution. In Sevatal & Sky's (2003) definition, an institution is a framework of rules and norms which can be culturally, legally, socially etc. founded, which determine how the actors behave. Institutions of informal land ownership have developed over time and the details differ from place to place. An attempt at introducing formal property rights systems based on the rules of the informal institutions will most likely be futile because of the seemingly chaotic system of rights. Based on the theory of path dependence, one can also claim that these informal systems will never evolve into formal systems without external pressure and reform.

Institutional preparedness is essential for a formalisation process to be successful (Toulmin 2008). Support to local institutions to undertake land registration, will be much more effective than creating new institutions from scratch because one will be able to draw on the local knowledge of the rights situation on the ground. This will probably help create a system which is sustainable in the long term perspective.

### 6.5. Distributional conflicts

Formalisation of property rights in informal settlements is a very comprehensive process and it will demand many resources to be effective; formalisation is expensive. It will be a big challenge to find private investors who are willing to finance the formalisation process mainly because of the time span before the investment yields adequate profit. Money is needed for surveying, registering and securing the authenticity of the rights claimed and will amount to relatively high amounts per parcel. The need for money to finance the formalisation process will have to be taken out of already strained budgets and the political will for this is not to be reckoned with. Another solution is imposing a property tax to finance the formalisation

(Sjaastad & Cousins 2008). For the urban poor, this will reduce the incentives for formalisation and presumably slow down the process if not bringing it to a complete halt.

In most developing countries there are situations which are much more acute and a natural consequence of this is to down-prioritise formalisation of property rights when it comes to financing over the official budgets. However, if a government finds the financial means to establish a formal property rights system, the risk is big that this will result in a simplified formalisation, ignoring secondary rights and causing privatisation of customary land areas (ibid.). This will inevitably cause the weakest rights holders to lose out, which is what one was trying to avoid in the first place.

This financial problem is a typical distributional conflict which occurs between several causes which each are highly worthy of protection and investment, but in a situation of general need, the more acute situations must be dealt with first. Generally, formalisation of property rights is not so acute as to be prioritised by the governments. In a short term perspective, the financial cost of formalising will definitely exceed the benefit gained, especially when considering the potential conflicts in a short term perspective. The cost of leaving the situation as it is, i.e. informal, is in a short perspective near nil, which tends to overshadow the fact that the benefit is not very high either. However, in the long term perspective, a well developed formalised property rights system will to a large extent be self-financing as opposed to the situation of non-formalised rights where one risks that the conflict level will rise parallel to the rise in scarcity of resources.

A study from Namibia (Christensen & Højgaard 1997) proposes a strategy for formalisation which minimises the economic burden from creating a formal system. The proposition entails a stepwise process which gradually makes the title more formal. The first step is a so called starter title where the tenure is registered for smaller groups of rights holders who achieve rights to a specific block of land. Included in this title are the rights to occupy a plot within the block without limitations in time, and to transfer this right to others. The second step is called a landhold title and includes most of the aspects one relates to formal land tenure. This title includes the right to perpetual occupation, to transfer and mortgaging of the plot, as well as recording and registration of the title in the local property office. The third and last step in the proposition is freehold title, which includes all formal rights over the property. By adapting this stepwise process to local conditions the financial costs of formalising land title

will be distributed over a longer period of time, and will be easier to accommodate in governmental budgets.

Another solution to this problem is of course for donating countries to earmark international aid money for the development of a formal property rights system. There are however several limitations to this strategy. First of all, economic assistance has been criticised lately for enriching corrupt bureaucrats and contribution to upholding ineffective and corrupt regimes (Moyo 2009). Dambisa Moyo sees economic aid as an inhibitor to national economic growth because it does not reach the people who can actually generate growth. It is the grass-root efforts based on local knowledge addressing local needs which in time can generate growth through local entrepreneurship (Kristof 2009). Even though Moyo writes about economic aid in general I believe this also to be true of exogenously “imposed” property formalisation schemes. Another problem is that the earmarking of money does not necessarily create the wanted incentives on the receiving end. This is also part of the criticism mentioned above; transformations like the one we focus on here need to come from a perceived need within the state itself to be successful, otherwise it will just be another exogenous ‘idea’ without root in the population. There is also a real danger of too much involvement and the wish to direct the process from the giving states. This puts us back into the cultural conflict and the Western need to dictate formalised systems based on existing systems that work (in the country/economic framework in question).

This conflict line is most visible on a higher level than in the actual settlement. Financial conflicts will most likely come up between different branches of local or central government, and also on the international level; between donating countries and scholars, and national government and scholars.

## 7.0. Conclusions

In this article I have presented some theories on formalisation of property while trying to focus on informal settlements in urban areas. I have tried to illustrate the difficulty of defining the concept of formalisation. This comes from the many different perceptions of the dichotomy formal – informal. If a condition for a formal property rights system were for it to be in writing, many systems which maybe *should* be termed formal will fall outside the definition. Whether a system is formal or not must be determined by the legitimacy the system is considered to have, both by the population using the system and by external actors

which may have vested interests in property rights in the area in question. Thus, I have not been able to definitely define the concept of formal – informal because this has to be done within the actual context where the property rights exist. I have also pointed at the different theoretical points of view when it comes to formalisation of property rights. Depending on which theory or literature block one builds on, the outcome of the discussion will most certainly differ. In this article I have built mainly on social sciences theory, but I have however tried not to exclude important points from other fields. The Namibia report is an example of a work which is based on a theoretical foundation from surveying, property rights and land law literature. Its orientation is strictly local and contextual when it comes to formalisation and registration processes, and maybe this is the best way of creating self-upholding, legitimate systems for formalised rights. If the report does not present the solution of all formalisation problems, it must at least be considered to be a step in the right direction.

Another proposed model for formalisation is STDM which is a model which aims to integrate formal, informal and customary land systems with each other and also to with administrative tools and spatial components to achieve a formal system. To reach larger groups of the population it is proposed to relate rights in land to personal identifiers instead of identification papers and other official documentation. Local needs will dictate what kind of data is used to identify plots and rights to these.

When looking at formalisation through a conflict oriented perspective, one discovers that such a process may trigger many big underlying conflicts which have been contained in the existing informal system. It is however very important to separate the short term conflicts from the long term conflicts. In a short term perspective the conflicts generated by setting a formalisation process in motion appear to be insurmountable compared to leaving the situation at status quo. There is however a rather big risk that the conflict level will rise in a longer perspective if formalisation efforts are not set in motion in fear of short term conflicts. If a contextually adapted formal property rights system is developed and applied, maybe as a stepwise formalisation to spread the costs over a longer time span and to make it possible to revise the system when one sees how it works in practice, the probability of lowering the conflict level in a long term perspective is higher. This however depends on the formalised system's ability of registering the actual rights which exist on the ground to create the needed legitimacy in the population.

## References

- Bernstein, H. (2003). Land Reform in Southern Africa in World-Historical Perspective. *Review of African Political Economy*, 30 (96): 203-226.
- Bruce, J. W. (1998). *Review of tenure terminology*. Tenure Brief #1. Madison: University of Wisconsin.
- Christensen, S. F. & Højgaard, P. D. (1997). Report on a flexible land tenure system for Namibia. Windhoek: Ministry of Lands, Resettlement and Rehabilitation. 135 pp.
- de Soto, H. (2000). *The Mystery of Capital: Why Capitalism Triumphs in the West and Fails Everywhere Else*. London: Black Swan Books. 276 pp.
- Durand-Lasserve, A. & Royston, L. (2002). International Trends and Country Contexts - From Tenure Regularization to Tenure Security. In Durand-Lasserve, A. & Royston, L. (eds) *Holding their ground. Secure land tenure for the urban poor in developing countries*, pp. 1-34. London: Earthscan Publications Ltd.
- Durand-Lasserve, A. & Selod, H. (2007, 14-16 May). *The formalisation of urban land tenure in developing countries*. World Bank's Urban Research Symposium, Washington DC.
- Kristof, N. (2009, May 1). Bright Continent. *New York Times Sunday Book Review*.
- Lemmen, C., Augustinus, C. & van Oosterom, P. (2009). The Social Tenure Domain Model. *GIM International*, 23 (10): 40-45.
- Madrick, J. (2001). The charms of property. *New York Review of Books*, 48 (9): 39-42. (Quoted in Sjaastad & Cousins 2008)
- McCrummen, S. (2009, November 26). Rike land overtar Etiopias jordbruksområder. *The Washington Post, Norsk enerett: Aftenposten*.
- Moyo, D. (2009). *Dead aid: why aid is not working and how there is another way for Africa*. London: Allen Lane. 188 pp.
- Muzondo, I. F., Barry, M., Dewar, D. & Whittal, J. (2004, May 22-27). *Land Conflicts in Informal Settlements: Wallacedene in Cape Town, South Africa*. FIG Working Week, Athens, Greece.
- North, D. C. (1990). *Institutions, Institutional Change and Economic Performance*. Cambridge: Cambridge University Press. 152 pp.
- Otiso, K. M. (2002). Forced Evictions in Kenyan Cities. *Singapore Journal of Tropical Geography*, 23 (3): 252-267.
- Palmer, R. (1990). Land-reform in Zimbabwe, 1980-1990. *African Affairs*, 89 (355): 163-181.
- Robbins, E. & Svendsen, S. E. (2007). *Urban Tenure and Land Rights: The Challenge for Norwegian Policy and Practice*. Norwegian Land Tools Relevant to Africa, Oslo, Norway, pp. 157-178: Norwegian Mapping and Cadastre Authority.
- Rognes, J. K. (2008). *Forhandlinger*. Oslo: Universitetsforlaget. 214 pp.

- Sevatdal, H. & Sky, P. K. (2003). *Eigedomsteori: innføring i samfunnsvitskapleg teoritilfang for utøving av eigedomsfag*. Ås: Norges landbrukshøgskole, Institutt for landskapsplanlegging. 119 pp.
- Sjaastad, E. & Cousins, B. (2008). Formalisation of land rights in the South: An overview. *Land Use Policy*, 26 (1): 1-9.
- Toulmin, C. (2008). Securing land and property rights in sub-Saharan Africa: The role of local institutions. *Land Use Policy*, 26 (1): 10-19.