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Will formalising property rights reduce poverty in South Africa's 'second economy'?
Questioning the mythologies of Hernando de Soto

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De Soto's influential book *The mystery of capital* offers a simple yet beguiling message: capitalism can be made to work for the poor, through formalising their property rights in houses, land and small businesses. This approach resonates strongly in the South African context, where private property works well for those who inhabit the so-called 'first economy'. Evidence from South Africa, however, suggests that many of de Soto's policy prescriptions may be inappropriate for the poorest and most vulnerable in our society, and have negative impacts on their security and well-being. More attention should be paid to supporting existing social practices that have widespread legitimacy. Features of 'extra-legal' property regimes provide a key to the solutions: their social embeddedness; the importance of land and housing as assets that help to secure livelihoods; the layered and relative nature of rights; and the flexible character of boundaries. The entire legal and social complex around which notions of 'formal' and 'informal' property are constituted needs to be interrogated more rigorously.

Introduction

High levels of poverty and inequality persist in democratic South Africa despite a decade of government policies and budgetary realignments designed to address the legacies of apartheid and steady economic growth. Some policies have been relatively successful: access by the poor to clean water, electricity and sanitation has improved dramatically, and increased numbers receive social grants. But South Africa has the second highest level of inequality in the world after Brazil, and the gap between the rich and the poor appears to be widening.

It is increasingly clear that growth alone will not reduce poverty and inequality, and that improved social services and grants do not address the fundamental problem: entrenched structural features of the economy. Government is now developing policies aimed at transferring resources to 'the marginalised', through expanded public works programmes, micro-credit for entrepreneurs, skills development and agrarian reform.

For some analysts a key problem is the absence of formal property rights to the assets owned by the poor. A recent African National Congress discussion document suggests that failure to provide title deeds to land and houses 'sterilises the enormous value of these existing assets, which could so easily be turned into collateral to secure access to capital'.

Government's new housing policy document *Breaking new ground* complains that the 1.6 million new houses funded by the state since 1994 have not become 'valuable assets' for the poor, and emphasises improved access to title deeds as a means to helping the poor participate in residential property markets. These examples demonstrate the increasing influence of Peruvian economist Hernando de Soto and his book *The mystery of capital* (2000).

De Soto offers a simple yet beguiling message: capitalism can be made to work for the poor, through formalising their property rights in houses, land and small businesses. This approach resonates strongly in the South African context, where private property is dominant and works well for those who inhabit the so-called 'first economy'. At the same time, international support for de Soto's ideas appears to be increasing. A High-level Commission on the Legal Empowerment of the Poor was launched this month, hosted by the United Nations Development Programme, and co-chaired by de Soto.

This initiative is also, however, generating strong opposition from NGOs, social movements and bodies such as the International Land Coalition, which contest the single-minded focus on individual title, formalisation and credit as solutions to poverty (www.desotowatch.net). This policy brief analyses evidence from South Africa which suggests that many of de Soto's policy prescriptions may be inappropriate for the poorest and most vulnerable in our society, and have negative rather than positive impacts on their security and well-being.

Bringing 'dead capital' back to life

The mystery of capital is a call for a global reform aimed at overcoming poverty and underdevelopment. Its focus is

formal recognition of 'extra-legal' property. De Soto argues that the poor of the world living in shantytowns and backward rural areas hold assets worth trillions of dollars in the form of houses, buildings, land and small businesses. The problem is that their rights are not adequately documented, and hence 'these assets cannot readily be turned into capital, cannot be traded outside of narrow local circles…, cannot be used as collateral for a loan and cannot be used as a share against an investment'. Existing legal and administrative systems to register property or set up a business are bureaucratic and time-consuming and create insuperable barriers to the formal recognition of property rights. As a result the assets of the poor are 'dead capital'.

In the West, by contrast, 'the mysteries of capital' have been solved; every building and every piece of land and equipment is represented in a document and is part of a 'vast hidden process that connects all these assets to the rest of the economy' injecting life into these assets so they become *capital*, with the potential to create additional value. Assets are used as collateral for credit and for the creation of securities and secondary markets, but also provide an 'accountable address' for the collection of debts and taxes (and thus a firm basis for public services utilities). Formalising property has effects that allow its owners to create capital – for example, it makes assets fungible, so they can be used for other purposes, divisible (in the form of shares), and combinable (in new business enterprises). What is required, therefore, across the developing world is a programme to 'capitalise the poor' by legalising their extra-legal property.

Extra-legal property systems, says de Soto, are not chaotic; rather, they are based on local agreements and detailed understandings of who owns what, a localised 'social contract'. But these rules are not codified or standardised and cannot be applied outside of their area of origin, and local systems must therefore be 're-engineered' into one national, formal property social contract. This involves the reform of existing legal and administrative systems to accommodate 'extra-legal' property, and the creation of a single, integrated regulatory framework.

What de Soto's critics say

De Soto's ideas have mesmerised many policy makers and politicians, but a significant body of scholars and land reform practitioners are concerned that his policy prescriptions are highly misleading.

The central criticisms revolve around his over-simplification of the informal economy and associated property relations. Although de Soto does not explicitly state that 'formal property' is equivalent to individual, private property, this is clearly his assumption. He does not adequately acknowledge that titling programmes have been tried (at huge cost) all over the developing world and failed to produce the results he predicts; in fact many titling schemes have been shown to *disadvantage* the poor. He also fails to acknowledge the rather different principles that often inform the 'extra-legal' property systems found in rural areas and informal settlements. The challenges in how the legal system should be adjusted to 'accommodate' other property systems, and the unsettling implications for mainstream property systems, are skirted, not confronted. Although he rightly advocates

the 'adjustment' of dominant frameworks to accommodate 'extra-legal' property and to create a bridge between the legal and the 'extra-legal', in reality his policies boil down to converting informal property into private property through systematic titling.

Secondly, for property to function as capital there must be a market for it, allowing it to be used as collateral for credit by banks and other lenders. Yet experience shows that formal rights are not sufficient to generate a market in land or housing, for example, where home owners value secure occupation over other functions, and localised practices *protect* poor people's occupation. In these situations, critics argue, other types of tenure than exclusive private property remain more secure and certain for the poor. Where property markets do emerge, research has shown that the credit effect can fail to materialise, for example, when prices are too low for banks to justify the risk.

Other related criticisms include:

- The focus is largely on urban realities and the complexity of rural property regimes (for example, the prevalence of common property resource use) is not acknowledged.
- The poor and the 'extra-legal' sector are portrayed as homogeneous, whereas in reality they are highly differentiated – some of the poor are entrepreneurs, but others are landless rural workers who own virtually no assets at all.
- The 'extra-legal' sector includes businesses that make fortunes from the exploitation of workers because they operate outside the law.
- Only the capital-formation function of property is acknowledged and other functions such as securing livelihoods or underpinning social identity are ignored.
- Large areas of land occupied by the poor are already owned (for example, by private landlords or the state) – the question of redistribution of this land is not discussed.
- In many countries the state is the owner of key economic resources such as timber, minerals, energy resources and wilderness areas. The distribution of benefits from these resources is a key political issue not considered by de Soto.
- De Soto's account of the development of capitalism in the USA and Europe is over-simplified and misleading.

Securing property rights in post-apartheid South Africa

A key legacy of apartheid was weak and insecure property rights for black South Africans, in both urban and rural contexts. About two million households live in informal settlements or in backyard shacks, and in rural areas at least 2.5 million households hold land in terms of 'communal tenure' regimes. Many new policies have been put in place since 1994 to address the problem, including the abolition of all racially-based legislation, amendments to existing laws, and ambitious land reform and housing laws and programmes.

Two contrasting approaches to securing property rights underlie these new policies and laws. The first is to open up the world of private property for those people who were denied access to it under the discriminatory regimes of the past. Thus beneficiaries of state-funded housing are entitled to full private ownership and registered title deeds, and land reform

beneficiaries can own land individually or collectively. The second approach is to secure people's rights of occupation and use *without* conferring ownership, including occupation of land owned by others (for example, commercial farms, or state land). This qualifies and constrains the 'absolute' rights of private ownership.

Government has also attempted an ambitious re-engineering of policies, laws and institutional frameworks in relation to land use, land management, development planning and service delivery (Kingwill 2005). These generally assume that surveyed land parcels will be privately used, owned and registered (see Box 1).

Evidence from South Africa: two case studies

Joe Slovo Park, Cape Town

In 1990 a group of households occupied part of Marconi Beam, a well-located vacant piece of land in Cape Town owned by a parastatal company. The area was then declared a temporary 'transit' area. After years of negotiation, the Joe Slovo Park housing project was implemented in 1997–1998, adjacent to the informal settlement. The project built 936 houses, using the housing subsidy worth R15 000 per beneficiary (Smit 2000).

In line with national policy, the form of tenure granted was individual ownership. However, for many people there was a decrease in security of tenure. Ownership was registered in the name of only one member of each household, often resulting in reduced security for women and members of the extended family. Also, the allocation process was biased: some long-standing residents were never allocated houses, while community leaders allegedly received more than one house.

The new property owners also became liable for paying rates and service charges, then around R200 per month. Many were unable to afford this, although the situation has subsequently improved with the introduction of rebates. Five years after the project was completed, it was estimated that about 30% of the new houses had been sold, generally for between R5 000 and R8 000 (Jacobsen 2003). Almost all sales of properties were informal, and the formal land registration system had broken down. People who legally owned houses were sometimes unable to occupy them, as street committees had decided who should be the occupier, and in some cases houses had been rented out by people who did not own them.

Some socio-economic impacts have been negative. Informal economic activities have been displaced (and sometimes relocated to nearby informal settlements). Social networks were disrupted as the allocation of plots ignored kinship ties and social networks. The small size of the houses also meant that landlords were unable to accommodate extended family members or tenants, upon whom the landlords had relied for rental income (Yose 1999).

The Joe Slovo Park case reveals that individual ownership can sometimes result in a decrease in *de facto* security of tenure and a negative impact on socio-economic status. It provides clear evidence of processes of informal re-sale and 'reversion' to informality. From a policy perspective, it shows that intervention must differentiate 'the poor' in terms of affordability/income and vulnerability; allocation processes must be fair and transparent; and livelihood strategies must be accommodated.

Ekuthuleni, KwaZulu-Natal

Ekuthuleni is a rural community of 224 households in KwaZulu-Natal. Residents currently live on state-registered land that they wish to formally acquire through land reform and hold in collective ownership, and also receive the benefits of public and private services. The community includes farmers operating at different scales, from those engaged in small-scale fruit and crop production on a hectare or less to forestry farmers on 5–10 hectares. Most families, however, survive on welfare grants, and supplement these with subsistence agriculture and natural resources harvested from the commons. Elderly women head many of these families. Community members say they want to hold land in common because 'we must have some group control here to prevent strangers from coming in and causing conflicts', and because 'we cannot afford the costs of maintaining individual title'.

Ekuthuleni clearly reveals the limitations of the dominant system of property rights. This requires three criteria to be met before rights can be registered: an individual rights holder must be identified; the exclusive rights of this rights holder must be precisely described; and the boundaries of land parcels must be accurately depicted through beaconing and geo-referencing.

But in Ekuthuleni property ownership is never exclusive to one person. It is always shared by a number of family members – those living now, some who are deceased and some yet to be born. This is a concept that South African property law cannot easily accommodate. The closest current law can come to doing so is through establishing a family trust. Analysis of this option indicates it is inappropriate to the needs of people at Ekuthuleni: it does not capture the nature, content and governance of family and community-based land rights. There are many nuanced layers of rights in Ekuthuleni (of access, use, transactions and decision-making) and it would be extremely difficult to precisely describe these in title deeds.

In relation to boundaries, people continuously adapt their land boundaries to fit social needs such as the temporary residence of a relative in distress or the resolution of conflicts over who has what rights. Boundaries are flexible and adaptable in the interests of social harmony, in a context where land provides access to vitally important livelihood resources.

The Ekuthuleni case reveals that there is often a fundamental incompatibility between property rights in community-based systems and the requirements of formal property. Formalisation of property rights is therefore not neutral with respect to existing rights; it does and will transform and alter both the nature of the rights and the social relations and identities that underlie them.

In both urban settlements and rural communities there is the additional problem that their 'extra-legal' property rights do not fit the assumptions of mainstream systems of planning, service delivery and land management. This makes it difficult for them to benefit from planned development (see Box 1).

Evidence from other studies

A growing number of studies suggest that the key features and processes found in Joe Slovo Park and Ekuthuleni are typical of wider realities in urban and rural South Africa. Mongwe (2004) finds that transactions in land and housing in informal settlements in Cape Town are socially embedded and that social relations and livelihood security are the key to understanding tenure dynamics. Cross (1994) suggests that in the Durban area 'urban informal tenure is a system of relative rights, which differs in its underlying conceptualisation from private tenure'.

A recent study of township property (Finmark 2004) found a weak secondary market for houses. The majority of homeowners were not interested in a formal sale because their incomes were too low to move up the housing ladder, and most viewed their homes as a family asset rather than

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Box 1: Planning, land management and the modern cadastre

Property systems are embedded in many institutional arrangements, not only in registers. Registers are thus only one component of the formal system, and it is the system *as a whole* that makes property 'visible', manageable and exchangeable in the eyes of public and private investors and service providers. The act of registration is the culmination of a number of processes that feed into the registration system. Formal planning, surveying and conveyancing are highly specialised sets of activities that prepare property for registration and maintain its technical and legal integrity.

There is a close correlation between the registration system and the land use management system (for example, planning and zoning laws) and service delivery systems. Governments are playing an increasingly active role in regulating patterns of land use as part of a larger effort to direct the course of economic change. For centralised property registration to be sustainable, all these elements have to work in tandem and all aspects require approval from society at large.

Property does not become private property by the mere entry of a name in a register or by surveying boundaries and preparing formal plans. These technical processes are the visible elements of norms and values around property. Without social consensus around these, the activities that ostensibly convert property into legalised private property may reflect the state's desire to control and manage land more than they reflect people's lived experiences, practices and beliefs around property.

The *coherence* of the formal land management system as a whole is sustained by the concept and practice of land 'parcelisation', that is, the notion that for each delineated property, there is a corresponding and current owner (individual, corporate or state). The modern cadastre has thus become a multi-purpose instrument serving many purposes.

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as 'capital'. Over 90% of respondents felt reasonably secure, even without title deeds. None of those who operated enterprises from their homes had a mortgage in the name of the business. Tomlinson (2005) suggests that the study reveals that a strong focus on title deeds is inappropriate, given the real constraints of affordability and the limited availability of housing stock.

Studies in rural areas show that rights to land and natural resources are socially and culturally embedded, and nested within social and political units operating at different scales. Shared and relative rights are characteristic of most communal areas (Alcock & Hornby 2004; Cousins 2005). Most people enjoy *de facto* security of tenure, but their rights can be vulnerable to abuse by both traditional authorities and elected bodies. Access to services and infrastructure is constrained by lack of formal recognition of property rights. The strongest demand on the ground is for security of rights of families and individuals, within a system that secures access to shared resources (Claassens 2003).

De Soto and the South African context

South African experience and evidence suggests many of de Soto's arguments do not hold water, although he rightly identifies weaknesses in the way current legal and 'extra-legal' systems limit poor people's access to resources:

▸ *Formalisation of property rights through titling does not necessarily promote increased tenure security or certainty* and in many cases does the opposite.

▸ *Formalisation of property rights does not promote lending to the poor:* The assertion that title to property will open up access to bank credit is not borne out – banks do not lend to the poor because of the high risk of non-repayment, the low value of their assets, and relatively high transaction costs. Households earning less than around R3 500 per month are unlikely to get access to formal credit using land or housing as collateral, whether or not they hold title deeds to their homes and land.

▸ *Rather than giving their property the character of 'capital', formalisation could expose the poor to the risk of homelessness:* If banks could be persuaded to lend to the poor with their assets as collateral, foreclosure of loans would result in repossession. Poor households understand this.

▸ *The urban and rural poor already have some access to credit*, through informal mechanisms such as loans from family members. They try to avoid creating a long-term debt burden, and are averse to forms of borrowing that might lead to loss of important assets. Entrepreneurs do, however, want improved access to medium-sized loans for which informal credit is unsatisfactory.

▸ *Formalisation through registered title deeds creates unaffordable costs for many poor people:* registered properties become subject to building regulations, boundaries must be surveyed, services must be paid for, and rates must be paid to local government.

▸ *Informal property systems currently support a robust rental market that is well-suited to the needs of the poor.* It is estimated that 78% of tenants in informal rental units earn less than R1 500 per month (Shisaka 2003). Formalisation, by pushing up costs, could impact negatively on this market.

▸ *Formalisation via title deeds for individual property can very quickly fail to reflect reality.* Many 'extra-legal' land tenures defy

parcelisation into individual estates governed by principles of exclusive access and control. Registers based on these assumptions quickly become outdated; similarly, land-use plans that do not reflect practice on the ground become meaningless.

▸ *'The poor' are not homogeneous and those in the extra-legal sector should be differentiated according to income and vulnerability status.* Formalisation via title deeds may be affordable and appropriate for some, especially those who are upwardly mobile, but can have negative impacts on the security and well-being of the unemployed and other marginalised groupings.

This analysis suggests that key elements of de Soto's arguments have limited use in South African context. Rather than being a 'silver bullet' for poverty reduction, formalisation of property rights within dominant legal and administrative frameworks is relevant only for those already on the way out of poverty. Innovations by government and the private sector in relation to low-cost methods of property titling and micro-credit schemes are welcome and should be encouraged, but these have clear limits.

Alternative approaches

For many rural and urban households, the lack of legal recognition of their property rights can result in insecurity of tenure and can also hamper development. Laws and policies to promote higher levels of tenure security and promote investment and development are thus required. If formalisation via integration into the existing system of private property is not the answer for large numbers of people, then what is?

Much more attention should be paid to supporting existing social practices that have widespread legitimacy, rather than expensive solutions that try to replace them. Some features of 'extra-legal' property regimes found in South Africa's informal settlements and communal areas provide a key to the solutions: for example, their social embeddedness; the importance of land and housing as assets that help to secure livelihoods; the layered and relative nature of rights; and, in some rural contexts, the flexible character of boundaries. Approaches based on Western property regimes fail to acknowledge and respond to these features, and can lead to distortions that impact negatively on the poor – even when this occurs within streamlined, more efficient and lower-cost administrative systems. The risks of damage are thus as important as the risks of failure.

Secondly, more attention should be focused on the complex relationship between property rights, development and state investment and administration. In many developing countries the state lacks the capacity to provide the poor with formal housing and associated infrastructure and services, and indications are that the problem is increasing exponentially. Attempts to address the problem through 'once-off' solutions involving high levels of state investment, such as systematic formalisation of property rights, need to give way to a more nuanced, incremental and integrated development approach. Such an approach would seek to extend infrastructure, services and economic opportunity – linked to legal recognition of diverse tenure forms – but without the necessity of imposing a country-wide property cadastre in the first place.

Thirdly, the enormous inequities in property ownership inherited from the apartheid era remain a fundamental constraint on the livelihoods of the poor. Poverty reduction policies must therefore include a central focus on large-scale programmes of redistribution. The snail's pace of current land redistribution efforts is not politically sustainable; new policies are urgently needed and may now be in the pipeline.

Fourthly, land reform laws such as the Extension of Security of Tenure Act and the Land Reform (Labour Tenants) Act, that seek to secure the rights of occupiers without necessarily transferring full ownership to them, remain important but are proving inadequate in their present form. Research indicates that nearly a million farm dwellers have been evicted in the decade since 1994 (Wegerif et al. 2005). Property rights of people on farms thus need to be strengthened and government needs to allocate resources for their protection. Similar arguments can be made for people subject to ongoing evictions from urban and peri-urban land.

For these suggestions to take root, reform of the dominant legal and administrative frameworks for holding and regulating property are urgently required, so that the principles that govern 'extra-legal' property in rural and urban informal settlements, and which often emerge within land reform projects, can receive legal recognition and practical support. This is the major focus of tenure reform initiatives currently being undertaken across Africa, Latin America and Asia. South Africans can learn from these.

The focus in de Soto's writings on only one element of property (legalisation), belies the multi-faceted nature of property in any given society (see Box 1). This suggests that tenure reform requires a more rigorous and far-reaching approach than the term 'formalisation' implies. The entire legal and social complex around which notions of formal and informal property are constituted needs to be interrogated.

It is indeed unfortunate that de Soto offers no examples of what might practically be involved in his positive suggestion that dominant frameworks need 'adjustment' to accommodate 'extra-legal' property, in order to build a bridge between the legal and the 'extra-legal'. In his work there is very little indication of what modifications to the core characteristics of the system of private property-as-capital would be required to accommodate the systems of the poor sectors of society. Despite the understanding he demonstrates of the workings of the extra-legal property systems and of localised 'social contracts', his focus remains integration within *current* legal frameworks.

The many interesting and important innovations in tenure reform that are under way across the developing world receive scant attention from de Soto, yet it is these that provide pointers for the future.

Conclusion

Policy makers must resist the temptation to seek simplistic solutions to poverty of the kind offered by de Soto. Poverty reduction efforts of the scale required in South Africa and elsewhere require a great deal more than the securing of property rights in the manner prescribed. Tenure reform remains necessary and important, but is far from sufficient. In addition, it must be recognised that restructuring the

dominant frameworks of property law and administration, so that they work to support the interests of the poor, is no easy task. We must build a better understanding of the complexity of multiple, informal tenures within the 'extra-legal' sector, in all their diversity, and acknowledge at the outset that they are fundamentally different to the individualised, exclusive, private property systems of Western capitalism.

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