

Claiming the Streets: Property Rights and Legal Empowerment in the Urban Informal Economy

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Summary. — This paper looks at the concept of law and urban development with a focus on property rights and land, exploring the potential collective rights in the public domain to underpin a more equitable approach to the management of public space and challenge inappropriate regulation that criminalizes the lives of the poor. The focus is on street trade and the informal economy. The hypotheses are that: collective use rights extend to public land and are crucial to the livelihoods of the urban poor; such use provides public good as well as private profit, and legal traditions in sub-Saharan Africa can often accommodate the broad definition of rights entailed. The literature review interrogates debates on property rights, legal empowerment, and public space, to suggest that urban public space should be considered as a common resource where open access remains. Fieldwork draws on comparative studies of Dakar, Senegal, and Dar es Salaam, Tanzania, based on in-depth interviews with street traders and key informants, and a legal review in each city. The findings suggest very different trajectories in each city. In Dakar collective action with political support has created space for dialog, while in Dar es Salaam lack of solidarity among traders meant that evictions were uncontested. In both cities the balance between public and private gain was moderated through complex social processes to create the hybrid space of the street, defined here as a ‘collective pool resource’. Finally the paper explores bundles of rights that might include access and beneficial use but with collective management to establish such a ‘collective pool resource’. Thus the paper challenges the usual conception of the public domain as state land, to recognize the collective claim for the street that is core to the operation of urban informal economies.

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Key words — legal empowerment, property rights, informal economy, street trade

1. INTRODUCTION

The end of the 20th century witnessed a global call for the rule of law that relies almost exclusively on official legal and judicial systems, pursued vigorously by international agencies and NGOs (Santos, 2006). Reforms include changes to land laws and planning legislation and initiatives such as the business environment reforms (Lyons & Brown, 2009). The approach relies heavily on the neo-liberal development model, emphasising the importance of market-based economic growth to poverty reduction, and a judicial framework that clarifies individual property rights with little consideration of the plurality of unofficial governance mechanisms that have existed for many years (Santos, 2006).

This paper looks at the concept of law and urban development with a focus on property rights and land for the informal economy, exploring the potential of collective rights in the public domain to underpin a more equitable approach to the management of public space and challenge inappropriate regulation that criminalizes the lives of the poor. The paper draws on comparative studies in Dakar and Dar es Salaam, undertaken in 2010–13 as part of research funded under the ESRC–DFID Joint Fund for Poverty Alleviation Research. The focus is on street trading as one of the most visible and contested domains of informal economy work, defined to include mobile hawking and vending from fixed locations in the street and on the edges of markets.

Three areas of academic enquiry underpin the research. First is “legal pluralism”—defined as the coexistence of multiple legal systems in a bounded physical or social space (Merry, 1988). In practice the developing world experiences a plurality of legal orders, with the official/unofficial, formal/informal and traditional/modern juxtaposed (Santos, 2006, Brinkerhoff & Goldsmith, 2005). Furthermore, urban researchers challenge the notion that the law is a neutral

instrument of change, and argue the need to explore the relationship between official legal systems and popular systems of justice (Fernandes & Varley, 1998, p. 9; McAuslan, 1998a, 1998b, p. 19).

Second is the concept of “legal origins theory” that suggests that the legal systems of former colonial powers influence the operation of modern-day law. A distinction is usually made between the “civil law” of continental Europe, which codifies the law in statutes establishing the state as the ultimate law-maker, and “common law” derived from the English legal system built on decisions of the judiciary which protect the individual against the state. Legal processes within the two systems are inherently different—with civil law based on inquisition and English common law set within an adversarial system of justice (Joierman, 2001; Klerman, Mahone, Spamann, and Weinstein, 2011; Wily, 2002).

Third is the concept of “property rights regimes” which reflect the social hierarchies and activities within in specific domains. Rights are expressed through the “laws, customs and mores of a society” (Demsetz, 1967) and depend on the existence of an enforceable set of rules. Property rights are sometimes described as “bundles” of rights on a continuum between full *private ownership* (excludable and transferable)

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to *communal ownership* (with full public access and no rights of transfer). *State ownership* is a third category implying where property rights are determined through politically defined processes (Demsetz, 1967; Ellickson, 1993).

This research breaks new ground in arguing that secure tenure for livelihoods deserves as much attention as land tenure for housing. For the urban poor with informal economy jobs and limited space in the home, land in the public domain is an important livelihood asset but is subject to complex claims that have barely been explored. This research draws on in-depth interviews with street traders and key informants in Dakar and Dar es Salaam carried out during 2010–13, to argue that accepted collective use rights extend to public land, that such use provides both public good and private profit, and that appropriate collective rights have the potential to reduce the vulnerability of insecure livelihoods.

The paper first analyses the literature on property rights and the informal economy. This is followed by analysis of field-work findings in Sénégal and Tanzania, including discussion of land rights, street traders' claims for space, and the politics of empowerment. The final section argues for a reframing of property rights for the informal economy.

2. PROPERTY RIGHTS AND THE INFORMAL ECONOMY

While the need for secure tenure for housing land has been widely recognized, land for urban livelihoods has received limited attention although the informal economy provides the majority of jobs in many developing country cities; meanwhile land in the public domain is excluded from land debates despite its central role in accommodating street vending and other urban work.

Since Turner's (1977) seminal book, *Housing by People*, over 30 years of policy and practice have recognized the importance of self-help housing, and centrality of secure tenure in ensuring shelter rights for low-income communities. Among leading proponents, UN-Habitat's Global Land Tool Network, promotes pro-poor land management, improved land administration, and gendered land tools that give women and men equal land and property rights (UNH, 2015). For many years, the focus was on housing land, leaving significant gaps under-explored, including the need for secure land for livelihoods, the role of the public domain in land rights regimes, and the dominance of neoliberal perspectives which emphasize individual property rights over collective rights.

Lack of focus on land for livelihoods is surprising given the prevalence of the informal economy. Although evident in low-income cities for many years, the scale and economic significance of the informal economy has expanded as long-term economic and policy trends such as economic liberalization and structural adjustment have reshaped developing country economies (Jenkins, Smith, & Wang, 2007, pp. 44–5). In many developing countries informal employment now provides 60–80% of all urban jobs (Lyons & Msoka, 2010; Skinner, 2008). Recent estimates from the ILO (2012) suggest that in Tanzania 83% of women and 71% men working in non-agricultural employment were working informally (Sénégal was not in the analysis).

(a) *Legal empowerment and livelihoods*

After many years of neglect, land for livelihoods has finally received some attention, particularly through the work of Hernando de Soto. De Soto's central argument is that the

poor have assets—shacks or land—which remain as “dead capital” because they cannot legally be sold, inherited, or used as collateral for loans, and that legally recognized property titles and formalization of business activity in the “extra-legal” economy are crucial for the benefits of the market economy to accrue to the poor (de Soto, 2000).

There are many critiques of de Soto's approach, which suggest that estimates of economic benefits of secure title have been overstated, that the requirement for formal titles excludes those who cannot afford to pay for registration and discriminates against those without occupancy rights, and that a single-solution approach is inappropriate (Bruce, 2012; Davis, 2006; Gilbert, 2002). Otto (2009) argues that de Soto's theories rest on a raft of mistaken assumptions, for example that better private property law will create tenure security, and that political elites will be willing to relinquish control over land. Joireman (2008) argues that for sub-Saharan Africa de Soto's emphasis on private property rights fails to recognize the customary law and discrimination against women's property rights, and suggests that property law that is most conducive to economic growth is that which develops organically.

Nevertheless, de Soto's work has influenced international debates, in particular the discussions of the Commission for Legal Empowerment of the Poor (CLEP) that he co-chaired. The 2008 CLEP report, published by UNDP, argues that four billion people around the world are excluded from the rule of law and that access to legal processes is crucial to poverty reduction (CLEP, 2008). Four pillars of legal empowerment are identified: access to justice and the rule of law; property rights; labor rights, and business rights.

The CLEP report argues that lack of legal property rights denies the poor access to credit and limits their potential for capital accumulation (de Soto, 2000). The four dimensions of property rights identified include: rules defining bundles of rights and obligations; a system of governance; a functioning land market, and social policy agendas (CLEP, 2008, p. 66). Certain groups are seen as particularly vulnerable to insecure property rights including women, indigenous people, and slum dwellers, while zoning and city planning are cited as instruments of exclusion of the poor (CLEP, 2008, pp. 66, 75–97).

Critically for this paper, the report argues that basic commercial rights for the urban poor should include rights to work, to a work space, and to related infrastructure; street traders in particular require municipal bylaws and appropriate zoning regulations which define use rights for public land especially in central business districts (CLEP, 2008, p. 201, 221). Interestingly, the report moves beyond de Soto's original emphasis on individual title, suggesting that collective legal entities can also hold land rights through transparent co-ownership structures (CLEP, 2008, pp. 75–83).

However, these insights are weakened by major flaws. The over-riding emphasis is on full formalization, and the intermediate or simplified property registration advocated for housing land (e.g., Durand-Lasserve & Royston, 2002) is not considered, suggesting that the doubts raised by Otto and other critics are not addressed. Many other gaps remain in the CLEP report, for example: what bundles of property rights might be defined; the merits of different types of collective or communal ownership; the challenges in ensuring transparent state action on property rights; the politics of land rights, and different land rights needed in urban and rural contexts. This paper accepts the CLEP report's emphasis on the potential of urban public space as a place of work as a seminal advance, but attempts to analyze the implications of these gaps.

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