



# Land ownership and land registration suitability theory in state-subsidised housing in two South African towns

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## ABSTRACT

Land titling programmes around the world have failed to yield the benefits envisaged in many cases. In South Africa's state-subsidised housing programme there is strong evidence that off-register sales and inheritances are occurring, which may give rise to long-term problems for the individuals involved and the general property system. What is lacking are studies that examine where land titling does work and what the critical conditions are that have to exist or be created for it to work. A situation may be analysed in terms of these critical conditions and classified as a weak, semi-weak, semi-strong or strong fit. In the latter two, properties are likely to be registered. In semi-strong situations, however, concerted effort may be required to create the conditions for it to work. Two state-subsidised housing projects were examined in terms of this theory and classified as a semi-strong fit. With some exceptions, contributing factors were that people had lived in the area for a long time, they knew who to approach on land tenure matters, and in general they registered transactions. However, a great deal of continual micro-management may be required to sustain people registering transactions in semi-strong situations.

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## 1. Introduction

There is a shortage of empirical support for theory concerning the conditions under which registered ownership can be effective in poverty alleviation programmes and how and why this occurs. Dating back to the mid-19th century, a substantial body of research on land titling and individual private property as a development driver indicates that in many situations titling programmes have failed to produce the economic and social benefits envisaged. Instead, land titling has caused loss of land and a host of other inequities primarily because the titling programmes have tended to be based on simplistic theory with a narrow focus on economic determinism, whilst ignoring other influential variables in local contexts (Mitchell, 2005; Shipton, 2009). Land titles and individual ownership, however, continue to dominate the development agenda (Benda-Beckmann, von Benda-Beckmann, & Wiber, 2006). While it is important to show where titling programmes fail, it is also important to develop knowledge about situations where individual ownership can be made to work as a tenure form for the poor.

The article examines the effectiveness of registered individual ownership in state-subsidised housing projects in Projects A & B, Fairmile, (pseudonym for ethical reasons), a suburb in a rural town of 36,000 people (Census 2011) approximately 200 km from Cape Town, Western Cape Province, South Africa. The focus is on general findings which are then compared with those reported in a similar project in a second town, Drakenstein-97, in the Drakenstein Valley, Western Cape (Barry & Roux, 2014). The piece should interest people involved in strategies to improve tenure security and land administration in poverty alleviation schemes in South Africa and internationally. There are South African state-subsidised housing projects where off-register transactions prevail, but this is not true of all projects. Specifically, the Fairmile and the Drakenstein-97 studies address a dearth of empirical work in South Africa and internationally which explains how and why registered individual ownership can work in poor communities. More generally it informs the continuum of land rights concept, which is gaining traction internationally. The continuum advocates a plurality of tenure options for improving tenure security, rather than registered individual ownership as the only option (UN-Habitat/GLTN, 2012; Barry, 2015a). While international agencies such as UN-Habitat, UN-FAO and the Global Land Tools Network are developing tools such as the Social Tenure Domain Model to improve land tenure security for the poor based on the continuum, there is a lack of

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empirical work which examines how and why these “alternative” land tools should produce the desired outcomes, have no impact at all, or perhaps do damage. The case studies adapt part of a framework for explaining and predicting the effectiveness of land tenure administration sub-systems (Barry, Roux, & Danso, 2012). A new addition to this framework is a set of simple indicators to communicate the status of a situation to politicians, senior officials and the public. A land tenure form and a land tool combination, e.g. ownership combined with registration, may be classified as strong, semi-strong, semi-weak or weak in particular situations.

Off-register transactions have the potential to become a major property rights problem in South Africa's state-subsidised housing programme, for both currently registered and yet to be registered properties. Department of Human Settlements (2014) statistics indicate that 2.8 million housing units and 900,000 serviced sites have been made available through state housing programmes since 1994. Although a large proportion remain unregistered, a number of studies report a significant number of the registered properties being sold or inherited without the transaction being registered (e.g. Gordon, 2008; Payne, Durand-Lasserve, & Rakodi, 2009; Vorster & Tolkien, 2008; Gordon, Nell, & di Lollo, 2011; Financial and Fiscal Commission 2012). Distinctive to South African state-subsidised housing projects is the majority of the titles that have been registered in ownership. Historically this was due to both fiscal and political considerations (Charlton, 2013). Apart from reduced tenure security, an important consequence of a series of off-register transactions is that cloudy title renders the property ineligible for mortgage financing, and cleaning up the title is a lengthy and very expensive process (Downie 2011). Failure to address the issue has implications for the poverty alleviation objectives of the subsidised housing programmes and possibly for the overall property systems and land market.

To clarify the legal implications, in South Africa, dating back to 1840, the courts only recognise transfers of real property rights that are registered in the Deeds Office and the deeds have to be prepared by a lawyer (*Deeds Registry Act* 47 of 1937, ss.15, 16; *Harris v Buissine's Trustee (1840) 2 Menz. 108*). To reduce the risk of fraud and sharp practice, the lawyer has to check that the vendor and vendee are entitled to enter into the transaction. Another condition for registration to proceed that is relevant to poverty alleviation programmes is the local municipality has to issue a clearance certificate indicating that the municipal account for rates and services is paid up to date (*Municipal Systems Act*, 32 of 2000, s.118). A distinctive characteristic of South African state-subsidised houses is that they are on fully serviced individual parcels. This means that beneficiaries have access to clean drinking water and water borne sanitation, which history has shown to be imperative for community health dating back to ancient times (Hodge & Gordon, 2014). The conundrum is that the housing projects are for the benefit of the poor who have limited livelihood opportunities, and for whom paying the municipal service fees may be very difficult.

Separate from the efforts of international agencies, there have been proposals in South Africa for alternatives to ownership registered in the Deeds Office. Proposals include a system similar to a car licensing system (McNab, 2011) and a system of registration run by municipalities or provinces (Gordon, Nell & di Lollo A 2011; Parliamentary Monitoring Group, 2013). The government is also considering using long term leases as the tenure form for state subsidised houses instead of ownership (DRDLR, 2014). No empirical work on the critical conditions for these alternatives is evident, especially the risks of fraud and sharp practice and how to deal with the political issues relating to ownership. Without a thorough understanding of those critical conditions, these alternative systems might well suffer the same problems, perhaps create greater problems, associated with ownership and registered titles. There

also remains the issue of administering the tenure of the more than 3 million ownership units that have been registered or are still to be registered.

The paper continues with a discussion on developing theory to explain and predict what might happen if particular tenure administration tools are applied in different situations. This frames the study of Projects A & B and the comparisons with the Drakenstein-97 case which follow.

## 2. Land tenure administration effectiveness theory

Land tenure administration system designers and managers require theory that explains how well certain designs are working and predicts how they are likely to work, preferably in the form of a set of hypotheses and the set of conditions under which those hypotheses are found to be valid. This should inform design and action in the local jurisdiction and possibly in similar international contexts. The primary interest is in theory that is generalisable across cases of the same type, i.e. theory that is valid in certain contexts, rather than the detailed theory that emerges from particular cases (Barry & Roux, 2012).

In our experience, case studies are the best way of generating the desired theory. The advantage of cases is they include far more detail than land tenure administration system designers require. The detail provides a comprehensive picture of the contexts in which a set of hypotheses are developed, which reduces the risk of developing the type of narrow, parsimonious theories which are behind many failed land titling initiatives. A way of developing generalisable theory in land tenure administration cases is to develop sets of hypotheses and the statements of conditions under which they have been found to apply for which there is at least persuasive empirical support. The hypotheses can then be compared from case to case to identify which ones may be valid under particular sets of conditions (Barry & Roux, 2013).

The question is how to develop hypotheses and then how to communicate them in a manner that has some practical application. Fig. 1 represents a causal process template for analysing the land tenure type – tenure administration tool compatibility. It is an extract of a broader framework developed in a number of different contexts in South Africa, Ghana, Somaliland and Nigeria, adapted specifically for measuring land registration effectiveness (Barry, 1999; Barry et al. 2012). It draws on a range of empirical and theoretical work on information systems effectiveness, such as in Dwivedi et al. (2009) and on the Reasoned Action Approach for predicting behaviour in social psychology (Fishbein & Ajzen 2010). Referring to Fig. 1, we may predict that people will register their land and register transactions if they consider registration more useful and accessible than other strategies available to them. Two major factors which are antecedents of the choice of strategy are firstly whether it is the generally accepted norm to register private property, and if there are control factors which prevent registration (e.g. powerful elites, corrupt officials, absence of resources). If so, are there enabling factors which can help people overcome these controls (e.g. subsidies, employer support)? A range of factors in the local context that are antecedents of these constructs include: landholders' economic status and livelihood opportunities; the levels of power and its application by state agencies, officials, groups within a local community, and family members; the nature of the registration system and the consequences of registered versus off-register transaction strategies; and landholders' levels of knowledge and understanding to assess the risks and benefits of the different strategies to administer their tenure. As per Fig. 1, the situation is systemic and continually evolving as changes in the local system and general environment occur.

What is still required is a way to communicate the results of

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