



# Do Informal Land Markets Work for Poor People?

An assessment of three  
metropolitan cities  
in South Africa

## Literature review

Isandla Institute and  
Stephen Berrisford Consulting  
with Progressus Research and Development



**Urban LandMark**

MAKING URBAN LAND MARKETS WORK FOR THE POOR

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**Table of contents**

1 Introduction.....2

2 Methodology .....2

3 Recent research .....3

4 Land markets.....9

5 Management of urban land ..... 13

    5.1 Legal and policy reform with regard to land tenure ..... 13

    5.2 Land use management..... 16

        5.2.1 Cadastral system ..... 17

    5.3 Land use planning ..... 18

6 Informality ..... 19

    6.1 Semi-autonomous social fields ..... 19

    6.2 Resistance ..... 20

    6.3 Quiet encroachment ..... 22

7 Formality and informal land markets..... 22

    7.1 Informality ..... 22

    7.2 Land ..... 23

    7.3 Legal pluralism ..... 26

8 Conclusion ..... 28

9 References..... 28

## 1 Introduction

The literature on urban land generally suggests that there is a straightforward, albeit complex, relationship between (formal) urban land management processes and land markets and informal land markets. Researchers and policy makers understand that the interplay of urban management processes and markets either ‘force’ or encourage people to resort to informal land arrangements. On one side urban land management processes and policies and the land market are arrayed to constitute formality. On the other side, the somewhat anarchic and unregulated activities (usually of poor people) are gathered together under the rubric of informality. Separating the two is a range of ‘barriers to entry’ inherent in the formal policies and urban land management systems and the market.

In this review however, we argue that for researchers and policy makers to suggest that there is a uni-directional relationship between informal land dynamics and land management processes is only half the story: informal land dynamics and land management processes are more complexly intertwined than the current literature suggests. There is a need to think about how processes in different parts of the city co-constitute each other and gain their meaning and social value in the overall process we call the social production of the city (Calderón Cockburn 1999a). As will become evident through the review, the view that informality and formality co-constitute each other has serious implications for interventions in urban land systems in that it opens up new possibilities for addressing the land processes that appear to impoverish large numbers of urban residents.

The aim of this review is to provide an overview of two distinct sets of literatures that are often related and sometimes overlap. The first is the literature related to informal market dynamics and understandings of informality. The second includes an international review of the dynamics and management of urban land systems, but with a specific emphasis on countries in the South.

The review begins with a methodological note (Section 2) before drawing on a few of the important studies of (informal) urban land markets in Africa to highlight key issues that have structured recent debates (Section 3). This is followed by sections that examine how urban land markets are understood (Section 4) and how these understandings relate to urban land management processes (Section 5). In relation to Sections 4 and 5, Section 6 reviews the literature on informal urban land markets. Finally, Section 7 presents different ways of thinking about land and law that are necessary to sustain an alternative view of the relationship between formal and informal urban land markets.

## 2 Methodology

The review is based on a literature search of major journals relating to urban issues, the catalogue of the British Library, journals relating to land management systems, as well as journals covering legal issues. This has been complemented by the project team’s existing knowledge of research literature generated in relation to informal economy issues, poverty, and urban land management systems. The review included

an Internet scan of important websites such as the Lincoln Land Policy Institute, UN Habitat, and UN Commission for the Legal Empowerment of the Poor.

### 3 Recent research

In comparison to research and activity in relation to rural land market issues in Africa, urban land markets have tended to receive relatively little attention (Kironde 2000; Mattingly 1991; Mooya and Cloete 2007). In South Africa this is reflected in the lack of state institutional responsibility for urban land management systems. Urban land issues have tended to fall between the Department of Land Affairs and the Department of Housing while the Department for Provincial and Local Government has been left to pick up other issues. The result in South Africa has been that urban land management issues have suffered from “policy and implementation neglect” (Royston 2002, 176).

While recent urban land market research does not compare in output and policy interest in comparison to rural land market research, there have been a number of important contributions to our understanding of African urban land issues. These studies are important points of reference for any new work on urban land systems and for this reason are summarily presented now. The purpose is to provide a set of reference points in the literature as well as an indication of the foci of recent research.

The first study to draw attention to is that undertaken by Robert Home and Hilary Lim. They aimed to explore the role of local **land titling in poverty alleviation** in peri-urban settlements under different land tenure regimes, comparing the experience of selected African and Caribbean countries within the commonwealth (Home and Lim 2004). This research was framed in important ways by the claims made around tenure reform by Hernando de Soto and his Peruvian Institute for Liberty and Democracy (cf. de Soto 1989, 2001). De Soto is arguably an important figure in issues relating to urban land management and informality and one of the important studies in Africa is his Institute’s study of informal land markets in Tanzania. This review will return to this study shortly and de Soto’s ideas and claims more generally in the section on land tenure later. For the moment, it is useful to outline Home and Lim’s main conclusions that informal land issues are more complex than that suggested by a direct relationship between tenure reform and poverty alleviation, that they did not find evidence of the benefits of urban titling claimed by de Soto, and that states should generally “soften their hostility to ‘squatter’ settlements” (Home and Lim 2004, 154).<sup>1</sup>

Overlapping in time, if not in aim and scope, has been the study on six Anglophone African cities led by Carole Rakodi and Clement Leduka (2003).<sup>2</sup> The focus of this study was to analyse the characteristics of **informal land markets and delivery systems**, to increase the institutional understanding and assess the strength and weaknesses of alternative land delivery mechanisms, and to make recommendations for policy. The conclusions of this study highlighted the importance of an historical

<sup>1</sup> For a thorough exploration of the relationship between land markets and poverty alleviation in the South African context see Manya Mooya and Chris Cloete (2007).

<sup>2</sup> The six cities were Eldoret, Kenya; Enugu, Nigeria; Gaborone, Botswana; Kampala, Uganda; Lusaka, Zambia; and Maseru, Lesotho.

understanding to land laws and confirmed the profoundly gendered nature of informal land delivery systems in these cities. Their study also concluded that informal land delivery is the main channel for poor people to access land and that non-commercial land access is now restricted. These restrictions mean that new and poor households face difficulties in accessing land for housing and that the vast majority of poor people now purchase land. Poor people that are unable to purchase land become tenants, and in practice, most poor people are tenants. Rakodi and Leduka (2004) highlight that informal land delivery systems build on earlier practices and respond to state land management system failures. The advantage of informal land delivery systems is their ability to provide a high volume of land while; the disadvantage is that the location of the land made available is often inappropriate. In their view, poor people choose informal land delivery systems over formal land systems because of informal systems' user-friendly characteristics and greater social legitimacy. The researchers chose to value poor people's choice to operate in the informal land delivery system rather than see 'barriers' (Rakodi 2005). However, the study highlights that although informal land delivery systems are resilient, they are under pressure. Rakodi (2005, 2) turns around the argument that there are barriers to the formal system and suggests that the success of informality can be attributed to their practical attributes and social legitimacy. Her argument is that policies have failed because they have not been based on an understanding of the social rules governing how people act in partly commercialised informal land systems (Rakodi 2005, 1).

The next important study is that of de Soto's Institute for Liberty and Democracy in Tanzania. Although this study and the policy changes that are anticipated to follow are only focused on Tanzania, this work can be regarded as part of a broader international process linked to a high-level United Nations Commission on the Legal Empowerment of the Poor.<sup>3</sup> The aim of the study was to get as "complete as possible a picture of how Tanzania's extralegal economy actually operates and how the official system interacts with it based on the conceptual framework that has been developed and advocated by de Soto over the years (de Soto 2006, 19).<sup>4</sup> The result was a double series of recommendations. The first focused on 'top-down' **reforms** to adapt existing **legal institutions** to meet the needs of poor people. The second highlighted 'bottom-up' reforms which built on and formalised the extralegal 'archetypes' of practices of poor people (de Soto 2006, 55). Understandably, such a study, that includes the support of Tanzania's ex-President Mkapa, has attracted a lot of attention and critique.

The fourth study that requires mentioning in this section is research on 'neo-customary land tenure' in African cities.<sup>5</sup> Alain Durand-Lasserve, Michael Mattingly and Thomas Mogale have led the study. The aim of this study is to highlight and then clarify dynamics at the interface between formal and customary land tenure systems. 'Neo-customary land tenure' is defined as land for housing that is provided by a catch-all understanding of informal processes that combine customary practices, other informal and formal practices. 'Neo-customary land tenure' is understood to involve social institutions, including central and local government institutions but the basis remains the groups that make land available to their members.<sup>6</sup>

<sup>3</sup> See <http://legalempowerment.undp.org>

<sup>4</sup> See also Lusugga Kironde (2006).

<sup>5</sup> The project includes a South African case study: Mandela Village north of Pretoria.

<sup>6</sup> See Durand-Lasserve (2005).

Within South Africa, the report completed by the Urban Sector Network and Development Works (2003) aimed to highlight key urban land issues and identify gaps in policy and practice. The study provides a relatively recent quantitative and qualitative overview of urban land issues. The USN and Development Works' (2003) concluded that there were forms of **market failure** because of:

- Apartheid urban patterns
- Emergence of a gap in the housing market
- Lack of access to appropriate credit
- Lack of low income estate agents
- Complex property transfer procedures

The report assumed that although the current legislative configurations were too complex and created barriers for poor people to access land the system needed to be transformed. In the view of the report, more flexibility was needed in the system to ensure that poor people could access urban land that was underpinned by “documented property rights that are defensible in court and which, in the case of ownership, are tradable on the property market and which can potentially contribute to using property as collateral for credit” (USN and Development Works 2003, 4).

Paul Jenkins (2001; 2002; 2004) has had a long standing interest in urban development in Mozambique and his work on urban land markets for housing in Maputo have yielded important insights. He adds his voice to a growing call to see cities and the activities of urban residents differently (cf. de Boeck and Plissart 2004; Robinson 2006; Simone 2004). Jenkins (2002) points out that we are now focusing on how African **urban dwellers adapt the city** to something more suitable to their needs rather than as previously where the focus was on how they adapted to urban life and wage employment. He “recognises that the formal land market in many developing countries will not act in the foreseeable future on behalf of the urban poor” (Jenkins 2001, 642) and therefore, the “answer is thus not to find ways to regularise the informal, as this runs the risk of just providing new systems for recognition of land rights which are limited and corrupt, and exacerbate social exclusion, but to base the systems on the cultural values and social mechanisms that actually operate – i.e. adapting the formal system to the informal reality” (Jenkins 2002, 4).

There is relatively little research into informal land markets in South Africa. There are only two such studies which we are aware of – Boaden and Karam (2000) and the Rutsch Howard Consortium (2003). Boaden and Karam (2000) use the housing market as a conceptual framework to analyse recipients of subsidised RDP houses selling off their units at less than the initial cost of supplying them. The aim of the research was to provide greater clarity on why new owners sell their units so soon after being allocated them and at a lower price than the cost of the state providing it. Their analysis is more of the housing market than the land market, nevertheless, it is important because it starts to address issues related to informal sales.

Boaden and Karam (2000) draw on existing research such Catherine Cross' (c.f. 2002) insights that the urban model of accessing land derives from experiences of the rural model in that newcomers will approach the figure of authority for permission to reside in the area. Davies (1998) further specifies these ideas by identifying three key behaviour patterns in South African urban informal settlements. Firstly, that there is a communal and individual bias in land tenure. Secondly, that there is usually a period of sponsorship and probation before a new resident is accepted into an area. Thirdly,

that allegiance and affiliation to a local group, such as a political party, is often required before a newcomer is accepted. They start to look at transactions in informal settlements and informal transactions in formal RDP housing projects and to what extent renting is occurring in informal settlements. They found it difficult to ascertain whether transactions were formal or informal because respondents were not clear themselves (Boaden and Karam 2000, 6). They used an open-ended questionnaire in four settlements (Delft and Du Noon developed with project subsidies), Atlantic Heights (consolidation project) and Philippi East (informal settlement)).

In Atlantic Heights, the development trust of the area estimated that approximately 8 per cent of recipients had elected to sell their units once the pre-emptive clause had expired (Boaden and Karam 2000, 8). In the informal settlement of Philippi East, the structures were sold but not the land as this was regarded as belonging to somebody else. This is an interesting recognition of formal land ownership. There did seem to be evidence of brokers emerging in the formal settlements although no information was obtained on how much the units were being resold for.<sup>7</sup> In terms of dispute resolution the levels of the process related to: between the parties, resorting to the civic organisation, resorting to the police. However, the local authority was considered not to be a point at which to resolve disputes because they were considered as discouraging renting.

It appeared that the transactions resulted in downward raiding. The value of the sales seemed to have an upper limit of R10,000 while the lower limit ranged considerably. This didn't seem to reflect the value of the land or infrastructure. Often properties seemed to change hands so that other land uses, particularly commercial uses could be pursued. In such cases, location seemed to be important but Boaden and Karam found that in general, location within a project area did not seem to be an important factor affecting the value of a dwelling (2000, 14).

In conclusion, Boaden and Karam found significant incidences of buying and selling of subsidised housing. These activities tended to occur in two phases, immediately after allocation and then more gradually as the recipients could no longer afford the living costs associated with service provision. They estimated that between 10 and 30 per cent of houses could have changed hands at least once. The seller is usually under duress in the formal settlements but less so in the informal settlement.<sup>8</sup> It is interesting

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<sup>7</sup> The role of informal land brokers is well developed in other countries. For example, Edsel Sajor (2005) shows that attempts by land brokers to professionalise and exclude what were considered to be informal land brokers broke down in Cebu City, Philippines. This was because of weaknesses on the part of the state to effectively regulate the system; the value and indispensability of intimate local knowledge; and the relative power of large land buyers over formal land brokers in transactions that were historically conditioned. This led to hybridised networks that consisted of both formal and informal land brokers which leads to the conclusion that there is nothing inherently incompatible between informality, modernisation and high-performing land markets.

<sup>8</sup> Distress selling is a pervasive feature which the middle classes are able to take advantage of. Thirkell (1996) looks at the involvement of the middle-classes in informal land markets through processes of 'downward-raiding' in Cebu City, Philippines. Thus where informal land transactions were seen as a strategy primarily of poor people, increasingly wealthier people are engaging in these practices. The answer for the participation of middle classes is that the cost of formal options is increasingly out of their reach and the increased confidence in informal land markets. The increase of middle-class people in informal settlements is considered to be beneficial to poor residents because the process of infrastructure provision tends to be speeded up. However, the participation of middle-classes in wider market activities such as acquiring plots, bargaining and the timing of their occupation tended to



that they found that delays in providing transfers increased the chances of informality. This level of informal transactions was also found in the research undertaken by the Finmark Trust on Township Residential Property Markets. This research found that over a five year period many households had transacted by purchasing a house from someone else (Nell, Gordon, and Bertoldi 2004). While this study was focused on the housing market, it is indicative of significant levels of transacting that may or may not have included land in the calculation.

Settlement type	Percentage
informal settlement	63
Site-and-service settlement	14
RDP housing project	12

Source: (Nell, Gordon, and Bertoldi 2004)

The Rutsch Howard Consortium (2003) looked at land markets that were bypassing formal land tenure mechanisms and the deeds registration system on the periphery of Durban. In 2001, a survey of Folweni showed that “there was an informal or extra-legal land market operating and that it functioned well within its local context” (Rutsch Howard Consortium 2003, 3). In a follow up survey in 2003 there was an opportunity to establish what impact an upgrading project that would deliver full services and freehold tenure to the residents would have on the operation of the informal system.

The study found an important role for an external witness to the transaction. This could range from the councillor in the area, to the Izinduna, the police, a community leader or some other mutually agreed upon person. In some cases, attorneys (but not necessarily conveyancers) were approached to confirm the value of the property and witness the transaction suggesting a new interface between formal and informal systems. The immediate cause of the extra-legal land market are traced to “the complexity of the formal system which is not often understood, is time consuming and is expensive” (Rutsch Howard Consortium 2003, 12). The origins of this are traced back to a bureaucratic vacuum that emerged around the social and political changes that occurred in Kwazulu-Natal in the late 1980s and 1990s, the collapse of influx control and huge population movements. Inevitably, people drew on their experiences and histories of rural land tenure arrangements and adapted these to bring some measure of legitimacy and stability to the land market. Despite these factors, they make the point that actors in informal land markets consider their arrangements “to be *in lieu* of the formal system of land registration and not in substitution” (Rutsch Howard Consortium 2003, 14). The research sets out to link the extra-legal to the legal. The conclusions that emerge are that the extra-legal system “operates as the default paradigm, ... is not hostile to the formal legal land market and tenure regime, and is functional” (Rutsch Howard Consortium 2003, 37).

In a review of land availability issues Todes et al (2003, 261-268) identified the following factors as restricting the availability of land in three of South Africa’s metropolitan areas – eThekweni, Cape Town and Port Elizabeth (Nelson Mandela Metropolitan Council):

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adversely affect poorer households.

- competing land use claims to land between residential and industrial and commercial uses (and environmental uses)
- considerable amount of well-located land is privately owned forcing the local authority into a reactive mode
- uncertain ownership within the state of well-located land
- institutional fragmentation within the state hampers co-ordinating responses
- level of housing subsidy amount used for land is below the market value of well-located land
- political issues such as Ingonyama Trust
- NIMBY factors
- Complexity of devising projects that can get around these issues are resources and time intensive.
- Money allocated to poorly performing projects in peripheral locations remains locked in these projects
- Difficulties in the administrative system mean that centrally located projects are under pressure where the costs are higher.
- Absence of a land policy linked to spatial framework

To round off this list of recent research, which is by no means exhaustive, we consider Adarkwah Antwi's work on Accra, Ghana (Antwi 2002; Antwi and Adams 2003; Antwi and Deakin 1996; Antwi and Omirin 2006). Antwi (2002) points out that informal land systems tend to be considered by policy makers as inefficient and as responsible for problems such as the lack of allocation of land for recreation/education/ public uses within informal settlements. In addition, traditional land owners are identified as being responsible for "high and escalating land prices, control who obtains land, the extent of land released, and charge arbitrary prices reflecting some non-economic attributes of purchasers" (Antwi 2002, 7). The argument goes that government intervention is needed to solve these problems. However, as Antwi notes, many assertions about informal land markets are not based on any empirical evidence. In the settlements in Accra, Antwi found that traditional landowners do not control the market, the choice of who is granted land is determined by ability to pay and that land prices are not often high and determined by market conditions. The results also suggest that bureaucratically supplied attributes of markets such as proof of titling and registration are completely irrelevant to this market (Antwi 2002, 21). This leads Antwi (2002, 22) to argue that "future formal policies and practices of land management should be viewed in terms of market regulation, not intervention".

Although these studies have all had different aims to the research being conducted now, they highlight important themes that both help frame and differentiate the current research. Important themes that emerge relate to land titling and legal reforms, the relationship between poverty and land, delivery systems and urban policies and land markets and forms of market failure. Despite this work, there remains widespread agreement that planners and policy makers lack basic information on African urban property markets and consequently how to manage urban land more effectively. In the following section, we turn to consider literature related to land markets before turning to the management of urban land.

## 4 Land markets

There was general recognition in South East Asia that the informal and illegal land markets were the main ways in which people accessed urban land (Angel et al. 1983). Calderón Cockburn (1999b) reached the same conclusion for Latin American cities by the end of the 1990s. Rakodi and Leduka (2004) have recently found the same conclusion for six cities in sub-Saharan Africa.

Generally the literature has tended to divide into two areas. Those that see informal land markets as arising from the *logic* of the capitalist land market. This view tends to associate the activities of agents in land markets with the general framework of the mode of accumulation. The other view is that it is the costs associated with *legality* that explain the informal land markets. This leads to the conclusion that radical regulatory reform is required and the development of a land market is considered a positive outcome.

Kironde (2000, 153) sets out a general understanding of urban land markets in Africa. In terms of this general understanding, an urban land market is considered to be a “framework in which those seeking land, and those owning or controlling land, are brought into transaction in order to effect access to land by the land seekers”. The understanding of the market framework is essentially prescribed by definitions of who participates in it and their assumed rationalities. For example, Mooya and Cloete (2007, 152) define the land market in terms of categories of agents such as ‘users’, ‘investors’, and ‘developers’. These categories give rise to ‘letting markets’, ‘capital markets’, and ‘development markets’ respectively. What is important to note is that these understandings are based on theoretical abstractions rather than observations of actual economic practices. The distinction between theoretical abstractions and actual economic practices around land transactions is an important one and we will return to it later.

For David Dowall (1993, 3), land markets perform two additional functions. Firstly, to allocate land so that the quantity of land supplied equals the quantity of land demanded and thereby ‘clearing’ the market, and secondly ensuring that land is efficiently used. The demand for land is understood as a demand derived from the demand for different economic activities (Dowall 1993). Efficient land markets therefore not only allocate land to maximise social welfare they also allocate productively amongst land uses (Harvey and Jowsey 2004). Different land uses, have differing potential to contribute to economic growth. The land market “encourages developers to develop sites to their highest economic potential, picking that use and building at that density that will yield the highest residual land value. Any bid to buy land to be used for a lower intensity use will lose out to bidders who will be able to make a higher offer” (Dowall 1993, 7). Maintaining efficient land markets requires the (local) state to eliminate barriers to entry, promote competition, and avoid unnecessary regulation that restricts the operation of the market (Dowall 1993, 11). The acceptance of this view of land markets, introduces the possibility that markets are understood to be unable to work for poor people.

There has been relatively more research conducted on rural land markets and it is instructive to borrow selectively from insights generated from such work. The dis-equalising effects of transactions costs have generally resulted in policy makers

favouring land-rental markets over land-sale markets. This is because they are considered to be more efficient and equitable and override the assumed benefits that derive from the investment potential associated with full ownership rights. Baland et al (2007, 284) summarise four disadvantages for efficient and equitable outcomes with land-sale markets:

- Transaction costs tend to be higher in land-sale markets and fixed costs associated with registration may be higher
- When the value of the ability to use land as collateral or any expected appreciation is capitalised in land prices, smaller and poorer households will find it more difficult to acquire land
- Where there are serious credit- and insurance-market imperfections, frequent and repeated adverse shocks can force smaller land holders into distress sales while larger (generally wealthier land holders) are able to insure themselves or diversify their activities
- Where there is an absence, or the capital market is inaccessible to large numbers of the population, land ownership tends to be used to accumulate savings, particularly as a hedge against inflation, and this acts as a cost in terms of lower levels of efficient productive use.

However, Baland et al (2007, 286) note that the “impact of land-sale transactions on land distribution is *a priori* ambiguous”. In some cases, land sales have led to higher levels of inequality in land ownership and in others, market activity has had an equalizing effect.

Kironde (2000, 153) notes that the supply of urban land is influenced by the nature of the topography, the extent and pattern of infrastructure, the willingness of current landowners to make land available for sale, and government restrictions on land uses. Paul Jenkins (2002) observes that what people are able to do with land is also a function of their ability to invest in high density or high rise constructions.<sup>9</sup> Since such forms of construction are usually beyond the reach of most poor people, residential land uses dominate, high densities emerge in accessible locations, and development usually follows the main infrastructure and transport routes. Kironde goes on to suggest that there are five main policy instruments that governments can use to affect the supply of land. These are: “property rights, land titling and registration, land use regulations, direct public intervention including land acquisition, and the use of fiscal powers” (Kironde 2000, 153).

It is useful at this point to review how urban land markets are abstract and conceptually modelled because this allows an appreciation of how the various studies described above have enriched policy makers’ understandings of urban land markets. What distinguishes urban land markets in Africa is that they “operate almost totally outside the realm of public authorities” (Kironde 2000, 153). However, this is not the situation in South Africa where the cadastre is complete and the state has substantial resources to intervene in urban processes.

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<sup>9</sup> Berner (2001) also attends to the relationship between land and construction processes and suggests that by reversing the conventional sequence of Planning-Servicing-Building-Occupation it becomes possible to lower the costs of land for poor people.

One of the ways in which studies of urban land markets have been enriched is through drawing on theories of New Institutional Economics (NIE). This is partly because it makes no *a priori* assumptions about whether the institutions are formal or informal. In this way, institutional analysis provides a means of avoiding the problems associated with the formal-informal dichotomy. As Mooya and Cloete (Mooya and Cloete 2007) point out NIE *extends* neo-classical economic theory by introducing the structure of property rights and transaction costs, and including how markets are organised and the structure of contracts.<sup>10</sup> The key argument is that there are costs associated with any transaction. Institutions emerge and evolve to reduce transaction costs. Institutions are therefore important to understanding economic development.

There are two ways in which institutions have tended to be considered. The 'behavioural perspective' sees institutions as a complex of norms and behaviours that are sustained over time because they serve collective purposes that are valued by the people that draw on them. The second consideration is the 'rules perspective' and it is this view that has come to dominate the NIE literature. The 'rules perspective' defines institutions as rules that enable people to co-ordinate their activities because such rules assist participants to form expectations about their encounters and engagements with others.

Drawing on Nabli and Nugent (1989), Rakodi and Leduka (2003, 13) identify three common themes that inform the conception of institutions. Firstly, institutions are considered as rules and constraints that exist to minimise transaction costs by setting out the range of expected actions or behaviour. Secondly, institutions govern individuals' relations with each other, whether in voluntary arrangements constituted by customs and traditions or in situations where relations are enforced by a third party, such as the state. Thirdly, a rule is only considered to be a 'social institution' if it is "predictable and able to guarantee a stable (but not necessarily efficient) structure to human interactions" (North 1990, 6 in Rakodi and Leduka 2003, 13). While institutions may reduce uncertainty and establish stability they may not be efficient. Mooya and Cloete (2007, 149) draw attention to the fact that observed institutions may simply reflect the interests of those who have the power in a society. The conclusion they draw is that institutions will reduce transactions costs for some actors and for some activities but not for others.

Within NIE, institutions can be formal or informal and for Douglass North (1989), informal institutions emerge as norms of behaviour from formal institutions and the ways in which individuals perceive their world. As (Rakodi and Leduka 2003, 13) comment, these perceptions may be shaped by "experience, policies, ideologies, religion and social values". While acknowledging that formal institutions are important, North (1989, 1324) suggests that it is the informal institutions "that probably provide the most important sources of stability in human interaction" (in Rakodi and Leduka 2003, 13).

The concept of trust has emerged to explain how informal institutions operate because in the absence of formal and enforceable contracts, the costs of transacting are much higher. Rakodi and Leduka (2003, 14) observe that "trust is generally defined in terms

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<sup>10</sup> It is important to bear in mind that NIE does not do away with the assumption of individual economic rationality that lies at the core of neo-classical economics but introduces more 'reality'.

of expectations or faith in the integrity or trustworthiness of parties to a transaction in a relationship ... and is important because of uncertainty or lack of full information and the costs of knowing the likely behaviour of others”. Importantly, trust can be considered as being both in relation to other people as well as to social systems. In this view, trust is not considered to be a static nor invariable quality of the nature of people’s relationship. A useful distinction has been made between ‘unconditional trust’, ‘conditional trust’, and ‘distrust’ (Jones and George 1998). In Jones and George’s (1998, 537) view, these three states of trust are different states of the same construct. This means that it is possible for the nature of trust to change in any transaction – either by improving or deteriorating.

As Rakodi and Leduka (2003, 14) point out, this understanding of trust appears highly useful to explain informal land transactions where participants appear familiar with the social environment and where the transactions appear unregulated. Evidence suggests that parties to informal land transactions “possess knowledge of their rights/interests and obligations in the things being transacted, and are able to attach meaning to their actions, as well as to structure the social conditions of their acts of exchange in a manner that is consistent with the expectations of each party... transacting parties trust one another because they are conversant with the social institutions structuring their transactions and either interpret these institutions in a similar fashion or strive to do so”.

Generally, transactions costs are reduced to those related to participating in the market (although they do not necessarily need to do so). High transaction costs can cause market failures because if the costs are too high, the ability to transact will be limited. Economic transactions are characterised by three features:

- Uncertainty
- Frequency with which transactions occur
- Degree to which transaction-specific investments are made.

Mooya and Cloete (2007, 151, emphasis in original) note that generally, “transaction costs *per exchange* are positively related to uncertainty and transaction-specific investments and negatively related to the frequency of *market* transactions. NIE suggests that there are transaction costs associated with each step in a transaction:

Steps	Possible transaction costs <sup>11</sup>
1	Searching for information about prices and quality and potential buyers and sellers for information about their behaviour and circumstances
2	Bargaining needed to agree
3	Making the contract
4	Monitoring to ensure that parties agree to the contract.
5	Enforcing the contract when parties fail to observe their agreed obligations
6	Protecting rights against third party encroachment
7	Searching for information about other prices and qualities...

There is the suggestion that urban land markets are segmented. These segments operate within certain socio-demographic characteristics and spatial boundaries and

<sup>11</sup> Adapted from (Eggertsson 1990, 15 in Mooya and Cloete 2007, 150).

limit the mobility of residential demand. However, research has also shown the existence of a broader demand segment that “floats or oscillates among various alternative mechanisms whose existence and volume are determined by the actions of the different agents who structure the market” (Calderón Cockburn 1999b, 14).

The notion that informal submarkets develop has been noted. Poor people demanding land are generally required to look for options of illegal sale, invasion, gradual occupation, or even State-authorized allocations. These options are usually located in different parts of the city and create limits to the spatial mobility of different demand sectors. Consequently, stark socio-spatial segregation emerges and is entrenched.<sup>12</sup> Official acceptance and tolerance of illegal forms of accessing land guarantees the permanence of these settlements. But Calderón Cockburn (1999a) suggests that mobility between different types of settlements may be related to improving economic circumstances of the household but not the idea that one form of settlement is “legally” more secure than any of the others. This raises the issue of why the category of ‘informal’ is useful. Our argument here is based on the recognition that research and policy discourses remain locked in the (formal/informal) binaries that characterise the debates – even if these binaries do not match up to the nature of actual practices. If these discourses are to be challenged, one element of the strategy must be to unsettle the certainty with which the binaries are counterposed.<sup>13</sup>

Within the South African context, LEAP’s (2005) suggestion to distinguish between those transactions within the Registry of Deeds and ‘off-register’ transactions is adapted up to characterise the nature of the multiplicity of different transactions within the city.<sup>14</sup> This does not so much get away from binaries as start to open up ways to think about how different agents are part of the processes of transacting. Part of the process of exploring the role of different agents is to examine urban land management processes that are usually considered as co-extensive with the (formal) urban land market.

## 5 Management of urban land

The need for transparent and accountable land management practices that promote equitable distribution have been recognised (Oruwari 2004). Yet, in practice this appears harder to achieve. In this section we investigate attempts at legal and land use management reforms. Such reforms are generally considered as important for making land markets work.

### 5.1 Legal and policy reform with regard to land tenure

The content of debates that have shaped the thinking behind land tenure systems over the years have been profoundly shaped by international organisations such as the World Bank. The orthodoxy that has developed has seen tenure reform as the

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<sup>12</sup> However, Ward et al (1994) suggest evidence from Mexico that suggests the opposite: that high levels of inequality promote inter settlement integration.

<sup>13</sup> For a broader discussion of the issues created by binary understandings of land transactions see LEAP (2005).

<sup>14</sup> This adaptation is from LEAP’s (2005, 5) distinction between customary, registered with the deeds system, off-register and transitional tenure types.

registration and granting of formal rights to land, such as leaseholds and freeholds. The ideology behind this is based on the elevation of individual ownership of land and the perceived need to prevent systematic overuse and degradation of land based on 'communal' or 'common property' forms of ownership. Individual ownership of land is also seen to encourage the spirit of innovation and entrepreneurship among landowners. Thirdly, and more importantly, formal registration is perceived to provide sufficient security to the landowner, which is related to the fourth perceived advantage, that is, allowing, the landowner to obtain credit from banks and other financial institutions. Finally, formal title enables entry into the formal market. This market-based rationale has been particularly espoused by writers such as Hernando De Soto (2001). The issue of property rights returns this review to consider the work of Hernando de Soto. According to Ray Bromley (1994, 131) de Soto's understanding of informality is self-developed rather than deviating from more mainstream definitions.

De Soto's understanding of the informal sector is based on four characteristics:

- It is socio-legal in character deriving from the interdisciplinary field of law and economics rather than mainstream economics and sociology.
- It focuses on economic activities and enterprises rather than individuals, households or neighbourhoods; it represents a way of doing things rather than a fixed population or territory.
- Bridges the gap between production and reproduction by dealing with the totality of income generating and expenditure saving activities.
- It is not dualistic, because it does not presuppose that the whole economy is, or should be, divided into two sectors (Bromley 1994, 132).

Based on a simple distinction between means and ends criterion, de Soto is able to exclude criminal type of activities. Although informal activities are considered to be between criminal and formal activities, informal activities are on a par with formal ones in terms of social utility. De Soto's views have received wide appeal because, in Bromley's view, they:

- Promote a peaceful and painless process of economic development and remove the burden of guilt from rich countries in colonialism.
- Do not discuss natural resource constraints or dictatorships, racism, crime, or speculative profiteering.
- By seeing mercantilists and coming from both the Left and the Right, de Soto can assume a centrist position.

Bromley notes that although de Soto's argument is clear and simple, it is far from being unambiguous (Bromley 1994, 146). De Soto's argument is that "informality results directly from the promulgation of unjust regulations and sees the state as the villain" (Bromley 1994, 134). However, as Jones and Ward (Jones and Ward 1994, 17) remark, in relation to the view that the state is failing poor people, that the state does not have the "monopoly on bad decision making, out-dated or arbitrary systems of control or divisive policies..."

The ambitious and often inappropriate nature of a narrow approach to property rights quickly emerged with time in the various developing countries it was implemented



in.<sup>15</sup> Quan (2000) writes on its implementation among peasants in agricultural land holdings in Africa and illustrates that the nature of land rights did not change significantly and traditional rights of access and inheritance still governed attitude towards disposing of the land. Further, public and private agencies were reluctant suppliers of credit to land because owners were seen as bad risks. Formal registration also dispossessed certain groups of their guaranteed rights over the land. Fourie (1999) notes these tenure systems also often involve slow and complex delivery processes. Other writers question the fundamental premise upon which these systems are based, which revolves around the notion that assimilating the poor into a capitalist system is to their benefit (Pugh 1997; 2001; Gilbert 1999).

A rights based approach to land tenure has also increasingly been adopted as an alternative way of looking at tenure reform. The notion of the right to the city, initially espoused by the urban writer Henry Lefebvre (1996) has become increasingly mainstream and adopted by a number of writers. Maia (1995) and Fernandes (2000), for instance, encourage the need to move away from the conception of land and housing rights as necessarily property rights.

There has been the call for a “gradual” and “incremental” development of tenure systems, culminating in the granting of freehold tenure (Payne 2001). Fourie (1999) calls for the need to explore varied and flexible tenure systems. More recently, the usefulness of ‘traditional’ and ‘customary’ systems of land tenure in urban areas has come under scrutiny. As noted above, Durand-Lasserve et al, (2004) for example, call for the recognition of “neo-customary” practices.

The development of the South African system of tenure is inextricably linked to its history of colonialism and apartheid. With the arrival of European settlers at the Cape, the first traces of individual ownership to land based on the Roman Dutch concept of ownership emerged. Key to this concept of ownership in terms of Roman Dutch law is the right of disposal (Miller and Pope 2000). This system of land law consequently developed towards a formal and structured system of granting and transferring rights to land.

The history of transplanting this notion of individual ownership to land however coincided with a distinctly exclusive and discriminatory manner of granting these rights to land. Miller and Pope (2000) note that the Native Land Act 27 of 1913 began, what was to be, a series of laws that effectively dispossessed blacks of their land, and that urban land tenure for black inhabitants particularly followed this discriminatory pattern. This set the scene for tenure reform in the new democratic dispensation. Reform initiatives revolved around three pillars, that is, tenure reform, restitution and re-distribution.

The effects of these reform initiatives, especially with regard to urban land and the poor have been commented upon. In the realm of private property, laws preventing evictions have, according to Berrisford (Forthcoming) brings to the fore considerations of social justice when property rights are being enforced. Rights to property have ceased to be seen as superior to other rights. However, many of these

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<sup>15</sup> Lauren Royston’s (2006) examination of the issues in the South African context is particularly useful.

laws do not provide for, nor were they intended to, enable the equitable distribution of land in urban areas. Huchzermeyer (2003) notes that the post Apartheid land reform and transformation agenda falls short of a critical assessment of land distribution in urban settings. Van der Walt (2001) writes of vestiges of the entrenched view that existing land rights need to be protected from, without having first to examine their larger socio-political legitimacy. Miller and Pope (2000) trace the origins of this to the negotiated settlement on land during the transition, wherein any fundamental departure from the prevailing political economic norms based on free enterprise and private ownership was rejected. Additionally, other writers such as Royston (2002), point to the bias of the tenure reform program towards the delivery of formal land rights, without recognizing informal and customary land rights.

The undesirable spatial patterning of land tenure rights granted to the urban poor has also been the subject of much comment both abroad (see for instance Cutter and Hodgson (2001) and locally (Bremner 2000; Huchzermeyer 2003; Smith 2003). Others, such as Berrisford (in press), argue that land market forces are responsible for the lack of effective integration of South African cities as the market is predicated on a particular notion of property protection which protects the urban elite. Huchzermeyer (2003) also notes that the current land reform process has a rural bias and there is an urgent need for meaningful engagement with inequitable land distribution in urban areas with special emphasis on the poor.

## 5.2 Land use management

Illegal mechanisms for acquiring land on the part of poor people are tolerated by the state because of the historical evidence that the formal land market does not meet their needs and if there were no alternative mechanism open to such people, a socially explosive situation will be created. In addition, the periodic attempts at regularising land have often proven too politically tempting to political interests wishing to shore up their popularity. Thus, those who are politically powerful benefit in two ways. Firstly, they can reduce expenditure on programmes designed to create orderly access to land. Secondly, incremental improvements to tenure situations create a form of political dependency and possible loyalty of poor people (Calderón Cockburn 1999a). However, there are costs to this approach. At a societal level, urban growth tends to be chaotic and highly segregated by class. At a local level, there are costs to poor land use management. While the economic costs are usually highlighted when a use emerges on a parcel of land and it cannot easily be reclaimed (Gough and Yankson 2000), the social costs are important too.

Following Robert Home (2004, 19) this study has adopted an understanding of an urban land administration system as consisting of:

- Land registries recording property rights
- Management systems for state and public lands
- Land dispute resolution systems
- Valuation agencies
- Land use planning systems
- Environmental agencies

- Expropriation and compensation rules for the amalgamation, sub-division and reconstruction of land
- Periodic reform to resolve complexities and contradictions.

In the following sections, we begin to explore some of these elements. Before this it is useful to outline two goals of a land use management system. The first is that it should “provide effective protection to both the natural environment and members of the public from negative impacts of land development and land use changes... [and the second is to] ... provide a reliable degree of certainty as to how land can be developed within specified periods” (Gilmore 2005, 28).

### 5.2.1 Cadastral system

The cadastral system is usually described as integral to the definition of property rights and it is not surprising that significant work has been done (Barry 1999; Barry 2006; Davies and Fourie 2002; Davies 1998). Indeed land registration is often identified as one of the barriers that force poor people into informal arrangements. Michael Barry (1999) notes that there has been a long tradition of arguing that transaction costs associated with land registration have been the underlying cause of informality in South Africa (c.f. Manona 1987).

With the view that it is not so much the type of registration that is appropriate Barry (1999, 75) set out to evaluate the question of “whether any form of registration is likely to be appropriate or used in the manner that the system designers’ intended it to be used”. Drawing on Jones (1964, 63), Barry suggests that a land cadastral system relies on:

- Unambiguous definition of land units
- Unambiguous definition of rights and interests in a specific unit of land
- Unambiguous definitions of persons enjoying rights in specific units of land (1999, 19).

It is clear that most cadastral systems fall short of this definition.

“Land tenure security is defined to exist when an individual perceives that he/she has rights to a piece of land on a continuous basis, free from imposition or interference from outside sources, as well as the ability to reap the benefits of labour and capital invested in that land, either in use or upon transfer to another holder” (Barry 1999, 19). According to Fourie (1998) the purpose of land registration systems is to clarify the rights of agents in relation to land and clarify the rights of use of land. Mooya and Cloete (2007) note that economists usually consider any restrictions on these rights to be undesirable because they restrict the ability of the person to realise the full value of their property. This provides the logic for the generally held view that the “more secure one’s property rights, the more secure is the future rental stream that the land produces; the better one is able to use land as collateral; and the larger is the market for sale” (Mooya and Cloete 2007, 151). For Mooya and Cloete the emphasis on secure rights has two positive effects for poverty alleviation. Firstly, to the extent that secure rights underpin the operation of a successful market, a successful market allows agents to capture increased value and allocate land uses to the most productive yields. Secondly, secure rights dovetails with the emphasis of poverty reduction initiatives that draw on the sustainable livelihoods framework which suggest that poor

people's vulnerability can be reduced if their asset base is strengthened. There is a complex overlap between poverty and access to land. Nunan and Devas (2004, 164) make the point that "urban poverty is inextricably linked to people's access to land and basic services". It follows that land is an "active ingredient" in the economic strategies of poor people (Nunan and Devas 2004, 169). Land interfaces with the economy in three ways (Nunan and Devas 2004, 170):

- Access to productive locations and particularly, those areas that offer access to multiple economic opportunities.
- Diversity of tenure regimes that allow for poorer people to consolidate their claims on contested locations
- The quality of the land (its level of servicing) influences its productive potential and reinforces tenure claims.

Both Barry (1999) and Davies (1998) draw on a model of social change developed by Clarissa Fourie (1993) to understand the formation of informal settlements. There are three features to this model. The first is that it is based on an understanding of society as a dialectical process that assumes that conflict and structural tensions are inherent in a social system. The second is that social groups are undergoing continual processes of fission and integration that can also co-exist. The final feature is transactional behaviour that relates to the negotiations and deals associated with land. This model has been usefully deployed to understand how to frame interventions in informal land processes in South Africa (c.f. Barry 2006).

### 5.3 Land use planning

International experience with innovative land use management practices point to writers such as Fernandes, (2000) and UN Habitat (2006a) on the Brazilian experience with the Zone of Special Social Interest (ZEIS). This allows variable rules to be applied to the use and occupation of land, and applies to areas that are presently occupied in discordance with the formal legislation. There are also a range of collective land acquisitions legally recognised and protected in many countries addressing especially the indigenous and, sometimes, black communities. Brazil, Colombia, Mexico and Ecuador are examples of countries that recognise collective land rights for the indigenous and/or black citizens (UN Habitat, 2006b). In a number of African countries, adaptation with regard to the recording of land use rights in informal areas is emerging intermittently. This includes the 1997 Mozambican Land Law that provides an innovative example of how tenure security can be provided by statute without the need for surveying. The Namibian Flexible Land Tenure Bill and the Zambian Housing (Statutory and Improvement Areas) Act are also less rigid in recording tenure rights to land (UN Habitat, 2006c)

The legacy of urban land use planning in South Africa is based on the colonial application of town planning laws imported from Britain into the emerging colonial South African cities, and the exigencies of the apartheid regime, largely based on the separate and fragmented development of urban systems based on racial discrimination. This history and the extent and bewildering nature of this legacy have been examined in a number of writings (for instance, Oranje et al. 1999; van Wyk 1999). The results of the failure to reform urban land regulatory systems have been examined by Kihato and Berrisford (in press) Mammon (in press) and Berrisford and

Kihato (2006). These writers note that regulations previously designed to create and sustain racial privilege have been retained and transformed into potent tools for sustaining spatial exclusivity and privilege in urban areas. They also write of the laws becoming potent instruments in the hands of better off neighbouring communities, determined to resist the integration of their communities with the poor. Further, the complex and fragmented character of these regulations, according to them, has created a bewildering array of regulations with negative implications on land development projects targeting the poor, by increasing the length of time and costs. The ideological underpinnings of these laws are now being challenged. They have 'certain preconceived notions of an 'ordered city' which may not be compatible with land uses commonly associated with the poor (Kihato, et al 2006:3). De Soto (2006) contends that parallel and informal land markets often provide the most realistic avenue for entry into the urban land market for the poor due to the sheer number and complexity of formal systems. They are cheap, quick and familiar.

In sum, the considerations of how land markets (even if they are deficient or imperfect in informal situations) are understood are thoroughly related to the activities and policies of the state. Together these combine to form a view of formal land market activities. In response to this view, a range of studies has developed insights into informal land markets and it is to these that we now turn.

## 6 Informality

Jenkins (2002) points out that there have been two general approaches to urban informality. The first is a more 'managerial approach' which attempts to regularise or cope with informality, with the knowledge that complete regularisation is impossible. The second approach is more conceptual and is based on the view that definitions of informality are based on particular precepts that do not equate with actual social constructs of value. The second approach therefore seeks to find ways to get a better interaction between definitions and categorisations and actual practices.

There have been a number of successful attempts to extend the notion of legal pluralism beyond a hierarchical understanding where different sets of laws and rules are stacked upon each other with state law being the top and dominant form of law and rule. These three approaches can be labelled as 'semi-autonomous social fields' (SASF), conflict or resistance, and 'quiet encroachment'. Each of these attempts offers different insights into the formality-informality relationship and is based on different assumptions about the nature of activities. The Rakodi and Leduka-led study successfully develops all three concepts in the context of an institutional analysis of land delivery systems. All of the models seek to restore agency to poor people/informal activities.

### 6.1 Semi-autonomous social fields

Omar Razzaz turned to the notion of 'semi-autonomous social fields' to explain the development of property rights in Yajouz, a peripheral settlement in Amman, Jordan. The concept of a 'semi-autonomous social field' was initially developed by Sally Falk Moore to understand the relationship between "law and social change in complex

societies” (Moore 1973, 720). In Moore’s view, society is comprised of a number of ‘social fields’ to which different actors belong at different times and in different ways.

Razzaz suggests that non-compliance by actors in SASF can be achieved three ways (1994). Firstly, actors may generate their own internal rules that might block the penetration of external rules. Secondly, by opening operational niches within the realm of formal state rules by taking advantage of gaps in the rules and inconsistencies in the enforcement procedures. Thirdly, by inducing adaptations to formal rules or institutions and enforcement by resorting to socially sanctioned norms or informal rules. Razzaz terms the combination of these three practices as a process of ‘contestation and mutual adjustment’. Rakodi and Leduka extend Razzaz’s insights by suggesting that there is a need to accommodate more ‘subtle and complex’ conditions between the different ‘semi-autonomous social fields’. In this regard, Rakodi and Leduka are seeking to get away from the notion that ‘contestation and mutual adjustment’ are ends in themselves. They point out that ‘contestation’ may only represent a particular moment in the land delivery process and ‘mutual adjustment’ may represent a compromise strategy rather than ... Most importantly perhaps, Rakodi and Leduka point out that the net result of a process of ‘contestation and mutual adjustment’ may not be to the “exclusive advantage of actors within the SASFs, since power and resources are unevenly distributed.

Because SASF’s are not impenetrable, ‘contestation and mutual adjustment’ might only be one type of relationship. Rakodi and Leduka state that “although formal state rules might be omnipotent, they are at the same time negotiable, and it is this negotiability, coupled with indeterminacies and inconsistencies in state rules and enforcement, that rend the process of contestation and mutual adjustment, acquiescence, accommodation/manipulation and domination possible” (Rakodi and Leduka 2003, 25). They therefore extend Razzaz’s model to include possibilities of acquiescence and accommodation/manipulation interspersed with moment of domination, as well as relations of power between actors (Rakodi and Leduka 2003, 25).

## 6.2 Resistance

While the concept of ‘contestation and mutual adjustment’ is a form of non-compliance that is expressed openly between informal land developers and the state, there are many forms of non-compliance that are more covert or quiet and which lack any observable forms of organisation. It is argued that the more overt and organised protest represents only a small proportion of what constitutes resistance or non-compliance.

As Rakodi and Leduka (2003, 20) note, Scott identifies “‘weapons of the weak’ which are symbolised by ‘foot dragging, dissimulation, false compliance, pilfering, feigned ignorance, slander, arson, sabotage, and so forth’ (1987, 419). Such individual activities do not require extensive planning and typically “avoid any direct symbolic confrontation with authority or elite norms. Their execution depends on little more than a bit of room to manoeuvre, a healthy self-interest and a favourable climate of opinion amongst one’s neighbours” (Scott 1987, 420 in Rakodi and Leduka 2003, 20).

This form of societal non-compliance is considered to be informed by societal endowments such as kinship ties, acts of reciprocity, geographic proximity that allows a quick transmission of ‘gossip’ as well as by collective perceptions of exclusion and marginalisation (Rakodi and Leduka 2003, 20). Similarly to SASF’s, it is argued that “such resistance can serve to foster autonomous norms and values, creating a culture of non-compliance and creating an alternative ideological vision among non-dominant actors” (Tripp 1997, 8). It is argued that this is a strategy of last resort and is not aimed at changing the ‘macro-rules’ simply because marginalised individuals do not have the resources.

Rakodi and Leduka note that this form of resistance “occurs within a framework of macro-rules, which ... are often not entirely ignored, but are used alongside informal rules in ways that advance the interests of disadvantaged groups ... [and] that disadvantaged groups are heterogeneous and may use tactics of non-compliance in different ways, ... [and] that disadvantaged actors have no monopoly on the ‘weapons of the weak’ as these are available for use by any actor or group of actors to resist state policies that appear to threaten their interests”. In this view, advantaged groups may fail to comply with state rules as they generate wealth and gain access to resources and the actors within the state itself may bypass state laws in order to maintain control (2003, 21).

This lack of uniqueness should not detract from the importance of Scott and Tripp’s contributions. Asef Bayat argues that their view counters the view that poor people are helplessly trapped in a culture of poverty and characterised by passivity fatalism and hopelessness. Their view also steers between a ‘survival strategies model’, which typically portrays poor people as hapless victims, and notions of urban social movements, which suggests that poor people are organised on a relatively large scale. Bayat argues that this does not account for the full range of strategies available to poor people and extends the range of strategies in three ways.

Firstly, he suggests that “struggles by the poor are not always defensive or reactive, nor always hidden, quiet and individualistic. Instead... such struggles can also be decidedly offensive in situations where disadvantaged groups take exception to the excesses of the wealthier groups and respond by “[capturing] segments of their [privileged groups] life chances (including capital, social goods, opportunity, autonomy and thus power) to themselves, [which sometimes] involve them in collective, open and highly audible campaigns” Bayat 1997, 4). Secondly, not all actions by poor people represent protest – a large proportion represent ‘genuine coping strategies that sometimes produce unintended consequences’. Thirdly, poor people might choose to use patron-client or other political and bureaucratic relationships to obtain access to resources or redress from grievances, or discourses based on rights enshrined in state law to make claims if circumstances permit”. And rather than decisions being made by rationality, Bayat suggests that people make decisions based on a “complicated permutation of motives behind everyday practices”. These are often a mixture of rational calculations and moral imperatives. Therefore Bayat (2004) proposes the idea of the ‘quiet encroachment of the ordinary’.

## 6.3 Quiet encroachment

There are a number of ways in which poor people advance their cause. Asef Bayat (2004, 81) draws attention to an important informal dynamic – what he has labelled ‘quiet encroachment’. This is offered as a better way of understanding the ‘activism’ of marginalised groups. Quiet encroachment refers to “non-collective but prolonged, direct action by individuals and families to acquire the basic necessities of life (land for shelter, urban collective consumption, informal work, business opportunities, and public space) in a quiet and unassuming, yet illegal, fashion”. ‘Quiet encroachment’ is characterised by “quiet, atomised and privileged mobilisation with episodic collective action ... without clear leadership, ideology or structured organisation, one which makes significant gains for the actors, eventually placing them at a counterpoint with the state. In the process of ‘quiet encroachment’, disadvantaged groups often realise substantial gains.

As Rakodi and Leduka observe, Bayat’s work appears as a logical extension of the ‘resistance view’ point forward by Scott and Tripp. Corbridge et al (2005, 8) point out that the way in which the state is seen is never direct nor unmediated. “We always see the state through the eyes of others, with close regard for past memories, accounts that circulate in the public sphere and how we see others being treated”. Corbridge et al (2005, 10) note that poorer people often see the state because the state has chosen to see them.

In the following section, we use build on these insights by examining how formality and informality co-constitute one another. We argue that it is necessary to introduce different understandings of land and legal frameworks if alternative understandings of the relationship between formality and informality are to be sustained.

## 7 Formality and informal land markets

### 7.1 Informality

The aim of this section is to understand how poor people access, trade, and hold urban land in a way that allows us to appreciate the ways in which informal, formal legal and economic activities co-constitute each other. The argument is based on the evolution of insights into the nature of informality that have evolved from an initial emphasis on duality, through to an acceptance of the co-existence of different sectors. This evolution has enabled researchers and policy makers to understand how actors’ working within and across the informal-formal divides depend on each other. In this view, the dependence is considered regrettable and reflects an assumption that informality is a lack of development. Eventually, the development project will be completed and everyone will be within the unfettered embrace and protection of modern formal system and moreover, the assumption that everyone wants to operate in this way because it is better, will have been fulfilled. This makes it possible to think about how the different sectors can be manipulated. However this developmentalist assumption, it has not made it that easy to understand how power relations between the different sectors perpetuate informality and formality.



Once the assumption that informality can be transformed/erased is set aside, a much wider range of opportunities emerges for researchers and policy makers to intervene in how (poor) people access, trade, and hold urban land. The aim of this research is to pursue this objective at this stage of the project. The view that informality-formality co-exist posits a role for the state on the formal side of the continuum/dichotomy. In effect, it is understood that the state can formulate policies and implement regulations in one direction only. It can seek to expand the formal by formulating policies and laws that seek to expand or temper the power of the state so that evermore aspects of citizens' everyday lives and their interactions are 'formalised'. And, or, it can seek to incorporate elements of informality into the formal system, retaining the basic principles of the formal but tempering them with the previously informal practices. However, the view that informality-formality co-constitutes each other increase the points of intervention for progressive policy makers. From the perspective of the state, the notion that informality-formality co-constitute each other suggests both that the state has a role in producing informality and in addition that the state itself incorporates elements of informality. This introduces a different perspective from which to understand the implications of policy making and proliferates and diversifies the range of interventions available to researchers and policy makers. For as the state seeks to produce policies and laws that underpin a more equitable society, policy makers have the added responsibility of understanding how this will produce new forms of informality and what the effects of this are for poor and marginalised people. It also has the responsibility of understanding aspects of informality within its own practices.

The key point is not that informality will always be a feature of everyday life and that the 'boundaries' between the formality and informality will always be shifting. Consequently, it is the interface between the two that needs constant attention and management. To sustain this view, it is necessary to think of land and law in a different way.

## 7.2 Land

Doebele (1983, 349) highlights that land is simultaneously profoundly private in the sense of providing psychological security and uniquely public in that its value is created by the social phenomenon of urbanization and its productivity depends on the provision of public services.<sup>16</sup> On both counts, this double characteristic of land points to ways in which land is best understood as being defined by a network of overlapping claims to defined spaces. For example, a piece of land in a formal, established suburban township is likely to include the occupier's claims to use, differentiated claims to inheritance within the household, the municipality's claims to taxes and restrictions on use, the Surveyor General's claims to determine the boundaries, etc. This understanding of land as network of overlapping claims helps to avoid a key dichotomy that is imposed over land.

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<sup>16</sup> This raises the wider question of who benefits from the public increases in the value of urban land (Jenkins 2002).

The problem is that this dichotomy sets the universality and abstractness of law up against the materiality, non-fungibility, and physicality of land. The dichotomy underpins a fundamental fiction in land-legal analysis – that the universality and abstractness of state-law can be counter posed against the arbitrariness and locally specific characteristics of other (lesser) forms of law. Indeed, the very character of formal law depends on its distinction from the arbitrariness of other forms of law. Timothy Mitchell (2002, 57) notes that the history of private property is rather silent on the conditions that produced it and the precedents incorporated into it (although it is perhaps more obvious in South Africa). Private property is presented as a history of legislation: the abstract arriving from elsewhere.<sup>17</sup> The power of law is achieved through securing its difference: universality from actuality of colonial history, ideality of property from materiality of land and labour, and order of colonial rule from its difference from what is presented as the arbitrary violence of the past. However, the arbitrariness of informal property relations, of law – which the state-law denounces, and excludes are never gone. They make possible the rupture, the denunciation, and the order and are the conditions of its possibility. In this way, state-law is another form of arbitrariness. It is arbitrariness rearranged. It has redistributed its operations and effects. By way of example, Doebele (1983) points out that land use controls are normally not only negative but also have inbuilt contradictions. For example, land use controls are partially founded on attempts to secure adequate standards of health and standards of health should be equally applicable. However, the wealthy simultaneously use land use controls to set standards well above the minimum which results in a situation where there are different tiers of standards which, in turn, is incompatible with a goal of equality of health.

The view that land is constituted by a network of overlapping claims also helps to get away from the assumption that land can be isolated as a commodity available to free individuals who are the only source and judge of their desires and which are not subject to constraints except those that they accept voluntarily. As Friedland and Robertson (1990, 27) suggest, “preferences are formed not simply in responses to the opportunities that are available, but through the discourse through which people understand what choices are available, what is legitimate or socially appropriate to want, and according to the particular metric in which its costs and benefits are to be evaluated”.

This view of land starts to suggest that it is necessary to admit notions of ‘legal pluralism’. There will also be need to think through the implications of legal pluralism when ‘informality’ is considered later in this review.

There is the broader question of which forms of land are recognised within urban land systems. Assies (1994, 116) illustrates the complexity of constructing the meaning of land and how actors appropriate, modify and negotiate the meaning of land. To begin it is useful to set out how the concept of ‘land’ is being utilised in this review. The dominant view is to consider land as an object that can be isolated from the particularities in which it is embedded and exchanged in terms of universal principles (typically of state law). In this review however, we work with an understanding of land as being constituted by a series of overlapping social claims that can never be

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<sup>17</sup> As pointed out in critiques of de Soto, the establishment process of private property in America, that de Soto uses as a case study, was achieved through violence, stealing, and corruption.

isolated or reduced down to a simple relationship between a person and a parcel of land (Mitchell 2002). In this view, claims on land are mediated by a diverse set of social and power relationships and the formal legal claims are just one set that can be used by different groups to privilege their claims over others. Other bases for claims might be household gender relationships; cultural practices or illegal practices (Benton 1994).

Building on the discussion above, the term (urban) ‘land’ proves too broad to be usefully deployed in this research. Distinctions are typically made in terms of whether land is serviced or unserviced and alienated or unalienated. However, these distinctions have already assumed a particular divide between the formal and informal systems. Land that is serviced in South Africa contains the assumption that a general plan has been prepared and approved by the Surveyor General’s office. Unalienated land (land owned by the state) must first be alienated before it can be traded and again this implies that a survey diagram has been prepared and approved by the Surveyor General. Hence, that the land is distinguished by its relationship to state law.

Our preference here is to distinguish a range of different relationships that people have with each other in relation to land. Jenkins (2001, 641) draws attention to the importance of ‘mental models’ upon which the social institutionalisation of property rights is based on (see also Wallace and Williamson 2006). There is a sense in which people have a direct relationship to land and that is the sense in which all people need access to land, or secure access to land on which to live and be productive. However, how this is realised is never simple and depends on complex social relationships. Despite, the immediacy of this type of relationship, there are significant numbers of people who are so impoverished that direct access to land is crucial to their survival.

Another type of relationship to land is having a ‘right to land’. Once membership is acquired to a social group, access is generally secured to either a portion of land or the means of accessing land (on a more nomadic basis), a group of people need “an organised way of thinking about its land – permitting basic functionalities of internal physical redistribution and organised admission of strangers to ... [access]” (Wallace and Williamson 2006, 126).<sup>18</sup> As Wallace and Williamson note, “there is an inevitability about development of land rights ... exigencies of human life, particularly land scarcity, irregular access and dispute management stimulate development of land rights” (Wallace and Williamson 2006, 126). To this view, we should add that membership of a group or society usually confers certain rights to land by virtue of the agreement arising from membership of the group. The notion of land rights have a dual function because in addition to suggesting an obligation on the part of the society or group to ensure members have access to land, land rights are fundamental to the possibilities of being able to trade land. The notion of land rights have been powerfully mobilised in South Africa in response to generations of systematic racially based dispossession.

The existence of rights amongst people to land raises the possibility of a third type of relationship to land; land as a commodity. This means that people can replace each

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<sup>18</sup> Land rights can be developed on a national scale where other nations are required to respect the territorial integrity of a nation. Land rights can also be developed on an intra-national scale and these continuously evolve and are interpreted in terms of socio-political and cultural processes. Unless otherwise indicated, it is land rights at the intra-national scale that will be referred to in this document.

other in terms of their control of rights to land through simple transactions that are objectively verified.

The fourth type of relationship is that people can relate to each through land as an asset. That is, land can be productive of wealth. This type of relationship depends concepts of using land as a commodity and as security for other economic activities. The fifth way in which land is constituted is as a “complex commodity”. According to Wallace and Williamson (2006, 132) for people to relate to each other through land as a complex commodity, it is securitisation through repackaging financial instruments, corporatisation to pool resources and increase participation by divorcing ownership from management; and separation of ownership and management.

Land as:	<ul style="list-style-type: none"> <li>• Survival</li> <li>• Right</li> <li>• Commodity</li> <li>• Asset</li> <li>• Complex commodity</li> </ul>
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The point about distinguishing between these different types of relationships is that they (and potentially others) constitute an ‘urban land system’. That is, they co-exist and influence each other. They are dynamic and can change. Some are dependent on each other. For example, commodity-land depends land-rights being established. But, we should not assume that complex commodity-land always overwrites survival-land. There are instances where poor people’s survival-land or for example, the religious significance of land is considered more important by society.

### 7.3 Legal pluralism

Griffith’s (1986) introduced the term ‘legal centralism’ to describe the view that the label ‘law’ should be reserved for state law and that other forms of law should be subordinated to state law (Woodman 1998). Ambreena Manji (2006) draws on this view. For Manji, ‘legal centralism’ is based “upon a model of historical progression that leaves little room for local variation: it is assumed that as societies develop modern capitalist economies, non-state legal orders give way neatly to state law and that, in relation to property rights, informal tenure arrangements are superseded by formalisation” (Manji 2006, 153).<sup>19</sup> The conclusion developing out of this view is that any form of rights short of “guarantees from the state itself will always be superseded as a result of economic development” (Manji 2006, 162). Chris Hann (2005, 117) draws attention to the assumptions around the role of land in the economy in that it is assumed that “rational agents will develop concepts of territoriality and construct boundaries around parcels of property once the benefits from being able to exclude others exceed the cost of doing so, including not just the cost of fences but also the long-term policing costs and the like”. In this understanding, communal ownership is

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<sup>19</sup> Griffiths (1986, 3) originally termed the ideology of legal centralism when “law is and should be the law of the state, uniform for all persons, exclusive of all other law, and administered by a single set of state institutions. To the extent that other, lesser normative orderings, such as the church, the family, the voluntary association, and the economic organisation exist, they ought to be and in fact are hierarchically subordinate to the law and institutions of the state” (in, Manji 2006, 159).

equated with open access to land. However, common ownership may yield better results and ownership is less important than complex forms of co-management between and among local and state actors (Hann 2005, 121). The understanding is that non-state recognition of land rights will be replaced by more formal arrangements that allow individuals to increase their investment in land. However, as Manji (2006, 162) points out, the empirical evidence “that such a transition in tenure arrangements does not necessarily lead to increased production and that [this view] is a misinterpretation of the experience of land registration.” Two important consequences of the ‘legal centralist’ view are that land reform has tended to focus on land *law* reform and hence ignored the politics of ‘who gets what’ and powerfully underpins the processes of land title formalisation promoted by de Soto.

The implication of a legal centralist view is that the normative orders, which although not derived from any state institutions, play an important role in people’s lives, should be gradually transformed and incorporated in the formal state law system. The result is that “the multitude of ways in which people relate to and perceive land, as well as their complex patterns of interconnectedness with fellow landholders, are denied by this legal-centralist paradigm” (Manji 2006, 160). In addition, the legal-centralist position cannot explain instances where “law-like patterns of social behaviour occur even though they lack some of the apparently essential characteristics of formal law” (Arthurs, 1985, ix in Manji 2006, 160).

It is recognised that informal land arrangements have differing degrees of illegality because they reflect the outcome? Of a range of issues such as a lack of formal provision, unaffordable rents, inadequate access, or the need for poorer people to live near their sources of income (Nunan and Devas 2004, 169).

This view is reinforced by Edesio Fernandes and Ann Varley (1998, 4) who make three general points:

- The legal system is not based upon a single, unitary conception of property rights but different forms of ownership are treated differently by the law.
- Even in countries where there is a strong tradition of the state claiming to be the sole judge of legality, individual behaviour and social practices are often regulated by other, unofficial criteria.
- There are always degrees of illegality and some forms are more accepted than others.

The idea that we want to develop here is that the ‘market’ and formal state rules are points of reference for the actions of all urban residents and not determinants. As Julio Calderón Cockburn (1999a, 13) indicates: “the demands of urban survival and the dynamics of the real property market, both linked to daily life in the city, have more explanatory power”. This does not mean that the market and public policies are unimportant. But it does mean that they are something that gets mobilised/drawn upon by certain actors in different ways and times to make sense of their world and it has different outcomes. There is nothing inevitable about how actual practices on the ground will unfold.

## 8 Conclusion

In this literature view of informal market dynamics and urban land management systems we have sought to both provide a sense of the major issues and build on the current debates. We began by outlining some of the important research investigations of urban land markets in Africa before turning to consider first urban land markets and land management practices and then informality. Our argument is that this literature provides the means to think about how formality and informality are thoroughly intertwined and hence that they no longer have as much value in explaining urban land markets in South Africa.

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