



# PROPERTY THEORY, METAPHORS AND THE CONTINUUM OF LAND RIGHTS

*SECURING LAND AND PROPERTY RIGHTS FOR ALL*

## PROPERTY THEORY, METAPHORS AND THE CONTINUUM OF LAND RIGHTS

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# PROPERTY THEORY, METAPHORS AND THE CONTINUUM OF LAND RIGHTS



# EXECUTIVE SUMMARY

## INTRODUCTION

The continuum of land rights has matured as a concept and is now widely accepted among a number of international agencies, such as UN-Habitat and the World Bank, the development community and some national governments. What is unusual is that it has developed independently of a critical examination in terms of the vast array of established development theories, property theories and metaphors.

Consequently, a number of problems are emerging with the concept. Questions are being asked, such as: what exactly is the continuum of land rights – is it a theory or a metaphor; what is its purpose and how should it be applied?

Another issue is that the graphic currently used to communicate the continuum of land rights concept is controversial. This is because in some quarters it is interpreted as advocating a particular strategic approach to land tenure administration, in which tenure security is improved in increments but that individualized private property is the end goal. This, in turn, may be interpreted as supporting land titling programmes. None of these interpretations was intended originally by the continuum of land rights concept. Land titling programmes have been a major component of development strategies since the Second World War. When enabling conditions exist, titles improve tenure security and are one of the variables that may improve economic opportunities. They are controversial, however, as many of them have failed to produce the desired benefits; a number have done the opposite and caused social problems and upheaval in local and community level politics. This document examines the continuum of land rights in terms of a small sample of development theories and property theories that dominate the development agenda, and in terms of a sample of theories and metaphors which

are opposite to them. Finally, this document makes a number of recommendations to improve the use and presentation of the continuum, and suggests changes to the graphic representation of the continuum.

## WHAT IS THE CONTINUUM?

The continuum is a metaphor and is not a theory in its own right. As a metaphor it can be used to describe and explain a land tenure situation from different ideological and theoretical perspectives; it can also be used to make predictions about how a situation is likely to evolve. Different descriptions, explanations and predictions of a particular situation around the continuum may be examined and debated from different ideological perspectives, and strategies to improve a situation can be developed from the ensuing debate. Ideally, at national level these solutions are the result of consensus reached after negotiations between those of different positions, with stakeholders from government, civil society and land professionals participating in the process.

## WHY IS IT IMPORTANT?

The challenge to improve tenure security is immense. A significant proportion of the world's population has insecure tenure. Metaphors such as the continuum of land rights are needed to guide processes in which alternative tenure forms to that of ownership are recognized by the state and civil society. They are also needed for strategic planning - to compare the strengths, weaknesses, opportunities and constraints / challenges / threats with different tenure forms, and for analysing how and why one tenure form transforms into another and to improve the level of justice and fairness during this transformation.

## PROPERTY THEORIES AND METAPHORS

There are two main schools of thought on how to address land tenure and property rights. The dominant school draws on modernization development theory



and a related form of evolutionary thinking. Property theories have been labelled evolutionary theories of property. Modernization theory and evolutionary thinking hold that all societies will progress to a stage where they have the political, economic and social attributes of a so-called modern society. The progression for traditional societies to the modern form through ongoing change is irreversible and inevitable. Two influential, evolutionary theories of property within this modernization school are based on economics alone. Their central theme is that communal tenure forms are inefficient when there is pressure on the land. Private property is far more efficient in managing land and in handling conflict; under private property systems, inefficient users of the land will be forced out by people who are more efficient. It follows that private, individual property is the best tenure option for development, and land titling is the way to achieve this.

Given the right circumstances, development strategies based modernization theory may produce the desired benefits. A criticism of this position is that modernization has been a cause of many conflicts and civil strife, and vulnerable sectors of society, who are not necessarily inefficient land-users, lose their land interests. A related question is who bears the costs of dealing with the associated problems when supposedly inefficient land-users becoming landless? The evolutionary property theories associated with modernization and evolutionary development theories are generally based on economics alone, and they ignore the social, religious, cultural and political dimensions of land tenure. As noted above, land titling programmes have produced mixed results, but they continue to dominate as a development strategy.

Often associated with evolutionary property theories are the bundle of rights metaphor, which first surfaced in the mid-nineteenth century, and the concept of

ownership. Rights in land can be viewed as a bundle of sticks. The complete bundle constitutes ownership. The owner may assign particular rights, particular sticks in the bundle, to other people. When these rights expire they revert to the owner. In popular jargon, land as private property is referred to as the commodification of land, and the opposing approach to this is often referred to as the social factor associated with land. The alternative group of theories and metaphors, which hold that land is more than a commodity, include personhood perspectives of property, property as a web of interests, and property as a constellation of interests. Central to personhood perspectives of property is that for many people their land has little value as a commodity, but it has significant emotional value to people who live on it – the land forms part of their identity. The web of interests metaphor holds that the bundle of rights, as described above, is too narrow a description of land tenure. The bundle may be considered a “bare bones metaphor”, which is limited to the legal rights between people and a land object. A web of interests holds that the sticks are not independent. There are interconnections between people, between people and their physical environment, and between different objects in the physical environment. A particular resource may be subject to a number of overlapping bundles of rights held by different social entities. The connections between these entities may be viewed as a web rather than a simple bundle of sticks.

The constellation of interests’ metaphor also arose from a rejection of the bundle of rights metaphor. It is not a simple bundle of sticks. A more realistic representation is that each stick splinters and each splinter forks, and each splinter and each fork creates additional interests as more people lay competing claims to a unit of land. The constellation of interests in a particular unit of land may extend from a local village to different places around the globe. Using the constellation concept in an

# EXECUTIVE SUMMARY

Continued

inter-disciplinary methodology to analyse land, there are three subsystems that should frame an analysis of a land tenure system: (1) the ideological – one cannot ignore the different ideological positions that different stakeholders have about development and land tenure systems; (2) legal or officially recognized interests; and (3) the actual relations that pertain to a property object. Actual relations may be different to what the law recognizes. They may be a variation on a legal relation, as the latter may not accurately reflect the constellation of actual social relations pertaining to a property object. Multi-stranded relationships may involve family or clan relationships. Powers of decision-making, rule-making, judging and enforcement that are accepted in Western systems may not be separated in some property systems.

## CONCLUSIONS

In conclusion, notions of a constellation of interests or a web of interests should be adopted, and the continuum of land rights should be used in conjunction with them. The continuum is focused on developing strategic approaches to improve tenure security. The constellation and web have a wider range of purposes, such as theory building and explaining a situation without necessarily recommending actions to change a situation. The bundle of rights, in an amended form that incorporates splintering and forking sticks, should be retained as it is an established concept and it continues to be applied in this adapted form by people who reject the original simplistic representation of it. What has emerged in all the theories deemed as alternatives to modernization based theory is that land tenure and property rights need to be addressed in a manner that is cognisant of the complexity of land tenure systems. Thus, there is a caution that the continuum should not be applied in a manner that is overly simplistic. Analysts should not cherry pick concepts from different disciplines in a manner that makes those concepts lose their meaning.

## RECOMMENDATIONS

The following recommendations are made in this report:

1. The continuum of land rights is a metaphor, not a theory. A metaphor can be applied in a number of theoretical contexts, whereas a theory has an ideological perspective.
2. When applying the continuum, establish a position on the role of the state and then define the terms formal and informal. The state cannot always be the sole steward and arbiter over land tenure, but a number of documents imply this. Associated with this issue is that the rights recognized by the state are considered formal rights and other rights, such as customary rights, are often considered to be informal. Customary systems are hardly informal and a number of countries recognize customary tenure systems.
3. When using the continuum of land rights for analysis purposes consider also adopting the metaphors of (1) a constellation of land interests and (2) the bundle of rights to complement the continuum of land rights metaphor in order to develop a broader analytical framework based on three main sub-systems, the ideological, legal and actual relations. Further, develop frameworks for specific applications or purposes of the continuum, particularly at country level.
4. The current graphic needs to be revised. What might be considered is having no standard graphic at all, but to use graphical aids that are suited to a particular situation.

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## INTRODUCTION

The Global Land Tool Network (GLTN) is a network of international organizations working on pro-poor, gender-responsive land tools, of which the continuum of land rights is one. The continuum of land rights is an aide to describing and explaining an existing tenure situation and predicting how a range of tenure types may transform over time given different scenarios and intervention strategies. These explanations and predictions in turn can inform individual and group behaviour, policy formation, law making, development strategy formulation and implementation, urban and regional planning, and land administration system design, practice and funding.

## BACKGROUND

GLTN was established in 2006 and currently has over 65 international partner organizations including professional organizations, multi-lateral and bilateral organizations, rural and urban civil society groups, and research and training institutions. GLTN is hosted by UN-Habitat, which was one of the founding partners of GLTN along with the World Bank, Huairou Commission, the International Federation of Surveyors, Swedish Sida, Norway and others.

In general, most developing countries have less than 30 per cent coverage in regard to land registration. To get close to 100 per cent coverage could take decades, possibly even 600 years, in some countries. The off-register rights and claims are often insecure. This is particularly critical for the poor, the vulnerable and women, who bear the brunt of evictions, land grabbing and insecurity of tenure. Alternative approaches need to be developed.

The aim of GLTN is to address these off-register rights and claims. The network's goal is to ensure that the urban and rural poor have better access to land and security of tenure. The agenda of the network is to

develop 18 pro-poor, gender-responsive land tools needed to improve access and land security and the continuum of land rights is one of them. The continuum has been central to the advocacy and work of the network since GLTN's beginning. As tools have been developed, the continuum has served as a key underlying assumption in their development and, in turn, has been influenced by their development.

The work of GLTN partners and the continuum of land rights concept have also led to a major paradigm shift at global level in the approach to land. For all these reasons, the continuum has also been a constant point of debate and discussion within and outside the network. Some country-level debate has started and is increasing. A range of opinions has emerged from the different ideological, legal and practical positions. This report examines the underlying theoretical aspects of the continuum in terms of property theory and it identifies a more robust theoretical approach for the use of the continuum as a pro-poor land tool.

## STATUS OF THE CONTINUUM OF LAND RIGHTS

The continuum of land rights is maturing as a concept. It has gained acceptance as a concept that contributes to policy making, practice and land tenure-related development goals by international agencies such as the World Bank through the Land Governance Assessment Framework (LGAF), UN-Habitat, donors and participants in bi-lateral agreements, some national governments, nongovernment organizations working in the land sector, and international professional organizations such as the International Federation of Surveyors (UN-Habitat, 2008; Augustinus, 2013; Deininger et al, 2012; Royston and du Plessis, 2014; Enemark et al, 2014). In *Handling Land, Innovative tools for land governance and secure tenure*, the continuum concept is a key facet of GLTN's activities (UN-Habitat/GLTN, 2012: 12) and is an underlying assumption for all

GLTN land tools. This publication, from which Figure 1 is taken, is a collaborative effort by many GLTN partners whose view of the continuum of land rights aligns more readily with many of the findings of this report, rather than the simple narrow definition sometimes applied to Figure 1 (see page 6).

The concept of a plurality of tenure systems and intermediate forms of tenure arrangements, a basis of the continuum of land rights, was incorporated into a resolution by Member States of the UN-Habitat Governing Council in April 2011, Resolution 23/17 (UN-Habitat, 2011: 29).

The notion of land-related issues existing on a continuum is widely used to describe complex issues that are subject to competing tensions. Landuse planners, for example, refer to an urban-rural continuum to describe peri-urban areas, and the discussion in this report will show that many property theorists use the term in a number of different contexts.

#### PURPOSE AND METHODOLOGY

This document examines the continuum of land rights in the context of a set of existing theories and metaphors of land as property. The document is based on relevant literature, the author's research projects and the author's participation in a number of workshops. It analyses the continuum in terms of:

- long-standing, established, land-as-property concepts of ownership and the bundle of rights;
- two theories of property that dominate the development agenda and that are grounded in modernization development theory and an associated form of evolutionary development thinking;
- a school of theory which romanticises customary tenure systems; and

- perspectives of property which fall in between these two positions and which incorporate anthropological views of land tenure systems, legal pluralism and land tenure during times of complex change.

The report makes a number of recommendations that should assist policy makers and practitioners in applying the continuum, while also throwing light on some of the different perspectives that may inform a particular discussion around the continuum of land rights. The scope of land tenure, property theory, development theory and the metaphors that are used to articulate them is vast and inter-disciplinary. Many prominent philosophers developed theories of property, and contrasting positions stretch back to the different views on private property held by Aristotle and Plato. This report is a starting point which, hopefully, should lead to further examination of the continuum of land rights from a number of different theoretical and disciplinary perspectives. At the practical level, it should encourage the consideration of the advantages and disadvantages of a range of strategic options when attempting to improve tenure security and economic conditions, and to reduce poverty. This is the essence of the principle of suitable to circumstances when designing a land registration system (Fortescue-Brickdale, 1913) and the more recent articulation of the concept of fit-for-purpose land administration (Enemark et al, 2014).

#### THE CONTINUUM: THEORY OR METAPHOR

There is a gap in the debate on the continuum of land rights as a concept in that the continuum has not been examined critically in the context of longstanding and emerging property theory and the metaphors associated with those theories. There is no mention of a continuum of land rights in the mainstream property theory literature. Originally it emerged as a tool for describing a situation. In recent years, it has become a platform to advocate for change and a normative

device to indicate what that change should look like (GLTN, 2014). In other words, it started out as a metaphor and that appears to be the original intention of the concept. Today, however, some people interpret it as being a component of modernization theory and evolutionary development theory.

The continuum of land rights should be examined and applied in the context of property theory if it is to be an enduring, practical aid to land tenure administration. John Maynard Keynes (1936) noted that developing theory is essential to developing knowledge. All development practice is based on theory. People who eschew theory and adopt a socalled practical approach to problem solving are often applying some defunct or poorly constructed theory, and the outcomes are often to the advantage of only particular sections of society (Keynes, 1936; Coetzee et al, 2001,3). Theory provides a platform for informed critical debate; different approaches to a problem can be discussed and compared if they are expressed in general, theoretical terms. Good theory informs good practice and is informed by it, so a theory should be both useful and credible. Conversely, bad theory underlies poor, if not dangerous practice (Ghoshal, 2005, Caputi et al, 2009).

If the continuum is to become an enduring concept that can be used in a range of situations and for a variety of purposes, it should be presented as a metaphor along with strong emphasis that it is not a theory in its own right. This is no different to the way in which the concept of a bundle of rights in land is currently widely applied as a metaphor rather than a theory. Development theories and theories of property have an ideological basis, such as socialism, neo-liberalism or a mix of the two. As metaphors, the continuum and the bundle of rights constitute frameworks for describing, explaining and debating a situation from different ideological and theoretical perspectives. These descriptions can then be

articulated from the perspective of a particular theory and so can inform policy and practice.

When the continuum is presented as a theory in its own right, it becomes problematic, as it then assumes an ideological position. The ensuing debate may exclude a number of perspectives on how to tackle a problem and consequently may eliminate strategic options to address it. It may also turn out to be an advocacy tool for a particular development ideology. Ideological bias may then lead to some stakeholders rejecting the continuum as a basis for discussion and withdrawing from the debate. This, arguably, was not the original intention of the concept. There are a number of recommendations at the end of the document on how to address this issue.

#### SYMBOLS AND GRAPHIC REPRESENTATION

In terms of the discussion above, the current graphical representation of the continuum as per Figure 1 should be done away with. Perhaps it is better not to have a generalized graphical representation of the continuum at all. Graphical representations should be developed to assist in explaining a particular situation. The understanding that many people have of the current graphic is laden with meaning that reflects a particular ideology embedded in modernization theory and an associated evolutionary perspective of property. Very few, if any, property theories and metaphors are expressed graphically in a generalized form that is expected to capture the relationships in all the situations in which they may be applied. However, graphical aids for debating and communicating particular concepts may be developed for a specific situation and purpose. As an analogy, an internet search will show that there are numerous graphical representations of the strengths, weaknesses, opportunities and threats/ constraints / challenges (SWOC or SWOT) analytical aides commonly used in strategic planning and land-use planning.

## STRUCTURE OF REPORT

This report proceeds as follows. Following the definition of relevant terms, the first part addresses the question what is the continuum, and then examines how the continuum has evolved. The report then addresses the need for the continuum and the purposes for which it has been applied or may be applied. This is followed by an examination of land tenure issues worldwide and why concepts such as the continuum are important in addressing these issues. The second part of the report examines classical notions of property, mainly the bundle of rights and ownership. It then examines one aspect of development theory and property theory. In particular, the report covers modernization theory and a form of evolutionary thinking in development, followed by evolutionary theories of property that are grounded in economic determinism, and which currently drive many land tenure improvement strategies.

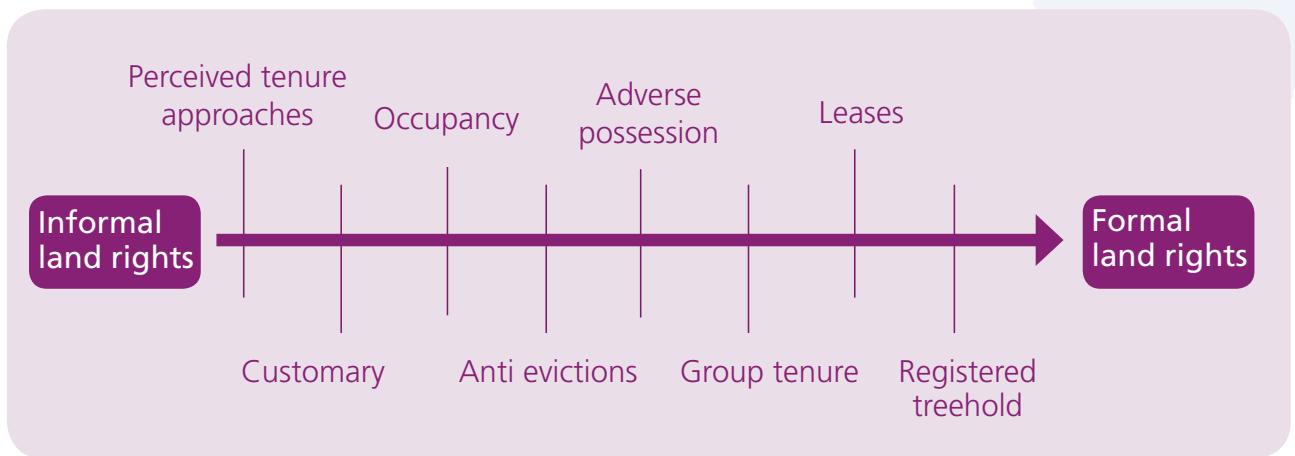
Following this is a brief description of another aspect of development and property theory, which is a perspective of land tenure administration that romanticises customary systems. This perspective is rejected by most observers as an option in situations where significant change in the land tenure system is occurring, i.e. one situation where the notion of a continuum of land rights might apply. Finally in this second part is an examination of a sample of alternative perspectives of property which better explain reality and fall between the evolutionary and romantic positions. It covers personhood perspectives, property as a web of interests and property as a constellation of interests. A number of recommendations are made to improve the analysis of the continuum, to clarify the concept and to situate the continuum in the context of other metaphors of land as property. Recommendations are also made about a further examination of the graphical representation of the continuum.

## 1.1 DEFINITION OF RELEVANT TERMS

The following definitions are important. A right, and its accompanying restrictions and responsibilities, is defined as an entitlement supported by law, longstanding custom or general practice. This contrasts with a common, narrower definition that a right is codified in law (i.e. a legal right), and that interests in land that flow from customary systems and longstanding convention are informal rights (e.g. see UNHabitat/ GLTN 2012:12). Linked to the latter definition is the notion that formal tenure is legally or at least officially recognised, while other tenure forms are classed as informal. Definitions of formal and informal tenure are examined in the recommendations of this report. Land interests include land rights as well as claims that are negotiable. An interest may be viewed on a continuum with a right at one extreme and a mere hope of obtaining a right at the other, with a mix of the two in between. Likewise, an obligation or duty includes restrictions and responsibilities that are codified in law or generally understood as being part of long-standing custom or social convention as rights, restrictions and responsibilities, as well as obligations arising from current social norms.

## 1.2 WHAT IS THE CONTINUUM?

The continuum originated as a metaphor to describe changing land tenure situations, such as informal settlements or peri-urban areas where cities are expanding into customary lands. In these situations, rather than distinct legal and not-legal tenure systems, the real world contains complex mixtures of both legal and non-legal tenure with infinite variations in between (Doebele, 1994). At times, the same land object (e.g. parcel, water body) may be affected by a number of different overlapping interests, some of which are recognized by law and some by relationships that the law does not recognize (UNHabitat, 2003). A plurality



**Figure 1: Continuum of land rights<sup>1</sup>**

of tenure practices may exist on a continuum of legal, illegal, spontaneous, planned, formal and informal concepts (Fourie, 1994; Davies and Fourie, 1998).

This last view, which uses the term continuum explicitly to describe tenure practices, is an anthropological view of property that draws on a particular school of social change theory applied to the transformation of land tenure systems. It rejects methodologies that describe land tenure systems purely in terms of rules and social status. Change is systemic, political and driven by changing relations and coalitions within a community as people in that community respond to external forces and the ongoing changes within their community that are triggered in both the external and internal systems. Land interests and obligations should be the primary focus when seeking to understand and improve a situation. In changing times, the tenure forms in two neighbouring communities with the same ethnic and cultural roots may turn out to be very different due to the manifestations of social change in local politics (Comaroff, 1982; Fourie, 1993). Generally, state

administrative organizations are ill-prepared to manage these situations due to over-simplification of the issues and relationships, and inadequate attention being given to organizational and institutional development to manage the issues before they become problems (Iaquinta & Drescher, 2000; Walker, 2008; Barry and Danso, 2014). From a land administration and strategy formulation perspective, a number of factors may be beyond the control of agents and agencies outside of the situation (Barry and Bruyas, 2009).

One recent articulation of the continuum, particularly in Handling Land (UN-Habitat/GLTN, 2012), is described in terms of Figure 1 above. On the right hand side of the figure are formal land rights that are recognized by law. A land unit is owned privately and individually by a legal person. Their rights to the parcel are recorded in a registry in ownership or near ownership (e.g. long-term lease) and the parcel may be depicted on a cadastral map. The owner has the right to transfer the parcel by sale or by bequeathing it to his or her heirs. The owner may alienate certain rights to others (e.g. mortgage or

<sup>1</sup> UN-Habitat/GLTN (2012), p. 12

lease) and exclude others from their land. At the opposite pole are informal rights, which are not administered by the state and may not be recognized by the state. For example, in a traditional society such as a clan, the extent of the clan's interests is not marked on an official map and there may be no official record of their interests. In between these two poles, a number of different tenure forms may exist. They may overlap and transform as change occurs and they are likely to be supported by a mix of formal (state systems) and informal (non-state) institutions (UN-Habitat/GLTN, 2012).

In some of these situations, tenure is precarious for people when they occupy a piece of land, e.g. when they migrate to a city from a rural area in the hope of securing better livelihood opportunities. Over time, providing they are not evicted by the state or a private landowner, or their land is grabbed by powerful agents, people occupying or using land under a particular tenure type are likely to enjoy an increasing level of security as different agencies and institutions recognize, or at least acknowledge, their tenure. Tenure may transform into different types along the continuum, acquiring increasing levels of formal (official) recognition, as more agents and agencies become involved in the management of the affected land.

One motivation for conceiving the continuum of land rights was to challenge policies and theories holding that individual ownership should be the tenure form of choice in development strategies. Dominating many development programmes, private individual tenure is held up as the apex of legal and economic evolution and as a precondition for efficient markets in some places. Misconceptions and misunderstanding arising from this notion have encouraged policies that have had unintended, damaging consequences in both developing countries and industrialized countries (Benda-Beckmann et al, 2006: 3).

Private ownership is seldom an appropriate tenure form for poor people and many other sectors of society. Firstly, private property in the form envisaged in the continuum discussion may be anathema in some cultures (Barry et al 2012). Secondly, the registration and land surveying systems needed to support large-scale private property systems properly are complex, expensive and beyond the capacity of many countries to go to scale. The associated transaction costs when using these systems are likely to be beyond the means of the poor. Thus, tenure forms somewhere along this continuum that are likely to function over the long-term should be supported by the state and civil society (UN-Habitat/GLTN 2012).

Accordingly, the continuum, and similar metaphors and theories, is intended to target a wider, differentiated range of strategic, administrative and tenure options than state-administered land titling and the registration of individualized, private property. It is supposed to cater for legal pluralism regimes (co-existing legal arrangements that are likely to be simultaneously complementary and competing), and local arrangements such as de facto private conveyancing systems (e.g. so-called informal transactions), customary and religious tenure systems, and unique law and tenure (*sui generis*) situations.

Although Figure 1 implies a linear progression, the tenure transformation process is usually systemic and not linear. Change may occur in jumps rather than through steady, incremental change from one stage to another. In development theory, most metaphors of progress assume that actions can be regulated by some high-level planner, that the state has complete control over the process, and that these actions will deliver the desired outcomes in an orderly fashion along a linear continuum. In reality, the properties that emerge during change are likely to be heterogeneous, complex,

non-linear and in multiple directions (Klerck, 2001: 97). Relating this to the continuum of land rights, particular landholders or clusters of landholders may enjoy increases and decreases in tenure security over time due to: (1) external forces; (2) local politics in a community, a social unit, settlement or family unit; and (3) the behaviour of the state and other powerful institutions. Different forms of tenure may emerge as clusters in the same settlement as change and transformation occurs (see Marx, 2007), and a number of these forms may be accepted by the state and society as long-term options. Other forms may emerge only to fade and disappear. Some tenure forms may emerge that are illegal and/or ethically intolerable, and both civil society and the state may actively seek to eradicate them. When the graphic is viewed against this background, the problems with a simple graphic become clear.

### 1.3 PURPOSE OF THE CONTINUUM

In general, the overarching purpose of the continuum is to be a metaphor to guide policy, law and strategy to improve tenure security, social justice and economic performance in development programmes, especially those that address inequality and poverty alleviation. There needs to be a better balance between equity considerations and economic objectives. The continuum emerged as a metaphor whose primary purpose was to frame discussion and debate about land tenure. That debate may feature contributions from participants with different ideological positions on the political-economy (e.g. neo-liberalism, social democracy, a mix of the two), participants who adhere to different development and planning theories, and participants who have different approaches to addressing land management and administration problems. The continuum should not be interpreted as a grand theory that serves as a template for action across a wide spectrum of land management challenges, until and unless it has been shown to be useful for any specific land management challenge.

### 1.4 CONTEXTS IN WHICH THE CONTINUUM CONCEPT MAY BE APPLIED

The continuum may be applied at a number of different scales, ranging from the micro-level cases, where detailed analysis is required, to the macro-level, i.e. the regional, national international scale, where more generalized descriptions and concepts apply. Drawing on communications with a number of land experts and the author's own studies, the following are some of the contexts in which the continuum may be applied:

- Explaining and predicting how different tenure types transform from one form to another and the heterogeneity in tenure forms that may be observed in particular types of settlements, within families and households as a situation changes. These explanations and predictions can then be used to support recommendations to amend the set of tenure forms that are supported by officially sanctioned land administration systems. This is especially relevant in situations where individual ownership, or near-ownership, is the only tenure type recognized by the state but where the reality suggests different tenure forms should be supported.
- Describing and explaining land issues and tenure practices among particular ethnic / language groups, population segments (e.g. migrants), religious groups, and explaining and predicting different tenure scenarios in particular types of settlements, types of built environments (e.g. periurban, rural, urban), types of farming approaches and/or environmental management.
- To facilitate engagement pertaining to improved tenure security for the majority in guiding different government authorities and development agencies in the development of policy, law and intervention strategies which address security of land tenure. These may occur at the national, regional, municipal, peri-urban, settlement, and customary authority level.

- To guide flexible land tenure reform approaches which allow people a range of options on how they want to relate to land. These options should enjoy both legal and de facto recognition of land interests. In an ideal world, these should develop within an integrated framework where the different policies, laws, tenure types, data, institutions, land-use planning and land administration operations management process flows and accompanying information flows are harmonized. The risk of creating opportunities for forum shopping for land-dispute resolution should be low, as should opportunities for fraud or sharp dealing if different tenure forms pertaining to the same land unit or parts of a particular unit are administered by different institutions.
- To serve as a metaphor in the development of national and international development goals such as the Sustainable Development Goals (SDG), Millennium Development Goals (MDG) and the Post-2015 Development Agenda.

## 1.5 WHY IS IT IMPORTANT?

There is a need for metaphors and property theories to guide law, policy and strategy in dealing with the plurality of tenure, law and administration arrangements that exist in many developing world contexts. A number of different legal and non-legal interests and obligations may apply to the same land unit, representing a web of social and legal networks, and relationships between land units and related property objects such as trees, fruit, air and water. Today, the web or constellation of relations may stretch from local villages to various parts of the world (Benda-Beckmann et al, 2006). In general, under legal pluralism, drawing clear boundaries between the legal and non-legal is impossible, especially as it may include state law, customary law, religious influences and international

law. Confronting this challenge by examining norms alone is insufficient as there are multiple standpoints and perspectives of relevant concepts such as values, facts, meanings, processes, structures, power relations, personnel and technology (Menski, 2006: 83). Thus, a narrow, simple definition of formal-informal discussed above, a key-component of some applications of the continuum, appears to be problematic in legal pluralism contexts. That is, the continuum has to be analysed in greater depth against particular contexts for it to be useful to analyse legal pluralism.

### THE CHALLENGE AND NEED

The global land tenure security challenge is immense. A significant proportion of the world's population has insecure tenure. Worldwide, some 828 million people live in slums. More than 90 per cent of slums are in developing world cities (World Health Organization, n.d.). There are 370 million indigenous peoples in 90 countries worldwide. They constitute 5 per cent of the global population, 15 per cent of the world's poor and about one third of the 900 million classed as extremely poor (United Nations Economic and Social Affairs, 2009). Often, indigenous peoples suffer from insecure tenure and are involved in major struggles to protect their territorial claims to land and to protect their environments. In the rural context, many are vulnerable to land grabbing for extractive industries, conservation areas and commercial agriculture (ILC, 2013). In peri-urban areas, they are vulnerable to land being sold without compensation, which extinguishes long-standing livelihood opportunities for them (Barry and Danso, 2014).

Land titles have dominated the development agenda as the instrument of choice. Large scale land titling programmes have been implemented to support urban and rural land tenure security and stimulate economic activity, but they often do not produce the desired

results (Doebele, 1994; Gilbert, 2002; Shipton, 2009; UN-Habitat/GLTN, 2012). There is the added problem of capacity and cost, and the tenure security gap cannot be addressed using longstanding land administration methodologies. One expert roughly estimated that only a quarter of land parcels worldwide are registered. Using conventional methodologies and institutions to register the remaining units will take an inordinate amount of time and the inequality gap will widen while this occurs (McLaren, 2011).

As titling approaches fail to produce the desired outcomes, the notion that development strategies should recognize what actually exists, the de facto situation, and strengthen tenure forms that are considered to be appropriate has gained momentum in recent years. For example, UN-Habitat Resolution 23/17 of 2011 encourages governments and Habitat Agenda partners to:

***“... promote security of tenure for all segments of society by recognizing and respecting a plurality of tenure systems, identifying and adopting, as appropriate to particular situations, intermediate forms of tenure arrangements, adopting alternative forms of land administration and land records alongside conventional land administration systems, and stepping up efforts to achieve secure tenure in post-conflict and post-disaster situations”***  
***(UNHabitat, 2011: 32).***

Thus, there is a need for concepts such as the continuum to explain a situation and to frame the discussion on suitable policy and practice. New approaches should be

debated and critiqued as they evolve and are applied in different contexts. Furthermore, the assumptions and definitions that underlie them should be examined critically; they should not become a standard that is then frozen in time. The bundle of rights, for example, has endured as a metaphor because it has been adapted and applied in different contexts and from ideological perspectives that are very different to the nineteenth century notions of property in which it originated.

## 1.6 ISSUES TO BE ADDRESSED

There are a number of issues concerning the continuum that need to be addressed. These issues are amplified when approaching the continuum through the graphic on its own. The attraction of a bi-polar continuum as per Figure 1 is its simplicity, and the metaphor is used in a range of disciplines. It is easily understood and easy to apply. Complex networks of relationships can be described at different positions on a continuum ranging from informal to formal as per Figure 1. The problem with this graphic is that it is over-simplified and may be interpreted as situating the continuum within a particular school of property theory.

There are two challenges that arise in recent articulations of the continuum, in particular the dichotomy of formal and informal as the two principle constructs on the bi-polar continuum and the graphical representation of the continuum as per Figure 1.

1. The notions of formal and informal imply a duality that is misleading. Formal implies that it is superior and a goal that should be attained; informal may be interpreted to imply chaotic. In reality, many so-called informal systems are plural and well-organized (Cousins et al, 2005). Formal also implies that systems recognized by the state are superior. This school of thinking is influenced by John Locke,

who argued that the sole purpose of government is the protection of property (Locke, 1690; Geisler 2006). This view is embraced by, among many others, North (1981), who argues that a useful analysis of government has to include property rights. Opposing this view is a school that argues property rights are created, defined and protected by organizations other than the state, both within the state and beyond its borders (Benda-Beckmann et al, 2006: 8). Some members of this school observe a modern obsession with creating order (e.g. good governance) and a focus on using the law to resolve conflicts and configure social relations (Comaroff and Comaroff, 2009: 37). The law often comes down on the side of the powerful. Land tenure security does not necessarily follow from legal ownership. Empirical evidence from southern Africa, for example, indicates that so-called informal tenure forms may be better long-term options for the poor (Cousins et al, 2005; Royston and du Plessis, 2014). That is, understanding the continuum as being from informal to formal is too simple and narrow when reviewed against real world situations.

2. The graphic, especially the arrow, imparts meanings that suggest particular schools of development theory and property should be adopted in addressing land tenure problems, i.e. modernization theory and evolutionary theory. Royston and du Plessis (2014) observe that ownership is seen as a target or endpoint. Further, placing customary systems at the informal end of the continuum in the graphic may be offensive to some aboriginal groups, especially those that have been subjected to assimilation policies. Customary systems are not informal systems. The arguments underlying the continuum of land rights promote

a multicultural society, and not what Waldron (2003) calls a bi-cultural society; the current graphic suggests the latter. Further, the land tenure arrangements in an informal settlement, for example, may not be recognized by the state, but people who live in these settlements would hardly describe the processes that they have to follow to access land and remain on it in the local political system as informal.

As indicated above, using the continuum as a metaphor and not a theory means that it could be used by different groups for different ideological purposes. The continuum and the graphic have been used by different groups for advocacy purposes.

Some use it to advocate for it being a property ladder towards freehold. Others use it to argue against freehold being the only option and that other tenure types are also suitable. This report does not address the advocacy aspects of the continuum in any detail.

What is apparent is that the continuum of land rights is being debated and applied from different ideological perspectives, and the theoretical/conceptual perspectives outlined in this report may not be clear to people engaged in the process. There are components of these different perspectives that are complementary and others in opposition to one another. The intention of this report is to unpack the conceptual/theoretical aspects thereby strengthening the use of the continuum by all groups. The next section examines a sample of relevant property theory, land tenure metaphors and development theories that should assist in unpacking these different perspectives.

02

## PROPERTY THEORY

Property is controversial and conflicts over property relate to wealth, power, identity and values (Macpherson, 1978: 4; Arnold, 2002; Watson Hamilton and Bankes, 2010: 30). A cursory examination of the number of disputes in which land and natural resources are a pivotal element, ranging from international boundary disputes, civil strife within countries, disputes between semi-nomadic and sedentary societies, to disputes between neighbours, are an indication of the magnitude of the problem. Historically, property regimes and property rights have been the domain of philosophy and law. Today, they are central themes in sociology, anthropology, political science, economics, geography and human ecology (Benda-Beckmann et al, 2009: 2).

Property rights and interests are a social construction, essentially a system of relationships, which implies that a number of perspectives and interpretations of what constitutes property exist at a particular time. Land tenure arrangements shape and are shaped by relationships among people and between people and the physical world (Meinzen-Dick & Mwangi, 2009). As a social construction, texts, stories, symbols, pictures and stories are essential signs that may communicate a range of different meanings about property (Watson Hamilton and Bankes, 2010: 30). The meanings that people assign to property are constantly changing, primarily in terms of what the dominant classes expect of property and what their fellow citizens consider to be allowable uses of property (Demsetz, 1967: 347; MacPherson, 1978: 2). Changing constellations of property relationships extend around the globe, affecting identity, social, political and economic organization, command over wealth, and governance, and these relationships may have religious connotations (Benda-Beckmann et al, 2006: 10).

Classical property theories are ill-equipped to handle present day levels of complexity in property relations. However, recent interdisciplinary approaches to property bring their own problems. There is a tendency

to cherry pick concepts from different disciplines and end up with over simplified notions of property, often based on conceptual misunderstandings and false comparisons (Benda-Beckmann et al 2006:10).

## 2.1 LAND AS A BUNDLE OF RIGHTS

Ownership and lesser interests in land are commonly described in terms of a bundle of rights, and the first mention of the concept is in the nineteenth century, attributed to Henry Maine (1861:178). To most laypeople, property is a thing of value, such as a piece of land or a tree, rather than some abstract concept such as a bundle of rights. In contrast, the bundle metaphor prevails in discussions among land professionals; it dominates property law and the courts often refer to it (Arnold, 2002: 290; Watson Hamilton and Bankes, 2010: 24).

The collection of rights in a property object can be likened to a bundle of sticks, which represent the number of rights and obligations that can be acquired or assigned to different people or groups of people (e.g. clan, tribe, company, family). Each stick can be taken out and treated separately in law. The number of sticks in the bundle may vary over time. New sticks may be created and some may be extinguished. Each stick has a magnitude, representing the extent of the powers and obligations associated with that right in the property object, and the stick may have a duration, after which it is extinguished or renegotiated and renewed (e.g. the term on a long-term lease) (Simpson, 1976: 7).

### CRITIQUE

The bundle of sticks may serve as a starting point to describe rights in land, but if not examined critically it may lead to simplistic notions of law, policy and land administration practice. It is a "bare bones" metaphor for Western property in land which facilitates an initial, simple understanding of land rights (Carmichael, 1975: 750).

A more realistic application of the bundle metaphor is that each stick splinters into a number of subsidiary doctrines. Each stick and each splinter has at least two “troublesome ends” involving reciprocal entitlements and expectations (e.g. between lessor and lessee). Furthermore, sticks may fork and fork again when more and more parties assert competing interests in a land object (Carmichael, 1975: 750). The sticks, splinters and forks are connected parts of a complex system of rights and duties.

The original essence of the metaphor, the rightsbased orientation, is that property is a set of rights in an object exercisable against others. In reality, there are shared and interconnected commitments and responsibilities in property (Arnold 2002:303). If each stick is viewed as a disaggregated right in a thing, then property as a distinctive institution collapses (Alexander & Peñalver, 2012: 3). There is an over emphasis on what Paul Bohannan (1963) refers to as person-land relationships to the neglect of land-land and person-person relationships. A criticism from an ecological property theory perspective is that the metaphor fails to accommodate relationships between a property object and other things in the natural environment, the land-land relationships. These are critical to ecological sustainability (Arnold, 2002: 289- 290).

A problem in developing world contexts is that tenure systems in many customary systems (and informal settlements) are fluid, negotiable and changing in contrast to the (relatively) rigid manifestations of tenure in the developed world (Berry, 1993). Consequently, establishing where one stick stops and another starts can be impossible (Platteau, 1996: 42).

What has attracted most of the criticism about the bundle is that it is often used in a manner that over-emphasizes the economic and exploitative nature of property at the expense of expectations of obligations and responsibilities

to other people and the environment. A narrow view of the bundle is that property rights are individualistic and land is a commodity (Arnold, 2002: 290). As such, land as property is a vehicle to accumulate wealth (Denman, 1978).

Arnold (2002) states that this school, in applying the bundle, over-emphasises rights (claims and entitlements by people against one another) at the expense of duties, and diminishes the importance of shared responsibility in managing land. The bundle is overly simplified in that it ignores the context of rights and how they are popularly understood, and it glorifies individual property, property as a commodity, and a means to accumulate wealth. It falls short in distinguishing property rights from other types of rights and ignores the characteristics of each property object, many of which are distinctive to some objects and, in many cases, unique (Arnold, 2002).

In spite of the above criticisms, the bundle metaphor has been applied in plural legal regimes and, with the above aspects in mind, it can capture the different roles, complexities and variations of property in different societies (Benda-Beckmann et al, 2006: 3). If applied in a manner that recognizes complexity and interconnectedness, the bundle of rights metaphor can be applied to numerous situations and harmonized with the continuum metaphor. For example, the bundle metaphor has been used to describe aboriginal title and the notion of *sui generis* (unique legal situations) property systems in the Canadian aboriginal land claims case *The Crown. v. Van der Peet*. In this case, one of the judges says: “Aboriginal title exists when the bundle of aboriginal rights is large enough to command the recognition of a *sui generis* proprietary interest.”<sup>2</sup>

<sup>2</sup> R. v. Van der Peet, [1996] 2 S.C.R. 507, L'Heureux-Dubé J. (dissenting): at para 119.

In synthesis, it is not the bundle of rights that is the problem in describing/analysing complex land tenure situations. The objections to it relate more to the ideological positions from which it is applied, rather than the bundle of rights as a metaphor. The metaphor can be adapted to complex, plural situations.

### RELEVANCE TO CONTINUUM CONCEPT

The continuum metaphor challenges the simple concept of the bundle of rights as it was conceived in the nineteenth century in that the continuum recognizes the interconnectedness of relations between people, and that tenure systems transform in ways that are not easily described using a simplistic representation of the bundle of sticks. The bundle of rights is part of a common language describing property rights; it is a long-standing, established concept, and it has been adapted to modern realities. Carmichael's (1975) description of property systems as a complex constellation of rights that are growing and organic, in which the sticks in the bundle continually splinter and fork, is a more accurate representation of reality. As described in more detail below, Benda- Beckmann et al (2006) apply the bundle of rights in representations of land tenure using a form of systems thinking and the notion of a constellation of interests. The bundle has been applied in Canadian courts to describe aboriginal land tenure systems in *sui generis* property rights regimes; i.e. the property systems are unique and special interpretation is necessary. There is no reason why modern conceptions of the bundle cannot be used in conjunction with the continuum of land rights.

### 2.2 OWNERSHIP

Ownership, also known as radical title or allodial title, is the strongest right in land. Most descriptions of ownership are framed in terms of the entire bundle of rights, and ownership is a good example to describe how the bundle is applied in Western concepts of property rights systems.

In practical terms, the ownership bundle comprises an indefinite bundle of rights, powers, privileges, obligations and immunities. In the legal sense, the owner of this aggregate bundle may behave as he or she chooses subject to statutory limitations imposed by the state from time to time (Yakubu, 1985: 55). The sticks may be assigned in such a way that the owner has no exercisable rights at all at a particular time. However, when particular sticks of rights are extinguished, the rights revert to the owner (Nwabueze, 1972:7-8; Simpson, 1976: 7; Kleyn and Boraine, 1992). That said, what constitutes legal property use, and ownership itself, are changing concepts (Lewis, 1986; Benda-Beckmann et al, 2006: 9).

Derived from Roman law, the three main categories of rights constituting the ownership bundle are *usu* – the rights to use; *fructus* – the right to the fruits; and *abusus* the right to destroy or dispose. The term *usufructuary* rights, meaning people can use the land and derive benefits from it but not alienate it or damage it, derives from these concepts. However, a more detailed metaphor for ownership and the lesser rights is necessary for examining land tenure systems using the continuum, especially in *sui generis* situations.

Honoré's (1961) 11 incidents (attributes) of ownership are commonly cited as constituting the bundle of rights representing the ownership paradigm in a liberal legal system. Unless cited, the italics are the author's additions to Honoré's original list.

### HONORÉ'S RIGHTS AND INCIDENTS OF OWNERSHIP

1. The right to possess (which includes the right to exclude (Alexander & Peñalver, 2012: 4), the right to possess exclusively).
2. The right to use.
3. The right to manage.
4. The right to the income (the right to the fruits).
5. The right to the capital (the thing itself (Alexander & Peñalver, 2012: 4), the right to destroy).
6. The right to security.
7. The incident of transmissibility (the right to alienate, to bequeath).
8. The incident of absence of term (potentially unlimited duration (Alexander & Peñalver, 2012: 4)).
9. The prohibition of harmful use (obligations to others – including future generations and past generations in some cultures).
10. Liability to execution (the possibility of losing land rights in execution of debt).
11. The incident of residuarity (the land reverts to the owner when all other rights are stripped away (Kleyn and Boraine, 1992: 163)).

Using the simplified bundle of rights metaphor (i.e. no splinters or forks in the sticks), Honoré's list may characterize most, but not all, systems of property. As noted earlier, private individual ownership, or near ownership, dominates the development agenda. The question that then arises is what differentiates ownership from other forms of tenure? One way is to define the particular rights that distinguish ownership from other forms of tenure. Two common ones are the incident of residuarity (the right of reversion) and the right to exclude.

The incident of residuarity holds that ownership vests in the legal person to whom the land reverts once all other entitlements have been stripped away. No matter how many rights the owner assigns to other legal persons, when all those entitlements are extinguished, full ownership automatically vests in the owner again (Kleyn and Boraine, 1992: 163; Lewis, 1986: 257).

If all the incidents in the list are not present, then they provide a metaphor for partial or incomplete ownership to be understood (Merrill, 1998: 737). There are legal tenure forms that may be classified as near ownership, but which for practical purposes are administered as ownership (e.g. freehold, longterm registered lease). Strictly speaking, arising from its feudal origins, freehold (fee simple) tenure is not ownership. The state or Crown holds the allodial title. For example, under freehold title, if land becomes derelict it reverts to the Crown through the principle of escheat. Similarly, long-term registered leases (e.g. durations of 99 years or 999 years) are often treated as ownership in land administration practice, but at the end of the term the rights revert to the owner.

An alternative view of what is a distinctive characteristic of ownership is the right to exclude (North, 1981: 21; Alexander & Peñalver, 2012). Interestingly, Honoré's list does not explicitly mention the right to exclude (Bell and Parchomovsky, 2004- 2005), but the right to possess (exclusively) implies this. The argument is that if someone has the right to exclude others from a valued resource, then they have property. If they cannot exclude others, then they do not have property (Merrill, 1998: 730). However, there are problems in attempting to make this principle universally applicable when describing the reality of many situations, and there are numerous examples indicating that the exclusion rule is too narrow (Alexander & Peñalver, 2012: 4). The real world is a complex tapestry of different sorts of property rights, not islands of ownership surrounded

by unclaimed resources. Different types and degrees of exclusion rights are exercised by different entities in different contexts (Merrill, 1998: 754).

### CRITIQUE

Honoré's list is highly influential in property rights discussions and there are many interpretations of it. There exist a number of different lists derived from it. There is disagreement over which bundles of sticks constitute property and are distinctive of ownership (Watson Hamilton and Bankes, 2010: 25). Honoré's incidents may serve as a way of describing different tenure forms that are not ownership, but with the same cautions that apply to the bundle of rights.

The list does cover the main categories of property rights and obligations, but, as with the bundle, it is a "bare bones" metaphor. It is useful in describing how ownership may be limited and reconstituted when different rights are assigned to others.

### RELEVANCE TO CONTINUUM CONCEPT

Most analyses of land tenure will have to consider what constitutes the notion of ownership in a jurisdiction. In land law and administration, it is important to know who the owner of a piece of land is, even if the land is occupied by someone else (e.g. under an "alternative" tenure) and the legal owner has very little power over it. Knowing who owns the land, and the different powers that they may have or may be able to acquire to reclaim it, is important in evaluating the security of tenure of both the people occupying that land and of the owner.

As described above, the continuum emerged as a response to concepts of land tenure in pro-poor land policy as either ownership / near ownership or informal land rights. De facto, tenure in poor communities was observed to be a mix of formal and informal, legal and illegal along a continuum. Tenure forms go through periods of transformation and stability.

Honoré's list is a useful framework for analysing different tenure forms and how secure they may be during periods of stability. However, it is inadequate as a metaphor for analysing the transformation processes and the accompanying social change, and additional tools are needed for this. A person's security of tenure may improve over time as they hold land under different tenure types. However, the transformation processes may cause some people to lose land interests while others acquire a larger set of property rights than they had prior to change occurring. There is a large body of literature showing that titling programmes often extinguish a number of existing land interests and place more power over a land parcel in the hands of the title holder than that person had before the land was registered. The same applies to tenure types that are not ownership, although not much is written on the subject. As a general rule, some people may end up with a lower level of tenure security or lose their interests completely when tenure changes from one type to another. Others may end up with a larger portfolio of land interests or greater power over the land as a consequence of the change. However, the latter group may still be at risk of losing their interests and powers over the land if the legal owner has the power, or has the potential to acquire the power, to take the land back and force them to leave.

The following section deals with development theory and properties that promote private individual ownership as a development solution. This is followed by a discussion on opposing schools of thought. The notions of ownership and modern conceptualisations of the bundle of rights are appropriate to both schools.

### 2.3 EVOLUTIONARY THEORY, MODERNIZATION THEORY AND UTILITARIAN PROPERTY THEORY

A number of property theories have been classified as utilitarian or evolutionary (Alexander & Peñalver, 2012; Platteau, 1996). Utilitarian property theories dominate the literature, at least among lawyers. In contrast to rights-based theoretical approaches, which emphasize moral entitlements, utilitarian theories are instrumental in that property rights are a means to a higher end. In a rights-based approach, rights are recognized irrespective of the consequences. In the utilitarian view, the goodness or badness of actions, rules or institutions should be measured in terms of the utility (e.g. economic benefits) or welfare (impacts on human well-being) that flow from strategies based on that particular theory (Alexander & Peñalver, 2012: 11, 17).

As a moral philosophy, utilitarianism holds that in any ethical situation, the solution that produces the maximum benefit (outcome, consequence) for the greatest number of people is best (Andrews, 2009). The origins of utilitarian property theory are commonly associated with Jeremy Bentham (1789). For Bentham, property is the basis of expectations in different objects (social, economic, legal) and so property rights differ from object to object (Arnold, 2002: 327). The challenges are how to define what is the “good” at which social decision makers’ aim, and how to aggregate individual experiences of that “good” in order to evaluate the overall consequences of social choices – the sums of total pleasure and total pain that

all people experience as consequence of one decision over an alternative decision (Alexander & Peñalver, 2012: 12). Utilitarianism has tended to be dominated by economic utility at the expense of equity or welfare considerations. The predominant instrumentalist perspective that has been developed by economists is that a rights-holder can expect to draw benefits from a valuable resource (Watson Hamilton and Bankes, 2010: 31). The discussion below indicates that an over-emphasis on economics is a cause of vulnerable people losing their land interests. These include poor people, women, youth, aboriginal groups and ethnic minorities.

There is an expansive array of property theories that might be classed as utilitarian. The ones of interest in a discussion on the continuum of land rights are a particular form of evolutionary theory of property, grounded in economic determinism, which fall under the umbrella of modernization development theories. Some of these evolutionary theories are proposed as replacement theories. That is, customary land tenure systems should be replaced by individualized, private property systems. Proponents of replacement theories argue that private property systems characterize modern society, whereas customary systems are primitive and will disappear as part of natural social evolution (Nkwae, 2006). Modernization and an associated evolutionary development theory are outlined in brief, followed by a discussion on evolutionary theories of property and their relevance to the continuum.

### MODERNIZATION THEORY

Modernization theory has been described as a mix of functionalism, evolutionism and free market principles, and there are a number of versions of it (Le Roux and Graaff, 2001: 46). In brief, development is determined by outside forces and not by forces from within a society (Coetzee, 2001: 40). Economists refer to these as externalities (Demsetz, 1967). In terms of its

relevance to property theory and land tenure security, modernization theory implies social differentiation and individualization, industrialization, commercialization of agriculture, and the emergence of a uniform mass culture (Le Roux and Graaff, 2001).

Central to modernization theory is ongoing social change and a sense of progress as a society transitions from a traditional, pre-modern form to new forms of technological, organizational and social characteristics of an advanced society. Ultimately, the development of humanity will become an integrated whole. It is a linear, irreversible, process in which the final stage is when political, economic and social characteristics of comparable modern societies are reached (Coetzee, 2001: 27).

A common narrative is European society's progress from feudalism to capitalism and democracy. A major driver of modernization agendas is the history of social change in the West and the dimensions of that change:

- (1) political – a search for democracy, a nation state, a separate judicial system, and representative government;
- (2) social – vibrant civil society, erosion of the power of ethnic groups and traditional leaders; and
- (3) economic – the drive for capitalism and a market system (Coetzee, 2001: 27). Modernization theorists tend to express "their perceptions of development in terms of a continuum", the two ends of which are traditionality and modernity. They have a penchant for exhaustive lists of ideal characteristics of a modern society that are expressed in social, cultural, psychological, economic and political dimensions. In their eyes, characteristics that are not modern are negative (Coetzee, 2001: 27, 32).

### CRITIQUE

A major criticism of modernization theory is the advent of modernization as a cause of numerous wars, civil conflicts and ethnic rivalry. Modernization leads to destabilization caused by political rivalry, civil war and ethnic conflict. A second criticism is that the distinction between modern and traditional is not easily created. Traditional societies evolve all the time. Overall, modernization idealises a perfect world and it is overly simplistic (Coetzee, 2001: 41).

The predilection for exhaustive lists of ideal characteristics of land administration systems and standards to give effect to them may be observed in the land administration literature. Many of these appear to have ideological foundations in modernization theory.

### RELEVANCE TO THE CONTINUUM

As noted above, the graphic in Figure 1 may also be interpreted to mean that the continuum of land rights is based on modernization theory. There are similarities in the traditional – modern continuum of modernization theory, as Coetzee (2001) describes it, and customary and individual freehold tenure types being situated on opposite ends of the continuum of land rights. It should be noted, however, that the original thinking behind the continuum of land rights does not conceptualize land tenure in this way.

### EVOLUTIONIST THINKING IN DEVELOPMENT THEORY

Evolutionist thinking may be considered as a subset of modernization theory (Le Roux and Graaff, 2001: 46). People have evolved from primitive forms to intermediate forms, to feudalism and then the advanced forms of Europe. Evolutionist thinkers range from Marxists to adherents of Adam Smith's concept of the free market driving development and progress. What they all have in common is that they hold so-called practical views of an inevitable progression to an ideal societal form (Le Roux and Graaff, 2001:56). Social change is caused by a number of factors which transform society from one categorical form to another in the evolution from primitive to modern. The progression occurs in cycles; some societies foster evolution, while others are beset by conflict that impedes progress and which may even cause the society to deteriorate (Parsons 1966, Ritzer 2008:112- 113).

The five main assumptions in evolutionist thinking are:

1. There are a predetermined number of phases of social change in a society.
2. Evolution occurs along a single, linear path and it is repeatable.
3. Change occurs gradually and not in revolutionary leaps.
4. Evolutionary change is irreversible
5. Evolution is good. Advanced societies are better than the less-advanced or primitive. (Le Roux and Graaff, 2001)

Note that the above list is a simplification as each of these assumptions is challenged by a number of evolutionary theorists.

### CRITIQUE

If evolutionary theories were valid then all of society would look similar. A number of countries have modern capitalists, hunter-gatherers, pastoralists and forms of feudalism (e.g. share croppers). Societies exist in an interdependent global system, they are not homogeneous and the evolutionist model is simplistic as the empirical evidence of multi-category societies invalidates it. Change is seldom gradual and major change is often rapid or sudden (Le Roux and Graaff, 2001).

Evolutionary theories of property that draw on the above are the mainstream theory of development economists (Platteau 1996:29). Two influential evolutionary theories of property that have popular appeal in policy making are Garret Hardin's (1968) Tragedy of the Commons and Harold Demsetz's (1967) Towards a Theory of Property Rights.

## EVOLUTIONARY THEORIES OF PROPERTY

The essence of Hardin's and Demsetz's arguments are rooted in economic determinism. Property systems evolve from communal systems to private property on economic grounds because the costs of maintaining efficient, sustainable communal systems are significantly higher in communal systems than private property regimes. The essence is that communal systems may function well until there is pressure on the land. When there is competition for use of resources, self-interested actors will try to grab more than their fair share. If all of them do this, then the resource, or the commons, will be overexploited or even destroyed. The costs of negotiating systems that stop this destruction are far cheaper in private property regimes than communal ones. Therefore, there is a natural evolution to private property (Demsetz, 1967: 350; Hardin, 1968: 1243-1248; Alexander & Peñalver, 2012: 20-21).

Hardin's and Demsetz's works are frequently cited, but similar arguments can be found that date back to ancient times. Aristotle and later Thomas Aquinas noted the common ownership of resources promotes overuse and underproduction, which would lead to their destruction. Thomas Hobbes, John Locke and William Blackstone, to name a few, advanced similar arguments (MacPherson, 1978: 9; Kingston-Mann, 2006; Krier, 2009: 141, 149).

## DEMSETZ'S THEORY OF EVOLUTION TO PRIVATE PROPERTY

Demsetz drew on the example of North American First Nations to illustrate his arguments. The central tenet of his thesis is that comparative costs and benefits drive change in a property system as external systems change. He says that in North American First Nations property systems, communal systems are likely to evolve into private property regimes as population pressure and market integration increases competition to use land. Communal systems are relatively inefficient and more costly to sustain than private property systems when there is pressure on the land. Evolution is gradual and driven by externalities such as the market, new knowledge and new technology. These bring about change that is both beneficial and harmful to individuals in a particular society (Demsetz, 1967: 350; Platteau, 1996: 29). In the absence of controls, people will overhunt or overuse the land as these costs are borne by others. Controls have to be negotiated and policed, and both these processes are costly in communal systems. In contrast, if a person owns the land privately, he or she will manage it in way that future income streams are budgeted for. Private ownership reduces the costs of negotiation because there are fewer people involved. Consequently, land rights evolve towards individualization, and landholders then press for formalized private property rights (Demsetz, 1967: 355; Platteau, 1996: 29).

Demsetz further argues that communal systems are inferior to private property in planning for future generations. The private landholder will look into supply and demand factors that may exist after their death, whereas the communal landholder's landuse strategies are focused on the present alone. If a person owns the land, they can maximize their wealth by brokering how well depleting it now will affect future income streams. In communal land there is no such broker and an unequal weight will be assigned to present income streams. Future generations are left to speak for themselves (Demsetz, 1967: 355).

### HARDIN'S TRAGEDY OF THE COMMONS

Instead of using a customary society to exemplify his thesis, Hardin uses the nineteenth century English commons to illustrate his theory of the tragedy of the commons. In a pasture that is accessible to all, each herdsman will try to keep as many cattle on the pasture as possible. The common pasture is sustainable, providing that external forces such as disease keep both the number of herdsmen and cattle down. Problems arise when the equilibrium is disrupted and there is pressure on the resource. Rational, self-interested actors in a common property regime will maximize their own utility if the costs are born by the commons. A herdsman who adds one cow to his herd increases his utility by one cow and decreases the utility of everyone else by one cow. The negative utility, or cost of one cow, is shared by all the other herdsmen, and so the impact is insignificant if only one herdsman does this. However, if all the herdsmen add one cow, then the commons will be destroyed. Thus, Hardin argues, private property in land, the oceans and fisheries, and pollution control is the optimum means of sustainability. A system of social arrangements that govern the responsible use of land and resources, and which is properly enforced, should ensure sustainable

use of the resources. Furthermore, those who are more fit to use the land in the most efficient manner should acquire the rights in it. Free riders may thrive in a common property regime whereas they are eliminated in a private property regime (Hardin, 1968: 1243-1248).

Evolutionary theory as it has been applied in Africa holds that customary land rights are dynamic and, under the impulse of market forces, will evolve in a beneficial, autonomous direction. Communal systems that do not incorporate the right to exclude are adequate when there is little pressure on the land. When there is competition due to population growth or demand for product, there is pressure for greater individualization of property interests. The communal system becomes unstable and harmful due to mismanagement and overexploitation. At this point there are two strategic choices for policy makers. One view is that the system will not change on its own and that drastic intervention is required by the state to replace the customary system. The expected response from government is a full cadastral survey and titles, which should reduce the number of disputes over land. As land can then be used for credit, a class of moneylenders and a class of landless emerge. The second strategic choice is that the increasing population pressure and increasing commercialization of land drive an institutional solution that is not dependent on the state alone. In this second strategy, rather than driving change through titling and land surveys, the state waits for the system to evolve to a point where there is demand for the state to provide the institutional support in the form of land titles as part of the changing dynamic (Platteau, 1996).

Evolutionary theories were popular with colonial administrations of the 1950s and 1960s, and post-colonial periods of the 1960s and 1970s were characterized by an assumption that private property

was necessary to promote productive use of agricultural land and stimulate investment. These were premised on trajectories of modernization and economic development based on Western European experience (Peters, 2006: 86; Shipton, 2009).

### CRITIQUE

Both Demsetz's and Hardin's theories have greatly influenced policy makers. They are attractive as they appear to offer a simple development solution. Internationally, there has been a strong drive to privatize property based on these theories and similar ones that preceded them. In his influential work, de Soto (2000) expressed the economic determinism argument in a way that is an attractive simple causalprocess recipe for urban poverty relief.

If the enabling conditions exist for these theories to hold, then the benefits are likely to materialize. These include landholders who want private property; they find the administrative instruments such as land titles and cadastral survey to be useful, and the administration system is accessible and easy to use (Barry et al, 2012). Thailand is frequently cited as a case where it has worked (Barnes, 2104: 27). The problem is that the enabling conditions generally exist for the middle classes but they seldom exist for the poor, and private, individualized property in the form envisaged in these theories may not be a cultural fit in many societies. For example, they ignore the concept of family tenures, where an individual parcel held by a family who can exclude members of other families from using it is desired, but it may not be traded outside of the family (Barry, 1999).

Demsetz's and Hardin's evolutionary theories and other similar theories have attracted strong criticism. Prescriptions based on grand economic theory, such as the tragedy of the commons, are flawed. The neoclassical economic model has been predominant for so long because scholars who embrace it as a paradigm tend to think in a particular way. They tend to focus exclusively on agricultural land as a commodity for individual use, to the exclusion of a number of other resources (Barnes, 2014: 28).

Two main criticisms of the evolutionary models are that they overlook inequity in the system (Peters, 2006) and that they are overly simplistic. Many countries have a wide range of property ideologies and legal and other institutions that give effect to land rights. These may owe their legitimacy to inter alia local or traditional law, state-based systems, religion and international law (Benda-Beckmann et al, 2006: 4, 23). The four universal categories for describing and analysing land tenure systems that are integral to these evolutionary theories - i.e. open access, communal, state and private - amalgamate a number of complex relationships into simple categories (Benda-Beckmann et al, 2006). In reality, there is a range of important relationships that cut across these categories.

Demsetz's thesis illuminates the economic forces at play when change occurs. However, the theory limits the causes of social change to economic factors and is silent on what causes the underlying costs in a property regime. It also does not indicate what form these transforming property rights are likely to take or how they arise. Land is more than a commodity. It embodies, for example, relationships pertaining to food, water, modes of production, culture, religion, gender, succession and conflict. The theory also does not account for land that is held by a group and where people outside the landholding group are excluded, but private and

communal rights are negotiated within the group. The theory also ignores the roles of designers in property systems, how collective action occurs, and the role of government in managing land (Krier, 2009: 144 - 149).

Similarly, Hardin's thesis is overly simplistic and deterministic. It offers a panacea, a simple, universal remedy, for a complex system, based on economics alone. A large body of empirical evidence of land use indicates that there is no single driver of change (Ostrom et al, 2007). Privatization of natural resource rights is not the best way to manage a migratory resource such as fish, ground water and wildlife (Feeny et al, 1990). When there are a number of layers of political actors involved, political considerations often override equity considerations in the way resources are allocated and in ecological sustainability criteria. Common property resources are not open access resources; i.e. access to these resources is not open to everyone. Proper management of resource exploitation is vastly preferable to the notion that privatization is the only way to preserve the resource. Moreover, the longstanding knowledge of those who have been working that resource and understand how it changes as other factors change (e.g. migratory salmon stocks) is of major importance. It is ill-advised for a bureaucrat far removed from the situation to make policy decisions that have far-reaching implications for local livelihoods (Brown, 2005: 326). Communal property implies a system in which those who have rights to the property may exclude others and hold joint and several obligations to manage the resource beneficially. There are numerous examples where this system works.

People are not helpless; they are able to organize and develop social arrangements to sustain the commons using models other than private ownership (Feeny et al, 1990).

A logical response in the developing world to the evolutionary theories advanced by Demsetz and Hardin is a simple title/no-title dichotomy. Individualization, titling and registration are the policy, legal and administrative prescriptions that should resolve land tenure and land economics problems as pressure grows on the land. This is attractive for the law and the operations management function in land administration. The processes are simple and can therefore be made efficient. The limitations of these strategies are well known, however, and have been widely reported. Simplifying tenure relationships using this dichotomy means certain relationships are strengthened and others are weakened or extinguished (Attwood, 1990: 663-4). People who are particularly affected include "women, pastoralists, hunter gatherers, casted people, former slaves and serfs, who have traditionally enjoyed subsidiary or derived (usufruct) rights to land." (Platteau, 1996:40).

These theories have also been labelled as replacement theories. For example, they argue that communal and customary systems are inferior and that market forces will drive people to replace customary tenure with private, individual property. However, they are based on economics alone and ignore the multi-functional importance of land (Nkwae, 2006; Shipton, 2009). The reality is that for many people, economics is of minor importance when they weight the different relationships that have some association with property. Moreover, some common property systems are far more efficient than they are credited with being in the literature (Kingston-Mann, 2006).

A wide body of research has shown that private land ownership has produced significant economic and non-economic benefits to owners and other sectors of society. However, the bulk of research has focused on these issues to the neglect of alternative models

and good comparative studies of the tenure forms that differ from ownership or near-ownership. There are indications that alternative property systems are better for the poor, but there is insufficient empirical work to predict the strategy choice set that should produce better results than private ownership (Platteau, 1996; Kingston-Mann, 2006).

#### RELEVANCE TO CONTINUUM CONCEPT

The continuum of land rights is a form of evolutionist thinking, but it is not grounded in economic determinism and modernization theory that is associated with the evolutionary theories of property discussed above. In a changing situation, tenure may evolve to a stable and secure state somewhere along the continuum in a form that is generally acceptable to landholders and external agencies, including the state. For example, in peri-urban areas, actual tenure practices may draw on customary tenure practices and state-based administration procedures, and they may be the best model for people living in those areas at a particular time. One view is that these are hybrids of customary and state-based tenure systems (Durand-Lasserve and Klerk, 1996). Alternatively, they may be considered an evolution or change of a customary system in response to external forces (Fourie, 1993). As per the discussion on the constellation of interests below, tenure security should be improved for different types of tenure as transformation occurs, not only to some desired end state, and private individual ownership is not necessarily the desired end.

#### 2.4 PROPERTY PERSPECTIVES THAT ROMANTICISE CUSTOMARY TENURE

Pauline Peters cautions against what she labels a reactive position on customary tenure. The position is in opposition to the hegemonic, individualization development position of evolutionary property theories, but it has leaned to the other extreme. Many observers romanticize customary systems, but these systems are characterized by the same problems as state land administration institutions (Peters, 2006: 87). The adaptive, negotiable and flexible character of customary tenure has been promoted as an alternative to the state-based administration. Land holding is complex, variable and fluid. Therefore, investing in social relations is an alternative to the individualization and titling approach (Berry, 1993; Kasanga & Kotey, 2001; Shipton, 2009).

For Peters, the so-called negotiability of land relations is a myth in many situations. Access to land is increasingly limited and a growing body of research "reveals intensifying competition and conflict over land, deepening rifts between and within kin-based, ethnic and regional groups, and expropriation of land by local and non-local agents" (Peters, 2006: 88). The flexibility of African customary systems, for example, has allowed them, in some circumstances, to be manipulated by both colonial and post-colonial regimes, which allowed customary leaders to become autocrats (Amanor, 2006). Conflict calls into question the image of relatively open, negotiable and adaptive customary systems. Instead, there are the politics of exclusion, deepening social divisions and class formation (Peters, 2006: 89). There is also the problem of lack of accountability,

abuse of authority and manipulation of tenure rules to benefit elites. Chiefs often do not have to account to an electorate (Berry, 2008). In contrast, elected politicians should be held to account for the performance of state institutions (Barry and Danso, 2014).

There are a number of perspectives of property that better explain reality than the individualization emphasis of the evolutionary theories of property mentioned above and the romantic perspective of customary systems. These include personhood perspectives, land tenure as a web of interests, and systems approaches to analysing land as a constellation of interests. Other terms that have been used to describe complex tenure systems are a matrix, a tapestry, and a mosaic (Boydell et al, 2007). These are not discussed in this report, as the personhood, web of interests and the constellation of interests perspectives discussed below provide sufficiently comprehensive frameworks for examining land tenure.

## 2.5 PERSONHOOD PROPERTY THEORY

The personhood perspective is one of a number of current views of land and property that are tendered as alternatives to traditional applications of the bundle of rights. A number of theorists in this school reject the manner in which the bundle metaphor is interpreted and applied in mainstream property theory (e.g. in the school of evolutionary theories described above). Personhood theories, within feminist traditions, indigenous tenure traditions or other communitarian traditions, resist the homogenization and commodification of land (Watson Hamilton and Bankes, 2010). Human-thing relationships are socially mediated. The personhood perspective rejects the notion of an autonomous individual with great control

over a thing (Arnold 2002:324); i.e. it rejects nineteenth century, libertarian notions of absolute ownership.

Personhood theory holds that to be a person and to develop as a person, one needs to have control over some things in one's external environment (Radin, 1982: 957). It is inspired by property theories of Hegel and Kant. As one of a number of theories that challenge the bundle of rights metaphor, the personhood perspective of property is anthropocentric, i.e. human centred. It differs from the group of recent theories that may be classed as environmental or ecocentric (Arnold 2002:322), and it diverts from the narrow economic focus of evolutionary property theories.

As with the continuum of land rights, Margaret Radin places relationships to property objects on a bi-polar continuum. At one end of the continuum, property objects may be fungible, i.e. easily replaced with a similar object. Fungible objects, such as bank notes, are easily replaceable and tend to have no emotional value for the people who possess them. At the other end are constitutive property objects, which are important in constituting the identity of that person. A wedding ring, for example, may be an important part of a person's identity, and it might be very painful for the wearer to lose it. If the ring is lost, compensating the wearer for the commodity value does not restore the total value it has to the owner (Radin, 1982: 972, 984).

A particular object may occupy different positions on the fungible-constitutive continuum at different times and in different hands. In the jeweller's store, the wedding ring is a fungible object for the jeweller; it is a commodity. If the wearer dies, the ring may again become a commodity or it may transform to a different place on the fungible – constitutive continuum where it has some emotional value as a family heirloom (Radin, 1982: 972).

## CRITIQUE

The personhood perspective places great emphasis on the symbolic importance of land as a component of personal and collective identity. The human rights connotations are that taking certain types of land entitlements away causes suffering beyond the material, commodity value of those entitlements. The difficulty in applying personhood principles to land is most noticeable in land restitution cases when the land itself cannot be returned. Estimating the constitutive value of the loss is extremely difficult. Walker (2008: 25) notes the "land is emotional" convention borders on cliché. Nonetheless, the constitutive value is very different for each individual who was on that land.

## RELEVANCE TO CONTINUUM CONCEPT

As with the modernization and evolutionary development theories described above, Margaret Radin's personhood perspective of property considers property entitlements to exist on a continuum. Interestingly, she chooses not to represent the dichotomy graphically but leaves the interpretation open to people who apply the metaphor.

Personhood perspectives can be found in a number of policy initiatives, such as the Land Governance Assessment Framework (LGAF), where different forms of rights, documented or undocumented rights, statutory and non-statutory are recognized. LGAF specifically recognizes that rights may exist on a continuum of land rights (Deininger et al, 2012). The move to prevent eviction from legitimate occupation may be seen as partially rooted in the personhood perspective as opposed to the notion of property as a commodity.

## 2.6 LAND AS A WEB OF INTERESTS

The web of interests perspective places far greater emphasis on person-person relations and their relations among land objects (land-land) than the simple person-land relationships characteristic held in many traditional views of the bundle of rights.

The web of interests has its origins in ecological perspectives of property. Resource-based property metaphors have evolved in response to both environmental and social concerns (Meinzen-Dick & Mwangi, 2009). If applied too narrowly, the bundle of rights lends itself to interpretations that may lead to environmental harm. The sticks in the bundle may be viewed as subject to a number of interwoven strands representing a concept in human-land relations. The strands include: "presence-absence; control-submission; use-preservation; exclusion/inclusion; input-output; attachment-detachment; security-risk; expectation-uncertainty; and alienability-inalienability". Each strand represents some concept in how people relate to land along a continuum (Arnold, 2002: 338).

Private individual property is not necessarily an optimum, sustainable tenure form for environmental management. There is increasing interest in the characteristics of property objects themselves and relationships between them, and these are not confined to legal interests. A nature-oriented property concept holds that particular features of things, especially their place in ecological relationships, should define the nature and scope of property rights, not merely social and legal relations (Arnold, 2002).

A web of interests better describes the systemic nature of property and the interconnectedness between people,

between people and their physical environment, and between different objects in the physical environment. A particular resource may be subject to a number of overlapping bundles of rights held by different social entities. The connections between these entities is a web of interests (Meinzen-Dick & Mwangi, 2009), and the connections between people within these entities are part of this web.

### CRITIQUE

The web of interests is a far more inclusive metaphor for explaining the local and international nature of property than the bundle of rights, especially when there are different layers of jurisdictions and government departments, and possibly customary and religious organizations, involved. It is also suited to understanding land tenure in the context of migration, including international migration. People may move away from their home, even move to a different country, but continue to influence decisions made on property that they may still consider to be home (Barry and Bruyas, 2008). In circular migration systems, members of a family may move between a registered parcel in a city and the traditional home on a piece of land in a customary area. The units of land are subject to a web of interests common to both of them, as well as interests that are distinct to each of them. The register may record one owner for the parcel in the city, but there may be a far larger web of interests in that parcel than the register reflects as people in the extended family move to and fro between the traditional area and the city (Barry, 1999).

### RELEVANCE TO CONTINUUM CONCEPT

The continuum concept is in harmony with the web of interests' perspective of property. Arnold uses the term continuum explicitly in describing how the nature of different relationships between people and between people and property may be viewed. The notion of tenure systems in peri-urban areas existing on a continuum of legal/non-legal with infinite variation in between recognizes the social connectedness of relations within a household and an extended family and other influential agents and agencies who may have an interest in that property. The concepts are explored in more depth in the discussion below of land as a constellation of interests.

## 2.7 LAND AS A CONSTELLATION OF INTERESTS

Not distinct from personhood and web of interests' perspectives, the constellation of property interests is becoming increasingly popular as a metaphor to explain the multi-layered, complexity of land tenure systems. Property systems are organic and growing social institutions, and the state has become a major affirmative actor (Carmichael, 1975: 752).

Property may be considered to be "a constellation of highly complex adjustments of entitlements and expectations" (Carmichael, 1975: 749). These constellations of relationships may be part of networks reaching into different parts of the globe. They have implications for identity, social organization and governance. Many states have "a plurality of property ideologies and legal institutions, often rooted in different sources of

legitimacy, including local or traditional law, the official legal systems of the state, international and transnational law and religious legal orders" (Benda-Beckmann et al, 2006: 3). For example, the constellation of interests pertaining to a particular parcel may draw on state, religious and customary law. The religious and state law may be rigid in its application to land and the customary law fluid and negotiable. These sources of the law may be simultaneously complementary and contradictory. Classical property theories are not adequate explanations and predictions of land tenure systems in many countries (Benda-Beckmann et al, 2006: 1).

Drawing on the constellation metaphor, Benda-Beckmann et al (2006) propose a framework for analysing property systems comprising three layers, or interrelated sub-systems. They reject the four evolutionary land tenure categories that are popular with property economists, i.e. private, state, communal and open-access property regimes. The "big four" classification, they argue, is too simplistic for a systemic analysis of the complex relationships that constitute many tenure systems. They are inadequate as a guide for complex property relationships because they amalgamate a variety of property bundles into the same category and obscure the range of relations that exist across these categories. They also obscure many relations that may be contained within each category. For example, communal tenure systems often have a range of overlapping private and common property interests. The "big four" are ill-suited for analysing plural legal systems, and useful theoretical propositions or policy are unlikely to flow from analyses based on them (Benda-Beckmann et al, 2006: 4).

### **ANALYTICAL FRAMEWORK USING A CONSTELLATION OF INTERESTS**

There are three interrelated sub-systems of social organization in Beckmann's analytical framework:

- (1) ideology;
- (2) legally institutionalized categorical property relations – the categories of rights and duties constituted in the legal institutional framework; and
- (3) the system of concretized relationships – the actual social relations as they exist in practice. The three layers are not easily merged as this may result in a loss of detail, variability and ultimately loss of meaning. Change is systemic. It is not a linear, irreversible process. It can originate in any of the three subsystems as various types of social practices create, maintain and change what constitutes property, having differential effects in each of these systems (Benda-Beckmann et al, 2006: 3).

### **PROPERTY AT THE LAYER OF IDEOLOGY**

The first layer includes the general cultural ideals, ideologies and philosophies. At this layer, relationships are likely to be plural due to competing ideologies such as neo-liberalism and the welfare state, capitalism and socialism, moral economy and possessive individualism (Benda-Beckmann et al, 2006: 22). One might argue that in many situations, ideologies should be analysed at different levels, ranging from the macro to the micro.

## THE CATEGORICAL, LEGAL INSTITUTIONAL RELATIONS LAYER

Property relationships are formalized in law to high degrees in most societies (Benda-Beckmann et al, 2006: 16). In highly differentiated social orders, institutionalized property rules tend to be isolated from social and political relationships. For example, family law tends to be a separate branch of the law from property law in Western countries. Interacting institutions in which property law is explained, discussed, disputed and changed include the courts, parliament, universities, the media and local forums among others. Other institutions such as the market, transport, education, health and so on, influence and are influenced by legal-institutional property relations. Societies with less differentiation in their legal orders do not separate property categories so rigidly. They are "one aspect of a strand in many-stranded relationships, including kinship ties, property relations and relations of political authority" (Benda-Beckmann et al, 2006: 17).

Categorical rights and interests form the legal and institutional basis for people to form concrete or actual social relationships pertaining to property. Property relationships are legally formalized in legal-institutional ways that legitimize and organize property relationships. Both the substance of the law and the procedures that are to be followed that give effect to the law should be examined when analysing land tenure (Benda-Beckmann et al, 2009: 16).

In most systems there is often significant overlap between institutions, between different classes of law (e.g. public and private, land law and family law) and the management

and administration of land. In plural legal systems, coexisting systems of state, religious and customary law overlap and contradict one another and have very different cultures of rigidity or flexibility in how rights are interpreted and managed. Rights are frequently transformed through dispute, negotiation or open struggle (Benda-Beckmann et al, 2006: 17; Berry, 1993, 2008).

The bundle metaphor can be adapted to dissect different aspects of rights at the legal institutional layer. It can be used to describe the complete range of rights and obligations. Bundles of sticks may describe access to a property object, a variety of uses, benefits and obligations, the management of the object, how it may be transferred and inherited, and the political and religious authority to regulate and distribute rights and duties (Benda-Beckmann et al, 2006: 17).

## THE ACTUAL, CONCRETE SOCIAL RELATIONS

Concrete relations are the actual relations that pertain to a property object. They may be a variation on a legal / categorical relation or a relation that is separate from the system that defines rights (e.g. law, custom, convention). A categorical right such as "X owns property A", upheld by a registered title, may not accurately reflect the constellation of actual social relations pertaining to property object A. Multi-stranded relationships may involve family or clan relationships and, in some cases, they may not seem rational to an outsider (Benda-Beckmann et al, 2009: 19-21). Actual relations pertain to use, transfer, inheritance or disputes over relationships with a property object and should be interpreted in the context of wider social networks. Powers of decision making, rule-making, judging and enforcement that are accepted in Western systems may not be separated in some property systems (Benda-Beckmann et al, 2009).

For example, in land matters where long-standing family feuds exist, the formal rules may not easily be separated from particular people. Status and position in social networks is an important part of how the rules play out. Who says something or does something may be more important than the substance of what is being said. Further, it is difficult for a decision maker to deny someone on the fringe of winning a right or being excluded from a right in land if there are longstanding social ties between the decision maker and the person who stands to lose their claim (Barry, 2010).

The ideological layer, the legal institutional (categorical) layer and the actual or concrete layer need to be treated separately as they may differ markedly (Benda-Beckmann et al, 2006:22). Changes in ideology may occur far more rapidly through political processes than in statute or other formal systems of rules. Likewise, actual relations may be very different to the categorical or formal relations.

### CRITIQUE

The constellation framework does provide a structure for interdisciplinary assessment of a situation in a field where policy and practice is dominated by economics and law, and it should capture complexity very well at both the micro- and macro-levels. Arguably, the framework is not new, as it is a broadening of an anthropological view of how to analyse tenure systems to other disciplines and encourages systems thinking approaches to land tenure problems. It focuses on the entire tenure system, on what actually happens and not just what the state recognizes (Benda-Beckmann et al, 2006: 23).

The systemic properties of the framework are very important. As Benda-Beckmann et al (2006:29) caution, there is a temptation to borrow and cherry pick ideas from different disciplines, which results in an analysis that may miss key relationships. Analysis based on the notion of a constellation, or web, of interests using multiple, interdependent systems goes beyond the frequent dualisms or dichotomies, such as ideal and real, law and practice, structure and agency, which tend to dominate many methodological assumptions (Benda-Beckmann et al, 2006: 30).

The big four classifications of tenure types are overly simplistic and one may argue that they may lead to strategies that harm the poor. They are also deficient at handling the manifestations of social change that occur in peri-urban systems and generally when societies are faced with external forces that stimulate change (Comaroff, 1982; Iaquinta and Drescher, 2000; Barry and Danso, 2014).

There are some limitations in the manner that the framework may be applied, and it may lead to analyses that explain and predict a problem well, but are limited in how they can serve prescriptions for design and action. The common law systems and civil code systems cannot deal with notions of the constellation easily as, by nature, legal systems are conservative and not easily changed (Hepburn, 2009). Land management actions that have occurred under particular laws at a particular time cannot easily be reversed. For example, under most Western systems, it is difficult for a government to expropriate mineral rights if these rights were allocated with an original grant.

A second limitation, related to setting up intervention projects, is that simplicity is essential in communicating project objectives and outcomes. Simple, easily digestible messages are important to get actors to commit to a project. For international agencies and politicians, these prescriptions tend to be the basis of intervention projects with defined deliverables and timelines. They need to be communicated to funders and other stakeholders in simple terms and objectives. Vague outcomes and deliverables are not attractive to funders or politicians, or to the people to whom they are accountable. Complexity and continual change implies that project activities, processes, deliverables and outcomes should be assessed and redefined continually. This needs to be incorporated in the risk analysis in the project design.

#### RELEVANCE TO CONTINUUM CONCEPT

The constellation of land interests framework presented by Benda-Beckmann et al (2006) can easily be used in conjunction with the continuum of land rights metaphor. Both assume that, today, continual transformation occurs in land tenure systems. Benda-Beckmann et al (2006) use the term “a continuum of differentiation” to describe cross-cultural differentiation in the legal-institutional layer. Where the two concepts differ is that Benda-Beckmann’s approach avoids the formal-informal dichotomy that is presented as part of the continuum of land rights, but the continuum metaphor can be configured to suit a particular situation. The constellation structure, the three subsystems or layers, may form the basis of an analysis along some form of continuum, not necessarily formal-informal. It may also be used as a structure to evaluate a land tenure type based on the three main sub-systems and how they interrelate.

03

## CONCLUSIONS

Drawing the threads together, this report has examined some relevant theories of property and metaphors of property. The distinction between theory and metaphor is blurred at times, and this has been observed in how the continuum concept is evolving. The field of property theory is vast; written forms date back to the ancient Greek philosophers and there are many more theories and metaphors than those discussed above that are relevant to the debate about what constitutes the continuum of land rights, and whether the continuum of land rights is a theory or a metaphor. However, the most relevant ones have been discussed here.

There are problems with land management strategies based on modernization and evolutionary development theories. However, what Plateau labels the evolution of theories of property based on them continues to dominate the development agenda. These evolutionary theories are criticized because they are based on simplistic forms of economic determinism, and the notion of an irreversible, linear evolution to individualized, private ownership of land prevails in many development agendas. Land titling is often a crucial component of strategies designed to privatize land. Empirical evidence shows that many titling programmes do not produce the desired outcomes as they are often implemented without sufficient consideration of the factors that are critical to their success. One of these factors is that, in many situations, titles and statute law can only partially reflect the networks of relationships between people who have an interest in a plot of land.

Ownership, however, remains an important concept in considering the continuum of land rights. It is important to know what constitutes ownership or near ownership in a jurisdiction and who the legal owner of a piece of land is when seeking to strengthen the tenure of people living on that land through some alternative tenure form. It is also important that the rights of a legitimate owner

are not extinguished unfairly through the recognition of alternative tenure forms on his or her land.

Related to ownership is the concept of a bundle of rights, which has been criticised as being too simple to describe and explain many tenure systems in situations where a continuum of land rights might apply. The criticism is valid if applications of the bundle are restricted to simple nineteenth century articulations of it. However, it is a longstanding, robust, descriptive tool that should not be discarded. If the bundle of rights is viewed purely as a metaphor and not a theory, the bundle can be adapted to serve as one of the tools to describe the complex set of social, political, economic, legal and physical relations that are intrinsic to many complex tenure systems.

In direct opposition to advocates of private ownership are perspectives of property that romanticize customary tenure systems. The argument is that customary systems are adaptable and relatively open, and that changes in relationships relating to land are easily negotiated and resolved. While this may be the ideal, it is not pragmatic. Empirical evidence suggests that the negotiability of land is a myth. One cannot ignore the imbalances of power in some local and regional politics in customary systems, and many customary systems are fraught with conflict, exclusion, class division, grabbing of land rights, chiefs acting autocratically, and lack of accountability. Thus, the argument that if customary systems are left alone, land tenure will be managed equitably is impractical.

In reality, the manner in which people relate to land is not as simple as the two schools of thought above would have us believe. There are a number of perspectives of property that recognize the complexity of tenure systems, and which caution against oversimplifying explanations of the social and physical relationships pertaining to land. Over simplification based on bad theory leads to an inaccurate model of reality and consequently flawed policy and

practice, as has been shown by empirical evidence when the two schools of property theory mentioned above have been applied without due consideration of the conditions that have to be present for them to work. Three of these “complexity” perspectives have been covered in this discussion, and they incorporate human-centred, ecological and interdisciplinary systems views of property.

Personhood perspectives of property are humancentred. They highlight the emotional attachments to property and the notion that land forms part of a person’s identity. A popular articulation of personhood perspectives are that property objects may be viewed on a bi-polar continuum. At one pole they are fungible, such as a commodity that is easily replaced because the owner has no emotional attachment to it. At the other pole they are important in constituting the identity of that person.

The web of interests has its origins in ecological perspectives of property that have arisen due to environmental and social concerns. This perspective places far greater emphasis on person-person relations and their relations among land objects (land-land) than the simple person-land relationships characteristic held in many traditional views of the bundle of rights. A particular relationship is subject to many influences - interwoven strands of competing forces, each strand representing a concept in human-land relations - and each strand may be situated on a continuum in the manner it influences that relationship.

The concept of a constellation of property interests incorporates an interdisciplinary, systems view of property, which embraces personhood perspectives, the web of interests’ perspective and legal pluralism. It is systemic in that it focuses on the entire tenure system. A framework to view property incorporates the micro-level,

anthropological view of property to networks reaching into different parts of the world.

**Land tenure can be viewed from the perspective of three interrelated sub-systems or layers:**

- (1) ideology;
- (2) legally institutionalized, categorical property relations – which may range along “a continuum of variation”; and
- (3) the actual social and physical relations as they exist in practice.

The constellation framework draws on the multiple, interdependent systems that constitute and influence a land tenure system. If applied thoroughly, an analysis using it should illustrate the complexity of a situation and reveal the different views and agendas of both the agents embedded in the situation and those analysing it.

Applying the constellation framework does pose a number of challenges, however. A tension exists between reductionism and systemic approaches to land tenure analysis. Complex, holistic analysis may provide an accurate picture of a situation, but simple messages are required to initiate action to improve that situation. Messages have to be conveyed to politicians, electorates, funders, officials and other stakeholders in simple, easily understood terms that promise clear outcomes and deliverables.

One way of dealing with the simplicity-complexity tension is to articulate a problem in simple terms in project proposals, but to strongly emphasise risk management, especially “what if: scenario analyses that cover the complexity of a situation. That said, there is a caution

against cherry picking concepts from different disciplines, which may result in an inaccurate picture of a situation.

Having argued for the constellation as a framework, the question then is how does the continuum of land rights fit in with this framework? The continuum of land rights is one of a number of metaphors for analysing a complex tenure situation and communicating how it may evolve, but it has to be applied critically and in a way that matches that situation. In general, the term continuum has been used to describe a number of situations and concepts that are relevant to land management, land-use planning, development theory and property theory. Thus a bi-polar representation of a complex phenomenon can be used to show the tension between two of the major competing concepts in a situation (e.g. formal – informal, positive – negative). It is a simple sign and the intended meanings should be easily understood if communicated correctly, and it is well-suited to portraying different, evolving tenure types in a changing situation. If fittingly emphasized, it also communicates that complex social change accompanies the evolution from one tenure form to another. Flowing from this, in an ideal world both the tenure form and the transformation processes should be evaluated and managed.

There are problems in the manner the continuum has evolved and is portrayed in some influential literature. For some, the graphic and the description of the continuum of land rights may be interpreted as advocating an evolution to private property. The single arrow in the graphic and the description in *Handling Land* (UN-Habitat/GLTN, 2012), for example, could suggest a linear progression to private, individualized property as a desirable end point or goal. A consequence is that some critics view the continuum in the same manner that they view simple representations of the bundle of rights; it is overly simplistic and advocates a particular ideological

approach to land tenure management. That is not the intention of the concept.

Covered in more detail in the recommendations below, it needs to be emphasized that the continuum is a tool for explaining, predicting and visualizing how tenure systems may evolve. The two poles on that continuum need not necessarily be formal or informal, and the evolution of tenure forms is not necessarily from left to right. At a minimum, the arrow in Figure 1 should be removed. Moreover, the different labels on the continuum should be assigned according to the situation being analysed; i.e. a fit-for-purpose approach. Noting the cautions about the tensions between complexity and simplicity above, the continuum of land rights can be used as a tool to debate, explain and predict land tenure systems, be that from different ideological perspectives, the perspective of evolutionary theories of property, a constellation of interests, a web of interests, personhood perspectives and other theoretical positions.

## RECOMMENDATIONS

**RECOMMENDATION 2:**

The following are recommendations that may create a clearer understanding of the continuum of land rights and its purposes:

**RECOMMENDATION 1:****The continuum of land rights is a metaphor, not a theory**

The first recommendation is the continuum of land rights should be considered as a metaphor if it is to be a lasting concept. It is a widely accepted concept with its primary purpose being an aide to improve tenure security. It becomes problematic when it is presented as a theory because it then assumes ideological characteristics. As noted above, land tenure problem situations should be debated from different ideological positions, especially if that debate is intended to be participatory.

**Adopt a position on the role of the state in land tenure administration**

Part of the rationale for the continuum is that the state is unable to administer land completely in many jurisdictions. However, the arguments in a number of documents (e.g. UN-Habitat/GLTN, 2012) and communicated in Figure 1 may be interpreted to mean that the state should be the sole agency that administers land. The GLTN should take a position on this and state that position explicitly, or at least a position should be taken on a particular jurisdiction or legal regime.

**There are two options for action:**

1. The state should be the primary agency involved in land tenure administration and establishing this should be a development goal.
2. A number of institutions / agencies are involved in land tenure administration and a development goal should be to harmonize the different systems in a manner that best suits the local circumstances. These institutions may be customary institutions, private information systems/insurance companies, civil society groups and non-government organizations. This is the "fit-for-purpose" approach. The situation may unfold where the state becomes the major agency involved in land tenure administration, but it should not be a point of departure.

## RECOMMENDATION 2:

### OPTION 1:

#### ADVANTAGES

- This option is relatively simple and it is easy to design policy, law, land administration operations management processes, land administration projects and interventions.
- The organizational development challenge in land administration is to harmonize the activities of different state organizations and institutions. The state is seldom an homogeneous entity. This is a sufficiently challenging task in itself, without having to consider non-state institutions.
- All the land-use planning and land administration functions are the responsibility of the state. Land tenure administration is not devolved to a number of authorities such as deeds registries and private agents such as title insurance companies or private conveyancing attorneys.
- It is easy to communicate to politicians and it is an attractive option for officials.
- It makes harmonizing the law and practice and dispute resolution simple.
- It is an attractive option if economic considerations predominate rather than equity considerations. It is easy to allocate and record land for industrial and agricultural development and this is attractive to both local and international investors.

#### DISADVANTAGES

- The option is an apparent contradiction of much of the literature that argues that the state is not able to manage land tenure effectively. Ideologically, it may be seen as motivation for some influential agents to embrace modernization and evolutionary positions on development and evolutionary theories of property. This contradicts much of the thinking that motivated the continuum.
- Much of the momentum for current GLTN initiatives is that option 1 as a development approach has not worked / is not working.
- The state often does not have the capacity or the will to administer tenure effectively. Undesirable equity consequences of this option are that people lose land interests through corruption, land grabbing, abuse of power by elites and other powerful actors.
- If people are made landless as a consequence of events in (c) above, then general society bears the cost of addressing the problems that follow from this. For example, who bears the cost of managing new informal settlements and squatting when poor people are evicted from an informal settlement, and with the reaction(s) to the loss of land by illiterate, unskilled youth who are expected to farm when their family land is grabbed or sold off?
- Unless it is handled sensitively, option 1 may impose an ideological position on customary / aboriginal systems that is culturally unacceptable. It may encourage proposals for bi-cultural societies or proposals that aboriginal societies should be assimilated into modern society.

## RECOMMENDATION 2:

## OPTION 2:

## ADVANTAGES

Under certain circumstances:

- Option 2 is better in legal pluralism regimes and in situations where there are a number of different development ideologies.
- Option 2 better captures the relations that define a land tenure system as they exist, the legal and the actual relations.
- Option 2 allows for different ideological positions to be debated as part of a response to land tenure challenges.
- Option 2 allows a society to develop in a manner that is truly multi-cultural, and it supports the notion of self-determination.
- If good governance, institutions and organizations are in place, then the change that accompanies development may occur in a manner that better serves the poor, women and other vulnerable groups.

## DISADVANTAGES

- It is extremely difficult to design and implement harmonized systems that cater for the level of complexity that option 2 implies. There is a wealth of literature criticising strategies that have been abused when option 1 has been applied. There are a number of authoritative works indicating that option 2 can also have substantial, undesired outcomes if the enabling conditions do not exist (e.g. good governance, appropriate legislation for bridging between different tenure types, capacity to administer

complex institutional and legal arrangements, open societies, freedom of information and free press).

- Institutions are seldom in place to handle the manifestations of social change in local politics at the micro-level as tenure transformation occurs.
- Complexity and the need to continually redefine objectives and outcomes in a systemic manner are not attractive to politicians and donors. Politicians and donors need solutions that appear to be simple and are easy to communicate to their stakeholders. Solutions or prescriptions have to be seen to fix problems rather than support actions that may bring about incremental improvements. Attractive schemes are ones with clear objectives. Activities need to be mapped against particular objectives. Funds are allocated to each activity in a manner which can be measured against specific objectives. Schemes with fuzzy objectives that involve allocating funds to activities where there are high risks that the objectives will not be achieved are less likely to garner political support or attract funding.
- If effective institutions and organizations are not in place, social change is not managed at the micro-level, and there are no effective strategies to harmonize the different overlapping and conflicting tenure systems, laws and rules, then the courts and other dispute-resolution forums may be clogged with land conflicts. In situations where land is strongly contested and it is possible to use nonviolent strategies to secure tenure, the most important strategy that landholders believe is necessary to secure tenure may be to acquire resources and power to access the courts.

**Conclusion:** Option 2 is the more attractive option if equity is the primary consideration, provided the enabling conditions can be created. This option is more in harmony with the original rationale for the creation of the continuum of land rights as a concept. What should be avoided are grand development strategies that fail to account for the enabling conditions and the institutions that need to exist at the local level.

## RECOMMENDATION 3:

### OPTION 1:

#### Define the terms formal and informal explicitly

The term formal currently implies state-recognized tenure forms as per the description in UN-Habitat/ GLTN (2012). As discussed in the main body of this report, there are problems with this description of formal and it is a reason why some people are sceptical about the continuum as a concept. There are two options to address this:

1. Define formal as tenure forms that are recognized by the state alone through laws and operational procedures (e.g. issue of occupation permit, lists of people who arrive in an informal settlement in chronological order so as to address their needs in a fair manner).
2. Broaden the definition of formal to include state laws, rules and actions, religious orders and interests arising out of customary systems such as oral tradition and oral history, and current social convention.

### ADVANTAGES

This option links to option 1 under recommendation 2 above. If the state is the sole administrator and arbiter of the tenure system, then tenure is simple to understand.

- Land tenure and property rights are far easier to administer under option 1 than option 2.
- It is attractive for commercial and industrial investment as it provides certainty for investors.
- It is feasible in societies with low levels of differentiation in their social and legal orders.

### DISADVANTAGES

- Models are seldom an adequate representation of actual tenure systems in many situations and the reality can be very different. The laws, rules and operational procedures may only explain a small part of actual tenure situations, especially in societies with high levels of differentiation in their social and legal orders.
- The option may be seen to be part of attempts to force people to modernize and assimilate into modern society.
- It may be seen as conflicting with the notion of legal pluralism.
- It may be impossible to implement. Even military regimes that have nationalized land have failed to remove customary tenure systems operating outside of state laws and regulations.

**RECOMMENDATION 3:****OPTION 2:****ADVANTAGES**

This option is far more inclusive and is more representative of tenure relations as they actually exist.

- It accommodates a wider range of ideological positions on tenure, land-use planning, social orders and the political economy.
- It is in harmony with the concept of legal pluralism.
- If a situation is analysed and debated from different perspectives then equity concerns are likely to be given more weight than under option 1.
- It allows for a range of dispute-resolution mechanisms that are best suited to the means and culture of people on the ground.
- It will make a simple graphical representation of the continuum of land rights more inclusive and more attractive. The graphic will have to be adapted to circumstances. This implies the notion of a fit-for-purpose graphical representation debated from different ideological perspectives as a starting point in a discussion.

**DISADVANTAGES**

- Option 2 makes planning, management, administration and integration far more complex as per the discussion on option 2 related to recommendation 2 above.
- The operational or situational culture, how things are done, may vary between organizations and institutions in plural legal systems. Jurisdictions may overlap on some issues. Organizations and agents may cooperate on some issues and be in conflict on

overlapping issues. State and religious applications of the law and rules may be rigid. Customary systems and the development of convention may be fluid and negotiable.

- Land disputes may be shopped around different forums and the same piece of land or overlapping parts of different pieces may be the subject of cases in different dispute resolution forums.
- The system may slow economic development if there is an overemphasis on equity considerations to the detriment of economic development. It may be very difficult to allocate land for industrial, commercial and agricultural development if there is the risk of a challenge to development based on a choice of different legal orders.
- If the enabling conditions are not in place, then option 2 for recommendation 3, along with option 2 for recommendation 2, can result in a dysfunctional land administration where decisions are ad hoc and achieved through political connections. Land grabbing and fraud fails to be addressed by the criminal justice system. (This may also occur under option 1 too if the state is weak or corrupt).

**Conclusion:** Option 2 is the preferred option, provided the enabling conditions are in place. Thus, work on land tenure, property law and land administration by the state alone is unlikely to produce the desired outcomes if attention is not given to other important systems, such as customary systems, religious influences and de facto versus de jure tenure practices.

## RECOMMENDATION 4:

Adopt the metaphors of

- (1) a constellation of land interests and
- (2) the bundle of rights as metaphors to complement the continuum of land rights metaphor, and develop an accompanying analytical framework based on three main subsystems, the ideological, legal, and actual relations. Further, develop frameworks for specific applications or purposes of the continuum

The constellation of land interests extending from local villages to around the world is a term that appears to be gaining acceptance in circles where the evolutionary theories of property are challenged.

The bundle of rights is a long-established land tenure metaphor and should not be discarded.

The three metaphors may be applied in the following way. The constellation metaphor and the bundle of rights metaphor may be used to describe the different interests and obligations as they currently exist or may exist in given scenarios. The continuum of land rights may be used to explain and predict how systems change in response to local and external forces. The continuum may then drive the debate related to policy and practice,

and strategies to improve a situation and to administer tenure given different scenarios.

Benda-Beckmann et al's (2006) three sub-systems may be developed as an overarching framework for analysing a particular situation and at a particular scale of analysis (e.g. local to international). The ideological layer may include ideologies pertaining to the national / international political-economy (e.g. neo-liberalism, social-democracy, socialism), ideologies pertaining to customary systems (e.g. replacement, evolution in a multi-cultural setting), land use planning ideologies, and the role of different agencies in land tenure administration. The legal or categorical sub-system describes the formal system of rules and regulations, as per the revised definition of formal described above, and the manner in which they are administered and enforced. The actual or concrete relations subsystem covers the actual relations as covered by the different formal sub-systems and how they are applied and social relations that exist inside and outside of these formal systems.

Putting this into operation requires further work. Recommendation 4 is one option for evaluating a situation.

**RECOMMENDATION 5:****Change the graphical portrayal of the continuum**

The current graphical representation should be discarded. It is appealing because it is simple and conveys the notion that land tenure security is complex and not a simple dichotomy between state and non-state systems. The pitfalls are that it may be interpreted to mean that evolutionary theories of property should drive development as per the arrow in Figure 1. Moreover, the formal-informal dichotomy implies that the state should continue to be a major actor. A particular intervention may well end up applying both of these concepts, but they should not be the starting point in a debate. The following three options exist:

1. Discard a general graphical portrayal altogether.
2. Revise the current graphical portrayal as a general, all-purpose communication device.
3. Develop purpose-specific graphics representing the continuum of land rights.

**OPTION 1:****ADVANTAGES**

- The absence of a graphic portrayal means the continuum can be used as a metaphor that distinguishes it from a particular ideology and therefore makes it a useful tool in a far wider range of applications.
- It may also make the continuum an enduring metaphor.
- As noted, there are objections to the current graphical portrayal of the continuum from a number of quarters. No other land tenure metaphor or property theory has an all-encompassing graphic to communicate its application to all possible situations.

**DISADVANTAGES**

- The continuum is used as a communication device to a far wider audience than conventional property metaphors such as the bundle of rights, which is used by lawyers and other specialists. Non-specialists benefit from a simple sign to communicate complex concepts. Laypeople do not think of land or other forms of property in terms of bundles of rights or constellations of interests. They need something simple.

**OPTION 2:****ADVANTAGES**

- If a general, all-encompassing graphic is to be developed, then the current graphic needs to be modified to address negative issues associated with evolutionary property theory and the informal-formal definition above.

**DISADVANTAGES**

- There are disadvantages to changing the current graphic, which is widely recognized. However, this has to be done for the continuum to retain credibility.
- Cousins et al (2005), GLTN (2014) and Whittal (2014) have experimented with a revised graphic. The first author has also experimented with purpose-specific graphics. Discussion of these graphics warrants a separate report. The main problem is that it is very difficult to develop a universally applicable graphic or graphics that attempt to address the constellation of interests, bundle of rights and the continuum of land rights without them becoming overly complex and ill-suited to communicating these concepts to the target audiences.

## RECOMMENDATION 5:

### OPTION 3:

#### ADVANTAGES

There are a number of advantages to having purpose- and situation-specific graphical portrayals. These graphics may be an augmentation of a general graphic or developed from scratch to fit the specific purpose of the analysis.

- The current graphic indicates that formal and informal are the two principle components, and the two most influential constructs in analysing a situation. This may not be the case and different constructs may be situated at the end of a continuum. This fits in with a number of theories and metaphors discussed in the main body of this report that also use the notion of a continuum to describe particular concepts.
- There are major advantages to graphics that portray concepts that relate to a specific situation because they capture the detail and the context of that situation, something that a general graphic such as Figure 1 fails to do. They may be a number of graphics that incorporate the constellation of land interests and its sub-systems as well as the bundle of rights. Thus a series of graphics may be used to analyse a situation and build different arguments rather than a single one.

- Using a Fit-For-Purpose graphic allows a range of problem solving methodologies to be used in conjunction with the continuum of land rights metaphor. This may include, for example, methodologies that use rich pictures and conceptual and actual systems representations that form part of soft systems approaches to problem definition and solving.

#### DISADVANTAGES

- The major disadvantage is it introduces more complexity into analysing a situation, which could make the process elitist. Analysis of a situation should include people who have a range of experience and education levels.

**Conclusion:** The issue requires a separate debate and needs to be workshopped with GLTN partners. There are strong arguments for all three options described above. Options 2 and 3 can be combined, for example. A discussion and analysis process may start with a general graphic, which can be critiqued and adapted to fit a particular situation over time.

# ANNEXES

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# GLOSSARY OF TERMS

## **Concept**

A generalization or abstraction or a simplification of things or phenomena that exist in the mind of the observer. Concepts may be a word or collection of words and symbols that can be used to describe relationships among phenomena (Grover and Glazier 1986:232). For example, land tenure is a concept.

## **Continuum**

A range of values or things that exist between two possibilities. The distinction between two adjacent values or things is very small. For example, attitudes may be measured on a bi-polar continuum ranging between positive and negative.

## **Hypothesis**

A hypothesis is a logical supposition, a reasonable guess, an educated conjecture which is either supported or not supported by an analysis of the research evidence. It is a proposition expressed in a form suitable for testing (Grover and Glazier 1986). For example, "Under conditions C1, C2, .... Cn, if X occurs then Y will occur with probability P." (Reynolds 1971:74).

## **Interest**

Land interests include land rights as well as claims that are negotiable. An interest may be viewed on a continuum with a right at one extreme and a mere hope of obtaining a right at the other, and a mix of the two in between.

## **Metaphor**

A figure of speech or a set of symbols that are used to describe something else. For example, a bundle of rights is a metaphor to describe the various interests in a land object in simple terms.

## **Obligation**

An obligation or duty includes restrictions and responsibilities that are codified in law or generally understood as being part of long-standing custom or social convention as rights, restrictions and responsibilities, as well as obligations arising from ethics and social norms.

## **Oral history**

When dealing with customary and aboriginal systems, oral history relates to what a person observes and assimilates in their lifetime. See oral tradition (Vansina, 2006). Oral tradition In customary and aboriginal systems, oral tradition relates to the stories that are passed down through a number of generations (Vansina 2006). See oral history.

## **Parcel**

A unit of land that has rights over it registered in a land registry or rights recorded in deeds in a legally recognized, private conveyancing system.

## **Proposition**

In theory building, a logical statement of a concept that can be restated as a hypothesis for testing (Grover and Glazier, 1986:232). Propositions often take the form: "If conditions C1, C2, ...Cn, then X is likely".

## **Responsibility**

A legal responsibility is codified in law or clearly understood in common law or custom. It binds a person or the holder of a real right to perform a particular duty or refrain from performing a particular action.

## **Restriction**

In land tenure, a restriction may be a general restriction, such as a town planning regulation, that prevents the holder of rights in land from exercising certain actions. It may be registered on a title or deed as a title restriction or an encumbrance.

## **Right**

An entitlement supported by law, long-standing custom or general convention.

## **Strategy**

A high-level plan or pattern of activities to reach desired ends with available means. It may be long term in contrast to tactics, which are short term and designed to achieve an immediate objective.

## **Sui generis**

In law, a unique, special interpretation is necessary for a particular situation, which is based on the facts of that situation and not precedent. In Canada, for example, aboriginal title to ancestral territories is *sui generis*, not usufructuary. It is in a class by itself, which cannot be explained by either Western common law descriptions of land rights or aboriginal legal systems alone, as they both evolve to influence a situation, which is not frozen in time.<sup>1</sup>

## **Symbol**

Symbols are words or pictures which assign meanings (subjective and objective) to observable events and their inter-relationships, and serve to communicate these meanings. They are the basic element in developing theory (Grover and Glazier, 1986). For example, as a symbol, a boundary beacon is a cultural artefact that comprises a physical object and a set of social and legal relationships designated to that object (Barry and Roux, 2012).

## **Theory**

*"Abstract entities that aim to describe, explain and enhance understanding of the world and, in some cases, to provide predictions of what will happen in the future and to give a basis for intervention and action."* (Gregor, 2006: 616). A systematic view of the phenomena by means of a set of inter-related constructs, definitions and hypotheses (Kerlinger, 1979:64).

<sup>1</sup> R. v. Van der Peet, [1996] 2 S.C.R. 507; Guerin v. The Queen, [1984] 2 S.C.R. 335, Delgamuukw v. British Columbia, [1997] 3 S.C.R. 1010, Tsilhqot'in Nation v. British Columbia, 2007 BCSC 1700.

## ABOUT THIS PUBLICATION

The continuum of land rights has matured as a concept and is now widely accepted among a number of international agencies, the development community and some national governments. It has developed independently of a critical examination in terms of the vast array of established development theories, property theories and metaphors. The critical examination is needed if the concept is going to facilitate the vigorous debate necessary to improve land tenure security in ways which accommodate the numerous ideological positions on land and development. This document starts the process. It examines the continuum of land rights in terms of a sample of development theories and property theories that dominate the development agenda, and in terms of a sample of theories and metaphors which are opposite to them, and it outlines how they apply and can be used for the continuum.

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