

A New Conceptual Model for the Continuum of Land Rights

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Abstract

This paper presents a new conceptual model for the land rights continuum. In developing the argument for the proposed model, the theoretical assumptions of the former model are challenged and an understanding of land rights and tenure elements is explored. The evolutionary approach is rejected in order to accommodate diversity and reflect the coexistence of multiple forms of land rights. In order to inform the development of a new model, a systems understanding is used to identify five primary elements of land rights and land tenure. These are expanded in a tabular form in the Appendix to the paper. An aspect of this is land value and the degree of simplicity/complexity in land value is found to be well-aligned with the land rights types in the former continuum model. This is adopted as a suitable substitute for the former measure of informality/formality when locating land rights types on the horizontal axis. Legitimacy, legality and complexity are identified as indicators of land tenure security. These lead to the triple vertical indices of land tenure security in the new model. The range of land rights options in use, their associated land tenure, as well as mobility of people and flexibility of land parcels between land rights types, can be modelled.

1. Introduction

The movement of people from the rural to the urban environments and from traditional societies to more urban and modern societies (as per Table 3.1 in Coetzee 2001b, p32) is consistent with modernization theory. Progress towards a modern state is understood in modernisation theory to occur along a trajectory in a linear fashion as long as development conditions are favourable. Regression is excluded and traditional aspects of society are abandoned over time (Coetzee 2001b). Land tenure research has been dominated by the development agenda (Coetzee 2001a) and normative responses to communal and customary land administration systems are consistent with modernization theory in that they are seen as primitive and a hindrance to development.

In addition to the underlying theory of modernisation and development, theoretical constructs (Barry and Roux 2012) in the land tenure domain also reflect an evolutionary approach to understanding the humankind-to-land relationship (Ting and Williamson 1999) that has endured despite critique (Willie Tan 1999). Evolutionism is defined as (Le Roux and Graaff 2001, p46)

“A theory which proposes that long-term social change happens in stages, that it is linear, gradual and irreversible, and that it is progressive”.

This understanding is conveyed by the Continuum of Land Rights model of the UN-Habitat (Figure 1) which has been a point of departure in land tenure discourse for a number of years. The model depicts a trajectory from perceived tenure approaches to registered freehold along a scale

from informal to formal land rights (UN-Habitat 2008). Contrary to the name of the model, discrete tenure types are depicted, in harmony with a staged understanding of tenure and incremental movement through the land rights and land tenure types. This heuristic model is linear, the arrow indicates progression along the trajectory towards registered freehold, and regression is not accommodated. On its own, the model conveys that some tenure forms are more desirable than others regardless of context.

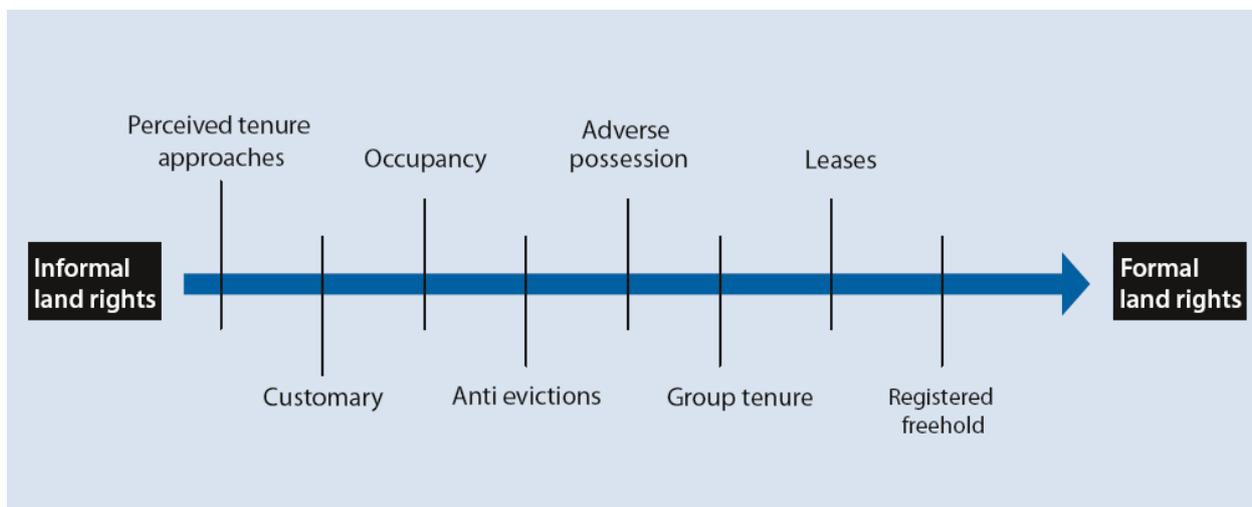


Figure 1: The Continuum of Land Rights (UN- HABITAT, 2008, p8)

There has been an international drive to individualize land rights and formalize land tenure records. The importance of land rights in accessing capital for production, promoted by De Soto (2000), has played an important role, but this approach has also been subject to much critique (multiple references in Barry and Roux 2012). However, the link between land markets and urban poverty is still an important area of scholarly debate (Kihato and Royston 2013). The author, along with Weideman (2004), Payne (2004) and Rakai (2005), questions the predominantly western worldview that judges freehold tenure to be a good and desirable goal in most, if not all, circumstances. Other tenure options may meet the needs of the poor and enjoy social legitimacy, however, early attempts to classify tenure systems were biased in favour of statutory categories (Payne 2004) as reflected in Figure 1. Past thinking and practice in provision of land rights has been laden with value judgement and preference for some land tenure tools over others. The enduring view of the continuum as evolutionary (Ting and Williamson, 1999) is in sympathy with the identification of “problems” that needed to be “eradicated” (Kihato et al. 2012). Hornby (2004) noted that, in South Africa, service delivery hinged on registered land rights and tenure, despite the fact that a functional, but less formal, tenure and land rights regime was in place. The individualisation and formalisation of land rights was entrenched and promoted through housing and service delivery policy.

It is recognised that the model in Figure 1 is in need of review (Augustinus 2013). Some model development has already been undertaken by the Legal Entity Assessment Project (LEAP) (Figure 2) and others. Cousins et al. (2005) highlight the multidimensional nature of land tenure as opposed

to a uni-linear understanding, and the evolutionary approach is discarded as evidenced by the double arrows on the horizontal axis of this later model. The idea of official recognition as a tool for increasing tenure security was mooted. From the critique of the binaries of economic formality *vs.* informality (the dual economy), a critique (Royston 2007) of the use of binaries in land tenure in the form of formal and legal *vs.* informal and illegal practices emerged (Kihato et al. 2012). This is also reflected in Sietchiping et al. (2012, p16) who note that land tenure security monitoring should go beyond “formal *vs.* informal or ownership *vs.* renting.” Royston (2005) called for a new land rights and tenure lexicon to reflect complexity and heterogeneous rules, procedures etc.



Figure 2: LEAP continuum of land rights model (Royston 2005 and 2012)

It is acknowledge that the United Nations model’s (Figure 1) “fitness for purpose” (Augustinus 2013) can be improved with the addition of measures of land tenure security (Sietchiping et al. 2012; Augustinus 2013). Various measures of land tenure security have been identified by previous researchers. The role of social networks in perceptions of tenure security emphasises the importance of legitimacy as a measure of tenure security (Cousins et al. 2005; Royston 2012) along with legality.

Incremental rather than “big bang” approaches to land tenure reform were advocated (Smit and Abrahams 2008; Royston 2010; UN-Habitat 2012) and adopted in the South African land policy National Upgrading Support Programme (NUSP) (Kihato et al. 2012). The Urban Land Markets Programme Southern Africa continue in their development of the concept of the land rights continuum but advocate upgrading and improvement towards legal land tenure forms that may include lesser rights such as leases, group or individual titles (Kihato et al. 2012).

Rakai (2005) warns against tenure eurocentricity but promotes tenure duality, pluralism and the notion of a continuum as desirable in a neutral land tenure framework that can transcend worldviews, values, concepts, goals and institutions. Pluralism is also advocated by Kihato and

Royston (2013). The aim of the UN-Habitat for the conceptual model to support pro-poor, sustainable, scalable and gender responsive land tools is a further incentive towards inclusivity and pragmatism in design. Research on peri-urban land tenure in Ghana (Akrofi and Whittal 2011b) highlights the need to understand and strengthen existing land tenure systems, such as customary systems, which are entrenched in the socio-political fabric. Kihato et al. (2012) highlight that more avenues to formal land tenure need to be created than currently exist, and that existing informal mechanisms of gaining access to land rights need to be recognised.

The paper is structured as follows: the research methods are reported and the evolutionary approach to land rights and tenure is critiqued. Thereafter, a soft-systems inclusive approach to understanding the various aspects of land rights and land tenure is proposed that then informs the development of tables in the appendix reflecting these aspects (land tenure objects, types and rights, concepts and value, and subjects). The essential elements of a new model are derived from the previous discussions, and the new model of land rights is then proposed. This conceptual model is presented with reflection on South African realities.

2. Methods

A human rights-based approach underpins current thinking on land tenure and is summarized as follows (Franco 2008, 19):

- (i) “people are viewed as rights-holders, rather than mere ‘beneficiaries’
- (ii) states are viewed as duty-bearers with the obligation to respect, protect and fulfil people’s human rights, rather than ‘service providers’ and
- (iii) governments should be held accountable when they fail to meet this obligation and rights are violated.”

In the South African Bill of Rights, the State is also obliged to promote human rights (Constitution, section 7(2)). The Land Management Paradigm (LMP) of Williamson et al. (2010) encompasses the four aspects of land tenure, use, value and development with its concomitant rights, restrictions and responsibilities (RRRs). The LMP, along with a holistic good governance framework for change planning and performance assessment (Whittal 2011), provide a useful backdrop to development in land rights and tenure security, but should not constrain creative development in this field.

A systems approach (Checkland 1999) is underscored by Whittal (2008) as well as Barry and Roux (2012). This approach includes both material/technical and social aspects of land, explicitly including the relational aspects of people and land (Barry and Roux 2012), and is lately termed a Land Tenure Information System (LTIS). Research on cadastral and tenure domain models by Van Oosterom et al. (2006) and Lemmen (2010) assists in identifying LTIS elements, while various tables in Williamson et al. (2010) provide useful input in clarifying other elements of the system. The measures of land tenure security are informed by Barry and Fourie (2002) and Sietchiping et al. (2012).

Theoretical research in this domain is lacking as underscored by Barry and Roux (2012). This paper reflects a theoretical level of thinking at the level of constructs (Barry and Roux 2012) and as such is not concerned with primary data collection and analysis, but rather seeks to reflect on practice.

“Constructs may be considered abstractions of concepts, i.e. conceptual notions which serve to allow us to make sense of observable entities...In a particular study, a number of variables may be defined, measured, analysed and modelled to infer ease-of-use and usefulness and the relationships between them.”

(Barry and Roux 2012, p306)

The proposed model should be subjected to critique and may, in time, inform design of land policies and land tools as well as guide action. The existing conceptualisation of the land tenure continuum (Figure 1) has been used for these purposes for many years, and it is likely that any successful contender will be similarly used.

3. An Argument for an Approach That Accommodates Diversity in Land Tenure and Land Rights

An evolutionary understanding of land rights and tenure promotes that communal land rights are associated with insecure tenure forms that are naturally, or due to intervention (Willie Tan 1999), replaced with individual land rights and more secure land tenure forms over time (Ting and Williamson 1999). Contrary to evolutionary theory, the reality in modern societies is that older forms of society are not replaced in their entirety by newer forms of society (Giddens 1984). In particular, older forms of relationships to the land may endure, even if not recognised in formal systems and processes (Cousins et al. 2005).

The assumptions underlying evolutionary land rights thinking require critique. Societal change generally follows a staged, linear and irreversible progression (Le Roux and Graaff 2001) but may also revert to a previous or less advanced state (change is not always unidirectional). In the land rights domain, this is observed in post-conflict situations documented by Augustinus and Barry (2006). Multi-directional change is also observed to be common by Royston (2005) and Cousins et al. (2005). Rights holders move between land parcels (mobility) with formal and informal rights, while informality occurs in the formal environment and formality occurs in informal environment. A land rights and tenure conceptual model needs to reflect this reality. The notion of flexibility of land tenure executed in Namibia (Lemmen et al. 2007) has focussed almost entirely on the land object and the Rights, Restrictions and Responsibilities (RRRs), and was motivated by progression towards registered freehold over the land parcel. It is hence not truly flexible, since it is unidirectional, and still follows an evolutionary approach.

In many developing nations, especially those with traditional indigenous communities, the mix of social and natural aspects of land rights and land tenure reflects a high level of relational complexity. Different laws, customs and tenure regimes may coexist, resulting in a diversity of

tenure types being an enduring norm (Sietchiping et al. 2012). Judging newer forms of society as better than older forms is rightly challenged by Giddens (1984). Customary and neo-customary (Durand-Lasserve 2004) tenure can offer legitimate and functional land administration and tenure security including allocation, demarcation, adjudication and dispute resolution as observed in many areas of South Africa, where many semi-formal and hybrid systems exist alongside customary and freehold tenure types (Cousins et al. 2005). Ubink (2008) argues that land policy must start from existing realities. Cousins et al. (2005, p7) promote multiple tenure arrangements “processes, rules and procedures”; however, the “literacy” of the formal land administration system relies on a parcel-based cadastre and is unable to “read” a system not based on land parcel objects (Cousins et al. 2005, p9). Recognition that there are a variety of land tenure regimes in operation at any one time is essential and is expressed by the term “tenure pluralism”.

Le Roux and Graaff (2001, p60) state that the “evolutionist argument entails huge problems in the modern social sciences, and ... it would be better to abandon it altogether. That conclusion has very important implications for development studies.”

From the preceding discussion, it is clear that a new conceptual model should reflect the full range of existing land rights typologies, without judgement, and without a favoured end-state. The model should acknowledge and accommodate a variety of land rights forms including informal and customary rights; this is no longer viewed as counter-development (Kihato and Royston 2013).

4. The Need for Development in Land Rights Types and Measurement of Tenure Security

South African policy makers and government planning and housing personnel are confronted with the limits of land and housing options in State schemes - a challenge that is not unique to South Africa. Driven by rapidly growing numbers of urbanites and ever-increasing formal land parcel/housing backlog, this “problem” has been on the agenda for over two decades and yet policies and mechanisms for delivery remain unable to meet the demand. There is no better time to present an alternative conceptual model to stimulate further development in land rights and tenure systems thinking. Cousins et al. (2005) posit that an exploration of the elements of tenure along the continuum, particularly in situations of transition, may lead to the development of new tenure forms. These forms might not be suspended on a linear continuum between the polarities of legal formality and social acceptability (Cousins et al. 2005). An example of such thinking is that of Shaw (2013, 169) who proposes a “new socially determined formality” to bridge the divide between communal and individual tenure forms in Ghana. Another aspect requiring attention is the investigation of mobility of people between land parcels with different forms of land rights and flexibility in the types of rights applying to a land parcel (Cousins et al. 2005).

5. A Systems View of Land Rights and Land Tenure

The meaning of land and land rights is inextricably linked to social context. Land policy and land administration, whether formal, customary, informal, transitional, post conflict etc., along with the

legal instruments that convey and defend land rights, are also essential elements in conveying tenure security in land. Land tenure is understood to include the soft concept of perceptions of security in land (social legitimacy and meaning) in addition to the hard concept of rights established and defended in law (legality). These aspects form part of the study by Sietchiping et al. (2012) who expressed them as people, policy and the land. The level of complexity, broadly measured by the levels of corruption, conflict, natural disasters and negative power play, is also an essential aspect of land tenure security (informed by Barry and Fourie, 2002). The combination of these natural and social aspects yields a complex mix that is best described and analysed as a system. In order to propose a new continuum model, elements of the system that underscore the model need to be identified.

5.1 Systems Elements

In line with systems thinking, it is necessary to identify various entities of a land rights and land tenure system. Van Oosterom et al. (2006) and Lemmen (2010) have identified objects, RRRs and subjects in their cadastral and tenure domain models. The elements of land value (conveying the meaning of land tenure to individuals and society) and land transactions (or transfer, the relational aspect), are included for completeness:

- The **objects of tenure**, in this case referenced spatially to the **land and structures** that may range from being bounded by fluid natural and/or social boundaries to fixed delineated hard boundaries, with possibly natural and/or social natures (see Appendix Table 1).
- The Rights, Restrictions and Responsibilities (**RRRs**) of **tenure** including all aspects that increase or decrease perceptions of land RRRs, including both natural and social aspects. The legislative system is usually identified as a system itself but, for the purposes of this understanding, it forms part of the RRRs of tenure subsystem and includes laws conferring and protecting land rights/tenure as well as laws reducing absolute ownership (see Appendix Table 2).
- The **values of tenure** including aspects such as social value in use and commodity/trading value. These are inextricably linked to use and development and so the three aspects of market value, use and development in the LMP are included here. However, the values of tenure considered for the development of the new continuum model are very broad and inclusive of traditional and spiritual land value aspects (Akrofi and Whittal 2011a, Strang 2000) (see Appendix Table 3).
- The **subjects of tenure** are any bodies capable of land ownership. They include individuals, collectives of people, legal persons (non-natural persons), the public (commons) and the State. Each of these may include any or all of the following types of people: the dead (ancestors), the living, those with future rights (live or unborn successors in title from legal persons arising from any cause) and those as yet unidentified (unborn) (Appendix Table 4).
- The **tenure transactions**. From a systems thinking perspective, these are the relationships between subjects by which RRRs are transferred (see Appendix Table 1). Land tenure transfer speaks to land access. Access to land, particularly by the urban or urbanising poor, has been

investigated by Royston and Marx (2007), but is an aspect seldom considered in the land administration system where the focus is on the holding of rights rather than the mechanisms of acquisition, except for those that lead to registration. When considering land access, the corollary of loss of land rights should also be considered in a pro-poor framework (see Appendix Table 4).

5.2 Design criteria

Design criteria for an extended continuum of land rights model emerge from the previous discussion and an understanding of the need for diversity (evident in Appendix Tables 1-4):

- The model should reflect an approach that *accommodates diversity* rather than one that reflects an evolutionary approach (section 3).
- The model should exhibit *neutrality* in worldview in that the model can accommodate a range of worldviews, land value and land rights options (section 1) with the exception of measures of land tenure security since greater tenure security is deemed desirable.

In the model there should be no implied progression over time from one land rights form to another and no implied judgement of any land rights regime as superior to another (most notably avoiding symbols such as unidirectional arrows) apart from the ability to deliver improved land tenure.

- The model should reflect land rights types in a *typology* (motivated by Payne 2004) *without an implied timeline* (section 1).
- The model should accommodate diversity or *pluralism* of tenure types (sections 1 and 3; Appendix Table 2) as well as *duality* in subjects (individual and collective, state and private) (Section 1; Appendix Table 4) and *flexibility* (multi-directional change of rights over land) (Sections 3 and 4),

The full range of possible land rights forms should be accommodated and it should be possible to use the model to reflect changes in the land rights forms relating to a particular land object.

- The model should reflect land rights and tenure articulation and subject *mobility*, including “tensions and incongruities” (Cousins and Hornby 2006, p15) (section 4)

The model should be able to reflect the movement of subjects between the land rights forms.

- The model should reflect the aspects contributing to *tenure security* (understood as the meaning of land rights to people and societies), broadly related to people, land and policy as identified by Sietchiping et al. (2012) and allowing the reflection of a range of tenure security for all land rights types (Sections 1, 2, 3 and 4),

The aspects that contribute to tenure security should be added to the vertical dimension of the model. These may be disaggregated into multiple axes in order to reflect the main contributors to land tenure security. This is the only aspect of the model design that is not neutral.

- The model should discard the **horizontal axis** measure of informality/formal in land rights types and seek a **better descriptor** since there are a number of land rights forms that can be formally recognised and managed.

The complexity of land value will be investigated as a suitable descriptor. Commodification of land adds greater potential for complexity in land value. Complexity may be judged as the possibility of many forms of land value to co-exist in relation to one land object (pluralism in land value). Issues of formality and informality relate to land tenure security and should find their place on the vertical axis of the model.

6. An Extended Continuum of Land Rights Model

6.1 Horizontal axis - land value complexity

Rejecting formality/informality to indicate the position of land rights types along the horizontal axis requires that another scale be identified. As a starting point, it is instructive to explore how people (subjects) value land. A broad range of land values, that is not restricted to capital markets, is tabulated in Appendix Table 3. This reflects the values people ascribe to land across the full range of land rights types, especially traditional and communal forms for which the market value of land may be minimal or non-existent. Here land value goes beyond its narrow interpretation as market value calculated for the purposes of property taxation.

Figure 3 shows that the usual typology of land rights along the horizontal axis is correlated with an increase in the number of aspects that contribute to land value, represented in layers. Ancient aspects contributing to land value are depicted as common to all the land rights typologies along the horizontal axis (the land rights continuum), while more recent forms of land value are attributes of land rights regimes to the right of the continuum. There is potential for greater complexity in land value to the right of the continuum as more aspects can contribute to land value determination. This use of land value complexity as the dimension of the horizontal axis is in contrast to the former (Figures 1 and 2) dimension of land rights formality, however, the arrangement of land rights types remains highly similar to the prior models. The formality or informality of land rights speaks to land tenure security and this aspect is now free to contribute as a measure of land tenure in the vertical axis of the proposed model.

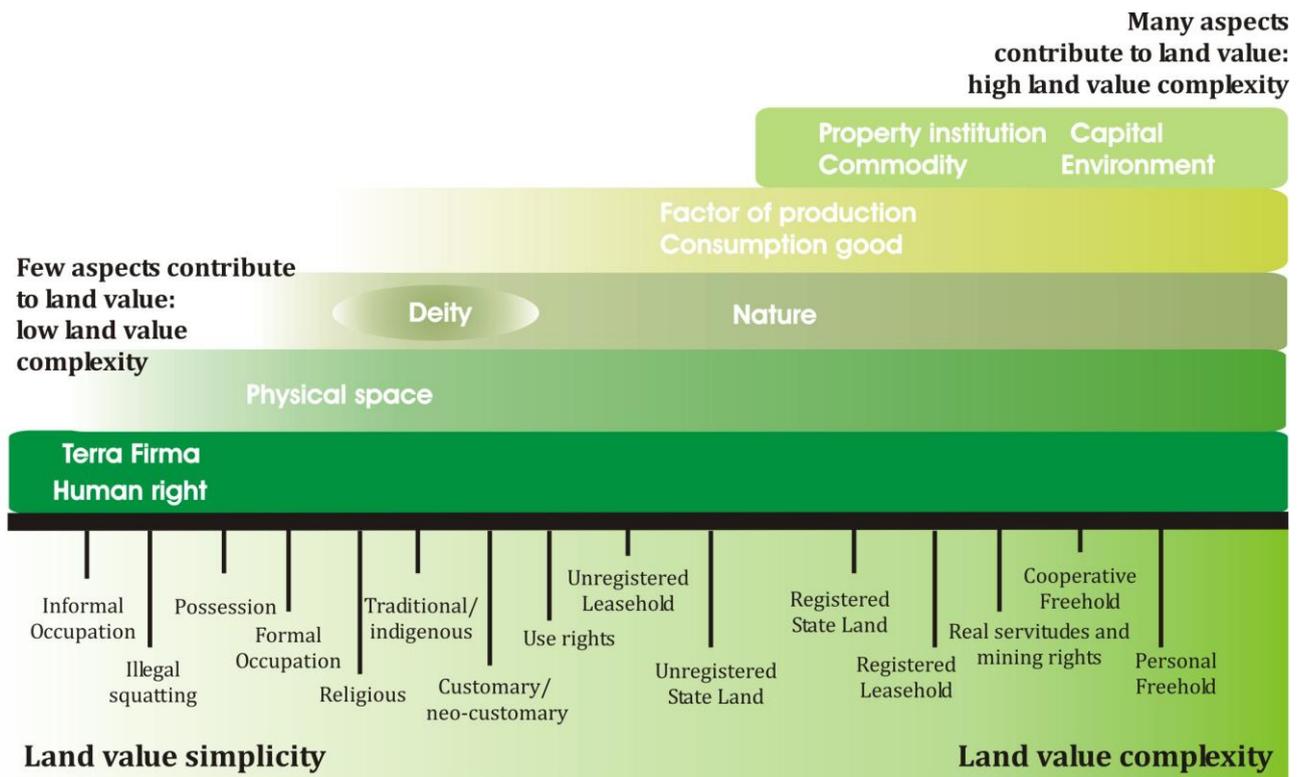


Figure 3: The correlation between land value complexity and land rights types

6.2 Vertical axis - triple measures of land tenure security

One of the main uses of the continuum of land rights model is to understand relationships between land rights and land tenure security with a focus on improving land tenure security, especially for the poor. However, land tenure does not necessarily improve linearly with changes in land rights forms as suggested by the UN Model (Figure 1). It is therefore necessary to add a vertical dimension to the model.

Reflecting on Seitchiping et al’s (2012) tenure security aspects of people and policy, these are expressed in the proposed model through the variables of legitimacy (acknowledgement by people) and legality (legislation is linked to policy). Their third aspect of land is not considered a variable measure of tenure security but is included as the land object (section 5).

Legitimacy is understood to be the popular acceptance of a practice, system of governance or leadership. In terms of rights over land, material evidence strengthens legitimacy. This usually takes the form of records of RRRs in land and land transactions and demarcation using beacons and/or visible boundary markers. Legality is the protection of RRRs and transactions in land through formal law. These can be both positive and negative: conferring rights and requiring action as well as preventing arbitrary loss of rights and restricting action. In South Africa, the aspects of legitimacy (popular acceptance) versus legality (in accordance with formal law) were juxtaposed in the execution of Apartheid land policy. Contest between legitimacy and legality is also evident in aboriginal/indigenous and informal land rights claims in many parts of the world and both are key land tenure indicators that should be treated as independent.

An additional measure of land tenure security is situational certainty vs. uncertainty/complexity. Certainty is increased in the absence of corruption, conflict and natural disasters and the use of power in a responsible manner. Uncertainty is associated with high levels of socio-political complexity in which corruption and conflict may be rife and power is abused. Uncertainty may also be linked to natural disasters (Barry and Fourie, 2002).

It is clear that there are three primary measures of land tenure security: legitimacy, legality and certainty. These should be treated as independent and should not be conflated into one measure without loss of information and hence meaning and usefulness. It is, however, possible to plot all three measures for each type of land right using different symbols or colours. A further grading of the colour intensity enhances graphical interpretation: strong legitimacy/legality/certainty is indicated by solid shades while weak legitimacy/legality/certainty is indicated by pale shades.

6.3 A proposed new continuum of land rights model

For a particular location, the range of applicable land rights can be mapped along the horizontal axis in accordance with the simplicity or complexity of land value. The strength of tenure associated with each type of land right is measured in the vertical dimension using the triple vertices of legitimacy, legality and certainty. Mobility is indicated with dashed arrows and conveys the practice or possibility of rights holders (subjects/people) moving to land with different types of rights. Flexibility is indicated by solid arrows and refers to the change of land rights over a particular land parcel (object). This model is illustrated for two non-specific South African scenarios: social land and housing in urban areas (Figure 4) and parcellation and conversion of communal to freehold rights in rural areas (Figure 5).

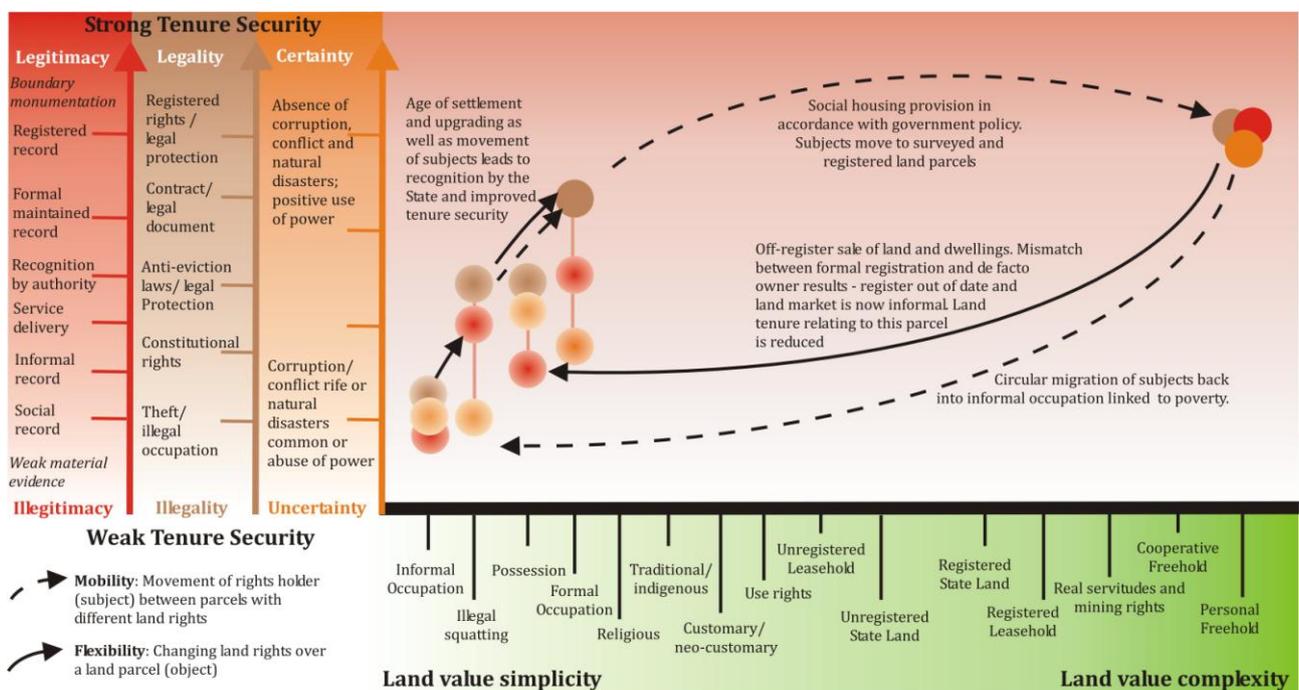


Figure 4: A new continuum of land rights conceptual model for the South African social land/housing in urban areas

Viewed through a pro-poor lens, the range of land rights to the left of Figure 4 are recognised as providing access to land for the urbanizing masses, with possible accompanying investment in land (Gordon 2008; Kihato and Royston 2013), although these land rights afford less secure forms of land tenure. Upgrading of informal settlements results in changes in land rights, possibly to formal occupation, and improved tenure security on the same land. This is an example of flexibility as there is a change of rights types applicable to a land object (parcel) as indicated by the solid arrows. The State land and housing “RDP” programme generally involves the movement of people from unsuitable and crowded settlements onto new land parcels with freehold tenure. This is an example of mobility indicated by the dashed arrow from formal occupation to personal freehold land rights types. In terms of State land and housing policy the task of improving land tenure security is thus achieved and socio-economic benefits are expected to result. However, registered freehold parcels may be unsuitable for the beneficiaries for a number of reasons and they may revert to land with less secure tenure forms; mobility becomes multidirectional (dashed arrow to informal settlement/illegal squatting). Flexibility can also be multidirectional. In some cases, the registered “RDP” land parcels are sold informally and the transaction is not registered. In such cases there may be duality in the form of rights over the land parcel – rights held through registered title and those held through off-register sale (Whittal, 2011). The informal purchaser probably holds land rights similar to possession as illustrated in Figure 4 by the solid arrow.

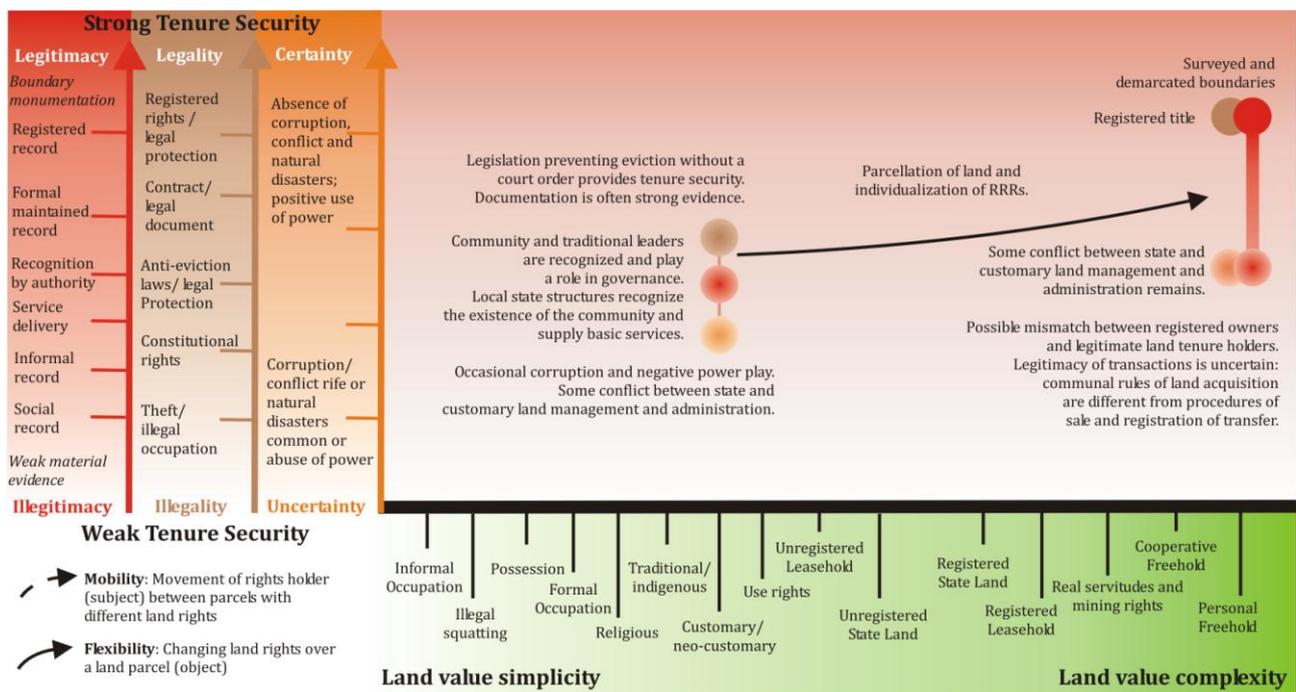


Figure 5: A new continuum of land rights conceptual model for the South African parcellation and conversion of communal to freehold rights in rural areas

Figure 5 illustrates the use of the model to map changes in land tenure security for the programme of land tenure reform in South Africa in which communal land is surveyed and transferred to the rights holders in freehold ownership. The model reflects that well-functioning

customary systems may offer reasonable tenure security and should be retained and strengthened rather than being reformed. Such observations have been made in Ghana by Akrofi and Whittal (2011b) and Boamah (2013). Land tenure security indicators for personal freehold are expected to be clustered together high on the scale of land tenure security, but this is not so. The duality of traditional authority and state authority that exists prior to implementation of land tenure reform (Nxumalo and Whittal, 2013) is likely to remain unresolved without changes in governance. This is likely to continue to affect legitimacy (double red measures for legitimacy) and the resulting conflicts may still limit certainty.

The proposed conceptual model (illustrated in Figures 4 and 5) maps real diversity in the range of land rights that may co-exist. The associated three tenure indicators convey land tenure security, while the arrows indicate mobility of people (subjects) and flexibility of rights related to land (objects) along the land rights continuum. This model and has the potential to assist in understanding new or hybrid tenure forms and thinking creatively in designing land rights tools. It may also assist in reflecting critically on current policy and practice such as parcellation and freehold titling.

7. Conclusions

The continuum of land rights model proposed by UN-Habitat (2008) has been used to inform thinking and practice in land rights and land tenure provision for a number of years. However, advances in theory and practice in the field of LTIS have left this model wanting.

This paper explores the approaches underscoring the former model and rejects the evolutionary approach in favour of allowing pluralism in land rights types to be reflected in a neutral manner avoiding a timeline. A systems understanding of land rights and land tenure highlights the main elements of the system as the land objects, RRRs, values, subjects and tenure transactions. These are unpacked in tabular form in the Appendix.

The new model is based on an understanding that multiple aspects of land value can contribute to the value of a land object/parcel and that land value complexity is correlated with the location of land rights types along the horizontal axis of the former continuum model. In the proposed new model land value complexity is used to inform the order of the land rights typologies along the horizontal axis. This releases the aspect of formality/informality to take its place as an indicator of land tenure security in an additional vertical dimension.

The key measures of land tenure security are identified as legitimacy, legality and certainty. These triple measures of land tenure security are measured in the vertical dimension in line with each land rights type. Each triplet indicates the security of land tenure for each land rights type within a particular context, facilitating graphical comparison without loss of information.

Mobility of subjects (people) and flexibility of objects (parcels) between land rights types may be added to the model as demonstrated in Figures 4 and 5. The dynamic nature of land objects, RRRs, subjects, values and the transactions between these elements is the sub-text to such

representations and is the backdrop to future understanding, critique and development of land rights and tenure options.

8. References

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Appendix

Table 1: Objects of tenure – to what does land tenure refer?

OBJECTS OF TENURE	
Personally occupied space	The space occupied by a person or his/her personal belongings – e.g. by homeless people, people occupying space at any moment in time, individually or collectively.
Surface area or volume	Area of land surface or 3D spatial envelope that may be occupied or unoccupied, used or unused, permanent or temporary or used repeatedly within in a timeframe (e.g. seasonal grazing, holiday sharing). May range from being bounded by very fluid natural and/or social boundaries to fixed delineated hard boundaries, with possibly natural and/or social natures.
Temporary dwelling	A dwelling erected for as long as use is continuous e.g. a night shelter, bounded by the extremes of the structure.
Semi-permanent dwelling	A structure without foundations that is erected for dwelling even when occupation is discontinuous e.g. a shack/informal house, bounded by the extremes of the structure.
Permanent dwelling	A dwelling made from permanent materials with foundations e.g. bricks/stone/wood that is designed for permanence, bounded by the extremes of the structure.
Permanent non-habitable building	A structure made from permanent materials with foundations e.g. bricks/stone/wood, that is designed for permanence and for non-dwelling purposes and is bounded by the extremes of the structure.

Table 2: Land Tenure types and associated rights
(partly informed by Williamson et al. 2010, p333-334)

LAND TENURE TYPES AND RIGHTS				
Tenure	Type	Examples	Rights	Instrument of security
Freehold may or may not be the tenure of underlying land	Traditional/indigenous	Tribal area or extent/range	To live according to traditional beliefs and customs since time immemorial on this land	Social relationships, cohesion, memory, trust, status, traditional/customary leadership, ancestral lineage, diagram & title are possible for outside figure, material evidence/documentation of boundaries, graves/shrines, historical evidence.
	Customary and neo-customary	Resettled or newly settled area by homogenous group with similar (perhaps evolved) customs	To live according to commonly held beliefs and customs, right to exclude others based on social affiliation	Religious community belonging, informal register, documentation
	Religious	Islamic land ownership	To live according to religious rules and customs	
Cooperative tenure – freehold on parcel	Commonhold / group right	Communal property associations, homeowner's association, sectional title/ condominium developments, share block schemes, community trusts, family trusts, communities established with a set of common aims	To a share (defined or undefined) the value (see Table 3) of the land individually and collectively excluding others not part of the communal tenure arrangement	Documentation/ contract; may include title deed and diagram on underlying parcel, functioning land administration and legal system
	Life right	Retirement Village	Occupation, use. The individual(s) can exercise the conferred rights to the exclusion of all others until their death	
	Time share	Three weeks holiday accommodation at a game lodge or sea-side resort once per year, fractional shares	Occupation, use. Individuals have specific times during which they may occupy and use the property in accordance with the timeshare scheme	
Freehold/allodial land ownership	Individual	House and garden, flat, farm, vacant land	Ownership, occupation, use, transfer, specify inheritors. The individual can exercise the conferred rights to the exclusion of all others	Deed/ title document, diagram, boundary monumentation, maps, functioning land administration and legal system
	Company	House and garden, business premises, flat, farm, vacant land	Ownership, occupation, use rights held on behalf of another. The company can exercise the conferred rights to the exclusion of all others	
	Trust	Holiday property, family home/homestead,	Ownership, occupation, use. The members of the trust can exercise	Deed/title document; underhand trust; notarial trust registered against

		farms with subdivision restrictions	the conferred rights to the exclusion of all others	the title deed; other trust documentation; functioning land administration and legal system
	State ownership, the commons	State-owned land and infrastructure, parks and reserves, the sea shore.	The State holds the land on behalf of and in the interests of the citizens of the country	Deed/title; diagram ; vesting; noting on plans
	Unspecified	<i>Fidecommisum</i>	Future right to ownership	Last will and testament
Freehold servitudes	Praedial Servitude	Right of way servitudes, power line servitudes, grazing servitudes	Formal real right of the dominant tenement over the servient tenement; can be positive – requiring something, or negative – preventing the owner from exercising a right.	Deed/ title document, servitude diagram, functioning land administration and legal system
	Public servitude	Roads	Via publica Via vacinalis	Proclaimed a public road Public road through long/immemorial use
Freehold Quasi-servitudes	Mining right	De Beers mines	The holder can execute mining operations in accordance with the law	Mining title and diagram
Public or private leasehold	Lease	Lease on apartment/house/business premises including rental	The period of time in which the specified rights may be exercised has a fixed term. A rental is usually paid to the owner.	Lease agreement Registered notarial deed of long-lease
		Includes “rent to purchase” arrangements.	“rent to purchase” is linked to tenure upgrade	“Rent to purchase” agreement
Occupation: informal individual or communal	Informal Occupation	Occupation prior to a semi-permanent state e.g. homeless temporary shelter or new settlement	Rights usually only include restricting eviction and basic human rights	Material and social evidence, Anti-eviction laws.
	Fuzzy boundary			
Occupation: semi-formal individual or communal	Illegal squatting	Temporary housing on land not owned including informal squatter settlements and backyard shacks	Rights usually only include restricting eviction and basic human rights. Tenure increases as human rights are met through recognition, service delivery and dwelling assistance. Ownership may be a track through adverse possession.	Material and social evidence. Recognition by the state through provision of services, housing lists etc. Anti-eviction laws
	Fuzzy boundary			
Possession: informal individual or communal	Physical possession	Possession as if you are the owner – e.g. fences not in the correct place	The holder exercises rights of occupation and use as if full ownership is held. Ownership may be a track through adverse possession (in SA this is called prescription)	Material/documentary evidence of possession, memory, documentation such as payment for services.

Recognised occupation: individual or communal	Formal Occupation	Permission to Occupy (PTO), labour tenants, use provided in provisions of a will e.g. may occupy house until death etc. Backyard dwellers, garden flats.	Rights are only of occupation/use (residential/subsistence agriculture use) and are generally not transferable	Material and social evidence; possible documentation; housing provision. Anti-eviction laws. Usufruct registered against title deed. Lease.
Current Use	Licence	Usually governs an activity or use e.g. a liquor licence, business licence	Rights can be exercised for the duration of the licence, conditional approval and retention	Licence documentation, government approval.
	Personal Servitude	<i>Usufruct, habitatio, usus</i>	Use and take the fruits (usufruct) may inhabit the property (habitation) or may use the land for personal needs (usus).	Registered title, contract or terms of last will and testament
Future tenure				

Table 3: Concepts of land and its value to humankind

CONCEPTS OF LAND AND ITS VALUE TO HUMANKIND		
Concepts of Land (Williamson et al. 2010)	Physical Value (after Williamson et al. 2010)	Conceptual Value
Land as terra firma	Natural resources	Home planet Earth
Land as physical space	Spatial extent and location	Sense of place, scarcity, locational and extent: value-in-use
Land as deity		Spiritual value of material land
Land as community	Collective RRRs	Traditional and cultural value, homeland value, social network value
Land as a property institution	Land extent, development, services, uses, potential	Value in trade and investment
Land as a factor of production	Combination of natural resources and spatial extent	Livelihood value
Land as capital	Has inherent capital value as a secure physical resource	Security for loans, investment value, social safety net value
Land as a consumption good	Exploitation value	Economic opportunity value
Land as a commodity	Tradable resource	Wealth creation/risk value
Land as a human right	Land rights value, bare minimum is physical occupation value	Human dignity value
Land as nature	Environmental systems	Essential for life, fragility value
Land as a resource	Sum of all the above	Source of power
Land as environment	Systems of administration for sustainability	Value of societal environmental consciousness, value of systems of sustainability e.g. green credits

Table 4: Subjects of Tenure and Tenure Transactions

SUBJECTS OF TENURE	EXAMPLES	ACCESS TO TENURE	TERMINATION OF TENURE
Individual	Mr Joe Blogs, Miss Nona Dlamini	Purchase, inheritance, donation/gift, prescription, marriage in community of property. May be restricted by citizenship, ethnicity and/or family lineage. Informal forms: possession, occupation, land restitution.	Death, bequest, gift, expropriation, prescription, sale, natural disaster, occupation/war/ dispossession (e.g. apartheid laws), lapse by merger or usability (servitudes).
Social collective – indigenous/traditional group	Indigenous land claims	Social belonging, ethnicity, tribal affiliation, family lineage, inheritance of individually-held rights, occupation since time-immemorial, land restitution.	Social exclusion, death (in some societies ownership does not terminate on death).
Social collective – religious group	Mrs Parker	Inheritance, pre-emption, endowment/donation/gift, possession.	Religious exclusion, sale, death/bequest, gift.
Neo-customary communal group	Protea Village Land Claim group	Social belonging, lineage/ancestry, inheritance, occupation over a long time period, donation/gift, land restitution.	Social exclusion, death (in some societies ownership does not terminate on death), donation/gift, bequest, sale within rules of association.
Non-customary communal group	Shady Pines Sectional Title Scheme	Purchase, donation/gift, inheritance.	Sale, death/bequest, gift.
Legal (named) collective – juristic person	Scouts South Africa	Purchase, donation/gift /bequest, prescription/adverse possession.	Expropriation, prescription, sale, donation/gift, natural disaster, occupation/war/ dispossession (e.g. apartheid laws), lapse by merger or impossible to use (servitudes).
Trust - juristic person	The Jones Family Trust	Registration of a Trust (Trust Deed) and founder/donation/grantor conveys asset to the trust for the beneficiaries either during life of founder or upon his/her death. Perpetual succession upon death of beneficiaries. Beneficiaries can include individuals, classes of persons, unborn persons, future spouses and other legal persons. Flexibility of beneficiaries and trustees is possible depending on trust type.	Termination of the Trust and transfer of assets
Inheritor	Andrew, only son of Sir Arthur	Bequeathed by a testator who was the previous owner	Death prior to owner
Ancestors	Great grandfather etc.	Lineage, buried on traditional/family land	Not terminated. Termination on reburial elsewhere. Termination if the descendants die out.
Unborn	Children of children etc. of those currently holding rights	Future lineage and citizenship, belonging to a social collective	Cannot be terminated. Termination if the descendants die out.
Company – juristic person	Ackermans group of companies	Purchase	Dissolution of company, expropriation, prescription, sale, natural disaster, occupation/war/dispossession, lapse by merger or impossible to use
State	Republic of South Africa	Default owner, prescription/adverse possession	Sale, occupation/war/dispossession, lapse by merger or impossible to use