

# Tenure Security, Land and Property Rights in an Urban Context

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## INTRODUCTION

This brief will discuss tenure security and make a distinction between tenure, security of tenure, property rights and title, which is important to the extent that by doing so one is able to explore a range of tenure typologies, recognise the importance of tenure security and explore the nuances in the term property rights. The brief demonstrates that tenure can be placed across a spectrum that is fluid and that tenure types are varied and emerge in complex environments. This is important to recognise because in a developmental context these terms take on a particular significance and challenge prevailing approaches and thereby open avenues for exploring how to address tenure in particular contexts. Different strategies, approaches and measures can then be explored to creating an enabling environment for ensuring enhanced tenure security that is applicable in a particular context. It is essential therefore to ensure that legal systems take account of the need for flexible, pro-poor responses and for governing arrangements and administrations to respond appropriately. Tenure security is vitally important to ensure that people are protected and feel safe from threats to their property and from evictions and elite capture. Tenure security creates enabling environments in which to encourage private and public investment and to build a tax base and advance land value capture mechanisms. It is certainly the case that enhanced property rights offer avenues out of poverty. Greater security of tenure also increases access to economic opportunities for the poor. These issues strike at the heart of the discussion of Indicator 1.4.2, which is the “Proportion of total adult population with secure tenure rights to land, with legally recognized documentation and who perceive their rights to land as secure, by sex and by type of tenure”<sup>1</sup> Indicator 1.4.2 is located within Goal 1 of the Agenda 2030 framework which is directed at ending poverty in all its forms everywhere. This lends further credence to the urgency of addressing land tenure security and property rights as fundamental to alleviating poverty.

USAID is furthermore convinced that secure land tenure and property rights are fundamental to achieving sustainable development in urban environments.<sup>2</sup>

## LAND TENURE, TITLE AND PROPERTY RIGHTS DEFINED

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<sup>1</sup> Goal 1: End poverty in all its forms everywhere <https://unstats.un.org/sdgs/files/metadata-compilation/Metadata-Goal-1.pdf> p. 8.

<sup>2</sup> USAID Issue Brief Land Tenure in Urban Environments p.1.

Lasserve describes land tenure as a system designed to “determine who can use what resources for how long, and under what conditions.” Land tenure is also described as the mode by which land is held or owned and the relationship people have to land. From a Habitat for Humanity standpoint people centred development is a key principle and informs the approach of land tenure essentially being about people and land relationships. This enables a more inclusive approach which identifies people as agents of change and as co-creators of solutions towards workable security of tenure and property rights methodologies. Land tenure systems in a particular jurisdiction set out the possible forms under which land may be used. This range of tenure options while having relevance for both rural and urban settings takes on a different form in an urban context allowing differentiated approaches to arise that are particular to the urban context.

In practice there are a variety of generally recognised tenure arrangements which describe people’s relationships to land and property and set out their rights and obligations. Broadly Royston sets out a range of “tenure arrangements,” including: registering ownership, intermediate ownership, expectation of ownership, off-register ownership, occupancy, officially recognised rental, unofficial rental; and looking after or borrowing.<sup>3</sup> These categories overlap and clearly describe the ways in which people access land.

It is essential to make a distinction between tenure security, title and property rights or access to property. Land titles typically suggest ownership in the sense of a freehold title. As Royston suggests title is therefore one system of tenure<sup>4</sup>, which is a system that is not the dominant or prevailing system in much of the developing world. Rather, there is a need to recognise a far more open and flexible approach that speaks to the realities that exist and to be responsive to recognising a pro-poor perspective. Various terms are assigned to defining the relationship people have to land and property, including “arrangements” and “claims”.<sup>5</sup> This applies equally well to urban contexts.

Tenure Security/Security of tenure is described by the FAO as the certainty that a person’s rights to land will be recognized by others and protected in cases of specific challenges. People with insecure tenure face the risk that their rights to land will be threatened by competing claims, and even lost as a result of eviction. Without security of tenure, households are significantly impaired in their ability to secure sufficient food and to enjoy sustainable rural livelihoods.<sup>6</sup>

Property rights may vary within, as well as between, tenure systems. It is therefore possible to have a high level of security, but restricted rights to use, develop or sell land, or a limited level of security, but a wide range of actual rights. The exact nature and content of these rights, the extent

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<sup>3</sup> Royston L p 6 – 7.

<sup>4</sup> Royston L p. 6.

<sup>5</sup> Ibid.

<sup>6</sup> <http://www.fao.org/docrep/005/y4307e/y4307e05.htm>

to which people have confidence that they will be honoured, and their various degrees of recognition by the public authorities and communities concerned, will all have a direct impact on how land will be used.

Emerging research based understanding of how people access land suggests that “informal” and customary property systems can be well-organised providing considerable tenure security. These systems can be exploited therefore the need for formal recognition but not necessarily through titling processes.<sup>7</sup> These processes do have a range of consequences that can be problematic amongst the poor. This makes the case for studying and understanding tenure perceptions more strongly.

Obtaining land tenure is generally beset with lengthy processes, delays and high fees. Women face added difficulties due to a lack of assets, money, discriminatory practices and time constraints and safety concerns.

## **PROPERTY AND ECONOMIC OPPORTUNITY**

According to Royston there are essentially three avenues whereby property advances greater economic opportunity. This underscores the necessity of promoting strong tenure security measures. These include: (1) property ownership and the production of capital gains; (2) land, livelihoods and accumulation; and (3) secure household base for access to the city.

Firstly property alienation or sale allows one to generate a return, which increases the pool of money that is available for purchasing a larger house so that a virtuous circle can be created where more wealth can be accumulated over time.

Secondly, residential property allows for property to become a basis and source of livelihood opportunities such as “on site rental accommodation provision, home based enterprise or urban agriculture.”<sup>8</sup> These activities do not necessarily require title but, as is pointed out, become entangled with zoning schemes and land use management practices.<sup>9</sup> These types of undertakings are, in many instances, unregulated.

In the third instance, property is the very basis for accessing employment opportunities in cities. Well located land has a positive correlation with the job market and in this sense represents proximity to economic opportunities.<sup>10</sup> Poorly located dwelling far from work locations has the opposite effect.

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<sup>7</sup> Hornby D and Kingwill R.eds. *Untitled: Securing Land in Urban and Rural South Africa*. KZN Press.2017

<sup>8</sup> L Royston p 5.

<sup>9</sup> Ibid.

<sup>10</sup> Ibid.

## LAND CONTINUUM

Habitat for Humanity supports the continuum of land rights model, which was developed by UN-Habitat in conjunction with GLTN. The continuum of land rights metaphor was largely a response to practical realities and to find ways of responding to local practices. According to GLTN, 70% of developing country population's fall outside of any land register.<sup>11</sup> In Africa, over half of the urban population (61.7%) lives in slums (UN-Habitat, 2013).<sup>12</sup>

The continuum depicts a spectrum of land tenure arrangements from perceived tenure approaches to freehold title. A perceived tenure approach accepts that a much wider continuum of land rights exists and is highly responsive to informality, including self-help also termed housing consolidation “in the absence of any legal security of tenure.”<sup>13</sup> For the reasons cited immediately above and in response to local realities, depicting the ideal, or even suggesting that tenure security should embody freehold title is simply unworkable and unrealistic. Thus, the continuum approach has been expanded and a variety of more flexible approaches adopted.

As recognised by authors, and affirmed by UN-Habitat's GLTN, tenure is frequently understood in binary terms: formal/informal/legal/extra-legal, secure/insecure, de facto/de jure. The reality reflects a far more diverse picture between these extremes, which are equally appropriate and legitimate. It must also be recognised that the extent of the actual security of such arrangements depends on local legal, institutional, governance contexts. Tenure security is therefore highly contextual.

The continuum began as a metaphor to describe and capture changing land tenure situations, such as informal settlements or peri-urban areas where cities are expanding into customary lands.<sup>14</sup> It was a response to the complexity that characterises land tenure where there are both legal and non-legal tenure systems with variations between these poles. “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 (UN-Habitat, 2003).”

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<sup>11</sup> Augustinus C Challenges in the Land Sector: GLTN's Response and Strategies FIG Working Week, 6-10 May 2012, Rome.

Secure Land and Property Rights for All

<sup>12</sup> <https://unhabitat.org/wp-content/uploads/2014/07/WHD-2014-Background-Paper.pdf> World Habitat Day: Background Paper.

<sup>13</sup> Kiddle GL Informal Settlers, Perceived Security Of Tenure And Housing Consolidation: Case Studies From Urban Fiji Victoria University of Wellington 2011.

<sup>14</sup> Property Theory, Metaphors and the Continuum of Land Rights

<http://www.ucalgary.ca/mikebarry/files/mikebarry/barry-2015-property-theory-metaphors-and-the-continuum-of-land-rights-published.pdf> United Nations Human Settlements Programme (UN-Habitat), 2015.

The tremendous value of the continuum of land rights is that it started a conversation about land tenure and brought about a fundamental shift in understanding of tenure. The continuum approach has been adopted widely by a range of multilateral organisations and other actors.

## URBAN CONTEXT

One of the key phenomena in Africa today is the sheer extent of urbanisation with literally thousands of people moving into African cities monthly. It is expected that by 2030 half of Africa's population will be living in cities. Cities are where jobs can be sourced and where investments are concentrated and are thus perceived as places where livelihoods can be established with associated improvements in standards of living. However, as is pointed out by writers and organisations many of those moving to cities are finding themselves living in informal settlements. In Africa, over half of the urban population (61.7%) lives in slums (UN-Habitat, 2013).<sup>15</sup> According to USAID "at present, one billion people are living in informal settlements that lack basic services and 60 percent of urban dwellers are physically exposed to natural hazards and pollution."<sup>16</sup> The number of those projected to be living in informal settlements is expected to increase to 2 billion. Projections show that urbanization combined with the overall growth of the world's population could add another 2.5 billion people to urban populations by 2050, with close to 90 percent of the increase concentrated in Asia and Africa, according to a new United Nations report launched.<sup>17</sup>

Habitat for Humanity, like USAID, is of the conviction that it is only through advocating for policy and systems change, in respect of housing policies, and growing the supply of affordable, legal shelter with tenure security and access to basic services and amenities that there can be an improvement in the lives of those living in informal settlements.

Urban landscapes and environments are characterised by informal settlements, backyard shacks, peri-urban communal areas and people occupying inner city buildings. In these settings land and property is exchanged in ways that do not correspond with recognisable formal approaches because land markets in these settings operate in ways where neither the state nor the (commercial) private sector have been actively involved in delivering to the current users.<sup>18</sup> Even if the underlying ownership of land is registered in the Deeds Registry, "title" does not accurately describe the relationships, rights and duties of people currently living there.<sup>19</sup> In this sense, rights often overlap. Nevertheless, title dominates in people's minds when reference is made to tenure.

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<sup>15</sup> World Habitat Day: Background Paper <http://unhabitat.org/wp-content/uploads/2014/07/WHD-2014-Background-Paper.pdf>.

<sup>16</sup> USAID Issue Brief Land Tenure in Urban Environments p.1.

<sup>17</sup> World's population increasingly urban with more than half living in urban areas <http://www.un.org/en/development/desa/news/population/world-urbanization-prospects-2014.html>

<sup>18</sup> Royston L p. 6.

<sup>19</sup> Ibid.

## URBAN HOUSING MARKET AND LAND DYNAMICS

In line with the explosive growth that has been have witnessed in urbanisation trends this has had serious implications for land dynamics. It is anticipated that urban areas in developing countries will absorb an additional 1.4 billion people, which means that the built up urban land area could triple by 2030 from 200 000 to 600 00 square kilometers (sq.km) (UN 2008 figures).<sup>20</sup> This growth is spectacular and will require fundamental shifts in planning, legislating, resourcing, financing and for governance arrangements.

Urban population growth is a result of births in urban areas and migration from rural to urban areas spurred on by declining fortunes in rural setting marked by unemployment and under-employment, conflict and worsening agricultural conditions. Urban areas offer an escape and offer opportunities, and as USAID notes, an “expanded social network”.<sup>21</sup>

Housing approaches need to take into consideration the types of people and family structures that are moving into urban environments. Migrants from rural areas initially try to find low-cost short term housing often in inner city slums, which are well located to livelihood opportunities. In line with this reality is the proposal by USAID that the provision of so-called “reception areas” is a vital part of the puzzle in the housing market. The argument is also made that as migrants become more settled they have different accommodation needs and search for longer term security in improved housing conditions further from the job market.

Therefore personal circumstances are and should be a key determinant of tenure security options. “Residential mobility” may be a high priority for those who seek flexibility so that they can maximise job opportunities as and where they arise.<sup>22</sup> Established families in urban settings would prioritise “longer term tenure options” to raise families, follow careers and establish a business.<sup>23</sup> Tenure options should, therefore, be responsive to reflect changing life circumstances. The critical point made is that there is a need for more tenure options to make it easier for people to “move from insecure informal tenure categories to more secure and formal options and integrate into the local community.”<sup>24</sup>

The reality is that competitively priced land is generally further from the workplace and is where new developments are established. This has led to a range of unintended consequences and with public transport connections largely absent people spend large amounts of their salary on transport. Added to this is the fact that governments simply cannot meet the housing needs of

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<sup>20</sup> USAID: Issue Brief Land Tenure in Urban Environments p. 2.

<sup>21</sup> Ibid.

<sup>22</sup> Ibid p. 5.

<sup>23</sup> Ibid

<sup>24</sup> Ibid.

their populations. Planning for new entrants into cities and making projections for housing has largely failed in a context marked by serious administrative and governance capacity constraints, cumbersome legal regimes, inappropriate zoning, costly processes, corruption and overlapping administrative mandates.

These failures allied with markets driving up prices up has meant that people have moved into informal settlements where they are responsible for their own housing provision and far from places of work. Others are “forced to share accommodation in over-crowded substandard inner-city areas.”<sup>25</sup>

The rise of informality has come to characterise the urban fabric. Informal settlements, backyard shacks and other housing arrangements are marked by a lack of tenure rights, unplanned layouts, non-compliance with building regulations and limited to no access to basic services. This puts these communities at risk and vulnerable to disease and lack adequate protection against the elements. Often there are risks associated with living close to hazardous areas due to poverty and marginalization. Women and children are most vulnerable in these environments.

Legal access to land is a strategic prerequisite for the provision of adequate shelter for all and for the development of sustainable human settlement affecting both urban and rural areas. The failure to adopt, at all levels, appropriate rural and urban land policies and land management practices remains a primary cause of inequality and poverty. It is also the cause of increased living costs, the occupation of hazard-prone land, environmental degradation and the increased vulnerability of urban and rural habitats, affecting all people, especially disadvantaged and vulnerable groups, people living in poverty and low income people.

## **PROPERTY RIGHTS**

Property rights to land are thus one of the most powerful resources available to people to increase and extend their collection of assets beyond land and labour to the full portfolio necessary for sustainable livelihoods, including natural resources, social, human, and financial capital as well as physical assets.<sup>26</sup> Property increases access to economic opportunities,

The link between security of tenure and poverty alleviation is pronounced where, in the absence of security of tenure, there is: (1) a lack of incentive by occupiers to invest in property the status of which remains uncertain; (2) the lack of investment in basic services on the part of governments over land that is not zoned or recognised formally; (3) threats of eviction and land grabbing; and (4) an absence of secure and legal shelter. These serve to create a negative downward spiral and threaten sustainable urban and rural development. If positive momentum

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<sup>25</sup> Ibid p. 3.

<sup>26</sup>FAO Land Tenure Studies Land tenure and rural development 2002 p.10.

can be developed to support and underpin security of access to land then as the FAO asserts households can enjoy sustainable livelihoods, which are an important part of sustainable development.<sup>27</sup> Secure tenure is vital to support access to economic opportunities, including livelihoods, credit markets, public and municipal services

Habitat for Humanity International advocates for land access for shelter as being central to addressing poverty. Habitat has a campaign titled Solid Ground, which has, as its focus, access to land for shelter. Access to land critically has to be supported and sustained by a framework of tenure and tenure security which is linked to property rights. The housing focus of the organisation implicitly underscores the importance of property rights as the broader context in which to describe and define land and people relationships.

The responses by governments have so far failed to keep pace with the challenge of urbanization and urban growth in ways which enable the majority of people on low incomes to meet their basic needs. These groups now represent the majority in most developing countries an increasing proportion of total urban population.

## **PERCEPTIONS OF SECURITY OF TENURE AND MONITORING**

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.<sup>28</sup> This approach makes an important distinction between legitimacy and legality, although the two need not be mutually exclusive. What is legitimate is often what is legal, however legitimacy, seen in an informal or customary context may offer sufficient perceptions of security, while being illegal. Where there are strong social bonds and close-knit community dynamics perceptions of security are likely to be higher as people will be certain that there is sufficient knowledge of where people stay. This point is underscored by Durand-Lasserve and others who have recognised the importance of how property is perceived as opposed to how it is regulated and conferred legal recognition.<sup>29</sup> It is argued that perceptions of tenure security deliver on many of the outcomes that formal title is meant to guarantee, including “access to credit and investment.”<sup>30</sup> Informal tenure arrangements and systems can “guarantee a reasonably good level of security, even when this is not formally recognized by the state.”<sup>31</sup> Recognition by the community itself and by the neighbourhood is often considered more important than recognition by public authorities for ensuring secure tenure. It is these social relationships and

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<sup>27</sup> FAO Land Tenure Studies Land tenure and rural development 2002 p.10.

<sup>28</sup> Whittal J A New Conceptual Model for the Continuum of Land Rights South African Journal of Geomatics, Vol. 3, No. 1, January 2014.

<sup>29</sup> Perspectives on Land Tenure Security in Rural and Urban South Africa An analysis of the tenure context and a problem statement for Leap [http://mokoro.co.uk/wp-content/uploads/perspectives\\_land\\_tenure\\_security\\_rural\\_and\\_urban\\_south\\_africa.pdf](http://mokoro.co.uk/wp-content/uploads/perspectives_land_tenure_security_rural_and_urban_south_africa.pdf) June 2005 p. 8.

<sup>30</sup> Ibid.

<sup>31</sup> Ibid.



networks that can confer a sense of security and belonging and recognition that are cited as why people in certain settings perceive their land (property) to be secure.

Infrastructure provision can be one of the most important determinants of perceptions of tenure security. This point is highlighted in USAID's Urban Services Policy, which states: "the need to improve urban service delivery in order to unlock the potential of an increasingly urbanised world."<sup>32</sup> Urban service delivery and infrastructure projects need to be accompanied by tenure security, which creates a positive cycle providing an enabling environment in which to generate local fiscal systems and land-value capture arrangements and develop innovative instruments to capture gains in land value and recover public and private investments.

Social legitimacy and the social function of land is often the result of women's networks in communities. It is these women and vulnerable groups who suffer the most and have the least access to services, shelter and land and therefore there is need to ensure that budgets, policies and processes related to urban service delivery are gender responsive.

## **EFFECTIVE SOCIAL AND COST EFFECTIVE APPROACHES TO SECURING TENURE**

One clear approach to improving security of tenure is to strengthen the rights that currently exist in relation to tenure. There are approaches and examples of how this has been done effectively. USAID notes the case of India where informal settlements were accorded an "unobjectionable status."<sup>33</sup> Evictions are the clearest form of a deprivation of almost all human rights and consequently curtailing these and ensuring that clear guidelines and due process is followed would strengthen security of tenure. Ensuring that evictions are the last resort or are not carried out until suitable alternative sites have been identified with compensation schemes are preferred options. The Voluntary Guidelines for the Responsible Governance of Tenure of Land, Fisheries and Forests (Voluntary Guidelines) underline the need to defend legitimate tenure rights against intimidation and violation and protect tenure right holders against the arbitrary loss of their tenure rights, including forced evictions inconsistent with existing obligations under national and international law.<sup>34</sup> Habitat II had a strong Habitat-driven agenda where States and governments reaffirmed their obligations to uphold the right to adequate housing. This included their pledge to protect communities from and redress forced evictions and to combat homelessness.<sup>35</sup>

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<sup>32</sup> Ibid.

<sup>33</sup> Ibid p. 8.

<sup>34</sup> Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security <http://www.fao.org/docrep/016/i2801e/i2801e.pdf> Rome, 2012 p 3.

<sup>35</sup> Habitat International Coalition (HIC) Statement to the Second Meeting of the Preparatory Committee for Habitat III Nairobi 14–16 April 2015 <https://unhabitat.org/wp-content/uploads/2015/01/Habitat-International-Coalition.pdf>

Community driven data approaches such as the Global Land Tool Network's Social Tenure Domain Model (STDM) empower community members to capture the land in a given settlement. The STDM approach documents land so that all the tenure arrangements and relationships to it, including secondary rights are reflected.<sup>36</sup> STDM technology is based on open access, is poor, flexible, and mobile and can be used to address scale. Fundamentally it is inclusive and fit for purpose.

Capturing and recording land rights through community enumeration and street addressing programmes, such as those carried out by the World Bank, through surveying and mapping to create addresses are all regarded as effective methodologies for increasing security and a sense of belonging and citizenship.

The Voluntary Guidelines sets out a range of clear principles to govern tenure in section 3B and asserts that the process of establishing policies and laws should be “participatory, gender sensitive and strive to make provision for technical and legal support to affected communities and individuals. States should furthermore, acknowledge the emergence of informal tenure as a result of large-scale migration.”<sup>37</sup>

From a structural perspective legal systems need to be responsive to addressing a more flexible and encompassing recognition of a range of tenure typologies. The case of the Namibian Flexible Land Tenure Act, 2012 has the following objects: (a) to create alternative forms of land title that are simpler and cheaper to administer than existing forms of land title; (b) to provide security of title for persons who live in informal settlements or who are provided with low income housing; and (c) to empower the persons concerned economically by means of these rights.<sup>38</sup>

## CONCLUSION

Innovative local solutions offer appropriate mechanisms through which to secure tenure and property rights create stability, economic opportunity and drive a sequence of positive outcomes for communities. Recognising that there is a spectrum across which tenure typologies exist should be embraced. Legal systems and governing structures need to be far more receptive and responsive to embracing more informal and customary forms of tenure in the context of emerging urban realities. Different tenure arrangements also align with the kinds of housing that is needed in an urban context further emphasizing the need for flexibility. Ultimately strong tenure security regimes and property rights advance economic prospects and offer resources for governments so that governance outcomes can be improved.

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<sup>36</sup> Ibid. p 8.

<sup>37</sup> Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security p.17.

<sup>38</sup> <http://www.lac.org.na/laws/2012/4963.pdf>