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After form. The credibility thesis meets property theory

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ABSTRACT

According to the credibility thesis (Ho, 2014 and 2016), property in land is determined by its functions. The form of property would follow its functions. But what type of form follows the functions of property? The article considers four meanings of the concept of 'form of property:' property in the Blackstonian sense as a mere shell for ownership (and its counterpart, property as social function); the sources of property law (*fontes iuris*) in international and domestic law; property as a highly formalized right in a legal system well-ordered by land cadastres and land registers (and its counterpart, informal land rights); and property as a standardized 'bundle of rights' (and its counterpart, polyrational or bespoke property). Since land rights, fulfilling their desired function, can be credible without full formalization or standardization, land policy must not consider dichotomies (such as 'formal' versus 'informal'), but degrees of (in)formality or credibility.

1. The credibility thesis: form follows function?

Around the turn of the millennium, a coalition of donor organizations, development banks, and megacities announced an ambitious, albeit misguided slogan: *Cities Without Slums* (Cities Alliance, 2002, pp. 2–4; Davy, 2009, pp. 246–247). What would a world without slums look like? Would it be a world with unambiguous, secure, exogenously determined, and fully formalized property rights? Yet, such a world contradicts our own experiences. Even if we imagine property in real estate as something unambiguous and secure, surely we cannot forget the housing conditions of the poor. Formal and informal housing (as is well known since Charles Booth published his 1889 maps of poverty in London) often coexist.

Consider, for example, the two apartment houses in the City of Bengaluru, Karnataka, India (Fig. 1). Bengaluru is notorious for its unregistered land, insecure titles, and corrupt planning practices (Pellissery et al., 2016). Still, the owners of the apartment houses presumably have a formal title they can show to a bank or produce in court. Their investment has been made possible, and is protected, by formal property rights. Yet, in the space between the two apartment houses, an entirely different form of housing has taken roots: an informal shack, the home of a family whose livelihood depends on their informal work at the edge of economic and legal formality (Fig. 1). The family's 'right' to put up their dwelling on another person's land is, of course, only a marginal land right. Informal dwellers often have to pay high sums of money to the formal landowner, politicians, and the police. As their proximity to formal housing and the formal economy is convenient to members of the 'formal' sector, informal dwellers provide cheap labor. Whether through bribes or convenience, their land rights somehow persist.

Informal property or informal land rights probably sound paradoxical to many. How can the unauthorized occupation and use of land owned by a third party, unplanned settlements, or working below the 'radar' of tax offices be equal to the development of high-end real estate? Perhaps such activities are not equal, but still similar to the use of land formally owned by the developer, subjected to careful land use planning, and fully taxed. Informal settlements in Latin America, Africa, and Asia frequently have proven to be robust and persistent (Attia et al., 2016; Huch-zermeyer, 2011; McFarlane and Waibel, 2012; Perlman, 2010; Roy and AlSayad, 2004; Watson, 2011; Webster et al., 2016). Informal work and informal housing also exist in Europe (Adriaenssens and Hendrickx, 2010; Kolocek, 2013; Silva and Farrall, 2016; UNECE, 2009). So-called 'informality' often is well-ordered and controlled through a social 'order without law' (Ellickson, 1991) or an 'everyday social contract of informality' (Davy and Pellissery 2013, pp. S77–S80). In global discourses, the term 'informal' was first used comprehensively by the International Labour Office, the permanent secretariat of the International Labour Organization (ILO), in a report on urban informality in Kenya:

> 'The popular view of informal-sector activities is that they are primarily those of petty traders, street hawkers, shoeshine boys

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Fig. 1. Formal and informal land uses often coexist.
Source: (c) Benjamin Davy (Bengaluru, India)

> and other groups "underemployed" on the streets of the big towns. The evidence . . . suggests that the bulk of employment in the informal sector, far from being only marginally productive, is economically efficient and profitmaking, though small in scale and limited by simple technologies, little capital and lack of links with the other ("formal") sector.' (International Labour Office, 1972, p. 5)

The quote emphasizes what since then have become the conflict lines in (in)formality discourses: For one, some stakeholders think about formality and informality as a dichotomy (see, e.g., Cities Alliance, 2002 pp. 2–4, juxtaposing cities with slums and cities without slums). Others rather think of a continuum with different degrees of (in)formality which need to exist simultaneously and in the same place, just like the apartment houses and the shack in Fig. 1 (see, e.g., UN Habitat & GLTN, 2008, p. 8, asserting a 'land rights continuum'). Also, the 1972 report already called into doubt that informality is mostly inefficient, disorderly, and lacking any economic or social purpose. Such doubt has been confirmed because informality can actually contribute to urban development (Huchzermeyer, 2011) and the production of non-state welfare (Davy and Pellissery, 2013). Nevertheless, the Cities Alliance for 'cities without slums' still believes that informal work and informal housing can and should be replaced by formal work and formal housing (World Bank, 2013).

The survival and success of informal institutions has been considered puzzling for some time already (North, 1991, p. 111). If informal land rights are able 'to survive,' at least for a considerable period of time and within a substantial space, there might be some common denominator between formal and informal tenure. If such a common denominator exists, it would be meaningful to think about land rights, tenure, ownership, or property in terms of degrees of (in)formality, not in absolute terms. But how and under what circumstances do informal institutions survive and succeed? Peter Ho suggests that the survival of property as an institution depends on its *credibility* (Ho, 2014, 2016) rather than its form. He warns policymakers as well as academics 'against obsession with form' (Ho, 2014, p. 25). This warning is directed against title formalization and neoliberal land reforms, as promoted by Hernando de Soto (2000), the World Bank (Deininger, 2003; World Bank, 2013), and (to some extent) the Chinese government. Ho (2014, pp. 13–14) suggests that more attention be paid to the credibility of property which would result from the function of property rights:

> '[W]hat ultimately determines the performance of institutions is not their *form* in terms of formality, privatization, or security, but their spatially and temporally defined function. In different wording, institutional *function presides over form*; the former can be expressed by its credibility, that is, the perceived social support at a given time and space.'

Ho's neo-functional approach to property—land policy based upon the credibility thesis—is a variation on a topic popular in economics, international relations, and public policy (Douven, 2006; Downes and Sechser, 2012; Drazen and Masson, 1994; Grabel, 2000; Keefer and Vlaicu, 2008; Moscarini, 2007): In what ways do actors or institutions achieve and maintain credibility? Regarding this discourse, Ho's rallying call of *function presides over form!* takes a fresh approach to credibility, land policy, and property theory (Ho, 2014, 2016). Initially developed with regard to land policy in mainland China, the credibility of property rights is also interesting from the perspective of Western property theory. What does it mean for planning, land policy, and property theory that the form of property supposedly follows the function of property?

2. Four forms of property in land

Architects, designers, and planners are quite familiar with the phrase *form follows function*. Louis H. Sullivan, by the end of the 19th century, used the phrase to promote his view on 'tall office buildings,' i.e., sky-scrapers. Using as illustration several examples

from nature, Sullivan claims the existence of a law of proper design, 'form ever follows function' (Sullivan, 1896, p. 408):

> 'Whether it be the sweeping eagle in his flight, or the open apple-blossom, the toiling work-horse, the blithe swan, the branching oak, the winding stream at its base, the drifting clouds, over all the coursing sun, form ever follows function, and this is the law. Where function does not change form does not change.'

Sullivan's claim was extremely naturalistic; he did not consider function and form as social constructions, but as natural dispositions. Despite the popularity of this design principle, architects, designers, and planners often find obscure the precise meaning of *form follows function*. Prominent critics include *Form Follows Fiasco* (Blake, 1977), yet Peter Blake fails to discuss Sullivan's slogan seriously. Presumably, forms and functions of the built environment depend on each other. The same must be true of the form and function of institutions such as the institution of property. Many scholars believe that the form of property has been overemphasized by title formalization programs in the global South (Bromley, 2008; Gilbert, 2002; Home and Lim, 2004). With good reasons, the credibility thesis brings back to our attention the *function* of property (Ho, 2014, 2016).

Obviously, the use or function of an object should determine its form in order to make this object most useful. But which function of property should the form of property follow? Property has a multitude of functions. Some are rather abstract, like individual liberty, efficiency, or peace among nations, others are quite specific like storing wealth, the right to housing, or the production of non-state social welfare through the use of marginal resources. Instead of hunting down the most relevant function of property, I suggest that the different meanings of 'form' be used as a test which helps identify a variety of ways to understand the credibility of property. Under the credibility thesis, 'institutional function presides over form' (Ho, 2014, p. 14). In order to understand 'credibility,' we need to consider what 'form' of property could possibly mean. One meaning of form considers formal property as a mere shell for ownership. This definition is opposed to the social function of property doctrine (Duguit, 1912; Renner, 1929). Property as a social function emphasizes the impact of property on the distribution of wealth and the politics of exclusion and inclusion. A second meaning of form considers formal property from the perspective of the sources of law (*fontes iuris*). Form in this sense classifies property as provided by international customary law, international treaties, constitutional law, common or private law, regulatory law, a court ruling, a contract, and so on. A third meaning of the form of property emphasizes the level of title formalization to distinguish between degrees of land survey, land registration, court protection, payment of land taxes and service fees, recognition by the legal system, protection from eviction (de Soto, 2000; Payne, 2001, 2004; Payne et al., 2009; UN Habitat & GLTN, 2008, p. 8). Finally, a fourth meaning of form considers property as a bundle of sticks or rights (Hohfeld, 1919; Penner, 1996). The metaphor of a bundle often has been used to represent property as a number of rights which are typical of ownership in the sense of Western property theory (Honoré, 1961). Depending on which type of form we do have in mind, the credibility thesis' tenet of 'institutional function presides over form' (Ho, 2014 and 2016) highlights a variety of property functions which may determine the credibility of the institution of property. The remainder of the articles examines these four meanings of the 'form' of property in land, starting with property as a mere shell for ownership.

2.1. A mere shell for ownership

If we consider the form of property as a mere shell of ownership, we neglect the nature of the objects of ownership. From this perspective, property in a toothbrush is not different from property in a field, a factory, or a transnational corporation. The most important feature of formal property, considered without any regard for the objects of ownership, is the owner's universal power of exclusion. In this sense, Sir William Blackstone called property 'that sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe' (Blackstone, 1766, p. 2 [Book II, Chapter 1]). Even if Blackstonian property is an exaggeration or misinterpretation (Schorr, 2009), it conveys a popular narrative of the powers of proprietors: Landowners may do with their land whatever they deem fit and exclude anybody else. Surely, Blackstone's definition of property prevents no landowner from generous acts of charity. In this sense, James Penner recognizes the social use of property with a metaphor of walls and gates:

> 'The right to property is like a gate, not a wall. The right to property permits one not only to make solitary use of one's property via the exclusion of others, but also permits one to make a social use of one's property, that is with other people, via the selective exclusion of others.' (Penner, 1996, p. 744)

Any world would be wonderful in which landowners open the gates to their properties and beckon the landless in. But what happens if landowners do not commit to the social use of their land? Then, of course, the true scope of property becomes relevant. Blackstone's definition of property sometimes is considered as a dichotomy between an absolute and a relative right (Mirow, 2010, pp. 193–194). Even if this were true, the dichotomy does not capture Blackstone's indifference towards the question which 'external things of the world' are subject to the 'sole and despotic dominion.' Surely, it would be no hardship if I exclude 'any other individual in the universe' from using my toothbrush. But if I am the owner of the only factory in town, I can bring great despair upon the families of all workers disobeying my orders. Nobody, who regards property merely a formal shell for ownership, can examine the difference between a toothbrush and a one-factory village because no difference in the formal right to either object exists.

Leon Duguit fundamentally opposed to this view of property as a shell for ownership: 'Mais la propriété n'est pas un droit; elle est une fonction sociale' (Duguit, 1912, p. 21). Property is not a right, it is a social function (Mirow, 2010, p. 191). The title of Duguit's sixth lecture in Buenos Aires is 'la propriété fonction sociale' (Duguit, 1912, pp. 147–178), and the chapter is the centerpiece of the social-obligation norm of property (Mirow, 2010, pp. 207–209). Duguit's concept of the social function of property has been very influential on the development of constitutional property in Latin America (Ankersen and Ruppert, 2006; Mirow, 2010; Ondetti, 2016). Under Article 5, para. XXII and XXIII of the Constitution of Brazil (1988 as amended), '[t]he right of property is guaranteed; property shall comply with its social functions' (Ondetti, 2016, pp. 30–31). The Latin American version of the social function of property is neither about socialist property nor about the sweeping redistribution of land (Mirow, 2010, p. 211; Ondetti, 2016, p. 30). Rather, Duguit gives examples of the social function of property which exists in all jurisdictions as the lawmakers' regulatory power to limit property rights for the sake of the public interest. Only in one of his examples, telephone lines running over private land (Duguit, 1912, p. 169), some jurisdictions would demand that compensation be paid to the proprietor (Loretto v. Teleprompter Manhattan CATV Corp. et al., 458 U.S. 419).

A symposium on the social function of property at Fordham University School of Law considered Duguit's version of property as a social function rooted in human solidarity (Foster and Bonilla, 2011, p. 1005). But this neglects versions of the social function of property which go much further than Duguit. Take, for example, Karl Ren-

ner, who was not only a legal theorist, but also Austria's first Prime Minister after the Great War and first Federal President after World War II. Without any reference to Duguit, the notion of a social function of property was crucial to Renner's private law theory. He was critical of considering property as a mere shell of ownership:

> 'The kind of subject-matter which is the object of the property-norm is irrelevant to the legal definition of property. One object is as good as another. The norms which make up the institution of property are neutral like an algebraic formula, for instance the formula of acceleration. But if one factor in this formula of acceleration is the avalanche, everybody is crushed, and if one factor in the property-norm which makes a person the owner of a thing, is the machine, generations are devoured.' (Renner, 1929, p. 112)

Renner took issue with considering private law institutions (such as property) merely as a formal blanket without examining critically what is wrapped in the blanket. He advised to study not only the form, but the social and economic functions of property (Renner, 1929). What land policy learns from Renner's (1929, p. 112) metaphor of property as avalanche is to pay attention to the nature of the objects of property. Owning a toothbrush or an allotment garden is different from owning large land-holdings or renting out thousands of apartments (Davy, 2012, pp. 83–84). A formal rule that fits nicely with regard to one kind of land use (e.g., allotment garden) can prove fatal in a different setting (e.g., privatized social housing). Article 14, para. 2, of the *Grundgesetz* (1949 = German Federal Constitution) offers an interesting way to create a duty of the proprietor which can be applied in different situations: 'Property entails obligations. Its use shall always also promote the common good.' The social obligation of a landowner varies with context; it puts different burdens on the owner of an allotment garden and on the owner of a large stock of apartments. In each case, however, the social obligation demands that the use of private property be *also* beneficial to the common good. Article 14, para. 2, of the German Federal Constitution does not coerce landowners to sacrifice their private interests. Considering constitutional property clauses in Latin America, Gabriel Ondetti thinks that the social function of property asserts 'that the right of private ownership includes an obligation to use land in ways that benefit society as a whole' (Ondetti, 2016, p. 29). The notion of property as a source of social obligations is well established among property scholars in Latin America (Ankersen and Ruppert, 2006; Mirow, 2010; Ondetti, 2016), the United States (Alexander, 2009; Foster and Bonilla, 2011; Singer, 2000; Singer and Beermann, 1993) and South Africa (van der Walt, 1999, 2005, 2009; van der Walt and Viljoen, 2015). It still remains unclear how much of a landowner's power over her land is limited by the social function. Does the social function of property leave any discretion to the landowner or supersede her right to self-determina-tion? Renner—much more than Duguit—seems to favor a reading of the social function of property that limits the landowner's liberty substantially.

If we understand 'function presides over form' (Ho, 2014) as meaning that the mere form of property rights is less important than the social, economic, and political value of property, we put into contrast a substantial view of property with a formal view of property. The social function of property serves as a reminder that the impact of property rights depends on the significance of the objects which someone owns, not on the formal right of the owner to exclude 'any other individual in the universe' (Blackstone 1766, p. 2 [Book II, Chapter 1]) from using these objects. Refuting the idea that property is a mere shell of ownership, we consider property as 'credible,' if the property system serves the social function well.

2.2. *Fontes iuris*

The second meaning of the form of property refers to *fontes iuris*, the sources of law. A source of law is defined by the legal or technical manner in which rights and duties may be created or modified. Does the production of legal rights and duties involve a parliament or a courtroom, a ballot or a handshake, the promulgation of an act of parliament or an agreement among gentlemen? Certain rights and duties can be created or modified only in a certain form, a specific source of law. With regard to the sources of law, international law can be distinguished from domestic law.

Each member of the international community–each sovereign country–is subject to international law. According to Article 38 of the Statute of the International Court of Justice (annexed to the Charter of the United Nations), the court shall apply the following sources of law:

> '[I]nternational conventions, whether general or particular, establishing rules expressly recognized by the contesting states[;] international custom, as evidence of a general practice accepted as law[;] the general principles of law recognized by civilized nations; [as well as] judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.'

The forms—or sources—of international law include customary international law, international treaties, the directives and decisions of international or supranational organizations with rule-making power. Depending on the signatories of an international treaty, the treaty can be a source of law only between two or more countries, all countries of a region, or universally (bilateral, regional, and universal international law). Some documents in international law, although of a high moral value, have not been issued in the form of a recognized source of law and are not legally binding (e.g., Universal Declaration of Human Rights; 'soft law'). The sources of international law are quite independent from the sources of domestic law which give form to separate legal systems. Domestic legal systems rarely know only one kind of legal source, such as the command of the emperor. Typically, legal systems offer a wide variety of forms in which different kinds of law can exist. Many countries have a written or unwritten constitution, yet also federal, state, and municipal law statutes, administrative rules and regulations, case law from courts or administrative boards. In federal states, the sources of law depend on the distribution of powers. Individual decisions also are a form by which law can be created or modified. Above all, the use of land in most jurisdictions is subject to zoning or planning permissions which shape the scope of property rights in land. Natural and legal persons create and modify legal rights and obligations between themselves through contracts.

With respect to the sources of property law, the classification of formal law is important to determine who is entitled and who is bound by a property right (rights-bearers and duty-bearers), the rank of property rights in the hierarchy of norms, and the venue for pursuing property claims. The three most important types of sources of property are international human rights law, constitutional law, and common law or private law. The typology determines what it means to have a *right* to property. Property as a human right creates an obligation among members of the international community and, occasionally, enables landowners to litigate in an international court. Property as a civil or constitutional right creates an obligation of the government to protect, respect, and fulfill property relations which, in rule-of-law countries, a constitutional court protects. Property in common or private law creates rights and duties among natural and legal persons, who can settle property claims in the domestic court system.

Source of law	Example	X v. Y	Venue
UN-sponsored human rights	CEDAW	member state v. international community	report system ('Geneva committees')
Regional human rights	Article 1 ECHR_P1	individual v. member state	European Court of Human Rights
Constitutional property	Article 14 *Grundgesetz*	individual v. German government	*Bundesverfassungsgericht*
Common law / private law	Sections 903 ff. *Buergerliches Gesetzbuch*	individual v. individual	civil law courts

Fig. 2. Sources of property law (case of Germany).
Source: illustration by author

Fig. 2, using as an example the case of Germany, illustrates how different sources of property law affect the rights-bearers, duty-bearers, and venues for pursuing property claims. One example of a property clause in a UN-sponsored human rights treaty are Articles 14 through 16 of the Convention on the Elimination of All Forms of Discrimination Against Women, 1979 (CEDAW). The treaty provisions deal with non-discrimination of women in agrarian reform in rural areas and the administration of property. In particular, States Parties shall ensure, on a basis of equality of men and women, the same rights for both spouses in respect of the ownership, acquisition, management, administration, enjoyment and disposition of property, whether free of charge or for a valuable consideration (Article 16, para. 1 [h] CEDAW). Although phrased like an individual right, the property clause in Article 16 CEDAW does not really offer a full right to individual women. CEDAW creates rights and duties between States Parties. Even if a country has signed the optional protocol, no woman, who complains that her property rights have been violated, is entitled to a trial (and no German woman, as far as can be seen, has ever raised a formal complaint under CEDAW).

Property rights granted in the form of a regional human rights treaty can offer much stronger rights to an individual. Fig. 2 mentions Article 1 of the (First) Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR_P1, entry into force 18 May 1954). The European Court of Human Rights (ECtHR) has developed a comprehensive case law on spatial planning, property, and land policy (Allen, 2010; Davy, 2012, p. 165; Ovey & White, 2006, pp. 345–375; Ploeger and Groetelaers, 2007). In its first case on property, the court already established a comprehensive doctrine of 'fair balance' that supported individual claims against disproportional interference with private property (ECtHR, 23 September 1982, Sporrong and Lönnroth v. Sweden). The court also interpreted 'property' autonomously and found that informal land uses, typically non-property under domestic law, are protected as a human right (ECtHR Grand Chamber, Öneryıldız v. Turkey, 30 November 2004, Application no. 48939/99; ECtHR, Akhverdiyev v. Azerbaijan, 29 January 2015, Application no. 76254/11). In Germany, ECHR_P1 has been transformed as lower-ranking federal law, not as a constitutional amendment. Therefore, property complaints against the government mostly rely on the constitutional property clause, not European human rights law.

Article 14, para. 1, of the German Federal Constitution (1949) guarantees the right to property to natural persons and, within the limits of Article 19, to legal persons. The *Bundesverfassungsgericht* (the German Federal Constitutional Court) in many cases has protected constitutional property comprehensively from government interference. Occasionally, constitutional property was interpreted comprehensively as including, for example, the rights of tenants which are, of course, non-property under civil law (BVerfGE 89 [1993] 1—*Besitzrecht des Mieters*). Finally, property claims can emerge in the form of private law (in Germany, under 903 and following of the *Bürgerliche Gesetzbuch*, the Civil Law Code). Such claims are raised by, and directed against, natural persons and private law corporations. Typically, such claims involve disputes between neighbors, nuisance protection, or land disputes between the parties of a private law contract.

If we understand 'function presides over form' (Ho, 2014) as demanding that property rights be placed into the hierarchy of norms, we put into contrast better or less suited rights-bearers and duty-bearers—and also better or less suited venues of dispute resolution. Above all, we examine what it means to have a *right* to property. Depending on the source of property law, the chances of pursuing, achieving, and protecting property vary greatly. From the perspective of the sources of property law, property is 'credible,' if the property system addresses the most suitable rights-bearers and duty-bearers.

2.3. Title formalization

The third meaning of the form of property refers to the level of title formalization. A property title can be formalized at different degrees. Full title formalization requires among other things the survey of cadastral parcels, the documentation in the land register of all rights and duties associated with a cadastral parcel, the full recognition of the landowner's rights by the legal system, a planning permission or other public law title approving a current or proposed land use, the effective protection of land rights by independent courts, and a feasible system of land taxes and service fees (Dale and McLaughlin, 1999).

Most prominently, title formalization has been put on the agenda by the Peruvian economist Hernando de Soto. His 2000 book on *The Mystery of Capital* has sparked many title formalization programs worldwide, yet also has provoked a number of critics. De Soto's main argument hinges on the role of formalized property in the credit sector:

> 'Property is the realm where we identify and explore assets, combine them, and link them into other assets. The formal property system ... is the place where capital is born. Any asset whose economic and social aspects are not fixed in a formal property system is extremely hard to move in the market.' (de Soto, 2000, p. 47)

Without formal title landowners would not be able to put up their land as security for a loan. The lack of formal title would prevent the production of capital in countries in the global South. De Soto draws from a concept of 'form' that is closely related to semiotic theory:

> 'A formal property representation such as a title is not a reproduction *of* the house, like a photograph, but a representation of our concepts *about* the house. ... Property's real breakthrough is that it radically improved the communications about assets and their potential.' (de Soto, 2000, pp. 50 and 59)

De Soto (2000, p. 61) emphasizes as an advantage of 'formal property systems' that 'all the property records (titles, deeds, securities, and contracts that describe the economically significant aspects of assets) are continually tracked and protected as they travel through time and space.' Most of de Soto's critics (e.g., Bromley, 2008) fail to comprehend the semiotic underpinnings of title formalization. Form in de Soto's approach is an individual's inexhaustible ability to present her wealth permanently.

Title formalization quickly attracted attention as the new land reform. The World Bank emphasizes the relevance of tenure security for poverty reduction (Bruce et al., 2006; Deininger, 2003; Deininger et al., 2010) as does the Commission on Legal Empowerment of the Poor, co-chaired by Madeleine K. Albright and

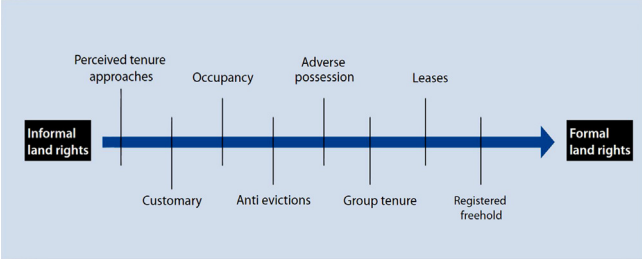

Fig. 3. The land rights continuum.
Source: UN Habitat & GLTN, 2008, p. 8

Hernando de Soto (CLEP and UNDP, 2008, pp. 64–68). Some authors expect land titling to help deepen democracy in developing countries (Atuahene, 2006). Others criticize privatization and private property formalization as ineffective and even dangerous (Bromley, 2008; Davis, 2007, pp. 79–82; Gilbert, 2002; Lesorogol, 2003; Manji, 2006; Roy, 2005, pp. 148–150; Sjaastad and Cousins, 2008). Property formalization jeopardizes spatial commons if local management practices are replaced by Western ownership ideology (Ostrom, 2009, p. 422; Porter, 2011, pp. 117–118). If titling programs go too far, the formal clearness of property rights turns into a disadvantage. A fair degree of imprecision of land rights as well as some skepticism towards wealth maximization can lead to beneficial flexibility of land policy (Davy, 2012, pp. 183–185).

For a long time it has been known that land surveys and land registration in the global South are often ineffective or even nonexistent. In contradiction to de Soto, UN Habitat has introduced a powerful picture to illustrate the wide range of land tenure. This picture is called the 'land rights continuum' (UN Habitat & GLTN, 2008, p. 8). The land rights continuum (Fig. 3) includes not only formal leasehold or registered freehold, but also customary title, occupancy, or adverse possession. The land rights continuum reminds everybody of the fact that informal and formal titles to land are simultaneously present in the everyday practice of property relations. The land rights continuum draws from the work of Geoffrey Payne (Payne, 2001, 2004; Payne et al., 2009). Payne advises policymakers not to make major changes to tenure systems, but to study the specific situation at hand:

> 'A starting point may therefore be to regard every step along the continuum from complete illegality to formal tenure and full property rights as a move in the right direction, to be incremental. This would minimise market distortion and the risk of undesirable social consequences.' (Payne, 2001, p. 427)

Considering the situation of residents and farmers with insecure tenure, Payne (2001, p. 427) suggests 'to increase the rights of residents rather than changing their formal tenure status.' The basic idea of the land rights continuum has been included in the *New Urban Agenda*, adopted by the resolution discussed by the UN Habitat III conference in Quito. Paragraph 35 of the *New Urban Agenda* recognizes 'the plurality of tenure types:'

> 'We commit ourselves to promoting, at the appropriate level of government, including subnational and local government, increased security of tenure for all, recognizing the plurality of tenure types, and to developing fit-for-purpose and age-, gender- and environment-responsive solutions within the continuum of land and property rights, with particular attention to security of land tenure for women as key to their empowerment, including through effective administrative systems.' (UN-GA 2016, p. 7)

It remains unclear, however, how such a plurality contributes to 'increased security of tenure for all' (UN-GA 2016, p. 7). The arrow in the initial illustration of the land rights continuum (Fig. 3) seems to indicate that informal tenure eventually is supposed to develop, or mature, into formal property. Reminiscent of the (neo-colonial) 'stages of economic growth' (Rostow, 1990), such an interpretation of informality would renounce self-regulation and self-determination in marginal settings (Silva and Farrall, 2016; Watson, 2011, p. 152). As Ho (2014, p. 21) emphasizes there can be 'a large perceived support, or high credibility, for *insecure* land tenure.' Credibility—in terms of human rights law: 'legitimate expectations'—can counterbalance a lack of formality, as has been pointed out by the European Court of Human Rights in the case of the user of an informal structure on land he did not own:

> 'It is true that the applicant had never applied for registration of his property rights over the plot of land occupied by his house and the courtyard attached to it. Therefore, formally, he did not have ownership title to the land at the time of the demolition of the house. However, in accordance with the applicable legislation, the applicant was a "lawful user" of the land in question by virtue of his ownership of the house. Moreover, he had a legitimate expectation, deriving from the national law, of being able to acquire ownership of the land free of charge.' (ECtHR, Akhverdiyev v. Azerbaijan, 29 January 2015, Application no. 76254/11, para. 77)

Although a 'legitimate expectation, deriving from the national law' is not quite the same as 'a large perceived support, or high credibility, for *insecure* land tenure' (Ho, 2014, p. 21), the difference is gradual. Land rights are functional not because of formality, but credibility. This is also true for well-developed countries. Surely, the exchange value of land seems to increase with the quality of surveying and registering the land. If there are no property maps, a mature land market hardly emerges (de Soto, 2000). Still, land in England and Wales was not registered comprehensively before the Land Registration Act 2002 (Clarke and Kohler, 2005, pp. 539–541; Gray and Gray, 2005, pp. 155–159). Nobody claims that no land market existed in England and Wales before 2002 (Davy, 2012, p. 148). What mattered to land markets in England and Wales was the credibility of property institutions even in the absence of full formality.

If we understand 'function presides over form' (Ho, 2014) as meaning that property rights be formalized legally and economically, we put the reality of informal housing, informal farming, informal economies into contrast to the legal formalities of land survey, land register, and court-protected land titles. From the perspective of title formalization, property is 'credible,' if property claims are widely respected apart from the degree of formality.

2.4. Bundle of sticks

The fourth meaning of the form of property pertains to the model of Western ownership. According to the model, property is like a bundle which contains 'sticks' (rights) typical of ownership in the sense of Western property theory (Penner, 1996). The idea of property as a bundle of sticks is rooted in a legal theory that draws from a highly formalized theory of law (Davy, 2012, pp. 158–160). Its author, Wesley Newcomb Hohfeld, criticized any concept of property limited to rights and duties. His analysis of 'fundamental legal conceptions' has deeply influenced property theory. He insisted that legal relationships not be reduced to rights and duties (Hohfeld, 1919, p. 35). We should conceive of property in land as a 'complex aggregate of rights (or claims), privileges, powers, and immunities' (Hohfeld, 1919, p. 96). In the wake of Hohfeld, legal theory conceives of property as a bundle of rights, including the right to possess, the right to use, the right to convey, or the right to bequeath land (Munzer, 1990, p. 16; Ostrom, 2000, p. 339; Penner, 1996, 1997 p. 30; Singer, 2000, pp. 130–139; Waldron, 1988, p. 28).

What does the bundle of sticks (rights) metaphor really mean? Many property scholars consider Honoré's definition of ownership the most suitable definition of the bundle of rights:

> 'Ownership comprises the right to possess, the right to use, the right to manage, the right to the income of the thing, the right to the capital, the right to security, the rights of incidents of transmissibility and absence of term, the prohibition of harmful use, liability to execution, and the incident of residuarity: this makes eleven leading incidents. Obviously, there are alternative ways of classifying the incidents; moreover, it is fashionable to speak of ownership as if it were just a bundle of rights . . .' (Honoré, 1961, p. 113)

Honoré's definition is about the content, not the form of property. His definition is still 'formal' in the sense that he presumes that property *typically* encompasses the eleven 'leading incidents' enumerated in the ownership definition. If property in some particular instance does not contain all incidents, this must be an atypical situation. Such a situation may arise, for example, because a planning authority prohibits the construction of buildings on land designated as public park. The definition by Honoré makes landowners expect that *typically* they are allowed to use their land as they like, notwithstanding the location, environment, or quality of the land. Apart from atypical situations, Honoré expects that one form of property fits all.

The theory of one property, wrapped up in a bundle of sticks, is riddled with exceptions, variations, and modifications that Honoré cannot explain. One author even suggests that the bundle metaphor lacks theoretical value:

> ' "Property is a bundle of rights" is little more than a slogan. The use of the word "slogan" is not intended to be merely polemical. By "slogan" I mean an expression that conjures up an image, but which does not represent any clear thesis or set of propositions. But like all good slogans, it rhetorically assuages the unease that results from our knowing there are real problems which, if plainly articulated, would demand serious consideration. There is no real "theory" that property is a bundle of rights.' (Penner, 1996, p. 714)

One of the problems with the bundle of rights approach to property is the failure to recognize that property is a relation between individuals, not between an owner and a thing. With good reason, the formal owner/thing reading of the bundle metaphor has been challenged for property would be 'a complex bundle of relations' (Waldron 1988, p. 28). Even if property rights have a lot to do with things, the key idea remains that property is 'a bundle of relations among persons with respect to things' (Munzer 1990, p. 62). If such relations are sufficiently complex to accommodate the needs and aspirations of a variety of social actors, how can we understand bespoke property, a host of custom-tailored ownership relations?

In sharp contrast to the theory of one property, the theory of polyrational property suggests that a variety of bundles of sticks, rights, or rules best fits the many uses of land (Davy, 2012, 2014). After all, a home is not a public street, a hotel is not a community garden, a railway is not a farmers' market. Homes, streets, hotels, community gardens, railways, or farmers' markets are all examples of uses of land. Land which is not *terra nullius*, but which is owned under private or common property. The theory of polyrational property asserts that, depending on the rationality of each type of land use, a different set of property rules applies. With respect to land policy and informality, one size does not fit all (UNECE 2009, p. 92). Take, for example, homes and public streets. Homes are insular land uses and the owners expect that property protects their homes from trespassers and preserves the exchange value of their land. Public streets, however, are shared land uses: Land users enter the street at will and use the street opportunistically. The property rules for public streets define and provide open access, under rules of public use, and preserve the streets' accessibility (Davy, 2012, p. 2012). Fig. 4 associates the functions of private and common property with four land use rationalities. Each of these rationalities promotes a different set of property rules (Davy, 2012, pp. 221–251 and 2014).

Honoré and the theory of one property cannot explain the variety of property rules which the practice of property constantly develops through international treaties, legislation, court cases, administrative rules, or contracts. This practice reflects that one form of property surely does not suit the many functions of property. Consider, for a moment, the bizarre consequences of applying the property rules designed for public streets (opportunistic land use) to private homes (insular land use). If my living room is accessible like any highway, I never shall enjoy my home as a castle. But the reverse situation would also make no sense: If my neighbor has the right to control access to the public street just as she can control access to her bedroom, many a driver will not be allowed to pass through. Fortunately, the practice of property hardly listens to property theory, but insists that *form follows function*.

If we understand 'function presides over form' (Ho, 2014) as meaning that property rights be responsive to a variety of land uses, we put into contrast bespoke property (with needful variations depending on land users' demands) and one property (Honoré's illusion of the liberal concept of full individual ownership). Polyrational property draws from the observation that a home is not a public park, a retail chain is not a motorway, a sewage system is not a hotel. The rules of using land vary. They do not, however, vary haphazardly. Their variations respond to the rationality of land uses and, to some extent, to the needs of land users. From the perspective of polyrationality, property is 'credible,' if land policy provides a diversity of land uses with plural property relations.

3. Credibility and degrees of (in)formality

Ho's neo-functional approach to property takes issue with a view of property as 'form,' ossifying an imagined equilibrium between public and private, formal and informal, secure and insecure (Ho, 2014, 2016). Rather, land rights should be tested against their credibility. Although developed with a view to mainland Chinese land policy, the credibility thesis also helps engage a meaningful conversation with Western property theory. The credibility thesis claims that the institutional function of property in land must preside over its form. What the credibility thesis implies, however, varies with what we mean by 'form.'

In the case of the social function of property (Duguit, 1912; Renner, 1929), the rejection of Blackstonian property as the ultimate form of ownership enables a substantial analysis of property in light of the nature of the objects owned (a toothbrush, a factory). In a similar vein, the forms—or sources—of law cannot be dichotomized. Many *fontes iuris* exist, and each serves its purpose. A property clause in an international law treaty is not less formal than a constitutional property clause, even if the latter might provide a stronger basis for individual claims. Perhaps formality in the sense used by de Soto (2000) is the most interesting form of property that evades dichotomies (such as the dichotomy implied by the *Cities Without Slums* slogan). Formality in this sense can relate to land cadastres, land registers, land taxes, planning permissions, bank loans, public services—and each of these relations can vary in degree along a land rights continuum (UN Habitat & GLTN, 2008, p, 8; Payne, 2001, 2004; Payne et al., 2009). Finally, we can learn from the practices of property in land, that no invariable bundle of rights constitute 'one property,' but that legislators, courts, and regulators

Restricted land uses based upon private property relations	Land use rationality	Shared land uses based upon common property relations
insular uses	INDIVIDUALIST	**opportunistic uses**
property protects owner from trespass and preserves exchange value	Lockean property	property defines open access and preserves accessibility
kinship uses	EGALITARIAN	**collaborative uses**
property coordinates the spatial production of capabilities	Rousseau's property	property supports the building up of trust and social capital
corporate uses	HIERARCHICAL	**structural uses**
property defines use hierarchy to maximize the territorial power	Hobbesian property	property gives power to establish territorial hegemony and use rules
container uses	FATALISTIC	**environmental uses**
property organizes isolated uses and reduces frictions		property preserves the existence value of land

Fig. 4. Functions of private and common property relations.

Source: Davy, 2012, p. 143

provide a variety of land uses with a plurality of property relations (Davy, 2012, 2014).

An examination of the relationship between the functions and forms of property certainly discourages any assumption of a dichotomy of 'formal' and 'informal.' The credibility thesis offers a convincing tool for explaining and evaluating different degrees of (in)formality. Depending on which type of form we put into contrast with property's function, property is credible, if the property system serves the social function well (2.1); if the property system addresses the most suitable rights-bearers and duty-bearers, establishes a *right* to property, and provides venues for settling property claims (2.2); if property claims are widely respected apart from the degree of formality (2.3.); if land policy provides a diversity of land uses with plural property relations (2.4). Each of these four criteria can be used in the 'Credibility Scales and Intervention' (CSI) checklist drafted by Ho (2016, pp. 1139–1141). After having considered 'forms' that might follow the functions of property, we no longer can collapse land rights classifications into dichotomies (such as 'formal' and 'informal'). After form, we must learn to deal with degrees of varying qualities, which is a huge challenge to policy-makers who prefer their advice be etched in black and white. After form, we must embrace the more and the less (in)formal.

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