The integration of multiple layers of land ownership, property titles and rights of the Ashanti people in Ghana

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Abbreviations

CLB – Crown Lands Bill

CLS – Customary Land Secretariat

DfID – Department for International Development

DPU – Development Planning Unit

GoG – Government of Ghana

LAP – Land Administration Project

LIS – Land Information System/s

K.C.M.G – Knight Commander of Saint Michael and Saint George

MLF – Ministry of Land and Forestry

NLP – National Land Policy

SSA – Sub-Saharan Africa

UDP – Urban Development Planning

UN – United Nations

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1.0 Introduction

Throughout West Africa the co-existence of multiple land registry systems, some of which are not recorded in written documents has led to a complex land tenure system. In many cases the 'official' land registry system based on private ownership through legal documentation does not recognise customary land rights and other local land holding agreements. In this way multiple systems of land and property registration lead to confusion and conflict represented by lengthy legal battles over ownership, use and sale of land and property. To add a further degree of complexity there is not one respected arbitration committee but several which may come to different conclusions depending on the principles and understanding of local land rights. Therefore one lengthy legal battle maybe overturned by a different committee, such a system is full of uncertainty and completely unsustainable as it fails to deliver lasting solutions.

Almost every nation in the world has a formal property system, but the success of that system is dependent upon citizens gaining access and benefiting from this access. Those outside the formal property system are what anthropologist Keith Hart defined as *informal* but was perhaps better illustrated by Fernand Braudel's bell jar. Braudel sought to understand why Western capitalism worked for only a small majority of the population and how the rest of the population could benefit from the capitalist system.

"The key problem is to find out why that sector of society of the past, which I would not hesitate to call capitalist, should have lived as if in a bell jar, cut off from the rest; why was it not able to expand and conquer the whole of society? [Why was it that] a significant rate of capital formation was possible only in certain sectors and not in the whole market economy of time?"

Fernand Braudel (1982: 248)

Hernando de Soto's book, *The Mystery of Capital* proposes that the reason why capitalism benefits only the West is based on access to formal property. The majority of people, who cannot convert what he describes as the 'fruits of their labour' into formal property rights live outside the bell jar and cannot capitalise on the opportunities provided by a capitalist economy. In this way the bell jar makes capitalism an exclusive club open to just a privileged few, enraging those left outside looking in (de Soto, 2000: 68). de Soto was not the first to argue that the poor should have access to property and debates regarding regularisation in the third world dates back to 1968 and the work of John Turner. Turner argued that granting the poor security of tenure would encourage people to invest and improve their housing and led international agencies to recommend property titling as a means to stimulate investment in housing consolidation (Linn, 1983). However, opponents of regularisation including Burgess (1982) suggested it would result in the displacement of the poor through 'raiding' by higher income groups, thus harming the intended beneficiaries. The third school of thought questioned the impact of regularisation suggesting such a programme would have little or no consequence on the lives of the poor people. Central to this argument was that for many without formal property titles housing improvement could be undertaken due to the high *de facto* security of tenure (Varley, 1987).

The majority of the research undertaken on regularisation has been done conducted in Latin America, this dissertation aims to investigate the practicality and impacts when applying de Soto's logic to the Ashanti Kingdom in Ghana. Perhaps de Soto's strongest critic is Alan Gilbert who argues that many poor people do not wish to borrow money from the formal sector and bases his critique on the standard of housing which appears to be as much a criticism of Turner as it does de Soto. Whatever the theory it is impossible to generalise on issues of land and property registration, Gilbert's cases all stem from Latin America and are unlikely to be representative of those found in West Africa.

4.0 Practical Implications and Recommendations

In this Chapter I will aim to present the impacts, feasibility and limitations of rolling out large scale land titling programmes in the context of West Africa. In doing so, I shall focus on the possible intended and unintended impacts of de Soto's recommendations for the Ashanti people. Following this I shall discuss the merits and pitfalls of an 'end-state' that includes an integrated land registration system and access to formal finance. The process by which we reach this 'end-state' is perhaps the bigger question which needs to be addressed and once again I will refer back to the complex dynamics of customary land tenure to assess the current attempts to administer land in Ghana.

I will assess the impact of the Land Administration Project, identifying benefits and limitations of the scheme before proposing three recommendations for the project to become more effective in serving the poor people of Ghana.

When considering the application of de Soto's ideas to a certain context whether West Africa or elsewhere it is first necessary to develop an understanding of not only land administration but also the social customs. In his book *The Mystery of Capital* de Soto concentrates his focus on making capitalism work for those outside the West. The first problem here is that not everyone lives in a capitalist society and perhaps nor do they wish to, so we have an assumption that capitalism will triumph it is just a matter of time. This assumption needs to be challenged in many contexts and this includes large parts of West Africa.

Central to the idea of a capitalist political economy is private ownership with capital accumulation achieved through amongst other things sale of assets. In the Ashanti region private ownership even recognised informally is rare because of the customary land administration system which has created tribal land controlled by an elected chief. Therefore this idea of individual ownership and personal capital accumulation appears marginal in its relevance. The reason capitalism works is because of access to a huge marketplace in which trade can be convenient and profitable. If then, as in Ashanti sale of assets to 'foreigners' is frowned upon and extremely rare then granting land titles would have no impact in terms of capital accumulation through property sale.

De Soto's response would probably be to reiterate his stance that 'capitalism stands alone as the only feasible way rationally to organise a modern economy' (2000: 1) and that in order to climb out of poverty society must conform to a capitalist way of operating. Does it have to be Capitalism or custom? Can it be both? I would argue in the case of the Ashanti because of the importance, value and beliefs attached to land and the societal structure it has to be one or another.

If it is to be one or another, then how realistic is to expect an entire society built around certain traditions, beliefs and values to conform in the way that Hernando de Soto is proposing? I would suggest highly unlikely.

4.1 Land

One issue which needs to be addressed here is the land itself which is interpreted differently by customary society and therefore produces an inconsistency between theory and practice. Immobility is perhaps the most obvious and valuable characteristic of land. A plot of land is a permanent asset comprising a fraction of the earth's crust and can be identified and located accordingly. This should be the basis for establishing ownership (Davis, 1976; 11). Regardless of how the Ashanti understand and explain land the reality is that land is immobile and finite, this is what we need to work with. It is impossible to progress on land administration without this fact being accepted, similarly, ownership is the right and responsibility of the living not ancestors. Understanding such basic realities is a pre-requisite for integration into any new formality, the deceased cannot sign legal documents nor can land be split into isolated components.

4.2 Representations and Legal Implications

Central to de Soto's proposition is the standardisation of legal documents, property titles and asset representations, the purpose of all these is to allow the integration of the informal with the formal. However, such integration in addition to economic compatibility would also encourage social and spatial integration and with it a loss of customs. Individual property rights would of course remove the land rights of the tribal chiefs which given the power of the chiefs in Ashanti society would be difficult to achieve.

By distributing formal property titles to the people it will be possible to increase security of tenure in certain instances and may prevent or discourage chiefs from selling tribal land for personal profit. However, it is plausible that some chiefs would refuse to acknowledge non-customary rights and proceed regardless of formal title. Even in instances where the chief did recognise and respect the formal property titles, the power of the chief within society could result in the removal of benefits to the individual or family resisting sale.

In comparison to other regions of the developing world evictions are not a huge problem in Ashanti, this may in part be down to the customary land system. It is also perhaps explained by the relatively low density of West African settlements which by nature reduces pressure on land and property.

4.3 Titling, Formal Financial Sector and Credit

If the Ashanti people were able to obtain formal property titles, what opportunities would be available for them to accumulate capital and improve their quality of lives? According to de Soto, they would have the opportunity to take out loans against their property and invest in housing improvements, business, education etc. Unfortunately de Soto himself has contributed very little research into the practical feasibility of these assumptions. As we have discussed in *Chapter Two* many families do not wish to burden themselves with formal loans even when they have the opportunity to do so. The Ashanti people benefit from the flexibility of their intra-tribal arrangements and the fear of being unable to repay formal loans which are likely to carry much higher interest rates are likely to discourage the application for formal credit.

There is also little evidence that formal banks or other financial institutions would be prepared to give credit to the Ashanti people on the basis of formal property titles. One reason for this is that the value of a property (to the bank) inside a tribal or ethnic region may be significantly lower than a similar property outside the Ashanti region. The location may discourage foreigners who are considered untrustworthy by many Ashanti people and would outsiders wish to live inside a society that may be alien to them under the chieftainship. These complexities posed by a customary society may make formal financial institutions reluctant to enter into agreements with the Ashanti people.

4.4 End-State = Formal Property Titles and Access to Credit. What is the Impact? Would it work?

Perhaps the strength of de Soto's work is his focus on the positive opportunities that become possible within a capitalist economy. For example, he predicts the impact of a land titling scheme with the assumption of economic integration into Braudel's bell jar resulting in increased capital accumulation, housing improvements and the elimination of poverty. The way in which it is delivered is so simple and straightforward it appears unchallengeable and you ask yourself "why has this not already been done?" However, in reality while he addresses the question of *Why?* land registration and property titling, he very rarely addresses the *How?* De Soto, by generalising his recommendations to 'developing countries and former communist nations' avoids the most difficult questions posed by land titling programs. While it would be impossible for him to address more than a few context specific cases he fails to sufficiently recognise the importance of the different starting points at which national governments begin.

4.5 Process: Informality -> formality = new formality?

When considering process it is important to be clear about what we are trying to achieve. Should we be encouraging the deformalisation of the property and legal system removing the legal apartheid that currently exists between the formal and the informal? Or, should we be trying to formalise the informal? Bringing all the small informal bell jars inside the large formal bell jar. The third option is to integrate the informal and formal by creating a 'new' formality carefully constructed using the rules and regulations of existing social laws and customs.

De Soto does himself discuss the possibility of a 'new' formality but this seems to contradict his central argument which implies that conforming to the existing formal capital-compatible system is the only option. Similarly, Fernand Braudel through his bell jar analogy implies that it is up to the informal to conform to the formal and not vice versa.

Despite having recognised the ignorance of a generic blueprint for creating an integrated and equitable property system, it can be useful to learn from historical attempts to integrate multiple land systems. Property is socially constructed (Posner, 1989) and all modern standardised property systems are the result of extralegal social contracts and are the reality in every country including the Untied States (Ellickson, 1991). This suggests that property law and agreements are most effective when they are constructed socially by achieving a popular consensus about the ownership, transfer and use of assets including land.

Outside the West, informal socially determined contracts exist for a very good reason, they have been better than formal law in building on consensus between people about how their assets should be ruled (de Soto, 2000: 181). Plato was the first to recognise that socially determined agreements underpin almost all successful legal systems, this is because where legitimacy is derived through consensus it is more likely to be respected than where it is imposed.

"To be legitimate, a right does not necessarily have to be defined by formal law; that a group of people strongly supports a particular convention is enough for it to be upheld as a right and defended against formal law."

Hernando de Soto, *Mystery of Capital* (2000: 182)

Experience has shown that those laws which have been imposed without agreement have lacked legitimacy and thus have in many cases been unenforceable, as is seen throughout the global South. In this sense, any attempt to integrate customary and formal property/land laws in Ashanti needs to be done so by reaching some level of agreement on how to govern and represent assets. Legal systems in the West developed from the social and economic structures that existed between different groups where usages were transformed into custom, and these customs into law (Berman, 1983). Berman (1983: 557) stated that 'Law both grows upward out of the structures and customs of the whole society and moves downwards from the policies and values of the rulers of society. Law helps to integrate the two.' By founding the legal property system in existing social agreements Western nations created a system that was widely accepted.

One of, if not the first attempt to generate a recorded property system was conducted by William I of England who orchestrated a survey in 1086 of the nation to find out 'what or how much each landholder had in land and livestock, and what it was worth' (Anglo-Saxon Chronicle). The results were recorded in the Domesday Book, it is a common misconception that the primary reason for William conducting this survey was to collect taxes it was actually to establish his legitimacy as the King of England. The purpose is in many ways irrelevant, it was the perhaps by accident but William had created the first written account of who owns what and the judgement of the King's assessors was final (the law).

When drawing parallels with the current situation in the Ashanti Kingdom in Ghana it is interesting to note that in 1086 large plots of land were held by a few wealthy individuals and not by independent families. Similarly, the chiefs in the Ashanti own large plots of land. In both situations the common people rent from these wealthy landowners entering into a patron-clinet relationship. This is a relationship which can be removed through a developed formal property system therefore I feel it is important further research is conducted on the process of moving from a few wealthy landowners to independent ownership of property. I guess the question here like with so many large-scale undertaking is do you work from the bottom-up or the top-down.

4.6 Ghana's Land Administration Project

As discussed in *Chapter Three* a new land administration system in Ghana was drawn up in 1999 and it seeks to deliver a rational and orderly land and property system. Despite being only a decade old the programme has come under scrutiny and in many cases been criticised for its methodological short fallings. Perhaps the biggest criticism has been the government's failure to publicise and promote the programme which has undoubtedly reduced the effectiveness of the programme. In 2003, Dr Callistus Mahama reported that the programme is unknown outside of government circles and although the Ministry of Lands and Forestry (MLF) organised workshops this was not enough. The nature of the project dictates that for it to be successful common Ghanaians who deal in land need to understand and trust the new administration system. This comes back to the need for legitimacy in the eyes of the population, without this legitimacy the programme will fail in its objectives. Dr Callistus Mahama (2003) calls for two parallel strategies. The first should systematically deal with the adjudication of individual property rights and create a transparent system to process current transactions. The second parallel strategy should be focused on developing policy, land regulations and facilitate further titling of land and property. By creating two complementary systems it will allow existing registration processes to continue uninterrupted while future policy is developed, this is critical to avoid political and economic stagnation. It also bides time for the policy makers to ensure they create a system which will provide long-term improvements in land administration for all Ghanaians.

The project aims to enable land owners to register their plot faster and cheaper. Research teams working for the government will work systematically moving from property to property getting residents to fill land registration documents. Following registration residents owners will be issued with property titles. For the people of Kumasi they have six months to take advantage of this opportunity, if they fail to do so they will then have to follow the old registration mechanism and incur the full fees. If public knowledge of the scheme is as low as has been widely reported then people will miss this six month deadline and the LAP will not reach its potential impact.

It is clear that the majority of people in Ghana are dependent on customary agreements for land occupation, a system which is embedded into their traditions and way of life. There is however a formal system for administering land and these two systems operating in parallel is what has produced this legal pluralism (Kasanga & Kotey, 2001). These two parallel systems have created a number of difficulties, hence the call by authors like de Soto for the integration of the two (Williamson and Ting, 2001). However, building on existing customary arrangements has also gained a lot of attention and is increasingly popular in Sub-Saharan Africa. The benefits of the second option are thought to be increasing accountability and in many cases it offers a low-cost mechanism for governments to deliver land (Alden Wily, 2008).

The need for change now is becomingly increasingly apparent with the increasing regularity of claims that chiefs are abusing their position of power for personal gain. This has brought into question the equity of existing customary communities, which had seemingly operated relatively well for many years.

4.7 Recommendations

In this section I will propose three key recommendations which having conducted theoretical and contextual analysis will provide the best opportunity to create a new formality which will be compatible with the international capitalist economy.

In English feudal times, all land was held by the king following William the Conqueror's victory in the Battle of Hastings in 1066 and all tenure agreements were built upon this understanding. The king would allocate land to his nobles; in return he would receive services and faithfulness which maintained his position and legitimacy. Beyond this, the nobles would allocate smaller plots of land to the commoners. In this structure the commoners had tenure as granted by the noble but not the rights to sell the land because the land itself was owned by superiors (firstly by the king, secondly by the noble). This hierarchical structure over time gave way to individual ownership, which included the rights to use and sell the land to a buyer of their choice (Davis, 1976; 14). Such, understanding proves useful when making recommendations for the process by which Ghana can achieve individual property ownership and sale rights. The parallels are clear when you replace the nobles with chiefs who allocate land to the Ashanti people in return for certain services. Similarly, to the English comparison individual families are not free to sell land to outsiders and are therefore stuck in a patron-client relationship. The most interesting and valuable lesson is that process of moving from collective land ownership to individual ownership, a process which I would argue is critical in improving peoples ability to climb out of poverty and accumulate capital.

4.7.A Recommendation 1: Two Phase Strategy

The process by which we reach this end state of a new formality I propose should be conducted in two phases. First, representatives from all customary authorities should come together to produce an agreed written legal framework for land tenure and rights in the informal sector. This is likely to be a lengthy process and will require politicians, lawyers and arbitration bodies to bring together all existing customary laws to consider before producing a standardised informal legality. The benefit of this is obvious, if you return to the bell jar analogy. By amalgamating all the existing informal arrangements (the small isolated informal bell jars) into a standardised system we create an integrated informal community (a single large informal bell jar. I have attempted to represent the process below;

Figure 3: Bell jar analogy representing the relative size of two parallel systems (intended output of phase one)

When considering that 80% of Ghana's land is held by customary authorities this integration would create an incredibly powerful customary institution which would dominate the formal institution at least at a national level. Despite remaining essentially extralegal in the sense that it is outside of the formal legal framework the new informal arrangements need to be delivered alongside retribution measures for breaking the agreed regulations.

The second phase of the integration and formation of the new formality would involve perhaps the simpler task of merging the formal and informal/customary institutions. Because of the power that the informal institution has gained through its size and land coverage it will hold considerable weight in this process. The informal institution has been socially determined and therefore has significant legitimacy which as discussed is critical if laws, rules and regulations are to be enforceable. A good interrelationship between those who plan and those whom the planning affects is essential for land use planning to be effective. Without this relationship there will be misinformation, mistrust and misunderstanding. Planners and planees both have power but this power arises from different socio-political sources. On the planner side, power is born out of authority through the process of delegation – whereas the power of the planee arises more from political influence (Davis, 1976; 296).

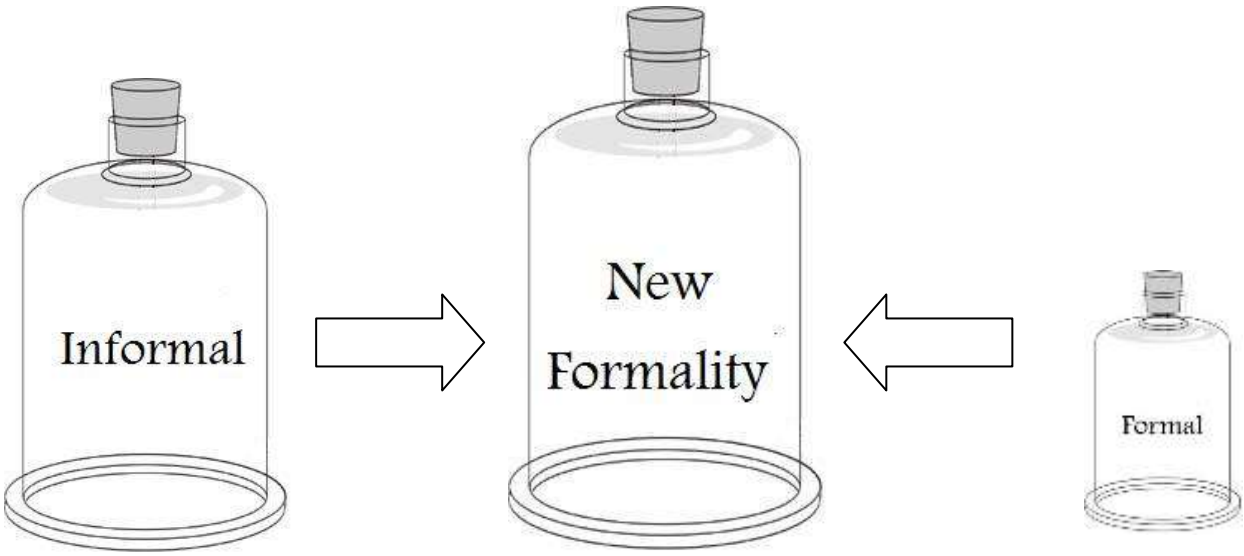

Figure 4: Bell jar analogy representing phase two and the formation of a 'new' socially-determined formality

The difficulty in this second phase will most likely arise from concerns expressed by formal stakeholders including financial institutions that may be reluctant to cooperate with tribal communities. Involving financial institutions in the development of a new formality is essential; this may be alongside a government housing bank or through the provision of subsidies or guarantees as incentives.

The importance of these two processes cannot be overstated and therefore it is essential that time is taken to achieve the optimum output for all interested groups. Many of the Western legal systems took over 100 years for the multiplicity of local rules and regulations to be assessed and harmonised. While I wouldn't predict such lengthy processes will be necessary to achieve modest results in Ghana, it would be ignorant to start setting inflexible deadlines which would undoubtedly influence the output. Progress will depend on the level of coordination, organisation and management that can be achieved by the government agency overseeing the programme.

4.7.B Recommendation 2: Information Distribution

As highlighted earlier in this chapter the current Land Administration Project in Ghana has failed to adequately publicise their initiatives which has resulted in people missing the opportunity to obtain land titles. In Kumasi residents are being given only a 6-month window during which they can apply for legal title, this deadline has restricted the participation rendering the process futile. Future programmes need to be more accessible to the poor Ghanaian.

Additional funding needs to be given to the marketing strategy with local governments responsible for ensuring that every chief informs his people. In some cases the chiefs may be against titling programmes because it reduces their power, therefore other ways of channelling information need to be explored. By increasing people's knowledge of what options are available to them and the potential benefits of choosing these options we can begin to remove this patron-client relationship. When individuals become aware that they can legally operate both inside and outside of the customary society without permission or assistance from the chief, the chiefs power will be reduced and this patron-client relationship can be eradicated.

Successfully rolling out land titling programmes can also provide better information for city planners, which is critical to future decision making and the impacts of their plans. Currently urban planners suffer from a lack of information, they don't have complete maps of their area nor do they have sufficient understanding of socio-economic conditions for Ashanti people. Land titling programmes alone will not be sufficient to bridge the gap between the planners and the planees but it can at least provide a connection point and certified mapping of communities.

In addition to improving publicity surrounding individual programmes or projects a deeper commitment to human resource development is required for sustained development of land management in West Africa. According to Dr. Callistus Mahama "One of the weaknesses in the design of land administration projects is often the commitment to human resource development and particularly formal education and training, both in-country and overseas, short course and study tours." (*GhanaWeb*). At least 10% of the overall budget for any land administration project should be channelled into human resource development and many international agencies encourage a figure closer to 30%. Currently in Ghana there is insufficient research into land administration processes, this has resulted in research being conducted by consultants which often have limited understanding of the context and/or may have no long-term interest in the project. For the

proposed land administration project to be effective and progressive it will require a number of forward thinking academics with extensive research experience in land administration. Academics require a well funded and coordinated higher education system and the development of a national research structure should be a priority for national government. Research centres and think tanks can also provide valuable contributions to the discussion and implementation of land administration across the developing world.

A robust monitoring and evaluation procedure needs to be rolled out to assess the impacts of land administration across Ghana and to ensure that goals and objectives are being met while working inside established guidelines. Monitoring and evaluation procedures should be performed by a wide variety of stakeholders including individuals, groups, organisations and institutions who influence but who are also affected by changes in land administration.

4.7.C Recommendation 3: Streamlining

The structure and procedure of land and property registration in Ghana needs to be re-designed to be more accessible and user friendly. Currently in Ghana formal procedures to register land involve require dealings with six different government departments and several other land authorities. To make the process simpler I recommend the creation of a new department responsible for all land titling and registration applications. This new department will allow resources and information to be centralised, reducing administration costs and the time taken to process applications. Previous experiences support this showing that almost all successful land administration projects have been conducted under the jurisdiction of one single land administration body.

Currently there are so many departments and arbitration commissions for land administration that no decision is final as it may be overturned by a different authority a few weeks later. By streamlining decision making you avoid this situation and increase personal and organisational accountability. The proposed re-organisation of land administration in Ghana will also give rise to a more participatory democracy at the national level by removing inconsequential bodies. Although there may be less staff employed in land administration, the role these staff is playing will be more productive, working towards an agreed end-state. Compared to the current situation whereby legal processes go round in circles benefiting only the lawyers and administrators.

This streamlining will be required as part of *recommendation 1: two phase strategy* and it maybe necessary to create a second non-permanent authority responsible for organising and producing the new legal framework.

This new department does not need to be responsible for controlling land use across Ghana, but should be the single land administration body in charge of registering land and mapping (including topography) currently un-mapped areas. Effectively this body will be responsible for gathering and processing information relating to ‘what is where’ and ‘who owns what’.

Designing, structuring and organising a new land administration programme in Ghana is clearly a huge challenge and one that may take time to deliver. To meet this challenge requires the development of a system controlling land administration which will facilitate the best possible use of land by a wide variety of groups including individuals, customary land owners, private businesses and government agencies. Current inefficiencies lost through unnecessary bureaucracy, corrupt officials and greedy chiefs can be greatly reduced by simplifying the process of land registration and administration.

Returning to de Soto's explanation of illegality and his observation that people 'do not so much break the law as the law breaks them' (de Soto, 2000; 23) through reducing obstacles to illegality by simplifying the registration process we can encourage people back into legality. The government of Ghana has a great incentive to attract people back into the formal/legal sector of society as this will raise considerable funds through property taxes and transaction costs. These need not be large fees and should be comparable to the fees currently paid to chiefs within the customary arrangements. In this way the money is being recycled into the national economy and can provide needed investment into all aspects of land management and administration. Monetary transactions in customary societies are currently serving the purpose of making the chiefs richer and the common people poorer (at least in relative terms).

4.8 Concluding Remarks

Throughout this research I have touched on a number of issues which I believe are critical to the successful delivery of land titling and administrations programmes in the Global South. I largely agree with Hernando De Soto's claim that capitalism is the only feasible way to organise a modern economy and recognise the importance of land titling and private ownership in achieving this. De Soto in my opinion failed to adequately address the way in which we may arrived at this desired end-state, and it is this that I believe is our greatest challenge.

Our case study of the Ashanti Kingdom in Ghana, and the challenges that customary land systems create only provides further evidence that titling programmes can never be generic. There is a need for a great understanding of the local context including religious or customary beliefs, without this understanding titling programmes or any other planning initiatives are likely to fail. For titling programmes to enable the poor to access formal credit requires regular dialogue between a number of stakeholders including the borrowers and lenders. Essentially, this means if not the harmonisation between the formal and the informal at least the strengthening of linkages, accountability and transparency between the formal and informal sectors.

I hope this research will contribute to the fascinating and progressive debate on land administration and property titling in the developing world. Further research is required to assess the impacts of different attempts around the world to create integrated property system. The process by which we can move from common ownership to private ownership is of great interest to myself, it is this process I believe can enable capitalism to work for the poor people of West Africa.

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